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# **Now We Know Better: A New Legal Framework on Sex to Better Promote Autonomy, Equality, Diversity and Care for the Poor**

HELEN M. ALVARÉ†

## INTRODUCTION

Sex between men and women is social, and also produces society. Like any other social activity involving relationships between parties of differing capacities, vulnerabilities and needs, it invites questions about rights and responsibilities. In other words, sex needs a social justice framework.

Laws and policies affecting sex in the United States have demonstrated cognizance of this. They show understanding, for example, of the reality that even a private sexual encounter between a man and a woman intersects with questions about consent, equality, rights and responsibilities respecting consequences, and fairness between the sexes. They appear to grasp that because sex regularly produces children—who are “caused” by adults, helpless for a long time, and strongly influenced by their family structure and formation—sex raises myriad questions about adults’ procreative responsibilities.

For at least the last six decades, U.S. laws and policies addressing the sexual relationships between men and women have consciously spoken the language of social

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justice. They have regularly highlighted a limited set of social justice categories including equality (especially regarding women), individual autonomy, the alleviation of poverty, and respect for diversity. In the name of these principles, they have generally promoted the following: adult freedom of choice regarding consensual sexual expression; the ability to engage in sexual expression free of pregnancy or childbirth; and the acceptance of a diversity of family forms. The legal vehicles have included Supreme Court decisions, nondiscrimination laws, contraception laws and programs, sex-education programs, and other government-funded programs and public/private partnerships.

The social justice categories emphasized to date are facially reasonable, and also responsive to the times in which they emerged. The values of individual freedom, equality, care for the poor, and respect for diversity, enjoy widespread and possibly growing support. They are celebrated not only in the United States but also internationally by way of documents ranging from the Universal Declaration of Human Rights,<sup>1</sup> to the European Convention on Human Rights,<sup>2</sup> to the United Nations' International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights.<sup>3</sup> Most are promoted in some form by the major world religions.

In the United States, the values of autonomy, equality, diversity, and aid to the poor are especially responsive to the history and degree of discrimination against African Americans and women. Slavery and Jim Crow forcibly separated and otherwise oppressed African American men, women, and children. Leading rationales for denying women

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1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

3. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

equal opportunities in education, employment, political participation, and other arenas included women's fertility and their participation in caregiving and domestic life.

The categories of autonomy, equality, diversity, and aid to the poor were also a credible response to two additional circumstances prominent about fifty to sixty years ago: the technological breakthrough and cultural hopes respecting "the pill," and the sometimes punitive application of social conventions to nonconforming families and individuals, including nonmarital children. In other words, it was widely believed that reliable birth control would allow women and men to enjoy sex without the threat of an unintended child, and that this would simultaneously boost adults' happiness and freedom while avoiding immiserating children who would otherwise be born unwanted or amidst poverty or instability. It was also anticipated that de-stigmatizing non-nuclear family structures could lead to improved emotional, social and economic flourishing for both the adults and children involved.<sup>4</sup>

It was not intended that advancing autonomy, equality, family diversity and aid to the poor would compromise the well-being of children or family units, as this was understood decades ago. Leading lawmakers and policymakers presumed, rather, that emphasizing individual autonomy and unlinking sex and children would boost couples' sexual and relational satisfaction—perhaps strengthening marriage—and free women for opportunities previously reserved to men. They also tended to presume that children's well-being was very much a function of their parents' relational satisfaction.<sup>5</sup> On the matter of non-marital family

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4. See generally NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* (1977).

5. See e.g., Joseph Goldstein & Maz Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 *FAM. L. Q.* 75, 78–81 (1969) (claiming that under fault-oriented divorce laws, parties' finger-pointing likely exacerbated the aggressive forces already destroying the family, and further claiming that children would suffer if spouses were unable to divorce, because in such

structures, commentators hoped aloud that nonmarital cohabitation would strengthen couples' later marriages and reduce divorce.<sup>6</sup> They also hoped that single mothers' talents and capacities for caregiving—combined perhaps with assistance from extended family and the state—would secure sufficiently good outcomes for children.<sup>7</sup> They likely assumed that the respect enjoyed by marriage and marital childbearing “from time immemorial” would continue strongly to shape social norms.

Fifty to sixty years ago, however, there did not exist the volume of literature we have today examining these hopes and presumptions, and measuring outcomes on the basis of large data sets over decades of experience. This research reveals that many of these hopes and presumptions proved inaccurate. Instead, a significant number of the choices, dynamics, and outcomes of the last six decades were quite unexpected. Consequently, although lawmakers and policymakers—as well as interest groups, scholars and journalists—continue today regularly to advance arguments about sex and social justice in terms of the above four categories, the ground has shifted beneath them. Their categories and arguments are insufficient to advance the requisite social justice today. More precisely, I will claim in this Article that while their categories remain relevant and important, they need “updating,” as well as rebalancing and nuancing, in order to promote the very goods they embody, and to reflect insights gained from decades of qualitative and

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situations, parents are unhappy and stressed).

6. See e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (“We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties.”).

7. See e.g., Taylor Hirth, *How to Make It in America as a Single Mother*, by *the Numbers*, HUFFINGTON POST, (Jan. 30, 2014), [http://www.huffingtonpost.com/taylor-hirth/single-working-mother\\_b\\_4688244.html](http://www.huffingtonpost.com/taylor-hirth/single-working-mother_b_4688244.html) (recounting the practical means by which a single mother survives financially and emotionally with help from the state, from friends and family, and from personal income).

quantitative research, and from commonsense observation and moral reflection. In particular, the categories need to be updated to include greater respect for well-executed scientific research; to assign greater priority to children's interests from the start of their lives; to consider the needs of boys with uninvolved fathers; and to attend to the well-being of the family as a *unit*, as distinguished from attending mostly to individuals within a family.

For the same reasons, the categories need to be re-balanced. Autonomy needs to be weighed alongside attention to the ineradicable fact of familial interdependence. And the category of equality needs to be better integrated with respect for diversity—between groups and among members of particular groups—in order more effectively to achieve equality.

In order to update the social justice framework for law and policy on sex, this Article proceeds in both a broad and a narrow manner. It narrowly considers only a social justice perspective on the sexual relations between men and women, given my focus upon the needs of children these can produce. For reasons of length, however, it can only broadly discuss each category of social justice identified. To attempt to write exhaustively, for example, about even the category of equality between men and women, would require several volumes. My aim is rather to raise the overall level of awareness about the social justice categories we tend axiomatically to consult where sex is concerned. I wish to illuminate their insufficiency, and to suggest an array better suited to contemporary knowledge and experience. It should be no surprise that even ideas once heralded as the vanguard of progress require updating from time to time.

I will proceed as follows: Part I will propose how U.S. lawmakers and policymakers arrived at their understanding of social justice respecting the sexual relations between men and women. It will concur that they chose credible categories and arguments given the information and influences available to them at the time.

Part II will set forth the developments that unfolded under the influence of laws and policies premised on this social justice framework.

Part III will propose how to amend and re-balance the existing set of categories according to which we evaluate social justice about sex.

The Conclusion will offer several proposals for realizing a more complete, more contemporary social justice framework, in various areas of law and policy related to sex.

I. THE EXISTING FRAMEWORK FOR DOING SOCIAL JUSTICE  
ABOUT SEX: LAWS, POLICIES AND THEIR INFLUENCES

A. *Changing Laws*

Early incarnations of U.S. law affecting sex were concerned to prevent the birth of children outside of marriage. Laws therefore banned fornication, nonmarital cohabitation, and adultery. They forbade rape. They applied a “paternity presumption” to children born during marriage, legally rendering them the legitimate child of the husband, no matter the true biological relation. They punished children born outside of marriage by means of “illegitimacy laws” denying such children various property rights, as well as rights to pursue causes of action available to martially-born children. They banned contraception on the theory that contraceptive availability would encourage nonmarital sex which could lead to nonmarital births.<sup>8</sup>

During the period before the 1960s, speaking very generally, laws about sex did not notably speak in a social justice voice, even though one could easily construct a social justice narrative explaining the prevailing set of rules, which favored marriage and marital childbearing. For example, one

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8. See Joanne Sweeny, *Undead Statutes: The Rise, Fall and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 147 (2014).

could easily affirm the need to provide children access to the usually greater resources of stably married adults, or the need to demonstrate fairness to women whose economic and social well-being were so highly dependent upon men who could command superior rights under the law.

Beginning most notably in the 1960s, however, it became easy to “hear” social justice language and arguments in favor of an emerging set of laws and policies concerning sex between men and women. In this Section, I suggest that these arguments, laws, and policies were influenced by a wide variety of technological, philosophical and cultural developments and ideas. I could tell the same story by characterizing these developments and ideas as a set of convictions about human nature and human rights in connection with sex. The resulting laws and policies stressed adult autonomy (sometimes called “privacy”) and therefore also the importance of sexual consent. They also took cognizance of the unequal treatment and inadequate attention and respect afforded women, racial minorities, and the poor. They regularly highlighted the role played by free choice about sexual expression, in affirming human dignity and identity.

Consequently, state lawmakers began to repeal or to choose *not* to enforce laws concerning nonmarital sex—including laws banning fornication, cohabitation, and adultery.<sup>9</sup> The Supreme Court struck down “illegitimacy” laws, on the rationale that they constituted a violation of the Equal Protection guarantee to treat similarly situated children similarly.<sup>10</sup> Cohabiting couples achieved protection in some states’ or locales’ housing nondiscrimination laws, under the ban on “marital status” discrimination.<sup>11</sup>

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9. *Id.* at 149–151.

10. *See, e.g.*, *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968) (affirming the right of minor illegitimate children to recover for wrongful death of their mother).

11. *See, e.g.*, *Thomas v. Anchorage Equal Rights Comm’n.*, 102 P.3d 937 (Alaska 2004); *Hess v. Fair Emp’t & Hous. Comm’n.*, 187 Cal. Rptr. 712 (Cal. Ct. App. 1982); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998), *vacated on other*

Laws protecting first married, then single persons' right to access contraception, and later abortion, also sprung up in the early part of the last five decades. In 1965, the Supreme Court's *Griswold v. Connecticut* decision articulated a constitutional "right of privacy" in connection with the marital relationship and marital bedroom; this was sufficient to strike down state bans on birth control access for married couples.<sup>12</sup> Seven years later, the *Eisenstadt v. Baird* opinion overturned laws banning the sale or use of contraception respecting single persons.<sup>13</sup> The Court reframed the "right of privacy" to include a right to make decisions about "matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>14</sup> It also located a woman's right to access contraception—whether she was married or single—in the *individual's* right to make such decisions, saying that the "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."<sup>15</sup>

In the name of the individual rights of the married woman, and the importance of sexual consent, marital rape laws were also reformed in this period.<sup>16</sup> Previously, the law had posited that the husband and wife were "one," rendering marital rape an impossible concept.<sup>17</sup> Reformed laws often allowed a cause of action for rape by a woman against her husband, under some circumstances; they presumed the separate personhood of each spouse.

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*grounds*, 593 N.W.2d 545 (Mich. 1999).

12. 381 U.S. 479, 515–16 (1965).

13. 405 U.S. 438, 465 (1972).

14. *Id.* at 453.

15. *Id.*

16. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: a New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465, 1468 (2002). See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

17. Anderson, *supra* note 16, at 1477–79.

One year after *Eisenstadt*, in 1973, the Supreme Court articulated a constitutional right of abortion in *Roe v. Wade*; an opinion stressing women's suffering in connection with an unwanted or embarrassing pregnancy.<sup>18</sup> Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed the existence of a constitutional right of abortion, this time stressing women's reliance upon abortion to achieve social and economic equality with men, as well as the importance of women's ability to engage without fear in "unplanned activity" (sex).<sup>19</sup> The Court made no distinction between single and married women.

The next Supreme Court opinion to make reference to individuals' interests in nonprocreative, nonmarital sex was *Lawrence v. Texas*, in which the Court struck down Texas' ban on homosexual sodomy, with language valorizing all consensual sex as inevitably constituting "one element in a personal bond that is more enduring," and closely tied to the achievement of human "dignity."<sup>20</sup>

Today, federal and state laws and policies have moved beyond the matter of a mere "right" to contraception, and rather stress the benefits of its widespread availability and use. They stress contraception's potential to reduce teen and nonmarital pregnancy among all women, but often especially among the poor.<sup>21</sup> In order to address these social problems, in 1970 the federal government enacted the Title X program as part of the Public Health Service Act.<sup>22</sup> Title X serves both adults and adolescents, and expends the largest part of its budget distributing contraception to poor women and girls

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18. See 410 U.S. 113 (1973).

19. *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 856 (1992).

20. 539 U.S. 558, 567, 574–75 (2003).

21. See William L. Davis, *Family Planning Services: A History of U.S. Federal Legislation*, 16 J. FAM. HIST. 381, 387–98 (1991).

22. The Public Health Service Act, 42 U.S.C. §§ 300–300a-6.

either free or at highly subsidized rates.<sup>23</sup>

Federal Medicaid insurance also provides contraception for poor women and girls, at the highest available federal reimbursement rate, which is ninety percent.<sup>24</sup> States often supply the last ten percent.<sup>25</sup> Today, through Title X, Medicaid, and other programs, the federal government spends about 2.1 billion dollars annually on birth control, and the states spend an additional 225 million dollars.<sup>26</sup>

Quite recently, state and federal programs began to stress women's right to contraception, in language more reminiscent of the *Eisenstadt* opinion: referring to women's right to make important decisions about their lives. In 2012, the Obama administration issued a regulation which became known as the "contraception mandate," which required employers of a certain size—including most religious employers—to provide women and girls free contraception via employee health plans.<sup>27</sup> Following hundreds of religious freedom challenges to the mandate, in 2014 the Supreme Court issued the *Burwell v. Hobby Lobby Stores Inc.* opinion wherein five members of the Court concluded that it could be a "compelling interest" of the state to guarantee cost-free access to the four challenged methods of contraception, which were challenged because of their potentially abortifacient effects.<sup>28</sup> A ruling majority found, however, that

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23. ANGELA NAPILI, CONG. RESEARCH SERV., RL 33644, TITLE X (PUBLIC HEALTH SERVICE ACT) FAMILY PLANNING PROGRAM 1–3 (2016), <https://fas.org/sgp/crs/misc/RL33644.pdf>.

24. GUTTMACHER INST., PUBLICLY FUNDED FAMILY PLANNING SERVICES IN THE UNITED STATES: FACT SHEET (2016), [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_contraceptive\\_serv\\_0.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_contraceptive_serv_0.pdf).

25. *Id.*

26. *Id.*

27. *See* 26 C.F.R. § 54.9815-2713(a)(1)(iv)(2013); 29 C.F.R. § 2590.715-2713(a)(1)(iv)(2013). The regulation stands, save for its application to religious entities, under the administration of President Trump.

28. 134 S. Ct. 2751, 2784–85 (2014). The Department of Health and Human Services acknowledged that the drugs and devices to which Hobby Lobby objected "may result in the destruction of an embryo." *Id.* at 2775.

whether or not the state possessed a compelling interest, it had less restrictive means of achieving its goal of delivering contraception to employees.<sup>29</sup> The dissenters stressed the good of free contraception as a tool for women to attain social and economic opportunities equal to men.<sup>30</sup>

Federal and state governments also fund a variety of sex education curricula. One prominent type regularly includes an introductory admonition about the efficacy of abstinence, and then counsels minors about and sometimes distributes contraception with federal and state dollars. Federal and state governments regularly partner with the Planned Parenthood Federation of America (PPFA), to accomplish both education and distribution of contraception. They also often partner with the National Campaign to Prevent Teen and Unplanned Pregnancy, recently renamed “Power to Decide.”<sup>31</sup> Both groups energetically promote the use of contraception by women in their teens and twenties.<sup>32</sup> Sometimes Power to Decide and PPFA openly invite women and girls to have nonmarital sexual relationships and even nonmarital children, so long as the principles of informed consent are observed.<sup>33</sup>

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29. *Id.* at 2780–83.

30. *Id.* at 2787 (Ginsburg and Sotomayor, J.J., dissenting; Breyer and Kagan, J.J., dissenting in part).

31. See POWER TO DECIDE, <https://powertodecide.org/> (last visited Mar. 31, 2018).

32. 32. *See id.*

33. See e.g., Bedsider, *The Real Housewives of Not In This Lifetime: What if marriage isn't your thing?* BEDSIDER (Mar. 15, 2013), <https://www.bedsider.org/features/512-the-real-housewives-of-not-in-this-lifetime-what-if-marriage-isn-t-your-thing>; Meg McDonnell, *All Sex All the Time: A campaign to prevent unplanned pregnancy encourages casual sex*, NATIONAL REVIEW (Mar. 6, 2014), <http://www.nationalreview.com/article/372682/all-sex-all-time-meg-t-mcdonnell>; National Campaign to Prevent Teen and Unplanned Pregnancy, *Bedsider's Photos*, FACEBOOK (March 31, 2018, 12:49 PM), <https://www.facebook.com/bedsider/photos/pb.131611470215125.-2207520000.1393271176./549424618433806/?type=3&theater>; Planned Parenthood, *Considering Pregnancy* (March 31, 2018), <https://www.plannedparenthood.org/learn/pregnancy/considering-pregnancy#sthash.L7uUJMbb.dpuf>.

For several decades, from the 1990s through to today—in addition to an emphasis upon the importance of contraception to avoid an unwanted pregnancy—laws and policies have focused a great deal upon the woman’s consent to sex.<sup>34</sup> This was especially true during the Obama administration,<sup>35</sup> but less true of the George W. Bush administration, which spoke directly about avoiding nonmarital sex altogether.<sup>36</sup> Furthermore, at the time of this writing, it appears possible that the Trump administration may withdraw federal funds from various “teen pregnancy prevention programs” which stress consent and counsel or provide contraception, and instead direct more funding to “sexual risk avoidance” programs, which counsel sexual delay for the unmarried.<sup>37</sup>

Finally, I would also group under the heading, “laws and policies relating to sex,” various aid programs designed and operated to supply what a marital family ordinarily supplies to both adults and children. I also do so because proponents hope or claim that such programs might compensate for the absence of married parents to care for a child conceived or born nonmaritally, and because the largest percentage of these programs benefit single parent households, half of

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34. See e.g., U.S. DEPT’ JUSTICE, SEXUAL ASSAULT (2017), <https://www.justice.gov/ovw/sexual-assault> (last visited Aug. 3, 2017) (“Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient.”).

35. See Tanya Somanader, *President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus*, WHITE HOUSE BLOG ARCHIVES (Sept. 19, 2014), <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> (“Understand that if someone does not or cannot consent to sex, it’s rape.”).

36. *A History of Federal Funding for Abstinence-Only-Until-Marriage Programs*, SEXUALITY INFO. & EDUC. COUNCIL OF THE United States, <http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=1340&nodeid=1>.

37. Janet Burns, *The Trump Administration Just Axed \$213M from Teen Pregnancy Prevention Programs, All By Itself*, FORBES (July 18, 2017), <https://www.forbes.com/sites/janetwburns/2017/07/18/the-trump-administration-just-axed-213m-from-teen-pregnancy-prevention/#3fb099f34495>.

which began with a nonmarital birth.<sup>38</sup> Some of these programs began many years ago, while many others were launched from the 1960s to today, when the laws affecting sex were also undergoing major revision.

These programs provide a wide array of help ranging, *inter alia*, from basic income to housing, transportation, food, early cognitive development, homework help, after-school care, health care, counseling about higher education and careers, summer jobs and financial literacy.<sup>39</sup> They include large and well-known programs such as the Special Supplemental Nutrition Program for Women, Infants and Children (WIC),<sup>40</sup> housing programs such as “Moving to Opportunity,”<sup>41</sup> and educational supplements such as Head Start and Early Head Start.<sup>42</sup> Again, while they are designed to assist the poor, the largest percentage of such programs benefit single parent households, half of which began with a nonmarital birth.<sup>43</sup>

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38. BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES 16 tbl.4 (2016) [hereinafter CENSUS BUREAU]; U.S. Dep’t of Health & Human Servs., *Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2010*, ADMINISTRATION FOR CHILDREN AND FAMILIES, <https://www.acf.hhs.gov/ofa/resource/character/fy2010/fy2010-chap10-ys-final>. (last visited March 31, 2018) [hereinafter *TANF Recipients*].

39. See HELEN M. ALVARE, PUTTING CHILDREN’S INTERESTS FIRST IN U.S. FAMILY LAW AND POLICY 66–85 (2018).

40. See U.S. DEP’T OF AGRIC., WIC PROGRAM AND PARTICIPATION COSTS (2017), <https://www.fns.usda.gov/sites/default/files/pd/wisummary.pdf>.

41. See LISA SANBONMATSU, U.S. DEP’T OF HOUSING & URBAN DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM xiii (2011), [https://www.huduser.gov/publications/pdf/mtofhd\\_fullreport\\_v2.pdf](https://www.huduser.gov/publications/pdf/mtofhd_fullreport_v2.pdf).

42. U.S. DEP’T OF HEALTH & HUMAN SERVS., HEAD START PROGRAM FACTS (2015), <https://eclkc.ohs.acf.hhs.gov/hslc/data/factsheets/2015-hs-program-factsheet.html>; CHERI A. VOGEL ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., 2011-8, EARLY HEAD START CHILDREN IN GRADE 5: LONG-TERM FOLLOW-UP OF THE EARLY HEAD START RESEARCH AND EVALUATION PROJECT STUDY SAMPLE xi (2010).

43. See PROCTOR, *supra* note 38, at 16 tbl.4; *TANF Recipients*, *supra* note 38.

B. *What Influenced the Existing Social Justice Framework for Sex?*

Which ideas and events led law and policy *away* from disapproval of nonmarital sex, households, and births, and *toward* laws, policies and programs facilitating or normalizing these? An exhaustive catalogue of these influences is beyond the scope of a single article. It is possible, however, to highlight some of the most prominent, relying upon some of the leading thinkers of the last fifty to one hundred years on the subjects of sex, the sexes, relationships, marriage and family. Below, I review eight of these influences.

1. The Pill

The invention of “the pill” in 1960 proved an important influence upon laws and policies about sex. The pill could regularly, though not perfectly, prevent the conception of a child, or in some cases, prevent a human embryo from attaching itself to the mother’s womb.

The pill’s influence, however, is not based only upon its actual efficacy, but on perceptions of its seeming technological wizardry, and upon its marketing and promotion. When the pill was first sold to doctors by Searle pharmaceutical, its salesmen provided doctors a statue of a naked, gold, bare-breasted woman breaking free from chains; on the back appeared the word “unfettered.”<sup>44</sup> Additionally, more than a few public intellectuals predicted revolutionary effects flowing from the separation of sex and children in the public mind. Secular humanist and socialist Paul Blanshard wrote in 1973: “[B]lessed be the pill! Perhaps some future historian will hail it as our century’s greatest contribution to happiness—and also to the dissolution of Christian

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44. JONATHAN EIG, *THE BIRTH OF THE PILL: HOW FOUR CRUSADERS REINVENTED SEX AND LAUNCHED A REVOLUTION* 302–03 (2014).

monogamy.”<sup>45</sup> Sociologist Andrew Cherlin judges that the pill has “allowed young women and men to become sexually active long before they think about marriage.”<sup>46</sup>

Given how many authors have written about the social impact of the pill, I will only emphasize here that it was inevitable that the pill would reduce the “weight” of sex, by severing it—mentally and usually physically—from the momentous fact that sex often produces a new and long-dependent human life. When sex is severed from this fact, it becomes—as leading sociologist Anthony Giddens observed—less like a signal about commitment or marriage or family, and more like a transaction dissociated from any future promise between a man and a woman. Their relationship will endure only so long as it satisfies the desires of both partners simultaneously—a phenomenon Giddens called the “pure relationship.”<sup>47</sup> Philosopher Zygmunt Bauman, unpacking his notion of “liquid love,” similarly observed that this separation of children from sex would isolate sex and even children from notions like love, kin, family, union, and future.<sup>48</sup>

As discussed further below, for those who regarded women’s fertility and childcare responsibilities as a leading cause of women’s oppression and the means of robbing sex of its joy—as well as for those who held a view of equality as “sameness”—the pill was a thunderclap which might solve myriad problems. In one fell swoop, children are avoided and women can have sex on men’s terms.

The pill also entered history at a time when “population bomb” theories were gaining traction, due in part to national

45. PAUL BLANSHARD, *PERSONAL AND CONTROVERSIAL: AN AUTOBIOGRAPHY* 115 (1973).

46. Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, *THE FUTURE OF CHILD.*, Fall 2005, at 33, 49.

47. See ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE, AND EROTICISM IN MODERN SOCIETIES* 2, 25, 58, 175–80 (1992).

48. See ZYGMUNT BAUMAN, *LIQUID LOVE* 42–47 (2003).

and international awareness of the persistence of poverty in some countries with high birth rates.<sup>49</sup> Scholarly and popular observers were also paying a great deal more attention to poverty among African Americans in the United States, given the emergence in the 1960s of a civil rights' consciousness following centuries of slavery and Jim Crow.

Contraception appeared to be an important part of the solution to each of these problems, according to the simple logic that fewer people to feed, clothe and educate could reduce poverty as well as the environmental degradation and potential food shortages that human beings were wreaking on the planet.

## 2. Feminism v. Maternity

In the second half of the twentieth century, there emerged a form of feminism that cast suspicion upon, or even rejected, women's roles as mothers and homemakers. It held these roles responsible for buttressing the belief that women are second-class citizens, and for foreclosing women's power in the family and in the wider world. This feminism effectively argued that women's fertility and mothering constituted the grounds for excluding women from opportunities in education, employment, political life, and more. It also suggested that women should avoid marriage altogether, and rely upon their own financial and personal resources derived from education and the labor market, given marriage's claimed tendency to limit women to demeaning roles.<sup>50</sup> While some feminists celebrated the differences between men and women, and even proposed that women were thereby superior to men, the feminism that "mainstreamed" was more likely to stress the good of women's independence, and the centrality of their right to be

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49. *See generally* PAUL R. EHRLICH, *THE POPULATION BOMB* (1968).

50. *See* Kira Cochrane, *1963: The Beginning of the Feminist Movement*, *THE GUARDIAN* (May 7, 2013), <https://www.theguardian.com/lifeandstyle/2013/may/07/1963-beginning-feminist-movement>. *See generally* BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); LAURA KIPNIS, *AGAINST LOVE* 18–23 (2003).

sexually active on men's terms, i.e., without pregnancy, childbirth, or even commitment.

### 3. A Right to Happiness

More than a few writers have suggested that ideas about sex were influenced by adults' growing conviction that they possess a right to happiness, including sexual happiness, which had been too long ignored in favor of attention to adults' responsibilities. Philosopher Charles Taylor has written of the historical importance of the notion of a right to happiness in the United States. He points to its appearance in the Declaration of Independence, and suggests that its former "limits" (good citizenship, self-rule, and sexual morality) were set aside after World War I.<sup>51</sup> Traditional ideas about morality became subordinated to the imperatives of personal fulfillment, and becoming our "authentic selves."<sup>52</sup> Similar observations about Americans were offered in the iconic 1985 book *Habits of the Heart: Individualism and Commitment in American Life*,<sup>53</sup> albeit the authors there stressed Americans' deep longings for community and tradition *alongside* our insistence upon our right to define for ourselves our very own, very individual, version of happiness. Media critic Neil Postman wrote in the 1990s that a backlash against adult responsibility and in favor of adult happiness manifested itself in adults' growing tendency to consume more fun and more childish things, which were only too happily supplied by the media and by corporations.<sup>54</sup>

Sexual happiness emerged as a particularly important element of adult happiness. Historian Steven Seidman

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51. See CHARLES TAYLOR, A SECULAR AGE, 484–85 (2007).

52. See *id.* at 618–20, 507–08.

53. See ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 55 (1985).

54. See NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 99, 127–137 (1984).

makes a strong argument for tracing the current attention to sexual happiness to the early twentieth century when Americans began to worry that sexual *unhappiness*—including women’s socially imposed naiveté—was an important cause of marital failure.<sup>55</sup> In response, the medical community and popular culture began to devote a great deal more attention to sexual knowledge and technique as an important element of any successful romantic relationship between a man and a woman.<sup>56</sup>

The notion that sexual happiness is essential for both married and single persons was fueled by leading and very visible scholars and activists of the early and mid- twentieth century. Such scholars included, among others, Wilhelm Reich, Margaret Sanger, Margaret Mead, Betty Friedan, Simone DeBeauvoir, Sherri Hite, and Alfred Kinsey. Wilhelm Reich was Freud’s famous disciple who coined the term “the sexual revolution,” claiming that good sex is the “*core* of life’s happiness.”<sup>57</sup> Contraception activist and Planned Parenthood founder Margaret Sanger, wrote that sex free of the fear of pregnancy could engender “spiritual illumination which will transform the world, which will light up the holy path to an earthly paradise.”<sup>58</sup> Similar, though less extreme, sentiments were later offered by feminist icons Betty Friedan and Simone deBeauvoir.<sup>59</sup> From the 1920s through the 1970s anthropologist Margaret Mead, as well as sex-researchers Alfred Kinsey and Shere Hite,<sup>60</sup> suggested to

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55. See STEVEN SEIDMAN, *ROMANTIC LONGINGS: LOVE IN AMERICA* 65–85 (1993).

56. See *id.*

57. WILHELM REICH, *THE SEXUAL REVOLUTION: TOWARD A SELF-REGULATING CHARACTER STRUCTURE* 88 (Therese Pol trans.) (1945).

58. MARGARET SANGER, *HAPPINESS IN MARRIAGE* (Blue Ribbon Books 1940) (1926).

59. See FRIEDAN, *supra* note 50, at 86; SIMONE DE BEAUVOIR, *THE SECOND SEX* 724–31 (H. M. Parshley ed. & trans., Vintage Books 2d ed. 1989) (1952).

60. See *generally* SHERE HITE, *THE HITE REPORT* (1976); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); MARGARET MEAD, *COMING OF AGE*

a highly receptive public that human beings naturally desired a much wider variety and frequency of sexual relations, including relations outside of marriage.

#### 4. Materialism and Prosperity

The rise of prosperity in the United States—which empowered new opportunities for leisure and enjoyment and was promoted by means of powerful mass media and advertising campaigns—advanced a materialistic vision of the good life as well.<sup>61</sup> According to sociologist Eva Illouz in her book *Consuming the Romantic Utopia*, these developments also regularly suggested both that sex is the most desirable consumer item imaginable, while they simultaneously used sex to sell consumer items on the claim that they could make the buyer “sexy.”<sup>62</sup> Professor Illouz’s research also demonstrated contemporary individuals’ strong tendency to associate romance with the consumption of expensive things and exotic places.<sup>63</sup>

#### 5. The Normalization of Cohabitation

The 1970s marked the beginning of a steady rise and then explosion of cohabitation.<sup>64</sup> From the beginning, it was touted as a possible means of curbing divorce, which was a growing practice. In *Marvin v. Marvin*, the first nationally famous case concerning the enforceability of a cohabitation contract, the court openly stated that one of the reasons it was willing to overturn prior law generally refusing to

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IN SAMOA (5th prtg. 1968).

61. See TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 5–7 (2016).

62. See EVA ILLOUZ, *CONSUMING THE ROMANTIC UTOPIA: LOVE AND THE CULTURAL CONTRADICTIONS OF CAPITALISM* 8–10 (1997).

63. See *id.*

64. See RENEE STEPLER, PEW RESEARCH CTR., *NUMBER OF U.S. ADULTS COHABITING WITH A PARTNER CONTINUES TO RISE, ESPECIALLY AMONG THOSE 50 AND OLDER* (2017), <http://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/>.

enforce cohabitation contracts was its belief that cohabitation might strengthen marriages and help prevent divorce.<sup>65</sup> While even today not every state will enforce contracts between cohabitants, many will.<sup>66</sup> As noted above, laws against cohabitation remain on the books in a few states only, but are rarely enforced.

#### 6. If the Adults are Happy . . .

Another important idea influencing laws and policies about sex in the United States was the belief that children's happiness in a family was a function of their parents'. This is obviously related to the central importance accorded adults' sexual happiness described above. This idea proved powerful during debates over passage of no-fault divorce laws. It was combined with the assumption that children would be resilient to family structure changes.<sup>67</sup>

#### 7. The Moynihan Report: Civil Rights and Family Structure

The Civil Rights consciousness of the 1960s and 1970s regarding black Americans also helped shape law and policy on single parenting. Then Assistant Secretary of Labor and later Senator, Daniel Patrick Moynihan, authored a widely criticized report during his tenure at the U.S. Department of Labor.<sup>68</sup> Dubbed "The Moynihan Report," it disclosed and publicly lamented that the black community had a high rate

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65. 557 P.2d 106, 122 (Cal. 1976) ("We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties.").

66. See Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L. Q. 309, 315-16 (2008).

67. See 2 THE DIVORCE LAW DEBATES: TRANSCRIPTS FROM THE 1963-1965 ANNUAL MEETINGS OF THE UNIFORM LAW COMMISSION 139 (Judy Parejko ed.) (Aug. 3, 1970) (comments of Levy) (on file with author).

68. See DANIEL PATRICK MOYNIHAN, OFFICE OF POLICY PLANNING & RESEARCH, THE NEGRO FAMILY 5-14 (1965).

of single-mother parenting; it also worried aloud that this would be detrimental to black children.<sup>69</sup> The backlash to the Moynihan Report was furious and suggested that a negative judgment of single mothering was a *per se* racist conclusion. This backlash, in combination with a feminism stressing the strength and power of women apart from men, became a fixture in conversations about sex and parenting.<sup>70</sup> It helped to mainstream the notion that there are no superior or inferior family forms where children's outcomes are concerned, only a welcome and inevitable diversity. It suggested that children might easily thrive in very different family forms. President Jimmy Carter's official statement from the 1978 White House Conference on Families illustrated the tendency:

This Conference will clearly recognize the pluralism of family life in America. The widely differing regional, religious, cultural, and ethnic heritages of our country affect family life and contribute to its diversity and strength. Families also differ in age and composition. There are families in which several generations live together, families with two parents or one, and families with or without children. The Conference will respect this diversity.<sup>71</sup>

## 8. Hope in Social Welfare Programs

From the latter part of the twentieth century to today, there has been growth in the number and size of governmental programs directed to assisting poor children, the majority of whom live in single parent households. As described above,<sup>72</sup> while some programs began in the first half of the twentieth century, far more began in the 1960s and beyond. These programs hoped to supply the support,

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69. *See id.*

70. *See* James T. Patterson, *Moynihan and the Single-Parent Family*, EDUC. NEXT, Spring 2015, <http://educationnext.org/Moynihan-and-the-single-parent-family/>.

71. White House Conference on Families, 1 PUB. PAPERS 251 (Jan. 30, 1978), <http://www.presidency.ucsb.edu/ws/?pid=29884>.

72. *See supra* text accompanying notes 35–43.

guidance, time, interaction, money, human and social capital, and other resources, that a stable two parent family regularly supplied.<sup>73</sup> They were accompanied by goodwill and significant budgets.<sup>74</sup>

The above list of eight influences is only a brief tour of the landscape of ideas which helped all three branches of government shape the social justice categories, laws and policies concerning sex, which are more or less still with us today. In the decades during which we have lived with these laws and policies, however, we have gained new information and insights from important qualitative and quantitative investigations about what social justice “looks like” respecting sex, and what is more or less conducive actually to achieving equality, autonomy, diversity and justice for the poor. From these, it is possible to conclude that while earlier ideas about the contents of social justice were not wrong on their face, they were incomplete and unbalanced. They are therefore insufficient to do justice and should be revisited. Part II below will address these new investigations and insights in order to help guide law and policy in new directions.

## II. UNANTICIPATED DEVELOPMENTS AND REACTIONS

It is helpful to think about the laws and policies affecting sex, and adopted in the cause of social justice, as a kind of “bet” about human nature in connection with sexual relationships. They are a bet that human beings will behave in certain ways, or avoid behaving in certain ways, in response to different rules or incentives about sex, *and* that these reactions or behaviors will advance equality, autonomy, respect for diversity and the amelioration of poverty.

Painting with a broad brush, the policies summarized

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73. See ALVARE, *supra* note 39, at 66–85.

74. See *id.*

above bet that valorizing and technologically empowering the separation of sex and procreation would—if paired with exhortations about the necessity of consent—lead to the following happy results: fewer nonmarital births and therefore less poverty; improved male-female relationships and better marriages; a sense of greater autonomy, especially among women; and greater equality between women and men.

This bet depended, of course, upon the assumption that contraception would be easily adopted and efficacious, and that women faced with unwanted or nonmarital pregnancies would not shy away from abortion in the event that their contraception failed or they declined to use it.

The new policies also depended on a bet that avoiding stigmatizing nonmarital households and parenting—and rather encouraging respect for different family structures, especially in minority communities—would advance respect for these same communities, without sacrificing children's well-being or the norm of marriage and marital childbearing. Closely related, they bet that—in the event that nonmarital households experienced financial or personal distress—state-supplied material, financial and personal help would constitute a good-enough substitute.

Finally, the new social justice-oriented laws and policies bet that premarital sex and cohabitation would not undermine either partner's later marriage, or their marriage to one another. Rather, such nonmarital behavior might even strengthen marriages. At the very least, individuals' ability to choose nonmarital households could improve partners' sexual happiness, and increase their sense of autonomy.

In some ways, these bets worked out. Rates of use of contraception and abortion generally increased—presumably avoiding unwanted children—and birthrates

declined.<sup>75</sup> More women entered the labor force.<sup>76</sup> Rates of poverty declined after the 1960s, albeit they remain stubbornly high among single parents, especially those with nonmarital children.<sup>77</sup> The state for the most part managed to supply the basic necessities of living to the poor.<sup>78</sup>

There is also little doubt that there has been progress in Americans' willingness to speak frankly about individuals' sexual interests and dysfunctions, and their ability to receive help when needed. There is also increased attention to the sexual satisfaction of women and married couples. This is important progress for individuals whose difficulties or frustrations would have been overlooked or frowned upon in an earlier era.

Furthermore, men's opinions and practices regarding childcare and domestic work have moved in an egalitarian direction, although not as far as many hoped or predicted.<sup>79</sup> And family law is far more gender neutral on its face about women's and men's rights and responsibilities respecting third parties, and toward one another, their property, and their children.

There is also a general acceptance by both liberals and

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75. See BRADY E. HAMILTON & SHARON E. KIRMEYER, NAT'L VITAL STAT. REPORTS, TRENDS AND VARIATIONS IN REPRODUCTION AND INTRINSIC RATES: UNITED STATES, 1990–2014, 1–3 (2017), [https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66\\_02.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_02.pdf).

76. See U.S. DEP'T OF LABOR, FACTS OVER TIME: WOMEN IN THE LABOR FORCE (2017), <https://www.dol.gov/wb/stats/NEWSTATS/facts.htm>.

77. See U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES, PEOPLE AND FAMILIES, 1959 TO 2015, at tbl.2 (2015), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html>; W. Bradford Wilcox, *Marriage Matters: the Left Continues to Deny the Importance of Matrimony in Escaping Poverty*, CITY JOURNAL (July 25, 2017), <https://www.city-journal.org/html/marriage-matters-15362.html>.

78. See SUSAN E. MAYER, WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES 155 (1997).

79. See Jillian Berman, *Equal Pay Day: This is How Much More Unpaid Work Women do than Men*, MARKETWATCH (April 4, 2017), <https://www.marketwatch.com/story/this-is-how-much-more-unpaid-work-women-do-than-men-2017-03-07>.

conservatives of a social obligation to vulnerable Americans, including nonmarital households. This is the case, even while disagreements remain regarding the level of state aid and the conditions for its distribution.<sup>80</sup>

In more than a few important ways, however, the bet did *not* work out. Children, women, the poor, and some men too, are experiencing substantial negative fallout. There is even evidence that some of the laws and policies adopted are actively undermining extant social justice goals. This fallout suggests a need to reform the social justice framework in order to address a set of new and unexpected problems. This should not surprise. New information and unanticipated human choices regularly lead to a need to update law and policy.

In what follows, I describe in greater detail what the earlier architects of laws and policies about sex—directed to achieving social justice—did not anticipate. The first group of matters concern unanticipated reactions or choices largely affecting women. Others concern children, the poor, and boys with uninvolved fathers.

First, it appears that women and men reacted to the incentives offered by legal contraception and abortion in ways that sometimes depressed women's freedom in several senses. According to a great deal of economic literature, as a result of the influence of contraception and abortion, women's preferences regarding sexual involvement, marriage and marital childbearing, can be more difficult to attain.

These economists variously explain their conclusions through the economic tools of "risk compensation" and "the prisoners' dilemma." For example, Federal Reserve Chair

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80. See *e.g.*, AM. ENTER. INST. FOR PUB. POLICY RESEARCH & THE BROOKINGS INST., OPPORTUNITY, RESPONSIBILITY AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM 8–9 (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/Full-Report.pdf> [hereinafter CONSENSUS PLAN].

Janet Yellen and her co-authors—including George Akerlof, who is a Nobel-prize winning economist and also her husband—propose that because contraception and abortion communicated that all of the “risks” of pregnancy were insured against, “the norm of premarital sexual abstinence all but vanished in the wake of the technology shock.”<sup>81</sup> Women engaged in more nonmarital sex, even if they preferred not to, or had no intention of aborting a nonmarital child in the event they became pregnant. “Shotgun marriage” rates fell sharply.<sup>82</sup> Nonmarital birth rates and abortion rates grew, with women consistently presiding over more than eighty percent of single-parent families.<sup>83</sup>

Furthermore, no matter one’s views about the goods of single-parenting or the after-effects of abortion, in both cases, this is “work” that women, not men, are mostly or completely assuming. Leading sociologist Sara McLanahan has commented to this effect noting that while the pill likely boosted women’s confidence to invest in advanced education, it is also true that both the pill and legalized abortion made it “easier for men to shirk their parental responsibilities.”<sup>84</sup>

Economist Timothy Reichert further suggests that due to women’s age related fertility constraints and preferences, they enter the “market” for marriage earlier than men, who remain rather in the market for “sex” longer.<sup>85</sup> Consequently, women have less bargaining power in the marriage market.<sup>86</sup> Further, in the sex market, they face a “prisoner’s dilemma” because they cannot effectively coordinate and enforce

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81. George A. Akerlof et al., *Discussion of Models and Experience in the United States*, in *EXPLORATIONS IN PRAGMATIC ECONOMICS* 141, 144 (2005).

82. *Id.*

83. *Id.*

84. Sara McLanahan, *Diverging Destinies: How Children are Faring under the Second Demographic Transition*, 41 *DEMOGRAPHY*, 607, 617 (2004).

85. See Tim Reichert, *Bitter Pill*, *FIRST THINGS* (May 2010), <https://www.firstthings.com/article/2010/05/bitter-pill>.

86. See *id.*

cooperation with other women.<sup>87</sup> Thus, because they can command a relatively higher price in the market for sex, each is inclined to participate, perhaps even to meet their future spouse.<sup>88</sup>

In addition to the surprising correlation between the availability of contraception and abortion and rising rates of nonmarital births, there also came the surprise that women still and persistently demonstrate a preference for spending a great deal of time caretaking for children. This is happening despite the availability of contraception and abortion, and of myriad educational and employment opportunities open to women. As discussed above, women continue to be vastly overrepresented as single parents.<sup>89</sup> Also, the percentage of women who are *not* mothers by age forty dropped to fifteen percent in 2014, after reaching a high of only twenty percent in 2008, which was the year of the great recession.<sup>90</sup> It has hovered between fifteen and twenty percent over the last twenty years.<sup>91</sup> In survey after survey, women with minor children report that between twenty and twenty-nine percent prefer to be home full time, another fifty percent wish to work only part-time, and only between twenty and thirty percent prefer to work full-time.<sup>92</sup> Whether or not these preferences are attributed to nature or to social

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87. *See id.*

88. *See id.*

89. *See* U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS tbl.A1 (2016), <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> (last visited Aug. 7, 2017).

90. *See* GRETCHEN LIVINGSTON, PEW RESEARCH CTR., CHILDLESS, (2015), <http://www.pewsocialtrends.org/2015/05/07/childlessness/>.

91. *See id.*

92. *See* Linda Hirshman, *Homeward Bound*, THE AMERICAN PROSPECT (Nov. 21, 2005), <http://prospect.org/article/homeward-bound-0>; KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD, (2013), <http://www.pewsocialtrends.org/2013/03/14/chapter-1-changing-views-about-work/>; Steven Rhoads, *You Can't Imagine Facts Away*, INST. FAM. STUD. (Aug. 1, 2017), <https://ifstudies.org/blog/you-cant-imagine-facts-away-a-response-to-brigid-schulte-and-gary-barker>.

conditioning, there is no doubt that they affect women's evaluation of their own freedom and happiness.

Lawmakers and policymakers made predications about poor women which also proved inaccurate. They believed in particular that poorer women would take advantage of a high volume of state-supplied free or low-cost contraception, and of abortion, in order to avoid the costs and burdens of children. Instead, according to the most celebrated account of the reasoning of poorer women—*Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage*—poor women remain *most* likely to have nonmarital and unintended pregnancies, and their abortion ratio—calculated by dividing the number of abortions by the number of pregnancies—is lower than more privileged women.<sup>93</sup> *Promises I Can Keep* further illustrates poor women's apparently stronger desire for children than that expressed by more privileged women, while they experience, of course, the same fertility constraints. It also reports that they are well aware of the availability of contraception and abortion, but live in a context with fewer marriageable men due to incarceration, drugs, and employment.<sup>94</sup> They also have lower "opportunity costs," due to having a child, given that they are not trading off opportunities for an excellent education or job when they choose to become unmarried mothers.<sup>95</sup> Together, these factors—along with a desire to please or bind a sexual partner—more often lead to the choice to have or to risk having a nonmarital child. Consequently, the children of the poor are vastly more likely to be reared in a nonmarital home, and to pass on the disadvantages of poverty and nonmarital birth to the next generation.

Recent research also continually confirms that the significant amount of nonmarital childbearing among the

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93. See KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 43–45 (2005).

94. *See id.*

95. *See id.*

poorer is responsible for widening and hardening the gaps between the highest and lowest socioeconomic groups, and between races. This dynamic alone is a powerful argument for improved social justice categories and tools where sex is concerned. It is routinely described by investigators across the ideological spectrum and need not be detailed here.<sup>96</sup> I will say only in summary that investigators report that more privileged women and men are not only avoiding nonmarital births—despite their greater ability to afford them—but also attaining higher rates of more stable marriages and marital births. These advantages are then transmitted to their children via “assortative mating,” which is marriage between similarly advantaged persons,<sup>97</sup> while the disadvantages of the less-privileged are also transmitted inter-generationally.<sup>98</sup>

A newer, disturbing set of findings indicates that nonmarital parenting may also play a role in creating long-term gaps between outcomes for boys and girls raised by single mothers. These cognitive and skill gaps emerge very early between brothers and sisters raised in identical home and school environments and persist to affect their long-term education and employment outcomes. Researchers are uncertain of the mechanisms, but suspect that the gap might be related to the absence of a role model for boys, the

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96. See generally RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?* (2011); KAY S. HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA* (2006); Laura Demanski, *Three Views on Inequality*, U CHI. MAG., Winter 2016, at 1, 22–25, <https://mag.uchicago.edu/law-policy-society/three-views-inequality>; McLanahan, *supra* note 84; Sara McLanahan & Christine Percheski, *Family Structure and the Reproduction of Inequalities*, 34 ANN. REV. SOC. 257 (2008); W. Bradford Wilcox, *The Evolution of Divorce*, NAT'L AFF., Fall 2009.

97. See Robert D. Mare, *Educational Homogamy in Two Gilded Ages: Evidence from Intergenerational Social Mobility Data*, 663 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 118 (2016).

98. See Robin S. Högnäs & Marcia J. Carlson, “Like Parent, Like Child?": *The Intergenerational Transmission of Nonmarital Childbearing*, 41 SOC. SCI. RES. 1480, 1481, 1482, 1486 (2012); Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 123–127 (2009).

presence of a role-model for their sisters, boys' differing sensitivities to fewer parental inputs, or mothers' possibly different ways of interacting with sons versus daughters.<sup>99</sup> It would not be surprising if this phenomenon has been affecting males' diminishing outcomes in the realms of higher education and employment over the last several decades.<sup>100</sup>

Third, persuasive volumes of national and global data indicate that women are less satisfied with casual sex than men. They desire it less, regret it more, and articulate a preference for sex in the context of commitment.<sup>101</sup> In fact, neither men nor women display in practice the sexual promiscuity predicted or allegedly measured by Alfred Kinsey, even in the context of the widespread availability of contraception and abortion. Instead, *The Social Organization of Sexuality: Sexual Practices in the United States*,<sup>102</sup> which continues to be the most respected study of the sexual practices of Americans, indicates that both men and women report moderate sexual habits, as well as a desire for—and more happiness in connection with—sex paired

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99. See Claire Cain Miller, *A Disadvantaged Start Hurts Boys More than Girls*, N.Y. TIMES (Oct. 22, 2015), <https://www.nytimes.com/2015/10/22/upshot/a-disadvantaged-start-hurts-boys-more-than-girls.html>.

100. See, e.g., DIANE WHITMORE SCHANZENBACH ET AL., BROOKINGS INST., *THE CLOSING OF THE JOBS GAP: A DECADE OF RECESSION AND RECOVERY* 4 (2017), [http://www.hamiltonproject.org/papers/the\\_closing\\_of\\_the\\_jobs\\_gap\\_a\\_decade\\_of\\_recession\\_and\\_recovery](http://www.hamiltonproject.org/papers/the_closing_of_the_jobs_gap_a_decade_of_recession_and_recovery); William J. Doherty et al., *Is the Gender Gap in College Enrollment Influenced by Nonmarital Birth Rates and Father Absence?*, 65 FAM. REL. 263, 265, 272 (2016) (discussing the greater risk of failure to attend college that males, as compared with females, face when the males experienced father absence from birth).

101. See John Angrist, *How Do Sex Ratios Affect Marriage and Labor Markets? Evidence from America's Second Generation*, 117 Q. J. ECON. 997 (2002); Russell D. Clark & Elaine Hatfield, *Gender Differences In Receptivity to Sexual Offers*, 2 J. PSYCHOL. & HUM. SEXUALITY 39, 48 (1989); David Schmitt et al., *Universal Sex Differences in the Desire for Sexual Variety*, 85 J. PERSONALITY SOC. PSYCHOL. 85, 97 (2003).

102. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (1994).

with commitment.<sup>103</sup>

Fourth, despite projections that the separation of sex from procreation—combined with an emphasis on securing consent—would increase women’s sexual freedom and enjoyment and enhance sexual equality, women do not generally report that they feel this autonomy or enjoyment in connection with sex outside of a committed relationship, although, of course, some do. In addition to the quantitative data cited above, qualitative data from the recent genre of literature studying “hookups” among younger women and men indicate rather that women are more disappointed than men when a casual encounter does not lead to more; that they continue to have sexual partners who are considerably older,<sup>104</sup> reflecting a potential imbalance of power; that they regularly get drunk in order to engage in casual sex;<sup>105</sup> and that they feel pressure to perform sex acts they do not prefer—including some which seem to be provoked by men’s porn-inspired fantasies.<sup>106</sup>

All of this further indicates that the matter of women’s consent remains murky or worse; it seems, in other words, to be an insufficient foundation for doing justice to women. It is also frequently measured that women far more often understand cohabitation as a “step toward marriage,” while men do not, and that women’s preferences for marriage versus cohabitation can be seen in studies showing lower

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103. Linda J. Waite & Kara Joyner, *Emotional and Physical Satisfaction with Sex in Married, Cohabiting, and Dating Sexual Unions: Do Men and Women Differ?*, in *SEX, LOVE, AND HEALTH IN AMERICA: PRIVATE CHOICES AND PUBLIC POLICIES*, 239, 240 (Edward O. Laumann & Robert T. Michael eds., 2001).

104. See KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING AND RELATIONSHIPS ON CAMPUS* 41, 54, 97 (2008).

105. See LAURA SESSIONS STEPP, *UNHOOKED: HOW YOUNG WOMEN PURSUE SEX, DELAY LOVE AND LOSE AT BOTH* 113 (2007); Emma Brown et al., *Drinking is Central to College Culture-and to Sexual Assault*, *WASH. POST* (June 14, 2015), [https://www.washingtonpost.com/local/education/beer-pong-body-shots-keg-stands-alcohol-central-to-college-and-assault/2015/06/14/7430e13c-04bb-11e5-a428-c984eb077d4e\\_story.html?utm\\_term=.4c6f4444c604](https://www.washingtonpost.com/local/education/beer-pong-body-shots-keg-stands-alcohol-central-to-college-and-assault/2015/06/14/7430e13c-04bb-11e5-a428-c984eb077d4e_story.html?utm_term=.4c6f4444c604).

106. See BOGLE, *supra* note 104; PEGGY ORENSTEIN, *GIRLS & SEX* 37–38 (2016).

cohabitation rates where women are scarce and can therefore more effectively set relationship terms.<sup>107</sup>

Fifth, it appears that nonmarital sex early in a relationship—regardless of cohabitation—impacts the stability of the current relationship and future ones. Sociologist Scott Stanley suggests that when sex occurs earlier than any commitment or substantial knowledge of one another, it may impair healthy relationship development.<sup>108</sup> Couples feel themselves bonded due to sex, but have not yet performed the relationship work to thoroughly bond at other important levels. They may even extend the length of their cohabitation or enter into marriage more from inertia than from a firm commitment. Stanley famously labeled this the “sliding versus deciding” phenomenon,<sup>109</sup> and writes that none of this has proved conducive to stability either in cohabitation or later marital partnership.<sup>110</sup>

Sixth, it was not anticipated that contraceptive technology would fail as often as it does, or be rejected or abandoned by women as often as it has been. Generally speaking, contraceptives are fairly efficacious, but they are not the “silver bullet” hoped for or predicted. Further, they are not free of side effects, nor are they safe for all, especially for the nearly fourteen percent of women who smoke,<sup>111</sup> or

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107. See Meg Jay, *The Downside of Cohabiting Before Marriage*, N.Y. TIMES (Apr. 14, 2012), <http://www.nytimes.com/2012/04/15/opinion/sunday/the-downside-of-cohabiting-before-marriage.html>; Taylor Kubota, *Why Areas with More Men Have Higher Marriage Rates*, LIVE SCIENCE (Aug. 25, 2016), <https://www.livescience.com/55892-how-gender-ratio-affects-marriage-rates.html>; Ryan Schact & Karen L. Kramer, *Patterns of Family Formation in Response to Sex Ratio Variation*, PLOS ONE (Aug. 24, 2016), at 2–5, 7, 10–11, <https://doi.org/10.1371/journal.pone.0160320>.

108. See Scott Stanley, *Is Living Together All It's Cracked Up to Be?*, SLIDING VS DECIDING: SCOTT STANLEY'S BLOG, (Jan. 15, 2016), <http://slidingvsdeciding.blogspot.com/2016/01/is-living-together-all-its-cracked-up.html>.

109. See *id.*; Jay, *supra* note 107.

110. Stanley, *supra* note 108.

111. *Women and Tobacco Use*, AM. LUNG ASS'N (Mar. 12, 2018, 1:47 PM),

the forty percent of women who are obese,<sup>112</sup> or women with a family history of breast or cervical cancer.<sup>113</sup> Continuing suspicions exists in minority communities towards contraception promotion there due to its links with racism and even genocide.<sup>114</sup> Even after nearly fifty years of generous federal and state funding of contraception, unintended pregnancy rates have not budged, while nonmarital births are near an all-time high.<sup>115</sup> Rather, in the sobering words of the Department of Health and Human Services:

Despite the availability of multiple contraceptive options, 49% of pregnancies in the U.S. are unintended. . . . Although sixty-two percent of reproductive age women in the US are using contraception, the unintended pregnancy rates and abortion rates continue to be high. . . . However, hormonal contraceptives have the disadvantage of having many undesirable side effects. In addition, hormonal contraceptives are associated with adverse events, and obese women are at higher risk for serious complications such as deep venous thrombosis. The oral contraceptive pill's failure rate among American women ranges from 9–30%. The reason for such a high failure rate is the requirement for daily compliance. Furthermore, a recent report found that 40% of women were not satisfied with their current contraceptive method. . . . Long-acting reversible contraception, which does not require daily compliance,

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<http://www.lung.org/stop-smoking/smoking-facts/women-and-tobacco-use.html?referrer=https://www.google.com> (reporting 13.6% of American women as smokers in 2015).

112. See *Overweight and Obesity Statistics*, NAT'L INST. DIABETES DIGESTIVE KIDNEY DISEASES (Apr. 5, 2018, 1:47 PM), <https://www.niddk.nih.gov/health-information/health-statistics/overweight-obesity> (reporting about 40% obesity rate among American women).

113. See Kelli Miller, *Birth Control & Cancer: Which Methods Raise, Lower Risk*, AM. CANCER SOC'Y (Jan. 21, 2016), <https://www.cancer.org/latest-news/birth-control-cancer-which-methods-raise-lower-risk.html>; Lina S. Mørch et al., *Contemporary Hormonal Contraception and the Risk of Breast Cancer*, 377 NEW ENG. J. MED. 2228, 2228, 2233 n.23 (2017).

114. See Jenny A. Higgins, *Celebration Meets Cautions, LARC's Boons, Potential Busts and the Benefits of a Reproductive Justice Approach*, 89 CONTRACEPTION 237, 238–40 n.4 (2014).

115. See CTR. FOR DISEASE CONTROL & PREVENTION, UNMARRIED CHILDBEARING (2017), <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm>.

has a much lower typical use failure rate. The perfect use and typical use failure percentages are very close for these methods. However, most of these methods are either devices, such as the IUD, or contain hormones. Use of intrauterine devices has only slowly gained acceptance in the US (from 0.8% in 1995 to 5.6% in 2006–2010), and IUDs are unlikely to be used by the majority of women desiring contraception. These statistics suggest there is a need to develop highly effective non-hormonal contraceptives that have fewer side effects than the currently available methods.<sup>116</sup>

It should be noted that although contraception—along with abstinence and sexual delay—is regularly credited with reducing our national teen pregnancy rates. A large portion of this decline is due to declining rates of teen *marriage*. Rates of *nonmarital* teen pregnancy have actually increased from 14 nonmarital pregnancies per 1000 teens in the 1950s, to 21.5 per 1000 today—a 50% increase.<sup>117</sup>

Women also remain quite ambivalent toward abortion; according to one study, fifty-nine percent of women still believed it should be illegal in all or most cases as of 2017.<sup>118</sup> Therefore, even though U.S. abortion rates are high compared to other western countries, U.S. women continue to choose nonmarital and unintended births, as described above.

Seventh, neither cohabitation nor premarital sexual partnerships lead to more stable marriages.<sup>119</sup> Both,

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116. Funding Opportunity Announcement for Female Contraceptive Development Program from Dep't of Health & Human Servs. (November 5, 2013), <https://grants.nih.gov/grants/guide/rfa-files/RFA-HD-14-024.html>.

117. See Stephanie J Ventura et al., *Births to Teenagers in the United States*, NAT'L VITAL STAT. REP., SEPT. 2001, at 2 tbl.2, [https://www.cdc.gov/nchs/data/nvsr/nvsr49/nvsr49\\_10.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr49/nvsr49_10.pdf); CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., R43667, NONMARITAL BIRTHS: AN OVERVIEW 24 (2014), <https://fas.org/sgp/crs/misc/R43667.pdf>.

118. PEW RESEARCH CTR., RELIGION & PUB. LIFE, PUBLIC OPINION ON ABORTION (2017), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

119. Scott Stanley, *Why Doesn't Living Together Before Marrying Decrease the Risk of Divorce?*, INST. FOR FAM. STUD. BLOG (Aug. 4, 2014), <https://ifstudies.org/blog/why-doesnt-living-together-before-marrying-decrease-the-risk-of-divorce/>; Nicholas H. Wolfinger, *Counterintuitive Trends in the Link*

however, are highly correlated with nonmarital births.<sup>120</sup> In more recent years, and contrary especially to more women's hopes, cohabitation is also less likely to lead to marriage.<sup>121</sup>

Eighth, leading researchers increasingly conclude that family stability is a primary mechanism driving children's success, while instability importantly drives their distress and diminished educational, economic, and emotional outcomes.<sup>122</sup> These findings indicate the wisdom of avoiding nonmarital parenting and cohabitation, given how regularly these open the door to later instability in adults' partnerships.

Ninth, it was not anticipated that governmental programs directed largely to nonmarital children and families would fail so significantly to compensate for the dynamics and functions of a stable married family. While social welfare programs have undoubtedly curbed poverty and provided families the basics of living,<sup>123</sup> and some programs, like the "Nurse Family Partnership," have even shown more promising results, overall these programs have not come close to erasing the disadvantages children experience in connection with the loss of stably married parents.<sup>124</sup> In the words of Brookings Institution scholar

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*Between Premarital Sex and Marital Stability*, INST. FOR FAM. STUD. BLOG (June 6, 2016), <https://ifstudies.org/blog/counterintuitive-trends-in-the-link-between-premarital-sex-and-marital-stability>.

120. SOLOMON-FEARS, *supra* note 117, at 1, 4–5, 12.

121. ESTHER O. LAMIDI ET AL., BOWLING GREEN STATE UNIV. CTR. FAM. & DEMOGRAPHIC RESEARCH, CHANGE IN STABILITY OF PREMARITAL COHABITATION, <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/PAA/lamidi-manning-brown-paa.pdf>.

122. Dohoon Lee & Sara McLanahan, *Family Structure Transitions and Child Development: Instability, Selection, and Population Heterogeneity*, AM. SOC. REV. 738, 738–40, 760. *See also* Clyde Hertzman, *The Role of Temporal and Spatial Instability in Child Development*, in CHAOS AND ITS INFLUENCE ON CHILDREN'S DEVELOPMENT, 113, 131, (Gary W. Evans et.al eds., 2009).

123. *See* MAYER, *supra* note 78, at 148.

124. *See* EDWARD RODRIGUE & RICHARD V. REEVES, BROOKINGS INST., HOME VISITING PROGRAMS: AN EARLY TEST FOR THE 114TH CONGRESS (2015), <https://www.brookings.edu/research/home-visiting-programs-an-early-test-for->

David Ribar:

While interventions that raise incomes, increase parental time availability, provide alternative services, or provide other in-kind resources would surely benefit children, these are likely to be, at best, only partial substitutes for marriage itself. The advantages of marriage for children appear to be the sum of many, many parts.<sup>125</sup>

Given all of these unanticipated developments, and the amount of human suffering they represent, reform of the social justice framework on sex—and of related laws and policies—is in order. We simply know more today about men’s and women’s preferences respecting sex, and about their responses to particular incentives and messages on sex. We know more about the resulting circumstances for children and the larger society. There is enough information to proceed to both better realize the noble social justice goals currently valorized, and to pursue additional goals suggested by recent developments.

Proposed new categories of social justice respecting sex and ideas about enhancing existing categories follow in Part III below.

### III. NEW AND IMPROVED SOCIAL JUSTICE CATEGORIES

This Part will propose categories to add to the “social justice framework” shaping laws and policies about sex. It also suggests balancing out the categories within the existing framework by adding relevant, competing considerations to them.

#### A. *New Categories*

##### 1. Respect for Facts

First, in order to promote social justice in connection

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the-114th-congress/.

125. David C. Ribar, *Why Marriage Matters for Child Wellbeing*, 25 FUTURE CHILD. 11, 23 (2015).

with sex, laws and policies ought to be conspicuously “evidence-based.” This is a matter of respect for the human beings engaged in debate about wise policies, and is necessary in order to most effectively accomplish those policies’ stated ends. They should openly rely upon research conducted according to the highest scientific standards. They should also appreciate scientifically gathered stories of human experience—qualitative data—manifesting intuitive or often-repeated insights about human beings in sexual relationships.

There is a great deal of such research today in matters treating a wide range of topics relevant to sex and justice. This includes family structure effects, individuals’ sense of happiness and freedom in connection with various sexual experiences and partnerships, and the effects of markets for sex and marriage (shaped importantly by the separation of sex from children and the related diminishing of the “weight” of sex) upon men, women, children, and the poor.”

Respect for well-executed research is a substantive social justice priority, even as it is also an aspect of *every* social justice category. This category should meet wide acceptance. “Evidence-based” policy has become a touchstone of federal policymaking especially since the Obama administration, and is a principle—not surprisingly—commanding respect from both the right and the left.<sup>126</sup> Reported attempts by the Trump administration to eradicate this standard from the work of federal agencies, if true, are mysterious and wrongheaded.<sup>127</sup>

Of course research findings and even compelling accounts of human experiences and insights are not the only

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126. See, e.g., Ron Haskins & Jon Baron, *The Obama Administration’s Evidence-Based Initiatives: An Overview*, BROOKINGS INST., (Apr. 2011), at 28, [https://www.brookings.edu/wp-content/uploads/2016/06/04\\_obama\\_social\\_policy\\_haskins.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/04_obama_social_policy_haskins.pdf); CONSENSUS PLAN, *supra* note 80, at 36–38, 48.

127. See Sheila Kaplan & Donald G. McNeil, Jr., *Uproar Over Purported Ban at C.D.C. of Words Like ‘Fetus’*, N.Y. TIMES (Dec. 16, 2017), <https://www.nytimes.com/2017/12/16/health/cdc-trump-banned-words.html>.

possible influences on laws and policies. Classic moral reasoning with particular deference to the needs of the most vulnerable should also play an important role. A well-done stream of research with findings persistently pointing in a particular direction regarding human flourishing—especially among the most vulnerable persons affected in connection with sex—cannot be ignored if justice is to be done.

## 2. Solidarity with Other Vulnerable Persons

A second addition to the social justice framework highlights the need for solidarity with a wider variety of vulnerable persons. Existing categories call for special attention to women, the poor, and racial minorities. This remains true, as the above material shows, but as the last half-century has further revealed, law and policy needs to demonstrate increased solidarity with children and with disadvantaged males—perhaps especially those reared without an involved father.

Children are an obvious cohort in need of careful consideration because their lives are deeply affected by adults' sexual decision-making. Their family structures are usually set at the moment of their conception, and their formation and adult opportunities are significantly influenced by this structure. It is well accepted today in sociological and neurological literature, for example, that children's wellbeing in the long run is affected by their interactions with their parents during their earliest years,<sup>128</sup> and that the number and quality of these interactions depend largely upon inputs that their parents supply or fail to supply: parental time, number and quality of verbal interactions beginning at birth, warmth, nutrition, and the quality of parents' mutual support.<sup>129</sup> Family structure has

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128. James J. Heckman, *Skill Formation and the Economics of Investing in Disadvantaged Children*, 312 *SCI.* 1900, 1900–01 (2006).

129. See BETTY HART & TODD R. RISLEY, *MEANINGFUL DIFFERENCES IN THE*

implications for every one of these factors.

Adults' responsibility to do justice for their children is obvious. Adults make children and determine children's family structure and formation. Children are the vulnerable, even powerless, players in the situation. In the words of the philosopher widely credited with articulating human beings' responsibility for our environmental future, Hans Jonas: "For when asked for a single instance . . . where that coincidence of 'is' and 'ought' occurs, we can point at the most familiar sight: the newborn, whose mere breathing uncontradictably addresses an ought to the world around, namely to take care of him."<sup>130</sup>

Philosopher Cynthia Willett makes a powerful case for grounding adult responsibility for children in the wide disparity of relative power between them, and the "unearned privilege[]" of being older.<sup>131</sup> Furthermore, today we know more clearly that government programs—important as they are for supplying basic needs—have not proved capable of erasing the effects of family structure deficits. Children are all of us, every single American. Their health is coextensive with the health of a pluralistic, democratic society, which requires sufficiently healthy and self-sufficient children for its continuation and stability. While this last point is not a substantive argument on behalf of adults' responsibilities toward children, it underscores the size of the imperative to fulfill them.

Today, we need also to include some groups of males among those to whom law and policy owe special solicitude and solidarity: boys reared in households without an involved father. Practically speaking, this group will contain a disproportionate number of poor and minority children.

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EVERYDAY EXPERIENCE OF YOUNG AMERICAN CHILDREN 91–92, 95–96 (1995).

130. HANS JONAS, *THE IMPERATIVE OF RESPONSIBILITY* 131 (1984).

131. See Cynthia Willett, *Collective Responsibility for Children in an Age of Orphans*, in *THE BEST LOVE OF THE CHILD* 179, 194 (Timothy P. Jackson ed., 2011).

Research described above indicates that these boys may experience long-term disadvantages affecting their educational and employment prospects and outcomes. President Obama highlighted this group in his “My Brother’s Keeper” initiative.<sup>132</sup> At its initiation, he spoke movingly and quite specifically about the pains and losses associated with fatherlessness in his own life, and confirmed by research.<sup>133</sup> This disposition needs to be incorporated more widely in laws and policies concerning sex.

### 3. Attention to the Family System Supporting the Individual

A third category to add to the existing social justice framework is concern for the family “system” as a measure of justice in connection with sex. It appears clear that policies adopted for the limited purpose of addressing or better advantaging individuals within families or those who create families fail to take account of the effects on other family members. Women’s sexual practices affect men, children, and the next generation—the same is true for men. Were this social justice lens adopted, the state would not emphasize individual rights in connection with nonmarital sex, cohabitation, or single-parenting.

#### B. *Balancing Existing Categories*

I would also amend existing social categories concerning sex as follows. First, the category of autonomy should be balanced with human beings’ well-demonstrated desires and needs for reliable interdependence. More and more family scholars of many stripes are recognizing that human beings are vulnerable —i.e., interdependent for a far greater portion

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132. See President Barack Obama, Remarks by the President on ‘My Brother’s Keeper’ Initiative (Feb. 27, 2014), <https://www.whitehouse.gov/the-press-office/2014/02/27/remarks-president-my-brothers-keeper-initiative>.

133. See *id.*

of their lives than is generally acknowledged.<sup>134</sup> It is easy enough to spot our interdependence during childhood, old age, illness or disability. These times, even by themselves, constitute a significant portion of life. In addition, however, there are times when people are unemployed, underemployed, or in need of guidance or financial or emotional support.

This is a fairly commonplace observation, but it is not yet well integrated into the laws and policies affecting sex. We seem to be stuck on the bridge between valuing individualism and recognizing the power of mutual support, as this was described more than thirty years ago in *Habits of the Heart*:

[M]any of those we talked to are still hopeful. They realize that though the processes of separation and individuation were necessary to free us from the tyrannical structures of the past, they must be balanced by a renewal of commitment and community if they are not to end in self-destruction or turn into their opposites. Such a renewal is indeed a world waiting to be born if we only had the courage to see it.<sup>135</sup>

Likely for the reasons I outlined in Part I, however, law and policy remain reluctant to consider sex as part of any “renewal of commitment and community.” Yet the last several decades have shown clearly that people will seek sexual partners and even bear children under far less than promising circumstances because they want to love and be loved; to give gifts and to receive them. They desire family ties even when money is beyond scarce and partner stability is unlikely. Law and policy ought to assist the realization of familial community under conditions meeting social justice norms.

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134. See EVA FEDER KITTAY, LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 128 (1999). See e.g., Martha Albertson Fineman, Essay, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 8–12 (2008); Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2181–82, 2200, 2205, 2214 (1995).

135. BELLAH ET AL., *supra* note 53, at 277.

Second, I would amend the categories of equality and diversity to better acknowledge the reality that admitting genuine differences is the better way to move toward equality. This would require abandoning ideological commitments to “sameness” between men and women regarding sex in categories and circumstances where they do not apply. It would also require a willingness to investigate differences between boys’ and girls’ reactions to absent fathers.

Also on the subject of diversity, I recommend greater attention to the experiences and opinions of a wider swath of women. As described above, many women have persisted in their discomfort with abortion and with some aspects of contraception and contraception policy. They are uncomfortable with the new markets for sex and marriage empowered by stripping sex of its links with children, marriage, kin and future. The majority of women are willing to make sacrifices in order to have children and to spend time caring for them. Furthermore, poorer women experience different constraints and opportunity costs in sex and childbearing.<sup>136</sup>

Yet all of this is not yet sufficiently reflected in the leading social justice arguments on behalf of women’s autonomy and equality. Instead, the voices most often aired insist that free or low-cost access to more contraception and abortion are the most important laws and policies advancing women. These policies, however, have not satisfied women’s preferences and have even introduced new disadvantages. Family law scholar Mary Ann Glendon is correct when she writes that “poor, pregnant women . . . have their constitutional right to privacy and little else,” including too little in the way of “social support for maternity and child raising.”<sup>137</sup> In line with this, it can only be considered

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136. See EDIN & KEFALAS, *supra* note 93, at 205.

137. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 65 (1991).

shocking that even in the second decade of the twenty-first century, mothers and fathers are still not legally entitled to paid parental leave.

#### CONCLUSION

Allow me to consider briefly what the above alterations to the social justice canon concerning sex might mean, practically speaking, for laws and policies touching on sex to better promote equality, diversity, autonomy and care for the poor.

I make my proposals in the context of the safe assumption that neither at the federal nor state level will any branch of government alter the existing situation regarding the legality of cohabitation, nonmarital sex, adultery, or state funding for contraception. Assuming this, I recommend the following:

First, that to the extent there is well-executed research relevant to a law or policy, it should not only be duly considered, but also thereafter transparently disclosed to the affected public. This would obtain no matter the precise law or policy at issue. As noted above, honesty about the state of human knowledge is a minimum requirement of justice. It is necessary as a matter of respect for the persons engaged in debate about family policy, and necessary too in order to produce more efficacious policy.

Second, every law, policy or program in which sex is addressed or affected—including but not limited to those involving sex education, marriage promotion, grants to government partners, and contraception research, promotion or distribution—must disclose accurate and balanced information about potential effects upon children's well-being in connection with family structure and stability, and upon women's and men's abilities to achieve their well-being. For too long, it has been presumed that favoring adults' short term preferences would automatically lead to the flourishing of both adults and children.

Practically speaking, this means that “sex education” becomes education about relationships and families, with a special emphasis on the effects of uncommitted sex upon the most vulnerable parties. These likely include children, the poor, possibly boys with uninvolved fathers, and women most at risk regarding their ability to give free and informed consent, especially to casual sex. Frank discussion about the limitations of the “consent” model may also involve to-date unwelcome discussion about differences between males and females concerning sex.

In connection with contraception, this means more disclosure. Alongside disclosure about its efficacy, therefore, there would exist information about its side effects and about women’s misgivings about contraception, including about contraception’s widely-acknowledged effects upon the “markets” for sex and marriage. It also means acknowledging the additional misgivings about contraception expressed by women of color.

Third, as recommended by scholars on both the right and left in the influential AEI/Brookings Working Group on Poverty, the state and its partners ought to mount a plain-spoken messaging campaign about the benefits of marital childbearing.<sup>138</sup> These benefits are well-known to consumers of sociological literature, but do not yet form a sufficiently visible part of the state’s messaging on sex.

Fourth, the above-proposed new social justice framework implies the need for the state to conduct “family impact” evaluations for laws and policies touching on sex. These would be similar to the “environmental impact” evaluations mandated every time that a federal action could significantly impact the environment, by the National Environmental Policy Act of 1969.<sup>139</sup> Family impact evaluations would plainly acknowledge that whole families are impacted by the sexual choices made by individuals.

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138. See CONSENSUS PLAN, *supra* note 80, at 32–40.

139. See 42 U.S.C. § 4321 (1969).

Fifth, the degree of the retreat from marriage, alongside the rise in nonmarital births among the poorest, should be acknowledged as an important interest of the state. There has been, and continues to be, significant public attention to the middle class, but far too little attention to the enormous hurdles facing the poorest Americans in connection with the basic stuff of life: love and work. The state should devote considerable attention to helping boost the conditions for entering marriage. Others have written a great deal about these conditions and recommended, for example, better employment and educational opportunities in the poorest communities, and a greater availability of apprenticeships and technical education.<sup>140</sup>

Even at the end of so many suggestions, and so long an essay on laws and policies affecting sex, I remain frustrated at the minimal degree of social justice impact these might have. Education, the economy, trade, immigration, and a myriad of other factors matter a lot to relationships between men and women, and to the wellbeing of children.

Still, it is better for law and policy to point in the right direction than the wrong one. It is better to signal openness to good information and the needs of the powerless than to be deaf to these. It is better to be willing to revise a social justice canon in light of the signs of the times than to adhere to outdated convictions which fail to advance equality, autonomy, diversity and care for the poor.

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140. See, e.g., Robert I. Lerman & W. Bradford Wilcox, *For Richer, For Poorer: How Family Structures Economic Success in America*, AM. ENTERPRISE INST. & INST. FOR FAM. STUD., Oct. 2014, at 50–55, <https://ifstudies.org/ifstudies-admin/resources/for-richer-or-poorer-hep-2014.pdf>.