

# The Family in America

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## The Incoherence of Federal Sex Policy: Title X, Medicaid, and the Eisenstadt Decision

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**IN A 1972 DECISION** widely hailed by the political classes, the Supreme Court opined in *Eisenstadt v. Baird*, “If the right to privacy means anything, it is the right to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>1</sup> Imagining that the Commonwealth of Massachusetts was coercing her citizens to have children against their wishes, the *Eisenstadt* decision struck down a statute that had been amended to comply with the requirements of *Griswold v. Connecticut* (1965). That earlier decision had demanded that states allow the sale of contraceptives to married couples, as the Court held that prohibiting the use of contraceptive devices in marriage would be an unacceptable invasion of marital privacy.<sup>2</sup> In *Eisenstadt*, however, the Court moved to claim that “whatever the rights the individual to access contraceptives may be,

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1. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

2. *Griswold v. Connecticut*, 381 U.S. 479 (1965). See the analysis of this case in Gerard V. Bradley, “Same-Sex Marriage: Our Final Answer?” *Notre Dame Journal of Law, Ethics and Public Policy*, 14.2 (2000): 729–52, and Jennifer Roback Morse, *Smart Sex: Finding Life-Long Love in a Hookup World* (Dallas: Spence, 2005), pp. 75–78.

the rights must be the same for married and unmarried alike.”<sup>3</sup>

The *Eisenstadt* rendering of a “right to privacy” seems to stand for the position that the nation’s laws—like the one in Massachusetts that functioned as a sanction against both sexual relations and procreation outside of marriage—should not impose so-called “middle-class morality” on the lower classes. The government at all levels, it is claimed, must remain absolutely neutral on “matters so fundamentally affecting a person,” including sexual behavior, marriage, and childbearing decisions. By creating an unrestricted right for all citizens to use contraception regardless of marital status, *Eisenstadt* is usually praised as an advance for individual liberty against the intrusion and meddling of the state.

Yet what one hand of the law appears to give, the other takes away. The same year the Court was demanding that the government be neutral on sexual matters, Congress was authorizing Medicaid to add contraceptives to its covered services to the low-income population. Not as innocent as it appears, this expansion of Medicaid cannot be understood apart from President Richard M. Nixon’s signing of the Family Planning Services and Population Research Act of 1970, or Title X of the Public Health Services Act, described by social historian Allan C. Carlson as “the first federal program openly focused on the promotion of birth control with the aim of sharply reducing American fertility.”<sup>4</sup> In a very real sense, the new coverage made Medicaid, an entitlement program, subservient to the goals of Title X. Within time, Medicaid would become the largest federal supplier of contraception. In 2006, for example, Medicaid was responsible for more than 70 percent of public birth-control expenditures, or \$1.3 billion.<sup>5</sup>

The goals, methods, and results of these two federal birth-control initiatives, however, fly directly in the face of the Supreme Court’s demand that the government remain neutral with respect to private reproductive

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3. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

4. Alan C. Carlson, “The Bipartisan Blunder of Title X: How Uncle Sam Embraced Thirty Years of ‘Family Planning,’” *Family Policy*, September-October 2000, p. 1.

5. A. Sonfield, C. Alrich, and R. B. Gold, “Public Funding for Family Planning, Sterilization, and Abortion Services, FY 1980–2006,” Occasional Report No. 38 (New York: Guttmacher Institute, 2008).

decisions. There is a fundamental incoherence in federal policy, which limits the rights of the states to regulate or even influence norms of sexual behavior while at the same time assigns to itself the right to spend billions of taxpayer dollars to influence those norms at the state, local, and individual level. The fact that the American public has grown accustomed to the idea of the federal government financing and promoting contraception does not eliminate the fact that Title X and its Medicaid version directly contradict the intellectual underpinnings of the “right to privacy,” which the Court has found to be “fundamental.”

### **The Medicaid Birth-Control Agenda**

The regulations that control Medicaid treatment of contraceptives illustrate that fundamental incoherence. They demonstrate that Congress was not simply making family planning available to the states and to low-income individuals on a neutral basis. No, through Medicaid rules, the federal government has been implicitly imposing a morality of its own. Medicaid’s policies actively promoting contraception have empirical claims and moral arguments embedded within them. For example:

- Birth control is a mandatory part of state Medicaid programs. Any state that does not want to offer family-planning services will face a penalty and lose other Medicaid funds. When dealing with most other services, including life-saving services such as chemotherapy, the states have a choice about whether to offer them. This conveys the unmistakable message that preventing births is more important than preserving life.
- Contraception is the most favored service in Medicaid. The federal government will pay up to 90 percent of a state’s birth-control related expenses, a treatment accorded to no other category of mandatory services, nor to other preventive medicines, both categories of which are normally reimbursed to the states at a little more than 50 percent of costs. This extraordinarily favorable coverage of birth-control costs is not a morally neutral posture.
- Birth control must be available to minors over the age of puberty. The states cannot adopt their own policies about how and whether

to promote sexual relations among unmarried teens. This policy has embedded within it the highly dubious empirical claim that making artificial birth control available promotes health and prevents unwed teen pregnancy more effectively than other policies which are less favored by the government. Such policies might include promoting the confinement of sexual activity to marriage, teaching the natural rhythms of the body, or providing teens with non-sexual activities to fill their time.

- Parents are prohibited from knowing whether their dependent children receive birth control. Medicaid extends to children the same right to doctor-patient confidentiality that adults have. States cannot protect parents' rights to be informed of or involved with the health-care decisions of their children. In effect, the federal government requires the states to undermine parental supervision and authority over their children.
- Contraception must be free to welfare recipients. The states cannot even require a nominal fee or co-pay. The tacit moral message is that all the problems associated with non-marital sexual relations can all be contracepted away.
- State governments must actively promote family-planning services, especially to minors. The state Medicaid costs associated with outreach, advertising, and sex education are reimbursed to the states at the same favorable 90 percent rate.<sup>6</sup>

Under these circumstances, the claim that the federal government pursues a policy of “neutrality” toward sexual activity and fertility is hardly credible. The government is not simply giving citizens complete freedom in making their own fertility and contraceptive decisions. The federal government has imposed its own values and choices on the population, particularly the poorest and most vulnerable portions of the population. These rules weaken the ability of state and local communities

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6. Daniel Patrick Moloney, “Forcing the Poor to Stop Having Children,” Public Discourse: Ethics, Law and the Common Good, The Witherspoon Institute, May 1, 2009, <<http://www.thepublicdiscourse.com/2009/05/230/>>.

to counter this federal thumb on the scale of people's decision-making. For all practical purposes, the federal government has nationalized a policy that tacitly encourages sexual activity among the unmarried while conducting a rear-guard action to prevent the natural outcome of that sexual activity.

### **Is This Really Uncle Sam's Business?**

Evaluating that nationalized policy requires not simply noting its incongruence with *Eisenstadt's* apparent demand for government neutrality. It also requires raising two questions: 1) whether Uncle Sam ought to be in the family-planning business, and 2) whether the federal financing and promotion of contraception has met its stated objective or has improved the quality of life of the urban poor. As to the first question: Are the private choices concerning family size and spacing of millions of private American citizens really proper concerns of Congress? What justification is there for the federal government to actively promote contraception to minors without parental knowledge or consent?

The obvious answer to the first set of questions is No. Whether Mr. and Mrs. Morse have two children or no children or ten children is none of the government's business. In the interests of individual choice, personal autonomy, and human freedom, the government really should mind its own business about reproductive decisions of private citizens. After all, the vast majority of parents shoulder the vast majority of financial responsibilities for the vast majority of babies. If the parents believe the babies are worth the costs, the state has no right to contradict them or to try to direct their choices one way or the other.

Advocates of federal family-planning policies, however, might argue that there are externalities associated with childbearing decisions. That is, maybe there are fiscal or social costs not borne by the parents. Under some circumstances, a private decision to have a baby could have the public consequence of having a child who will be dependent on government assistance in some form or fashion. One more baby born could mean increased tax expenditures through education, welfare costs, and social infrastructure. Yet this consideration applies only to the limited number of cases of babies who are likely to become *net tax consumers* over

the course of *their entire lifetimes*. After all, most babies eventually grow up, earn a living, contribute to society, and pay taxes. The crass financial assumption that additional babies mean additional public burdens is simply not plausible for the vast majority of births.

Still, defenders of current federal family-planning policy may argue that the government has an interest in limiting the number of babies who are likely to become wards of the state or net drains on state expenditures. For all practical purposes, this means the government has an interest in the procreation decisions of the poor. Using this rule of thumb, however, assumes that the children of the poor will remain poor, and never become net tax-contributing citizens. It assumes further that the proper policy of the government is to limit the births of the poor, rather than to try to help them become self-supporting tax-paying citizens.

Note the incoherence in this argument. The government decides to direct tax funds to assist the children of the poor, and then uses its own decision as a rationale for taking an interest in the private reproductive behavior of the poor. The behavior of the government becomes an entrée into regulating the behavior of the least well-off citizens. Put another way: To the extent the government awards generous support for the children of the poor, the government creates its own interest in limiting the number of poor people. But acting on that interest violates the autonomy rights of the poor, rights that the Supreme Court has described as being fundamental.

Concern for the environment is another externality that might generate a public interest in private decisions about family size. Every new human being consumes resources and generates pollution. Some environmentalists argue that this “carbon footprint” amounts to a cost that each person imposes on the environment and on the rest of the world. Hence, no decision to bear a child is truly a private decision. This is an argument for reducing family size, regardless of the wealth of the family or the wishes of the parents. If anything, the rich should be especially discouraged from reproducing, since their children are likely to be bigger consumers, hence bigger polluters.

Finally, the government might adopt a population policy for explicitly eugenic reasons. That is, the government might claim for itself the responsibility to monitor the health of the gene pool. If it takes up this

responsibility, then funding and promoting contraception per se does not make sense. The government really ought to encourage people with desirable genes to reproduce, while encouraging contraception for those with genes deemed to be undesirable. Most definitions of “desirable” genes include some combination of intelligence, high income-earning capacity, and social productivity. In other words, the genes labeled “desirable” are the genes of the relatively well-off. These are the very people most likely to have the heaviest “carbon footprint,” since they will be able to consume more resources. This eugenic motive, therefore, contradicts the environmental motive for the government’s taking an interest in citizens’ private reproductive decisions.

It should be obvious that these possible motivations are some combination of perverse, implausible, or repulsive. It is one thing to argue that the government should permit private citizens to use contraception in any way and in any context that they choose. But it is quite another thing to say that the government ought to pursue a policy of actively promoting some kinds of reproductive decisions and tacitly discouraging others.

### **Has Federal Family Planning Worked?**

The second question for evaluating federal sex policy is whether it has achieved its goals. The answer to this question depends on the policy goals of family planning. Keep in mind that some of the possible goals are mutually contradictory. The birth rate is lower now than in 1970, so one might argue that the policy has met its “environmental” goal. But it is difficult to argue that the government has achieved any eugenic goals or reduced any fiscal externalities. A larger percentage of births are now to unmarried women than ever before. Moreover, the taxpayer cost of out-of-wedlock childbearing is conservatively estimated at \$112 billion per year in federal state and local expenditures.<sup>7</sup> This is the equivalent of the GDP of New Zealand.

In fact, one can make an even stronger argument for policy failure. Without question, anyone wanting to know why unmarried women are

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7. Benjamin Scafidi, “The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States” (New York: Institute for American Values and the Georgia Family Council, 2008), <[http://www.marriedebate.com/pdf/ec\\_div.pdf](http://www.marriedebate.com/pdf/ec_div.pdf)>.

now bearing an unprecedented number of babies must acknowledge the impact of Title X and Medicaid funding for contraception—along with the Supreme Court’s decision in 1973 to give women an unrestricted right to abortion. The linkage between government funding for contraception and out-of-wedlock births is not merely some fantasy of right-wing social conservatives. That widespread contraception and unwed childbearing are causally related is the conclusion of a Nobel Prize winning economist, George A. Akerlof, and his colleagues. They set for themselves the task of answering the question of why unmarried childbearing increased at exactly the period of time that contraception and abortion became widely available. Their conclusion: widespread use of contraception and the availability of abortion changes relationships between men and women in significant ways. These changes do not just affect the individuals who choose to use the technology. Contraceptive technology, imposed on the states by the Court and subsidized by Title X and Medicaid, changes the terms on which everyone participates in the dating and mating game, even if they decline to use the technology.<sup>8</sup>

When sexual activity entails a high probability of pregnancy, society develops a set of cultural norms for inducing men to commit to women they impregnate. These norms, largely if informally enforced by women, include a strong social expectation that women will refuse sex outside of marriage. Women develop a set of socially acceptable ways to refuse sex, even with men they genuinely like. The norms also include the expectation that the man will marry a woman he impregnates. All these norms are designed to discourage casual encounters and encourage fathers to commit to mothers.

But when low-cost, highly effective contraception is introduced, distributed, and paid for by the federal government, these cultural norms no longer serve the same purpose and are likely to fade. A woman cannot so easily resist a man’s sexual advances on the grounds that she might get pregnant: the probability of pregnancy is lower. The man can make birth control and sex the price of being in a relationship with him. In many ways, the man has the upper hand; he can more easily find an alternative

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8. See George A. Akerlof, Janet L. Yellen, and Michael L. Katz, “An Analysis of Out-of-Wedlock Childbearing in the United States,” *Quarterly Journal of Economics* 111.2 (May 1996): 277–317.

lover if she refuses. Even a woman who would be inclined to abstain from premarital relations will face increased pressure to be sexually permissive. The pressure comes not only from men but also indirectly from competition with other women.

If sexual relations commonly result in pregnancy, a woman can refuse sex unless she receives an implicit or explicit promise of marriage in the event of pregnancy. As the connection between each sexual act and pregnancy weakens, a woman is less able to extract a promise of marriage in the event of pregnancy. If she asks for a promise, she may simply cause the man to leave the relationship and find someone who does not ask for a marriage promise. The “social compact” among women therefore breaks down because of the broader social impact of even a small number of women who are willing to abort their children rather than carry a non-marital pregnancy to term.

Look at it this way: A single woman who is willing to terminate a pregnancy will not ask the man for a promise to marry in the event of pregnancy; she considers abortion a simpler solution to her “problem” of an unwed pregnancy. A woman who really wants motherhood will keep the baby, even if the father refuses to marry her. The typical man presumably knows this, so her attempts to persuade him to marry her are not credible. Therefore, in the presence of unrestricted abortion as a back up to contraceptive failure, women will not insist on a promise of marriage in the event of a premarital pregnancy. To put it even more starkly, no woman will be in a position to demand such a promise, since there is no credible threat of social stigma or sanction that she can impose on him. The social norm that insists that men marry women they impregnate erodes very quickly.

This is the answer to the puzzle of federal family planning: Why should low-cost and free contraception for the unmarried lead to more children being born in less desirable, more difficult circumstances—namely out-of-wedlock—when the ability to prevent and terminate pregnancy increases? This occurs precisely because so many women actually want babies, more so than the estimates of so-called “unintended” pregnancies and birth suggest. These women want their babies; they don’t want to have abortions. Not very long ago, these women would have had the support of the entire society in pressuring the father to marry them. But since

having a baby is a “woman’s choice,” that pressure is greatly attenuated.

Consequently, the overall birth rate has declined, the proportion of women that are married has declined, and the proportion of babies born outside of wedlock has increased. As Akerlof notes, between 1965 and 1989, the birth rate per 1,000 married white women declined from 119 to 90, while the birth rate per 1,000 unmarried white women doubled from 12 to 24 births over the same time period. At the same time, the percentage of white women who married declined from 68 percent to 58 percent. The percentage of “shotgun marriages” declined from 60 percent to 42 percent for whites, while the ratio of adoptions to out-of-wedlock births declined from 49 percent to 20 percent.<sup>9</sup>

In short, more of the women who conceived out of wedlock ended up raising the child as a single parent. Fewer mothers married the father of the child or placed the child for adoption. The overall result is that fewer children are raised in married couple, two-parent households. Yet, this is the family form most conducive to the welfare of children.<sup>10</sup>

### **The Moral of the Story**

The lesson should be clear: A nation cannot avoid legislating morality.<sup>11</sup> The attempt to remain neutral is itself, not neutral. The federal government’s policies have eroded the social norms around sexual activity, marriage, and childbearing. Far from occupying some Olympian perspective of neutrality, the largest and most powerful government in the world has created an alternative moral universe, based upon highly debatable moral premises and empirical claims. States and localities, churches, and individuals have very limited room to maneuver in trying to establish more reasonable standards of sexual behavior. Citizens who see the destructiveness of the current federal sex policy are reduced to arguing for parental

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9. Ibid., Tables I and II.

10. See Morse, *Smart Sex*, chapter 1, for some of the many references on this point. See also the essays by Don Browning and Elizabeth Marquardt, Maggie Gallagher, and W. Bradford Wilcox in *The Meaning of Marriage: Family, State, Market and Morals*, eds. Robert P. George and Jean Bethke Elshtain (Dallas: Spence, 2006).

11. Micah Watson, “Why We Can’t Help But Legislate Morality,” Public Discourse: Ethics, Law and the Common Good, The Witherspoon Institute, November 4, 2010, <<http://www.thepublicdiscourse.com/2010/11/1792>>.

notification or waiting periods for abortion, or for marriage and abstinence promotion to counter the federal government's active promotion of sex outside of marriage. The federal government has morally disarmed our culture. Ordinary Americans have been reduced to bringing knives to a gunfight.

The federal government has no business trying to persuade women to have fewer children. Nor does the federal government have any business undermining the authority of parents to supervise their children's behavior by mandating that minors receive contraception and abortion without parental notification. Nor does the federal government have any business regulating the sexual policies of the states. This area is ripe for policy experimentation among state and local governments and for the creation of distinctive local cultures. Finally, in this era of bankrupt governments, it is the height of fiscal foolishness and irresponsibility for the taxpayers to subsidize family-planning programs that are aggravating the very problems they were implemented to solve.

In short, it is time for the federal government to cease and desist from trying to shape the reproductive choices of American citizens. Ending Title X and Medicaid funding for contraception is a policy idea whose time has come, and not just for the "religious right," whoever that might be. This is good policy for fiscal conservatives and civil libertarians, for anyone who wants to limit the expenditures of the government and the intrusiveness of the state.

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