THE CULTURAL MEANING OF THE "WELFARE QUEEN": USING STATE CONSTITUTIONS TO CHALLENGE CHILD EXCLUSION PROVISIONS

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The stereotype of the lazy, black welfare mother who "breeds children at the expense of the taxpayers in order to increase the amount of her welfare check"[1] informs and justifies the ongoing welfare debate. This debate has led to the passage of recent federal welfare "reform" legislation eliminating the federal entitlement program of Aid to Families with Dependent Children (AFDC).[2] The debate now continues at the state

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1. Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and Right to Privacy*, 104 HARV. L. REV. 1419, 1443. *See also,* text accompanying notes 89-109, *infra*, discussing the modern stereotypes of the welfare mother. Throughout this article, I focus mainly on black women living in poverty. However, many of the ideas herein are applicable to all women of color. For a discussion of the commonalities of stereotypes of poor black and latina women, see Nina Perales, *A "Tangle of Pathology": Racial Myth and the New Jersey Family Development Act, in* Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood 250, 254-61 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

2. Aid to Families with Dependent Children (AFDC) was the cooperative federal and state program established by Title IV of the Social Security Act as the basic federal need-based income transfer for dependent children and their caretaker relatives. *See* 42 U.S.C. §§ 601-617 (1988). In exchange for administering the AFDC program in compliance with federal law, the states were reimbursed by the federal government for a portion of the benefits provided to recipients. Although not required to do so, all fifty states participated

level, as states formulate their own welfare programs under the new block grant program.[3] Because certain stereotypes perpetuate the myth that poverty is caused primarily by the "irresponsibility" of the poor, many states seek to "reform" welfare by enacting measures aimed at modifying recipients' perceived behavior.[4] Many of these measures are steeped in a history of racism, yet evade meaningful judicial review under federal equal protection analysis.

One such measure, the child exclusion provision, penalizes welfare recipients who have additional children by denying otherwise automatic increases in benefits when a child is born into a recipient family. Denial of the grant increase bars dependent children conceived by welfare recipients from receiving public assistance grants necessary for their care, maintenance, support and protection.[5] Although facially race-neutral, child exclusion provisions are rooted in a history of racial discrimination that has restricted black women's access to welfare.

This article argues that we must examine the intersection of race and class in the imagery and historical treatment of welfare recipients to expose the race discrimination underlying child exclusion provisions.[6] Federal

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in the program. The recently enacted Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), eliminates this program, replacing it with cash assistance block grants to the states under Temporary Assistance for Needy Families (TANF).

3. Under the block grant system, states are given a lump sum of federal money, and delegated responsibility for administering and setting need and benefit standards for their own welfare systems. While this eliminates most federal guidelines, oversight and entitlement that existed through AFDC, some federal requirements still exist, such as a lifetime benefit limit of five years and a requirement that most recipients find work within two years. Furthermore, the new law drastically reduces funding for food stamps and aid to immigrants and disabled children. For a discussion of the block grant system and how advocates for the poor should respond, see Christopher Lamb, *State Cash Assistance Programs Under a Block Grant: Preparing for Advocacy*, CLEARINGHOUSE REVIEW, Jan. 1996, at 847. For a discussion of the federal-state cooperative system of AFDC, see Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform,"* 26 U. MICH. J.L. REFORM 741, 750-68 (1993).

4. Included in these reforms are those which require participation in work programs, deny benefits to unwed teenage mothers, reduce welfare benefits to families in which children repeatedly miss school, and impose overall caps on the amount of benefits a family may receive. *See* Lucy A. Williams, *The Ideology of Division: Behavior Modification and Welfare Reform Proposals*, 102 YALE L.J. 719 (1992).

5. Plaintiff's Complaint for Declaratory and Injunctive Relief, C.K. v. Shalala, 883 F.Supp. 981 (D.N.J. 1995). Prior to the passage of the Personal Responsibility Act, *supra* note 2, the child exclusion had been implemented in at least seven states, and at least eighteen additional states were seeking federal approval for its implementation. N.O.W. LEGAL DEFENSE AND EDUCATION FUND, CHILD EXCLUSION PROVISION: A STATE BY STATE ANALYSIS (June 11, 1996). At least 19 of the 40 states filing their state plans under the new welfare law as of February 23, 1997 include child exclusion provisions in their plans. Robert Pear, *Rewards and Penalties Vary in States' Welfare Programs*, N.Y. TIMES, Feb. 23, 1997, at A26.

6. Along with race and poverty, gender is an essential factor in the creation of stereotyped images of the welfare mother. Likewise, gender is a significant factor in the treatment of welfare recipients; male supremacy is linked to the oppression of poor women

equal protection analysis of welfare legislation misses this race discrimination. This failure of equal protection jurisprudence is due, in part, to the way in which the Court defines race discrimination: rather than examining the context in which a challenged measure operates, the Court merely looks for a "purposeful intent" to discriminate. Because of the federal courts' limited approach to equal protection, advocates for the poor must look to the broader protections offered by some state constitutions as means of articulating the historical and social context in which welfare measures operate.

Part One of this article explores how child exclusion provisions are aimed at women of color. It begins by discussing what Professor Charles Lawrence calls the "cultural meaning" of legislation and its operation in child exclusion provisions.[7] The "cultural meaning" of child exclusion provisions is evident in the welfare system's historical discrimination against black women, as well as in the racist stereotypes and myths surrounding welfare recipients. Specifically, I will show that child exclusion provisions are implicitly aimed at black women.

Part Two details how federal equal protection jurisprudence is limited because of its failure to recognize that race and class are inextricably intertwined. These limits have curtailed protections against race discrimination in welfare legislation. The Equal Protection Clause is designed to eliminate invidious classifications, which include race but not economic class. Thus, legislation directed at poor people is judged by a deferential standard assigned to economic regulations. Furthermore, a plaintiff alleging a constitutional violation in this context must show that the defendant had a "purposeful intent" to discriminate. This test mistakes the way race operates in our culture and excludes situations in which economic class plays a significant role in race discrimination. Attempts to challenge welfare reform measures have been frustrated by these inadequacies in current equal protection jurisprudence.

Part Three focuses on the utility of state constitutions as an alternative to the federal Equal Protection Clause for challenging the unconscious racism that underlies child exclusion provisions. In particular, I will argue that under the Massachusetts state constitution, a child exclusion provision may be judged racially discriminatory. The reasons for this are two-fold: the Massachusetts court has shown its willingness to afford greater protections under the Massachusetts Constitution than the U.S. Constitution; and the court has indicated its acceptance of and ability to explore context and history in discerning race discrimination.

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of color. Because the three—race, class and gender—are inherently linked, gender is a component of this analysis, as well.

7. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-62 (1987).

I.
THE RACE DISCRIMINATION UNDERLYING CHILD EXCLUSION PROVISIONS

Racism in America seldom functions in an explicit manner demonstrating intentional discrimination. Professor Charles Lawrence argues that "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role," resulting in *unconscious* racial motivation influencing racial discrimination.[8]

To compensate for current judicial inadequacies in detecting unconscious racism, Charles Lawrence advocates a method for assessing "intent" to discriminate that more accurately describes both the origins and nature of the injury inflicted by racism.[9] Lawrence's method evaluates the cultural meaning of an allegedly racially discriminatory act to determine if the act "conveys a symbolic message to which the culture attaches a racial significance."[10] In part, it seeks to discern when an action results in stigmatic harm to a minority group.[11] Cultural meaning can be determined by analyzing governmental behavior in the historical and social context in which the decision was made and effectuated.[12] This is achieved by judges considering both written and social text to determine the symbolic and historical meaning attached to a state action. In this way, a court may uncover a racialized "meaning."[13]

Although Lawrence considers government subsidies to the poor to be "hard cases" with regard to whether the cultural meaning test reveals a racialized decision,[14] I argue in this section that welfare—and in particular the child exclusion provision—provides a clear example of how the cultural

8. Lawrence, *supra* note 7, at 322. Lawrence posits two explanations for the unconscious nature of racially discriminatory beliefs and ideas: Freudian theory of repression and the cognitive psychological theory that the culture transmits certain beliefs and preferences which influence an individual's "rational ordering of her perceptions of the world." *Id.* at 322-23. As a means for accounting for this unconscious racism, which evades the intent doctrine, Lawrence advocates the adoption of a "cultural meaning test," which will be further explored in Part III of this paper. *See also,* Kenneth Karst, Belonging to America: Equal Citizenship and the Constitution 152 (1989)(stating that "both racial and sex discrimination mainly influence behavior in ways that are obscure to the actors themselves. The motivations of whites concerning blacks . . . are in considerable measure unconscious, for they begin in the formation of identity through differentiation from the Other").

9. Lawrence, *supra* note 7, at 321.

10. *Id.* at 355-56.

11. Lawrence defines stigmatization as "the process by which the dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in that community as equals." *Id.* at 350.

12. *Id.* at 356.

13. Lawrence acknowledges that his "test" remains within the confines of the Court's intent doctrine. However, by informing the notion of "intent" with psychological theory, Lawrence posits that his approach enables a showing of intent that is closer to the way in which racism truly operates in American society. *Id.* at 324.

14. *Id.* at 376-77.

meaning test can expose the race discrimination inherent in a government action. Application of the cultural meaning test to child exclusion provisions requires a re-examination of the provision in its social and historical context. This necessarily includes an exploration of the historical treatment of black women by the welfare system, as well as the current and past myths and stereotypes associated with welfare recipients and poor black women.

A. The Welfare System's History of Discrimination Against African American Women

The historical treatment of black women by the welfare system provides part of the necessary context for a critical assessment of child exclusion provisions. Much of this history involves AFDC, the former federal welfare entitlement program. AFDC was originally enacted as Aid to Dependent Children (ADC), pursuant to a provision of the Social Security Act of 1935, which also originally included Old Age Insurance, Aid to the Blind, Unemployment Compensation, and Public Assistance.[15] Thus, significant to an understanding of AFDC's historical discrimination against black women is an understanding of the Social Security Act's history of race discrimination. From its inception, the passage of the Social Security Act was predicated on its allowance for the exclusion of African-Americans from certain of its programs.[16] The Southern states, in particular, insisted on means to exclude blacks from obtaining full benefits under Social Security Act programs.[17] For example, the Act's only exclusively federal program protected workers aged 65 and over from loss of income due to retirement, but contained strict eligibility rules which categorically denied assistance to agricultural workers and domestic servants. The Old Age Insurance program's eligibility rules effectively excluded blacks from core programs of the Social Security Act, and relegated them to programs over which local authorities had more control.[18]

In addition to the categorical exclusion of a significant population of workers from programs like Old Age Insurance, the Social Security Act allowed states to set their own benefit levels for many programs. This ensured that the Southern states could prevent Social Security programs from destroying their source of under-valued labor supplied by the planter/sharecropper class of blacks.[19] With regard to ADC in particular, allowing

15. MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 215 (1988). ADC changed to AFDC in 1962. *Id.* at 313.

16. Williams, *supra* note 4, at 722.

17. JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 21 (1994).

18. *Id.*

19. JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY: CLASS POLITICS IN THE AMERICAN WELFARE STATE 16 (1988).

states to set their own benefits has been called a "compromise with racism," as it permitted the Southern states to continue unequal treatment of blacks and whites through its differential funding of the various Social Security programs.[20]

ADC was established as a small program within the Social Security Act. As originally enacted, the program—a nationalized version of the Mother's Pension[21]—assisted children living with their mothers, with the purpose of providing for children of women who were white, widowed, and who had been connected to men for a substantial portion of their lives.[22] Thus, the dominant image of the ADC mother in 1935 was "the white, chaste widow whose husband had been a productive member of the paid labor market."[23] Assistance to these families was justified by the important role played by white women in providing good homes for their children.[24] In general, the original purpose of ADC was to assist a category that was deemed the "deserving poor."[25]

After World War II, the population of ADC changed dramatically. Overall, the number of ADC families rose.[26] The ADC population changed from that of white widowed women to women whose husbands had deserted or divorced them, as well as women who were never married.[27] These changes were due, in part, to population growth, changing family structures such as a rising divorce rate, and labor market dislocations.[28] The racial demographics of ADC also began to change. The percentage of ADC families who were black rose from 31% in 1950 to 48% in 1961.[29] Also spurring these changes was a 1939 amendment to the Social Security Act which allowed widows and children of workers who had been eligible for Old Age Insurance (the "deserving poor") to receive benefits from the Old Age Insurance program.[30] Thus, white widowed women were

20. ABRAMOVITZ, *supra* note 15, at 318.

21. State-level Mothers' Pensions were designed to enable single women to raise their children at home by removing the necessity to participate in the paid labor market. Mothers' Pensions were aimed at white women. *See* ABRAMOVITZ, *supra* note 15, at 184-85.

22. Williams, *supra* note 4, at 723.

23. Lucy Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1175 (1995).

24. Williams, *supra* note 4, at 723.

25. MICHAEL KATZ, THE UNDESERVING POOR: FROM THE WAR ON THE POOR TO THE WAR ON WELFARE, 68 (1989). The term "deserving poor" seeks to distinguish those who society considers "worthy" of assistance from those who are not. "Upright widows with children and old women remain the quintessential worthy poor." *Id.* at 67. During its first ten or so years of operation, ADC "aid[ed] deserving women and den[ied] help to those perceived as out of role and therefore undeserving of aid." ABRAMOVITZ, *supra* note 15, at 319.

26. The number of ADC families grew from 371,000 in 1940 to 803,000 in 1960. ABRAMOVITZ, *supra* note 15, at 319.

27. KATZ, *supra* note 25, at 68.

28. ABRAMOVITZ, *supra* note 15, at 320.

29. *Id.* at 321.

30. QUADANGO, *supra* note 17, at 119.

shifted from ADC to the Old Age Insurance program, leaving ADC as a "last resort" for divorced, deserted and never married women. With this change in the ADC population came a shift in the perception of the program from being one for "deserving poor" to being one for "undeserving poor."[31]

In response to the changing demographics of the ADC population, many states enacted eligibility restrictions aimed at preventing ADC from becoming a means of support for black divorced, deserted, and single women.[32] Restrictions took several forms, such as "suitable home" rules, used to disqualify children on the basis of the alleged immorality of the mother. "Man in the house" and "substitute father" rules allowed welfare workers to make unannounced visits to recipients' homes and deny assistance to any woman found living with a man based on the rationale that the man's presence was enough to indicate his financial support of the child.[33] These measures effectively enabled states to limit coverage of black women (and their children), who were "vulnerable to suitable home rules based on vague and discretionary definitions of moral fitness."[34] In 1968, the United States Supreme Court outlawed the use of man in the house and substitute parent provisions in *King v. Smith*,[35] acknowledging that the use of "suitable home rules" were often used to disguise systematic racism.[36]

In the 1960s, partly as a result of the Court's invalidation of many of these restrictive laws, but also as a result of the civil rights movement, the War on Poverty and the welfare rights movement, the number of women, particularly black women, receiving AFDC increased significantly.[37] However, states and the federal government continued to treat AFDC recipients less favorably than recipients of other Social Security Act programs. Many states provided less money to AFDC recipients than to recipients of other welfare programs, such as Old Age Insurance.[38] States also enacted

31. KATZ, *supra* note 25, at 68-69.

32. QUADANGO, *supra* note 17, at 119.

33. ABRAMOVITZ, *supra* note 15, at 323-26. These rules were applied broadly, enabling the state to deny assistance to single mothers who took in male boarders, co-habitated with men, refused to reveal the identity of fathers of out-of-wedlock children, or "whose homes and behaviors simply did not look right to the investigating worker." *Id.* at 324.

34. *Id.* at 326. Abramovitz states that an additional reason for restricting black women's access to ADC was to pressure them into low-wage labor, especially domestic service. ABRAMOVITZ, *supra* note 15, at 326.

35. 392 U.S. 309 (1968).

36. Although the Court did not rest its holding on the racism inherent in such provisions, it did acknowledge these criticisms of suitable home provisions and the invalidity of state justifications for them. *Id.* at 321-22.

37. ABRAMOVITZ, *supra* note 15, at 334-35.

38. *Id.* at 323. *See also* Jefferson v. Hackney, 406 U.S. 535 (1972)(challenging Texas' grant of lesser benefits to AFDC recipients than to recipients of other federal assistance programs).

legislation requiring AFDC mothers to work outside the home and attempting to restrict the number of children born to unwed recipient mothers.[39]

Many state welfare reform provisions enacted pursuant to state waivers, and in the future likely to be enacted pursuant to new federal welfare legislation, bear a strong resemblance to these previous attempts to restrict and limit black women's access to AFDC.[40] Particularly, child exclusion provisions limit the receipt of benefits of children born to mothers receiving welfare. Examining these provisions alongside the stereotyped images of recipients, and placing them in historical context, one understands the child exclusion provision as a more subtle version of these previously invalidated restrictions.

B. Images of the "Welfare Queen"

Historically, stereotypes and myths of the poor have informed the creation, shape and scope of public assistance programs. Specifically, myths which differentiate the "undeserving" poor from the "deserving" poor justify punitive welfare policies on the basis that certain populations (unwed mothers, "lazy" and shiftless paupers) are responsible for their poverty and must be discouraged and prevented from depending upon public assistance.[41] As the welfare population, particularly AFDC, became increasingly black, the stereotypes associated with the "undeserving poor" fused with stereotypes that have traditionally justified systemic discrimination against African-Americans.[42] In particular, despite the fact that large numbers of white women also receive welfare, the popular conception of the "typical" AFDC recipient has become an unmarried, unemployed black urban woman with many children.[43] According to children's rights advocate Marion Wright Edelman, this has resulted in the use of "welfare" as a

39. ABRAMOVITZ, *supra* note 15, at 332-38. Significantly, it was at this same time that attempts were made to challenge discrimination in the allocation of welfare benefits. Challenges to both race and wealth discrimination in the AFDC system resulted in clear articulation by the Court of the requirements for successful Equal Protection challenges. These requirements, discussed in section II, limit the utility of anti-discrimination protections in challenging the validity of such measures.

40. Included in the many currently popular welfare "reform" programs are Bridefare, Learnfare, the family cap and child exclusion provisions. Bridefare provisions give higher welfare benefits to two-parent families in which the mother is married, compared with the amount of benefits given to households in which the parents are simply co-habitating. Perales, *supra* note 1, at 250. Learnfare conditions receipt of a family's welfare benefits on the children's school attendance. Williams, *supra* note 4, at 726-27.

41. *See* KATZ, *supra* note 25.

42. Perales, *supra* note 1, at 256. These racial stereotypes characterize African-Americans as shifty, lazy, childlike, dependent, "animal-like" and impulsive. *Id.* at 254. Such stereotypes are used to justify what has previously been discussed as the "culture of poverty" view, which continues to link African-Americans with a "pathology" that causes their own poverty. *See supra,* text accompanying notes 46-48.

43. Lucie E. White, *No Exit: Rethinking "Welfare Dependency" From a Different Ground*, 81 GEO. L. J. 1961, 1966 (1993). *See also* Williams, *supra* note 23, at 1168-70.

code word for race.[44] Thus, the stereotyped image of the "welfare queen" enables racist ideology to manifest itself in seemingly "neutral" welfare legislation.

This section explores the gendered, racist mythology that informs child exclusion provisions.[45] In the context of this mythology, it may be argued that child exclusion provisions are racially discriminatory due to their racist motivation, as well as the effect they have of perpetuating and reinforcing the stereotypical image of the "welfare mother."

One of the most pervasive images of the poor is that of the "underclass" or "counter-culture" poor, which links blacks with poverty through representations of "able bodied persons with virtually permanent dependence on cash welfare. . .especially seen as unmarried minority women bearing children with a succession of minority men who are, at best, on the fringes of criminal activity."[46] Consequently, policy approaches to poverty are predicated on an assumption that poor, urban blacks suffer from "cultural inferiority," which is seemingly illustrated by the disintegration of the family and the absence of a strong work ethic, and characterized by out-of-wedlock births, chronic unemployment, welfare dependency, teen pregnancy, drug abuse, alcohol addiction, and criminal activity.[47] This use of *cultural* inferiority to explain the poverty experienced by inner city blacks has replaced the use of *racial* inferiority to explain the subordinated status of blacks.[48]

Gender is infused into these images of the "underclass" via the "welfare queen." "Content to sit around and collect welfare, shunning work and passing on her bad values to her offspring,"[49] the welfare queen is portrayed as being lazy and irresponsible. Her personal faults cause her own poverty and that of her children. This myth of the welfare queen stems

44. Robin Turner, *New Politic of Welfare Reform Focuses on its Flaws*, N.Y. TIMES, July 5, 1992, at A1, A16.

45. Gender, race and poverty are connected in social constructions of poor women of color, as well as their treatment by the welfare system. Gender is implicitly, if not always explicitly, part of the analysis which follows.

46. Hugh Heclo, *Poverty Politics*, *in* CONFRONTING POVERTY 418 (Sheldon Danziger, Gary D. Sandefur, and Daniel H. Weinberg eds., 1994). Heclo further states that this image "is the most visible form of poverty both in the social reality mediated through television and in the imagery of our mind's eye." *Id.* at 421.

47. For a history of the rise of the culture of poverty notion and its connection to race and later the underclass ideology, see KATZ, *supra* note 25, at 9-37. *See also* Leslie Innis & Joe R. Feagin, *The Black "Underclass" Ideology in Race Relations Analysis*, SOCIAL JUSTICE, Winter 1989, at 25-30 (critiquing the black underclass ideology by stating that it focuses on behavior, rather than structural barriers faced by the poor and accents class and cultural isolation, rather than racial discrimination, thereby dislocating the focus and blaming the victims).

48. Kimberle Williams Crenshaw, *Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379.

49. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND EMPOWERMENT 76-77 (1990).

from other traditional stereotypes, or "controlling images,"[50] of black women, which devalue black motherhood and blame black mothers for the problems of the black family.[51] One particular image at the root of this myth is that of Jezebel, the promiscuous slave woman, whose extreme sexuality and fertility rendered her an unfit mother.[52]

An outgrowth of Jezebel, the welfare queen is invoked as a clear example of the "cultural inferiority" of poor urban blacks and is used to justify shifting the focus of welfare policy from addressing structural causes of poverty to blaming the victims themselves.[53] Specifically, the "welfare queen" is "a woman of color who manipulates and exploits the welfare system, scorns lasting or legalized relationships with men, and has a series of children out of wedlock in order to continue her welfare eligibility."[54] When the welfare queen is blamed for perpetuating the black underclass by producing too many economically unproductive children, welfare policies aimed at modifying her perceived behavior focus on limiting her fertility.[55] Thus, welfare reform measures which seek to prevent her from having additional children are justified.[56] Child exclusion provisions predicated on discouraging welfare recipients from having additional children while on welfare are intricately connected with the image of the welfare queen.

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50. *Id.* at 69. Such images "prove remarkably tenacious because they not only keep black women oppressed, but are key in maintaining interlocking systems of race, class and gender oppression." *Id.*

51. Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 873-75 (1994). *See also*, Paulette Caldwell, *A Hair Piece: Perspectives in the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 395 (stating that "stereotypes and negative images of Black women serve many functions. . . . They make black women responsible for the economic and social position of black families in general, and black men in particular.").

52. Roberts, *supra* note 1, at 1438. This, in turn, is linked to the stereotyped image of the mammy, seen as the asexual, mothering black woman devoted to the care of her slave owner's children. The Jezebel is a "failed Mammy." Outside of the context of the white family, the black mother is seen as threatening and must be portrayed as a failure. COLLINS, *supra* note 49, at 72-77. *See, e.g.*, Darci Elaine Burrell, *The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 U.C.L.A. WOMEN'S L.J. 401, 412-13 (1995) (discussing how devaluation of black motherhood stems in part from black women's "deviation" from the norm of the "good mother" and is predicated on the patriarchal notion of the public/private spheres dichotomy).

53. *See, e.g.*, White, *supra* note 43, at 1966; COLLINS, *supra* note 49, at 77.

54. Perales, *supra* note 1, at 257-58.

55. It is important to recognize that, by basing policies such as child exclusion provisions on stereotypes such as this, the long history of the denial of reproductive freedom to African-American women continues. The control over black women's bodies—both their labor and reproductive capability—is rooted in the history of slavery. Because the slave status of children was determined by the status of their mother, black slave women were used as "breeders," thus serving as an economic asset to slave owners by enabling them to increase their property. The denial of reproductive freedoms and exertion of control over African-American women's bodies continued through the coerced sterilization of African-American women and eugenics. Thus, when viewed in this context, child exclusion provisions may be viewed as a pretext for the continuing systematic denial of reproductive freedom that has persisted throughout African American women's history. *See, e.g.*, Roberts, *supra* note 1, at 1438-40.

56. *Id.*

The transmission of stereotyped images of welfare recipients and their use in informing legislation such as child exclusion provisions are counter-productive. In reality, although a disproportionate percentage of African-American women receive welfare, blacks and whites receive welfare in approximately equal numbers.[57] Furthermore, the number of children born to an average welfare recipient is no larger than the number born to her non-recipient counterpart.[58] Perhaps most importantly, social science research indicates that receiving welfare does not motivate recipients to get pregnant.[59] As a welfare measure justified by false assumptions about welfare recipients, the child exclusion provision does not effectively address the issue of poverty.

In addition to being counter-productive, stereotyped images of welfare mothers are racially oppressive. These images provide justification for economic and racial subordination. One way in which this is achieved is through the function and creation of the "other."[60] In characterizing whites as the "norm," and blacks as deviant from that norm, stereotypes based on racist ideology arrange blacks and whites in "oppositional categories in hierarchical order," placing whites in a dominant position relative to the subordinate status of blacks.[61] The social construction of blacks in opposition to whites was a necessary step in justifying and enabling slavery, which represents the ultimate fusion of economic and racial domination.[62] This creation of the "other" is significant in the creation of welfare policy

57. The U.S. Department of Commerce, Bureau of the Census reports that in 1993, 15.1% of the total U.S. population lived below the poverty threshold. 12.2% of the white population lived below poverty, compared with 33.1% of the black population. 36.0% of the black female population lived below the poverty threshold, compared with 13.7% of the white female population, 10.7% of the white male population, and 29.7% of the black male population. Furthermore, 49.9% of the black, female-headed households lived below the poverty level. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Series P60-188, INCOME, POVERTY, AND VALUATION OF NONCASH BENEFITS: 1993, at 22-24 (Feb. 1995). 37.2% of AFDC households were headed by African-Americans and 38.9% of AFDC households in 1992 were headed by whites. ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS FY 1992 (1993).

58. MARK R. RANK, LIVING ON THE EDGE: THE REALITIES OF WELFARE IN AMERICA 301 (1994).

59. William J. Wilson & Kathryn M. Neckerman, *Poverty and Family Structure, in* FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 248-51 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) (citing studies indicating no association between the receipt of welfare benefits and out of wedlock births).

60. *See e.g.*, KARST, *supra* note 8, at 23-25; Crenshaw, *supra* note 48, at 1371-75; Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1717 (1993).

61. Crenshaw, *supra* note 48, at 1373. Crenshaw cites a wide body of literature discussing the notion of blacks as the subordinated "other" in Western culture. *Id.* at 1372.

62. Harris, *supra* note 60, at 1718. In exploring the way in which slavery was premised on the interrelation between economic and racial subordination, Harris examines the way in which racial identity is intimately connected to property, which in turn determines economic class.

as well. It fuels the stereotypes of welfare recipients by driving the distinction between deserving and undeserving poor, in turn justifying inadequate expenditures on public assistance programs. It also enables shifting the focus of welfare policy from the structural and societal causes of poverty to the moral, "cultural" failings of the poor.[63] Examining the stereotypes which have informed the welfare debate (and then have been transmitted by the resulting welfare policies) exposes the role of child exclusion provisions in perpetuating racial subordination.

C. Illumination of History and Representation via the Cultural Meaning Test

Charles Lawrence's method of evaluating the "cultural meaning" of an allegedly racially discriminatory act requires engaging in an analysis of the historical and social context in which the action was taken. In this way, a racialized "meaning" can be uncovered. Applying Lawrence's test to the above "story" of the child exclusion provision reveals the racism underlying the measure.

As discussed above, Congress originally envisioned AFDC as a program to assist "deserving" white widowed mothers staying at home to raise their children. The program, as well as the larger Social Security Act, was predicated on the exclusion of African-American women. As the AFDC population changed to include never married, divorced, and black women, AFDC began to be perceived as a program for "undeserving" families. Along with this perception came restrictive and punitive measures, such as the suitable home rules, which both restricted access to benefits, as well as stigmatized the AFDC population. The image of the welfare recipient as an urban woman of color with many children validated and perpetuated this perception and treatment of welfare recipients.

Child exclusion provisions are an extension of AFDC's long tradition of race discrimination. These measures are an attempt to restrict recipients' access to benefits and punish and stigmatize what is widely, if inaccurately, perceived to be a largely black population of welfare mothers.[64] Like the invalidated suitable home rules, child exclusion provisions are predicated on the "immorality" of the recipients; they rest on the notion that these women are "immorally" conceiving children as a means of increasing their welfare checks. Furthermore, its basis on the understanding of recipients as "welfare queens" suggests that child exclusion provisions are attempts to control the fertility of black women and coerce them into limiting the number of children they have through the denial of welfare

63. *See generally*, Perales, *supra* note 1, at 266 ("The popular support for punitive welfare reform nationwide is an intentional targeting of a small number of persons of color as the cause of the nation's woes. . . . As middle class people feel the pinch of the economic crisis, politicians turn to race-baiting as a convenient escape from the demands of an improved economy.").

64. Williams, *supra* note 23, at 1171.

benefits. This, too, is reminiscent of and rooted in historical attempts to control black women's reproductive capabilities through forced sterilization, legitimized rape, and denial of access to reproductive health services.[65]

In this historical and social context, child exclusion provisions can be evaluated in a more critical fashion, revealing the way in which they are not merely facially neutral, benign "economic regulations," but rather are imbued with cultural meaning, symbolizing a continuing attempt to limit access to welfare and control the fertility of poor women of color.[66]

An analysis of this cultural meaning illuminates other ways in which the measure perpetuates the subordination of poor black women. Child exclusion provisions seek to "promote individual responsibility" and "strengthen and stabilize the family unit" by discouraging welfare recipients from having additional children.[67] Implicit in this purpose is the assumption that recipients, lacking a sense of responsibility and a stable family structure, require punitive restrictions to curtail their propensity to have numerous children for the purpose of getting welfare benefits. By transmitting and validating this assumption, child exclusion provisions shape the public's perception and belief system regarding poor black women.[68] Despite the inaccuracies and exaggerations of the stereotype, poor black women receiving welfare are seen as deviant and undeserving of public support and compassion. They are blamed for their economic situation, and efforts to relieve their poverty in non-punitive ways are abandoned. One commentator has noted that these "one dimensional images," transmitted and validated by measures like child exclusion provisions, "drive and sustain the conclusions and beliefs that the electorate maintains about poor women. In turn, those public opinions drive elected officials."[69]

A cultural meaning test which explores both the symbolic, racialized meaning attached to child exclusion provisions, as well as the racial subordination that results, reveals the provisions' discriminatory nature. However, despite this understanding of child exclusion provisions' cultural meaning, traditional federal constitutional protections of equality under the Equal Protection Clause fail to recognize the discrimination inherent in child exclusion provisions.

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65. *See generally*, Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 14 WOMEN'S RTS. L. REP. 305 (1992); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

66. *See* Williams, *supra* note 23, at 1159, 1171-72.

67. C.K. v. Shalala, 883 F.Supp. 991, 1013 (D.N.J. 1995).

68. *See* Williams, *supra* note 23, at 1171-72 (detailing research results showing the close connection between the media image of poverty and race and its effect on white viewers' perceptions of poverty).

69. *Id.* at 1174.

II.
THE INSUFFICIENCY OF EQUAL PROTECTION DOCTRINE IN ELIMINATING RACE DISCRIMINATION IN WELFARE "REFORM" LEGISLATION

The Fourteenth Amendment's Equal Protection Clause has been a powerful tool for eradicating discriminatory state actions.[70] Enacted after the Civil War, the Equal Protection Clause was designed primarily to secure the rights of former slaves.[71] The Court has since extended Equal Protection under the laws to other victims of invidious discrimination, as well as to those whose fundamental rights have been infringed.[72] However, there are significant limits on the Court's willingness to safeguard Equal Protection guarantees. For instance, the Court has found race, but not class, to be an invidious classification. Furthermore, the Court requires proof of racial discrimination to include a showing of "intent." By analyzing how the Court's limitations have specifically impacted efforts to challenge race discrimination in welfare reform legislation, this section will explore how these two limitations result in the failure of courts to detect when class-based justifications mask race-based motives and/or resulting racial inequalities in social welfare legislation.[73]

Traditionally, the Equal Protection Clause has been used to protect against invidious classifications.[74] The level of scrutiny to which courts subject a particular state action is based on the extent to which the group

70. No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

71. *See* Adarand Constr., Inc. v. Pena, 115 S.Ct 2097, 2122 (1995) (Stevens, J., dissenting).

72. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 113 (1987). There are at least two theories about the nature of the equality guaranteed by the Equal Protection Clause. "Formal equality" would guarantee that all individuals are treated in a color-blind, race neutral manner. Such an approach is illustrated by the Anti-Discrimination Principle, which conceptualizes discrimination as an act against individuals based on prejudice, and fashions the Equal Protection Clause as a tool for prohibiting state actions motivated by bias and prejudice. *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). "Substantive equality" focuses on harms resulting from inequality, rather than on the discriminatory actions of individuals. This approach is illustrated by the Anti-Subordination Principle, which justifies the use of the Equal Protection Clause as a redistributional, countermajoritarian device for upholding and defending the rights of relatively powerless minorities. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); *See also* Roberts, *supra* note 1, at 1450-57.

73. Although the court's refusal to extend heightened scrutiny protection to wealth classifications contributes significantly to the difficulty in challenging the racialized aspects of child exclusion provisions, I do not argue here for wealth as a suspect classification. Rather, I argue that courts must recognize how race and class intertwine to allow class-based justifications to mask race-based motives and effects.

74. While this section is concerned mainly with cases in which an invidious classification triggers strict scrutiny, courts also recognize the guarantees of the Equal Protection Clause when a statute violates a fundamental right or liberty which is implicitly or explicitly guaranteed by the Constitution. In such situations, strict scrutiny is triggered, as well. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (applying strict scrutiny to a law denying welfare

affected by the law has been subject to discrimination and prejudice.[75] In determining whether a classification is invidious to the extent that more stringent review is applicable, courts have followed the rule that statutory classifications giving distinct treatment to historic victims of discrimination are "suspect" and deserving of strict scrutiny.[76] According to this analysis, race-based classifications are recognized as "suspect"[77] while wealth-based classifications are not.

During the late 1960s, there was some indication by the Warren Court that classification on the basis of wealth might be deemed suspect.[78] During that period, the Court ruled that, in the context of welfare, strict scrutiny analysis was applicable where fundamental rights — such as the right to interstate travel[79] or procedural due process rights[80]— were being impeded by restrictive welfare legislation. The Court recognized in *Goldberg v. Kelly*[81] that, rather than being mere charity or a "privilege," welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."[82] However, the Court never explicitly extended heightened scrutiny to wealth classifications based on the notion that poverty is a suspect

benefits to new residents of a state because the law violates the implicit constitutional guarantee to interstate travel); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalidating a state poll tax as a violation of fundamental right to equal voting opportunity).

75. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.1, at 1438 (1988).

76. *Id.* at § 16-6. Strict scrutiny analysis requires that a state action be based on a compelling state interest, serve that interest as narrowly as possible, and be the least restrictive means available, such that there must be no reasonable way to achieve the relevant goals by means which place a lesser burden on constitutionally protected activity. COX, *supra* note 72, at 306-07. Such analysis by the courts is the most effective way of gaining protection from state action.

77. The Court first explicitly referred to race as a suspect criterion in Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[L]egal restrictions which curtail the civil rights of a single racial group are immediately suspect."). Race as a suspect classification has its roots in the famous *Carolene Products* footnote. "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a more searching judicial scrutiny." United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

78. *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1968 Term Forward: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19 (1969) ("[R]elative impecuniousness appears to be joining race and national ancestry to compose a complex of traits which, if detectable as a basis of officially sanctioned disadvantage, render such disadvantage 'invidious' or 'suspect.'").

79. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

80. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (declaring that termination of welfare benefits without evidentiary hearing violated right to accurate determination of eligibility, and was therefore in violation of Fourteenth Amendment due process rights). Outside the scope of this paper is a separate strand of cases involving welfare recipients' due process rights. This strand has emerged following the Court's holding in *Goldberg*.

81. *Id.*

82. *Id.* at 262. In a footnote to its decision, the Court quoted extensively from Charles Reich, who posits that welfare entitlements should be treated as property. *See* Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1245 (1965); Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964).

classification or that welfare recipients have a "fundamental" property right to welfare, and the Burger court refused to extend the protections begun during the Warren Court era.[83]

Rather, in the realm of economic regulation and social welfare, the courts have adopted a lenient, rational basis—rather than strict scrutiny—approach.[84] This results in a great amount of deference to the legislatures. In *Dandridge v. Williams*,[85] the Court announced its intention to treat such legislation in a lenient fashion. There, AFDC recipients challenged a Maryland statute capping benefits at $250 per family, regardless of the family's size. Plaintiffs argued that this statute violated their equal protection rights by discriminating against them based on their family size, as larger families received less, per capita, than smaller families. Upholding the statute's validity, the Court found that the statute was rationally related to the state's goals of encouraging employment and discouraging discrimination between welfare families and families of the working poor.[86] Refusing to subject the statute to more stringent scrutiny, the Court held that "in the area of economic and social welfare legislation, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"[87]

The Court affirmed its position two years later in *Jefferson v. Hackney*.[88] This case was brought by Texas AFDC recipients claiming that the state's method of calculating AFDC benefit amounts was racially discriminatory.[89] In holding that the statute passed muster under the Equal Protection Clause, the Court reiterated that "[s]o long as its judgments are

83. *See* CHRISTOPHER E. SMITH, COURTS AND THE POOR 83-90 (1991). The result of the Warren Court rulings is that courts will occasionally protect the rights of the poor under the guise of a separate fundamental right, but not on the notion that the right to welfare or the right to be free from poverty are in themselves fundamental rights, nor on the notion that the poor are a suspect classification that should be protected in the same fashion as other groups that have been the victims of discrimination and prejudice. *Id.*

84. Rational basis scrutiny requires that legislation be rationally related to a legitimate governmental purpose. *See* TRIBE, *supra* note 75, at § 16.2 .

85. 397 U.S. 471 (1970).

86. *Id.* at 486.

87. *Id.* at 485 (quoting in part Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

88. 406 U.S. 535 (1972). *See also* Bowen v. Gilliard, 483 U.S. 587, 601 (1987) (applying rational basis review and stating that a statute authorizing AFDC eligibility determinations to take into account the income of all parents, brothers and sisters living in the same home does not violate the Equal Protection Clause "if any state of facts reasonably may be conceived to justify it"); Sullivan v. Stroop, 496 U.S. 478, 485 (1990) (applying a rational basis review in upholding statutory interpretation which excludes child insurance from the definition of child support for purposes of a $50 disregard).

89. Plaintiffs alleged that the state calculated AFDC benefit amounts in such a way that AFDC recipients had a lesser amount of their state-defined "need" provided than did recipients of other public assistance programs.

rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket."[90]

Hackney also signaled another important trend in welfare jurisprudence: the rejection of disparate impact as proof of racial discrimination. Rejecting the plaintiffs' claim regarding the state's method for determining AFDC benefit grant amounts, the Court found that a "naked statistical argument" does not suffice for showing racial discrimination in welfare statutes which have a disproportionate adverse impact on minorities.[91]

Eventually, in *Washington v. Davis*,[92] the Supreme Court required that all challenges to state action based on the Equal Protection Clause must show an intent to discriminate on the basis of an invidious classification. According to the Court, the purpose of the Fourteenth Amendment is to prevent invidious discrimination, which is only proven through intent.[93] Although the Court stated that it was not necessary for the discriminatory purpose to be express or appear on the face of the statute, proof of a disparate impact of legislation on racial minorities was insufficient to trigger strict scrutiny under the Equal Protection Clause.[94]

This requirement of discriminatory intent was affirmed one year later, in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*[95] The Court held that the plaintiffs' proof of disparate impact on minorities resulting from a local authority's refusal to rezone a tract from single-family to multi-family did not suffice to prove a Constitutional violation. Rather, the Court stated, "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[96] The court then discussed factors that it would consider as such proof. These factors include whether a clear pattern emerges from the challenged action that cannot be explained on any grounds other than race, a historical background of the decision revealing invidious purpose, departures from a normal procedural sequence, and the legislative or administrative history of the action.[97]

Whitfield v. Oliver[98] provides another example of the types of evidence required by courts, post-*Davis*, to prove intentional race discrimination.

90. 406 U.S. at 546. *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("At least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.").

91. 406 U.S. at 548.

92. 426 U.S. 229 (1976).

93. *Id.* at 239.

94. *Id.* at 241.

95. 429 U.S. 252 (1977).

96. *Id.* at 265. *See also* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (applying the intentional discrimination requirement to challenges involving gender-based discrimination).

97. *Id.* at 267-68.

98. 399 F. Supp. 348 (M.D. Ala. 1975), *aff'd*, Whitfield v. Burns, 431 U.S. 910 (1977).

This case was brought as a class action by Alabama AFDC recipients challenging racial discrimination in the administration of the AFDC program. Plaintiffs claimed that the disparities in the allocation and payments by the Alabama Department of Pensions and Securities of AFDC, which was received by a predominantly black population, and Old Age Insurance, which was received by a predominantly white population, were racially discriminatory.[99] Applying the Court's holding in *Hackney* that discriminatory purpose and effect must be proven by more than a "naked statistical argument," the Alabama district court nevertheless found sufficient evidence of an intent to racially discriminate against black AFDC recipients.[100] Evidence supporting this intent included statistical disparities between the populations served by the two forms of public assistance, as well as an increasing percentage of black AFDC recipients in conjunction with the increasingly preferential treatment of Old Age Insurance recipients, an awareness of Alabama officials of AFDC's racial composition, testimony by the former commissioner of the Alabama Department, the previous record of the Department with respect to racial matters, and the lack of an adequate official explanation for the disparities.[101] Significantly, the court examined the long history of Alabama's discrimination against blacks, particularly through political disenfranchisement, and ruled that any explanation given for the disparity in funding of the AFDC and Old Age Insurance programs was insufficient.[102]

Following these rulings, courts have accepted at least three methods of showing a racially discriminatory purpose: laws can be shown to be discriminatory on their face, a facially neutral law can be shown to be administered in a discriminatory manner,[103] and a law can be shown to have been enacted with the purpose of discrimination.[104] While it is uncertain how explicit the showing of intent to discriminate must be,[105] it is clear that courts require more than disproportionate impact as proof of discriminatory purpose.

Because of the more subtle ways in which racism operates, the Court's requirement of proof of intentional discrimination is inadequate on several grounds. The intent doctrine places a burden on plaintiffs that is extremely difficult to overcome because of the ease with which improper motives are

99. *Id.* at 349.

100. *Id.* at 351. Although this case was actually decided prior to *Washington v. Davis*, it anticipates the Court's holding by following the guidelines set by the Court in *Jefferson v. Hackney.*

101. *Id.* at 352-57.

102. *Id.* at 357.

103. *See* Shelley v. Kramer, 334 U.S. 1 (1948) (holding that discriminatory enforcement of racially restrictive covenants violates the Fourteenth Amendment).

104. *See* Rogers v. Lodge, 458 U.S. 613 (1982) (holding the at-large system of electing a Board of Commissoners, although facially neutral, violated the Fourteenth Amendment).

105. TRIBE, *supra* note 75, at § 16.20.

hidden.[106] Additionally, reliance on a fault-based model of discrimination fails to capture racially discriminatory laws in which the discriminatory purpose is not evident because of the unconscious way in which racism operates.[107] Requiring proof of conscious and intentional discrimination "disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious."[108]

As these criticisms indicate, the difficulties in showing an intent to discriminate on the basis of a suspect classification, usually race, has resulted in the courts applying lower levels of judicial scrutiny to laws which are informed and motivated by unconscious racism, as well as result in racial subordination, yet which fall short of deliberate racial intention. Furthermore, courts' failure to recognize the intersection of race and class and therefore extend heightened scrutiny to "social welfare" regulations results in such measures being subject only to a rational basis of judicial review.[109] As described previously, this lenient level of scrutiny is generally considered to result in a presumption of constitutionality.

The presumption of federal constitutionality given to social welfare regulations has recently been applied to a state's child exclusion provision. In an attempt to challenge the child exclusion provision enacted in New Jersey, *C.K. v. Shalala*[110] was brought in federal district court by Legal Services of New Jersey, the NOW Legal Defense and Education Fund, and the ACLU of New Jersey, on the behalf of a class of New Jersey AFDC recipients. Among other claims, plaintiffs asserted that the plan violates the Equal Protection Clause of the Fourteenth Amendment because it fails both rational basis and strict scrutiny analysis.[111] Plaintiffs argued that the child exclusion provision should be subject to strict scrutiny analysis because the provision violates their fundamental right to make procreative

106. See KARST, *supra* note 8, at 154 ("When the discriminatory purpose doctrine is applied rigorously, its practical result is to convert the burden of proof of improper motive into a substitute rule for upholding governmental action.").

107. Lawrence, *supra* note 7, at 322. Lawrence states, "Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional . . . nor unintentional." *Id.*

108. *Id.* at 323.

109. *See, e.g.,* Richardson v. Belcher, 404 U.S. 78 (1971) (holding that reduction in social security benefits to reflect worker's compensation awards but not benefits from private insurance plans is "rational"); Wyman v. James, 400 U.S. 309 (1971) (upholding termination of AFDC benefits to recipients who refuse to consent to a warrantless home visit of caseworker for purpose of investigating eligibility). *See generally* TRIBE, *supra* note 75, at § 16.57 (stating that *Washington v. Davis* represents reluctance on the part of the courts to intervene in welfare legislation by characterizing it as "state regulation in the social and economic field").

110. 883 F. Supp. 991 (D.N.J. 1995), *aff'd*, C.K. v. N.J. Dep't of Health and Human Serv., 92 F.3d 171 (3d Cir. 1996).

111. *Id.* at 1012. Plaintiffs also challenged the child exclusion on various statutory grounds, including the Administrative Procedure Act, the Social Security Act, and HHS regulations governing experimentation involving pregnant women and fetuses.

choices.[112] The child exclusion provision fails under such strict scrutiny, plaintiffs argued, because the state's overriding purpose in enacting the legislation—deterring childbirth by welfare recipients—is an illegitimate goal sought to be recognized by overly broad and intrusive means.[113] Alternatively, the plaintiffs argued that the child exclusion fails rational basis review; the measure irrationally penalizes children for the behavior of their parents, over which the children have no control.[114] The district court in *C.K. v. Shalala* rejected the plaintiffs' argument that the child exclusion violated fundamental rights to make procreative choices (thereby avoiding application of strict scrutiny), and instead analyzed the statute according to rational basis review.[115] The court cited *Dandridge*, stating that a program which "places a ceiling on welfare benefits will pass muster provided that it bears a rational relationship to a legitimate state interest."[116] The court then found support for the rational relationship, stating that the purposes of the legislation—to give AFDC recipients the same structure and incentives as working people, to promote individual responsibility, and to strengthen and stabilize the family unit—were "clearly legitimate," therefore the child exclusion "illustrates a rational decision" by the legislature to reach the above purposes.[117] The United States Court of Appeals for the Third Circuit affirmed the district court's ruling on all claims, including the equal protection claims.[118]

As section I has shown, race and poverty are inextricably intertwined in the historical treatment of African-American welfare recipients, and in the images of the welfare population which inform the welfare reform debate. It is precisely because of the interlocking nature of race and poverty that legal doctrine requiring a showing of purposeful intent to discriminate on just one of these factors—race—fails, thereby enabling the underlying race discrimination. Instead, courts should look to the historical and social

112. *Id.* at 1014.

113. *Id.* at 1012.

114. *Id.* The plaintiffs in this case did not invoke strict scrutiny analysis based on a suspect classification such as race, although a Title VII challenge to the New Jersey Child Exclusion is pending in the Office of Civil Rights.

115. *Id.* at 1014.

116. *Id.* at 1012. The court later reiterated, "New Jersey's welfare cap must be rationally related to a legitimate governmental purpose." *Id.* at 1013. On appeal, the plaintiffs asserted that the district court was incorrect in analogizing the child exclusion provision to the family cap in *Dandridge* in justifying its use of rational basis scrutiny. While it is perhaps accurate for the court to rely on *Dandridge's* holding that courts apply lenient scrutiny for welfare legislation, it should not be cited for the per se constitutionality of the type of measure challenged in New Jersey. Unlike the Maryland family cap in *Dandridge*, New Jersey's child exclusion withholds additional benefits from children born after the enrollment of the family in AFDC. Thus, while the court in *Dandridge* could justify the Maryland family cap as "permissibly" discriminating against larger and smaller families, the New Jersey child exclusion penalizes welfare recipients who have additional children while on welfare. *See* Bennett & Sullivan, *supra* note 3, at 764-65.

117. C.K. v. Shalala, 883 F.Supp. at 1013.

118. C.K. v. N.J. Dep't of Health & Human Serv., 92 F.3d 171 (3rd Cir. 1996).

context in which a legislative measure operates to determine if a statute is racially discriminatory. Because federal equal protection jurisprudence has proved ineffective for guarding against such discrimination, state constitutions should be used as alternate sources for such protections.

III.
THE USE OF STATE CONSTITUTIONS FOR CHALLENGING THE RACE DISCRIMINATION INHERENT IN CHILD EXCLUSION PROVISIONS

Although the Supreme Court is the final arbiter of the U.S. Constitution, states may interpret their own constitutions to provide their citizens with greater protections.[119] Former Supreme Court Justice William Brennan has commented on the validity of this practice.[120] In noting the trend among state courts to afford more protections under their state constitutions to citizens than those provided by the federal constitution, Justice Brennan reminds us that "[d]ecisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[121]

With the elimination of a federal welfare entitlement and the shifting of responsibility for welfare to the states, advocates for the poor are forced to create new litigation strategies for protecting the rights of welfare recipients. Because some federal statutory challenges are no longer available and recent federal constitutional challenges have proven ineffective,[122] state constitutions may provide a useful and needed alternative. First, several state constitutions guarantee their citizens substantive rights not explicitly guaranteed in the U.S. Constitution, including health and safety.[123] Using such provisions, advocates may obtain protections for welfare recipients.[124]

Second, state constitutional guarantees of equality may provide advocates for the poor with a useful alternative to the federal guarantee of equality. By affording more protections than the U.S. Constitution, such

119. *See* Lego v. Twomey, 404 U.S. 477, 489 (1972) (holding that states are free to give greater protections for citizens by adopting higher evidentiary standards for the voluntariness of confessions than the United States Supreme Court requires); Cooper v. California, 386 U.S. 58, 62 (1967) (holding that a state is free to impose higher standards on searches and seizures than required by the U.S. Constitution); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (a state constitution may provide more expansive protection for individual liberties than does the Federal Constitution).

120. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550-51 (1986).

121. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

122. *See*, C.K. v. Shalala, 92 F.3d 171 (3rd Cir. 1996).

123. Rebecca E. Zietlow, *Two Wrongs Don't Add up to Rights: The Importance of Preserving Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1141 (1996). New York and New Jersey are among the states that offer such provisions. *Id.*

124. *Id.* at 1142.

state provisions may be less rigid in their requirement of showing an "intent" to discriminate and more receptive to a "cultural meaning" test. Thus, the flexibility of and heightened protections offered by some state constitutions may provide a venue for challenging the race discrimination underlying child exclusion provisions. This section will explore the possibilities for making this argument under the Massachusetts Constitution.[125]

Massachusetts is among the states that have interpreted their own constitutions to provide greater protections than those provided by the U.S. Constitution. In *Moe v. Secretary of Administration and Finance*,[126] the Massachusetts court addressed the issue in the context of Medicaid funding for abortions. The U.S. Supreme Court held that restrictions on Medicaid funding for abortions are permissible under the U.S. Constitution. The Massachusetts court, however, stated, "We think our Declaration of Rights affords a greater degree of protection to the rights asserted here than does the Federal Constitution."[127] In reaching this conclusion, the court held that Massachusetts was "not bound by federal decisions, which in some respects are less restrictive than our Declaration of Rights."[128]

Using the Massachusetts Constitution to argue against the constitutional validity of a child exclusion provision may result in a finding that the provision discriminates on the basis of race. Two factors, in particular, indicate the utility of the Massachusetts State constitution for mounting this type of challenge. First, the Massachusetts court and legislature have acted affirmatively on the state's interest in providing heightened equality protections. Second, the Massachusetts court has indicated its acceptance of and ability to explore context and history in determining whether a measure is a guise for race discrimination.

Massachusetts' interest in providing greater civil rights protections than guaranteed by the U.S. Constitution is evidenced by the state's adoption of the Equal Rights Amendment (E.R.A.).[129] In 1976, the state enacted the E.R.A. with the purpose of providing protection against gender-based classifications.[130] The Massachusetts court used the E.R.A. to justify application of strict scrutiny to gender-based classifications, thus enabling the court to apply greater protections against gender-based discrimination

125. Because each state constitution is unique, each must be explored individually for its possible acceptance of cultural meaning as proof of race discrimination.

126. 417 N.E.2d 387, 400 (Mass. 1981).

127. *Id.* at 400.

128. *Id. See also*, Commonwealth v. Ford, 476 N.E.2d 560 (Mass. 1985) (holding that the exclusionary rule gives greater protection under Massachusetts state law than under the Federal Constitution).

129. The Massachusetts E.R.A., enacted in 1976 as Art. 106 of the state constitution, amended Art. 1 of the Declaration of Rights. It states, in part, "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

130. *See* Opinion of the Justices to the House of Representatives, 371 N.E.2d 426, 428 (1977).

than that provided for by the federal courts.[131] The Massachusetts Supreme Judicial Court has found that "the requirements of the Equal Rights Amendment to the Massachusetts Constitution are more stringent than the Fourteenth Amendment equal protection requirements."[132] While the Massachusetts E.R.A. was passed to provide greater protections against gender-based discrimination, it may be argued that the E.R.A. is also useful to challenge the "unconscious" racism underlying child exclusion provisions designed to control the behavior of Black women.

The utility of the Massachusetts E.R.A. in challenging the child exclusion provision's inherent racism through an examination of cultural meaning is bolstered by the Court's willingness to examine both the effects of statutes and the relevant contexts in which they operate when determining their constitutional validity. One instance where the Massachusetts court has done this is in the area of racial segregation. In a series of cases and advisory opinions concerning the racial imbalance of the public schools in Massachusetts, the court rested its conclusions on an examination of the "'historical context,' 'immediate objective' and 'ultimate effect,'" of legislation, to determine if the legislation "serves to perpetuate existing segregation in some of the schools, regardless of its cause, and thus 'significantly encourage[s] and involve[s] the State in racial discrimination.'"[133]

For example, in *School Committee of Springfield v. Board of Education*,[134] the court considered a statute amending the state's racial imbalance law. The amendment in question limited the measures that a school could employ to achieve racial balance. In invalidating the statute, the court stated that attempts by the legislature to forestall racial desegregation are unconstitutional.[135] The court looked to the historical context in which the statute was passed in order to determine that the law was intended to impede integration.[136] In reaching its holding, the court examined the results,

131. *Id.* ("To use a standard any less than the strict scrutiny test [in assessing gender based classifications] would negate the purpose of the equal rights amendment and the intention of the people in adopting it.") (citations omitted). *See also* United States v. Virginia, 116 S.Ct. 2264 (1996) (holding that "parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

132. Lowell v. Kowalski, 405 N.E.2d 135, 138 (Mass. 1980).

133. Opinion of the Justices to the Governor, 298 N.E.2d 840, 843 (Mass. 1973) (quoting Reitman v. Mulkey, 387 U.S. 369, 373-81 (1966)). *See also* Opinion of the Justices to the Lieutenant Governor, 310 N.E.2d 348, 351-52 (Mass. 1974). These cases were decided on both state and federal constitutional grounds.

134. 319 N.E.2d 427 (Mass. 1974), *cert. denied*, 421 U.S. 947 (1975).

135. *Id.* at 434.

136. If the statute "is viewed against the historical background . . . and if it is considered with other portions of the imbalance legislation, together with all the opinions of this court . . . a persuasive argument can made that the clear intent of that statute was to forestall, wherever possible, the immediate implementation of board-ordered racial imbalance plans which require redistricting or busing of students . . . . In any event, regardless of the legislative intent . . . one proposition is clear: in the circumstances of his case, any action taken whether by the legislature or by the school committee . . . which would tend to reverse

as well as the context, to determine that the motives behind the statute were racially discriminatory.

The court's willingness to expand the notion of discriminatory intent when analyzing statutes' constitutional validity under both Massachusetts' own constitution and the federal Equal Protection Clause indicates that it may be willing to accept the theory of cultural meaning as a means of exposing the unconscious racism that underlies the child exclusion. The segregation rulings, coupled with the Massachusetts E.R.A., suggest that the court is willing to look beyond the traditional indicators of motive and intent when determining if an action is discriminatory. The court is more willing to engage in the contextual analysis necessary to determine the cultural meaning behind the child exclusion.

In 1995, Massachusetts enacted a child exclusion provision which provides no additional welfare payments for children born ten months after a family begins receiving Transitional Aid to Families with Dependent Children, the state's welfare program.[137] The child exclusion was part of larger welfare "reform" legislation which places a two-year eligibility limit on welfare recipients and requires recipients to work a minimum of 20 hours a week at a paid job or community service.[138] The stated purpose of the child exclusion is to "promot[e] the principles of family unity, individual responsibility and self-reliance."[139]

Despite the racially neutral terms of the measure and the apparently benign purposes asserted by the legislature, the welfare system's historic treatment of women of color and the stereotypes and myths surrounding welfare recipients strongly suggest that race discrimination is an inherent part of this provision. The child exclusion provision perpetuates the historical racism against blacks by the welfare system detailed in section I by limiting the access of poor black women to welfare benefits, curtailing the number of children to which poor black women give birth, and maintaining harmful stereotypes and myths regarding welfare recipients.[140] Professor Lucy Williams uses an example from the Massachusetts legislative debate over the child provision to explicate this link between the provision and these stereotypes. During this debate, several state senators invoked the

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or impede the progress toward the achievement of racial balance . . . would constitute a violation of the Fourteenth Amendment of the United States Constitution and of Arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution." 319 N.E.2d at 434.

137. MASS. GEN. LAWS ANN. ch. 118, § 110 (West 1991).

138. *Id.* With the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), Massachusetts is currently formulating its new welfare program. The child exclusion is likely to be a component of the new state program as well.

139. MASS GEN. LAWS ANN. ch. 118, §110 (West 1991).

140. *See, e.g.,* Perales, *supra* note 1, at 266 ("New Jersey targeted African American and Latina mothers for racial and sexual control because they are a disempowered population and because the damaging combination of stereotypes renders them even more vulnerable to attack.").

image of Clarabel Ventura, a Puerto Rican woman, pregnant with her seventh child, collecting AFDC, food stamps and WIC, who was described in a newspaper article as "a crack-addicted, neglectful mother who sold her food stamps and her washing machine . . . to buy drugs."[141] In lobbying the state legislature on the need to enact his welfare reform provisions, Massachusetts Governor William Weld sent copies of the newspaper article on Clarabel Ventura to illustrate the need for his reforms.[142]

A court that recognizes the racialized meaning attached to the child exclusion provision will apply more stringent scrutiny to the measure, rather than simply reviewing the measure with great deference. Strict scrutiny of the child exclusion would reveal that the measure fails to serve a compelling state interest. Rather, the measure's true purpose—controlling and coercing women's reproductive choices—is illegitimate. The child exclusion provision also fails to serve a compelling interest as narrowly as possible. First, eliminating welfare benefits for children born to recipients fails to advance the interests articulated. Social science data and the facts about welfare families highlight the dis-utility of denying benefits to children as a means of deterring pregnancy and child birth among welfare recipients. In particular, it is not true that women on welfare have large families or that they get pregnant in order to receive greater amounts of welfare benefits. Rather, most families on welfare are smaller than most families in the United States: 43% of families receiving AFDC included only one child, and another 30% of families had only two children; 90% of families had three or fewer children.[143] A major study of birth rates among welfare mothers found that fertility rates among women in the general population were significantly higher than those among women receiving welfare.[144] Second, numerous less restrictive means can be imagined. Affordable access to information and means of effective birth control, opportunities for higher education, and training for meaningful employment are just a few alternative ways in which the state can effectuate its goals to "promote individual responsibility and to strengthen and stabilize the family unit."[145]

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141. Williams, *supra* note 23, at 1159.

142. *Id.* at 1188.

143. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS: FY 1992, at 1.

144. RANK, *supra* note 58, at 72-76. Furthermore, numerous advocates for recipients have cited studies which confirm that there is little if any correlation between receipt of welfare and increased birthrates of recipients. *See, e.g.*, RANK *supra* note 58, at 301; Wilson & Neckerman, *supra* note 59, at 249.

145. C.K. v. Shalala, 883 F.Supp. 991, 1013 (D.N.J. 1995). I am not arguing that these measures are the most effective means of alleviating the economic/racial/gender subordination of poor women of color. Ideally, more pervasive structural and systemic change will eventually displace the focus on the failings of the individual to achieve "equality." Rather, I make this argument to illustrate that there do exist alternative accepted means for achieving the goals advanced by states such as New Jersey as justification for enacting the child

The racial subordination of poor women of color is perpetuated through the maintenance of their poverty and of racist ideology, yet will not be uncovered through a lenient rational relation analysis. Rather, using the notion of cultural meaning to articulate the historical treatment and pervasive stereotypes of welfare recipients informing the current welfare debate enables a state court such as the courts in Massachusetts to use its state's constitution to provide greater protections than those provided by the federal Equal Protection Clause.

IV.
CONCLUSION: THE ADVANTAGES AND LIMITATIONS OF A CULTURAL MEANING TEST

A race-conscious exploration of social welfare legislation can be a powerful tool for exposing discrimination and subordination lying beneath a race-neutral surface. However, the approach outlined above is not without its limitations, including the difficulty and reluctance of courts to apply the test and the test's reliance on vague and malleable classifications and criteria.

Application of a cultural meaning test would be met with much resistance by courts. Federal courts have become accustomed to simply citing Supreme Court precedent for the assertion that all social welfare legislation is subject to rational basis review.[146] However, there is some indication that even federal courts are able and willing to engage in a form of cultural meaning analysis advocated by Lawrence, when examining an allegedly discriminatory state action. The Alabama federal district court's recognition of racial discrimination in *Whitfield v. Oliver*[147] is an illustration of one court's ability to examine the context in which a law was passed for purposes of determining whether the law operates to perpetuate race discrimination. The Supreme Court has also engaged in a type of cultural meaning test when determining whether or not a measure is discriminatory.[148] These cases, along with the Massachusetts desegregation cases discussed previously, indicate that courts are capable of engaging in searching inquiry and analysis when considering the context surrounding social welfare legislation.

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exclusion. While not ideal, these measures are arguably less intrusive and punitive than outright denial of benefits to children born to AFDC recipients.

146. *See, e.g.*, C.K. v. Shalala, 883 F. Supp 991, 991 (D.N.J. 1995).

147. 399 F. Supp. 348 (M.D. Ala. 1975), *aff'd*, Whitfield v. Burns, 431 U.S. 910 (1977).

148. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 625 (1982) ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.").

A second limitation of the cultural meaning analysis is its vagueness as a judicial test. Much has been written on the indeterminacy of the courts in applying even bright line rules and classifications. Judicial formalisms may appear to be objective and valueless, yet nevertheless serve as a smoke screen for more subjective determinations.[149] Thus, even a "clear" standard, such as strict scrutiny, can be manipulated by the court to produce a particular result.[150]

Furthermore, the approach suggested in this article relies on courts' recognition of unconscious racism through the application of a cultural meaning test. Yet, determining cultural meaning may be problematic, and may essentialize culture and reify harmful misconceptions and stereotypes. The decision maker's own perception of cultural meaning influences the outcome of the test.[151] While there are no easy solutions to these difficulties, it is important to recognize them and advocate for the relevant determinations and classifications to be made self-consciously.

There are numerous alternate approaches one can imagine for challenging the constitutionality of welfare reform measures such as child exclusion provisions. Some include arguing for quasi-suspect classification and semi-strict scrutiny for the poor, advocating in favor of a more flexible application of scrutiny to laws affecting the poor, rather than strict or mere rationality, arguing for a fundamental right to welfare, putting forth a theory of "minimal protection" for the poor,[152] or advocating for suspect class status for the poor. Indeed, this article draws on many of the ideas contained in these alternate approaches.

Underlying all of these approaches is the notion that current federal equal protection jurisprudence is inadequate for reaching inequalities experienced by the poor. This article also presumes that the poverty experienced by people of color, in particular black women, results in part from

149. *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (discussing how the indeterminacy of contract law is masked through recourse to dualities and rules).

150. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 166-70 (1988). Professor Bell discusses the malleability of judicial standards by reference to the Court's decision in *Korematsu*. The Court agreed that the appropriate standard was strict scrutiny, due to the racial classification drawn by the state. Yet, in applying this standard to the internment of Japanese-Americans during World War II, the Court ruled that the Equal Protection Clause was not violated, as "all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways." *Id.* at 167 (quoting Korematsu v. United States, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting)).

151. For further criticism of Lawrence's test, see Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 823 (stating that Lawrence "proposes small doctrinal adjustments within that culture which will prove ineffective because they do not consider the systems of power and knowledge within which all interpretive acts take place.").

152. *See, e.g.*, Michelman, *supra* note 78, at 42 ("A state's duty to the poor respecting their inner-circle interests is not to avoid unequal treatment at all, but rather to provide assurances against certain hazards associated with impecuniousness which even a society strongly committed to competition and incentives would have to find unjust.").

the intersection of race, gender and poverty. Failing to recognize this intersection preserves a facade of race-neutrality, thus allowing the race discrimination implicit in measures such as the child exclusion provision to go unchallenged.