University of Baltimore Law Review

Volume 27
Issue 1 *Fall 1997*

Article 5

1997

Comments: In Re Cager and the Commission to Study Problems of Illegitimacy

Kevin Kendrick
TOTE, Inc.

IN RE CAGER AND THE COMMISSION TO STUDY PROBLEMS OF ILLEGITIMACY

I. INTRODUCTION

In *In re Cager*,[1] decided in 1968, the Court of Appeals of Maryland reversed a Circuit Court for Prince George's County's ruling that children living in homes with illegitimate siblings were "neglected" within the meaning of Article 26, Section 52(f) of the Maryland Code.[2] The circuit court ruling addressed three consolidated cases concerning unwed women, each of whom gave birth to consecutive illegitimate children.[3]

The court of appeals held that the circuit court misconstrued the statute at issue in *Cager*.[4] The court of appeals reversed the circuit court's holding that permitted the state to consider successive illegitimate births as independently sufficient grounds for deeming a child neglected.[5] The court also held that, in light of then-recent Supreme Court precedent, federal requirements concerning termination of benefits eligibility under the Aid to Families with Dependent Children program (AFDC)[6] rendered the actions taken by Prince George's County unlawful.[7] Further, the court held that the state's action was invalid because the Prince George's County State's Attorney had wrongfully used information gleaned from AFDC applications to initiate proceedings under Section 52(f).[8]

---

1. 251 Md. 473, 248 A.2d 384 (1968).
2. *See id.* at 478, 248 A.2d at 387. *See generally* MD. ANN. CODE art. 26, § 52(f) (1966) (repealed 1969) (defining the term "neglected child"), *quoted in Cager*, 251 Md. at 476 n.1, 479, 248 A.2d at 386 n.1, 388. See *infra* note 21 for the text of Section 52(f).
3. *See Cager*, 251 Md. at 477 n.2, 501-02, 248 A.2d at 387 n.2, 400-01; *see also infra* note 21 (providing text of the statute).
4. *See Cager*, 251 Md. at 479, 248 A.2d at 388.
5. *See Cager*, 251 Md. at 480, 248 A.2d at 388.
6. *See generally* 42 U.S.C. § 601 (1994); *Cager*, 251 Md. at 480, 248 A.2d at 388-89 (citing King v. Smith, 392 U.S. 309 (1968), and Levy v. Louisiana, 391 U.S. 68 (1968)). See *infra* notes 49-105 and accompanying text for an in-depth discussion of the *Cager* court's application of *King* and *Levy*.
7. *See Cager*, 251 Md. at 480, 248 A.2d at 389.
8. *See id.* at 481-83, 248 A.2d at 389-90.

This Comment will revisit the *Cager* decision and argue that the case was wrongly decided for several reasons. Specifically, the statute at issue in *Cager*,[9] which was an outgrowth of recommendations by the Commission to Study Problems of Illegitimacy among Recipients of Public Welfare Monies in the Program for Aid to Dependent Children (the Commission), unambiguously authorized the challenged actions taken by the State.[10] Furthermore, the Supreme Court cases relied upon by the court of appeals did not support the propositions for which they were cited.[11] Additionally, the State's Attorney's reliance on information taken from AFDC applications was consonant with the goals and structure of that program and all federal and state regulations applicable at the time.[12]

This Comment concludes that the egregious misconstruction of the authority relied on by the *Cager* majority invites speculation as to whether the court's goal was to confound the clear intent of the legislature regarding "serial illegitimacy."[13] *Cager* appears to be a product of a then-emerging trend concerning public assistance and family structure.[14] The emerging trend was towards a more liberal acceptance of non-traditional family structures and long-term reliance on public assistance.[15]

In contrast, Judge Barnes's powerful dissent urged in *Cager* conformed with more traditional views concerning public assistance, il-

---

9. *See id.* at 476 n.1, 248 A.2d at 386 n.1. *See generally* REPORT OF THE COMMISSION TO STUDY PROBLEMS OF ILLEGITIMACY AMONG THE RECIPIENTS OF PUBLIC WELFARE MONIES IN THE PROGRAM FOR AID TO DEPENDENT CHILDREN (1961) [hereinafter COMMISSION REPORT]. The Commission was convened by Governor J. Millard Tawes at the behest of the Maryland General Assembly in 1961. *See* COMMISSION REPORT, *supra*, at 4. It consisted of sixteen members. *See id.* at 11.

10. *See, e.g.*, COMMISSION REPORT, *supra* note 9, at 24-25, 27-28 (discussing Recommendations Two and Seven).

11. *See infra* notes 46-109 and accompanying text.

12. *See Cager*, 251 Md. at 501-02, 248 A.2d at 400-01 (Barnes, J., dissenting).

13. The term "serial illegitimacy" is used to describe unwed women bearing two or more children.

14. *See generally* Loren Miller, *Race, Poverty and the Law*, 54 CAL. L. REV. 386 (1966) (discussing constitutional implications of poverty and the law); Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443, 456-78 (1966) (discussing the evolution of the legal concept that placing conditions on receipt of welfare can have constitutional implications); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (discussing the emergence of the government in private and societal interests).

15. *See generally* WINIFRED BELL, AID TO DEPENDANT CHILDREN (1965). Assistance to single mothers had historically been conditioned on strict notions of moral fitness. *See id.* at 7, 29-30.

legitimacy, and family structure.[16] Similar values guided the Commission in its work, and the Commission's Report provided much of the basis for Judge Barnes's dissent.[17]

The issues addressed by the Commission and the *Cager* court remain at the forefront of public debate. Today, politicians, political activists, and pundits fiercely contest whether a causal relationship exists between welfare policies and the rise in illegitimacy over the past several decades.[18] A related issue concerns the claimed link between illegitimacy and several social problems.[19]

This Comment will analyze the *Cager* court's rationale and examine the Commission's Report. Additionally, it will update core data presented in the report and look at additional related data, providing a look at a social transformation since the *Cager* decision. Finally, this Comment will identify the larger implications of the *Cager* holding, discussing both the proper role of the judiciary and the appropriate source of authority on matters of public policy.

II. *IN RE CAGER*

A. *The Trial Court Ruling*

In *In re Cager*, the court of appeals addressed a Circuit Court for Prince George's County ruling[20] that a child living in a home with one or more illegitimate siblings was neglected within the meaning of Article 26, Section 52(f) of the Maryland Code.[21] The

16. *See Cager*, 251 Md. at 499, 248 A.2d at 399; *see also* COMMISSION REPORT, *supra* note 9, at 17-18.

17. *See infra* notes 162-93 and accompanying text.

18. *See* JARED TAYLOR, PAVED WITH GOOD INTENTIONS: THE FAILURE OF RACE RELATIONS IN CONTEMPORARY AMERICA 301-05 (1992) ("Over the tragedy of the underclass, the welfare system casts a long, dark shadow."); *see also* CHARLES MURRAY, LOSING GROUND 162-66 (1984) (showing empirical correlation between the growth in AFDC spending and liberalization of welfare rules with a dramatic rise in illegitimacy rates among the population receiving benefits). *But see* Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond The Silver Bullet*, 81 GEO. L.J. 1697, 1707 (1993) (discussing the diversity of recipients receiving welfare); Dorothy Roberts, *Exploding the Myths Behind New Jersey Welfare Reform*, N.J. L.J., Jan. 25, 1993, at 21 ("[N]umerous studies have found no causal relationship between welfare and family size."); Robert Samuelson, . . . *Essential to the Debate*, WASH. POST, Sept. 8, 1993, at A19 ("The idea that girls have babies to get welfare checks is absurd.").

19. *See infra* notes 232-34 and accompanying text.

20. Circuit Court Judge Bowen presided at the trial. *See Cager*, 251 Md. at 477, 248 A.2d at 287.

21. *See* MD. ANN. CODE art. 26, § 52(f) (1966) (repealed 1969), *quoted in Cager*, 251

circuit court ruling resolved the cases of three unmarried women, each of whom had borne successive children out of wedlock.[22]

Judge Bowen ordered the children removed from their homes and placed in foster care upon finding that the minors were neglected children within the meaning of Section 52(f).[23] Judge Bowen based his ruling on criterion[24] six of Section 52(f), which concerns children living in a home which "fails to provide a stable

---

Md. at 477 n.1, 248 A.2d at 387 n.1. Section 52(f) defined the term "neglected child" as a child:

> (1) who is without proper guardianship;
>
> (2) whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity, is unfit to care properly for such a child;
>
> (3) who is under unlawful or improper care, supervision, custody or restraint, by any person, corporation, agency, association, institution or other organization or who is unlawfully kept out of school;
>
> (4) whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child;
>
> (5) who is in such condition of want or suffering, or is under such improper guardianship or control, or is engaged in such occupation as to injure or endanger the morals or health of himself or others; or
>
> (6) who is living in a home which fails to provide a stable moral environment. In determining whether such stable moral environment exists, the court shall consider, among other things, whether the parent, guardian, or person with whom the child lives
>
> (i) Is unable to provide such an environment by reason of immaturity, or emotional, mental or physical disability;
>
> (ii) Is engaging in promiscuous conduct inside or outside the home;
>
> (iii) Is cohabiting with a person to whom he or she is not married;
>
> (iv) Is pregnant with an illegitimate child; or
>
> (v) Has, within a period of twelve months preceding the filing of the petition alleging the child to be neglected, either been pregnant with or given birth to another child to whose putative father she was not legally married at the time of conception, or has not thereafter married.

MD. ANN. CODE art. 26, §52(f) (1966) (repealed 1969).

22. *See Cager*, 251 Md. at 478 n.2, 248 A.2d at 387 n.2.
23. *See id.* at 476-77, 248 A.2d at 386-88.
24. For purposes of this article, Sections 56(f)(1) through 56(f)(6) will be hereinafter referred to as criteria one through six; Sections 56(f)(5)(i) through 56(f)(5)(v) referred to as sub-criteria one through five. *See generally supra* note 21 (providing full text of Section 56(f)).

moral environment."[25]

In determining whether a home provides a "stable moral environment," the legislature prescribed five sub-criteria that a court should consider, including whether the parent or guardian with whom a child lives "[i]s pregnant with an illegitimate child; or [has,] within a period of twelve months preceding the filing of the petition alleging [neglect,] . . . been pregnant with or given birth to another child to whose putative father she was not legally married . . . or has not thereafter married."[26]

Judge Bowen anticipated that resolution of the cases would have important implications. He described the cases before him as "test cases" that would "determine whether . . . [s]tate law furnishes a vehicle to assist in the control of the problem of illegitimacy, its mounting costs to the taxpayers, and its mounting costs in human misery and suffering."[27] Proceeding on a record of stipulated facts, the judge ruled in favor of the county.[28] He held that bearing more than one illegitimate child was alone sufficient to support a finding that a child was neglected and living in "an unstable moral environment" within the meaning of Section 52(f)(6).[29]

Represented by attorneys *ad litem*, the unwed mothers filed suit challenging the county's application of Section 52(f).[30] The mothers

---

25. *Id.* at 477 n.1, 248 A.2d at 386 n.1 (quoting MD. ANN. CODE art. 26, § 52(f)(6) (1966) (repealed 1969)).
26. MD. ANN. CODE art. 26, § 52(f)(6)(iv)-(v) (1966) (repealed 1969). See *supra* note 21 for full text of Section 52(f).
27. *Cager*, 251 Md. at 477, 248 A.2d at 387.
28. *See id.* at 477 n.2, 248 A.2d at 387 n.2. The parties stipulated that the children were illegitimate. *See id.* In his dissent, Judge Barnes observed that the use of information from a mother's AFDC application to initiate neglect proceedings was not properly before the court and should not have been addressed by the majority. *See id.* at 502, 248 A.2d at 401 (Barnes, J., dissenting).
29. *Id.* at 478, 248 A.2d at 387. In the circuit court, Judge Bowen had little difficulty concluding that such an environment "relate[s] or [was] intended to relate to a situation where a mother has had a series of illegitimate children [as] . . . in these cases," and he asserted that "[m]ost first illegitimate children . . . are the result of mistakes." *Id.* Judge Bowen continued, "The second time around . . . demonstrates an unstable moral attitude . . . that is inconsistent with the minimum moral standard the community requires." *Id.* Likewise, the dissenting judge on the court of appeals further opined "that by . . . engaging in sexual relations with men, that produce illegitimate children, [a single woman] has demonstrated in the most forceful and irrefutable way that she either does not care for the views of society . . . or . . . is unable to conform." *Id.* at 498, 248 A.2d at 398-99 (Barnes, J. dissenting).
30. *See Cager*, 251 Md. at 476-77, 248 A.2d at 386-87.

specifically challenged the circuit court's conclusion that multiple illegitimate births, standing alone, was sufficient grounds to deem their children neglected under the statute.[31]

B. The Court of Appeals Opinion

The Court of Appeals of Maryland reversed the circuit court[32] and held that an illegitimate child may not be found neglected under Section 52(f) based solely upon the fact that the child lives with illegitimate siblings.[33] The court's holding was based on its interpretation of the phrase "among other things," preceding the five sub-criteria specified at Section 52(f)(6),[34] which a court must consider in determining whether a child is in a stable moral environment.[35] The court concluded that the "other things" to be considered include the preceding five primary criteria, in addition to the five sub-criteria.[36] Thus, the court of appeals held that a "fail[ure] to provide a stable moral environment" under criterion six could not be established solely upon a showing of the presence of one or two of the sub-criteria.[37] The majority held that criterion one through five were as essential to discerning a "stable moral environment" as the five sub-criteria prescribed in criterion six.[38] The court also found that there was nothing explicit in Section 52(f) to suggest that the mere presence of more than one illegitimate child was, by itself, sufficient grounds for a finding of neglect, and that such a reading could not be reasonably inferred as within the meaning of Section 52(f).[39]

Analyzing criteria one through five, the court discerned that the underlying purposes of the statute were to prevent "unlawful or

---

31. *See id.* at 478, 248 A.2d at 387. On appeal to the Court of Appeals of Maryland, amicus briefs arguing in favor of the mothers were filed by Planned Parenthood Federation of America, Inc., Planned Parenthood Association of Maryland, Inc., Planned Parenthood of Metropolitan Washington, D.C., Inc., and the Washington Chapter of the Medical Committee for Human Rights. *See id.* at 477, 248 A.2d at 387.
32. *See id.* at 486, 248 A.2d at 392.
33. *Id.* at 478, 248 A.2d at 387.
34. *See supra* notes 21, 24 (providing full text of Section 52(f) and explaining categorizing of criteria and sub-criteria, respectively).
35. *Cager*, 251 Md. at 479, 248 A.2d at 388 (quoting MD. ANN CODE art. 26, § 52(f)(6) (1966) (repealed 1969)).
36. *Id.*
37. *Id.*
38. *Id.*
39. *See id.*

improper care, supervision or restraint" of children, and to provide a lawful basis for state intervention when there has been a failure by a parent or custodian to provide proper care or make adequate provisions for a child.[40] Such factors, the court held, must be considered prior to any valid finding of neglect under Section 52(f).[41]

The court of appeals also noted that the state has *parens patriae*[42] authority, and that the provisions of Article 26 concerning juveniles must be utilized in a manner consistent with the objective of child protection, which is integral to that authority.[43] The ultimate standard to be used in determining child custody questions is "the best interest of the child," which may or may not be served by removing a child from a home in instances of consecutive illegitimate childbearing.[44] The court also based its holding on its understanding of the AFDC program requirements as administered by the states, particularly in light of recent Supreme Court rulings concerning the legal status of illegitimate children and the scope of state discretion regarding administration of the AFDC program.[45] The court first cited *Levy v. Louisiana*[46] as comparative authority for the proposition that the illegitimacy of a child or a child's siblings cannot serve as the sole measure of either a child's best interests or the suitability of a particular home.[47]

Levy concerned the right of illegitimate children to bring a civil action under Louisiana's wrongful death statute.[48] The statute pro-

---

40. *Id.* at 478-79, 248 A.2d at 387-88.
41. *See id.* at 478, 248 A.2d at 387-88.
42. *See id.* at 480, 248 A.2d at 388 (quoting *Ex Parte* Cromwell, 232 Md. 305, 308, 192 A.2d 775, 777 (1963)). Literally, *parens patriae* means "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). This common law doctrine stands for the proposition that the sovereign has both the right and duty to act as guardian of minors and others critically lacking capacity, such as the insane. *See id.*
43. *See Cager*, 251 Md. at 480, 248 A.2d at 388.
44. *Id.* at 479-80, 248 A.2d at 388. Evaluating a child's best interests is an inherent equitable power of the court. *See, e.g.*, Beckman v. Boggs, 337 Md. 688, 655 A.2d 901 (1995) (determining visitation rights of grandparents); Evans v. Evans, 302 Md. 334, 488 A.2d 157 (1985) (awarding visitation rights to nonadoptive stepmother); Davis v. Davis, 280 Md. 119, 372 A.2d 1231 (1977) (holding that an equity court's determinations concerning a child's best interests may be disturbed only on grounds of a clear abuse of discretion).
45. *See Cager*, 251 Md. at 480, 248 A.2d at 388-89; *see also infra* notes 47-89 and accompanying text.
46. 391 U.S. 68 (1968).
47. *See Cager*, 251 Md. at 480, 248 A.2d at 388.
48. *See Levy*, 391 U.S. at 69.

vided that such suits could be brought by various relatives of a deceased, including the decedent's children.[49] The Louisiana Court of Appeals upheld a dismissal of an action seeking recovery under the statute by a trial court[50] which held that the term "children" only included legitimate children.[51] The Louisiana Supreme Court denied certiorari.[52]

The United States Supreme Court held that the statute, as construed by Louisiana's courts, was invalid under the Equal Protection Clause of the Fourteenth Amendment.[53] The Court found that the purpose of providing children with standing under the wrongful death statute was to provide an avenue for compensation of all who had benefitted from an "intimate, familial relationship between a child and . . . [a parent]."[54] The statute's purpose was frustrated by placing illegitimate children into a separate category of persons who, although they may have equally benefitted from such a relationship, were nonetheless not entitled to bring suit.[55] Moreover, the Court held that there were no redeeming rationales for such an exclusion.[56] It rejected both of Louisiana's public policy arguments in defense of the State's construction of the statute.[57] Therefore, the classification was held not "rational,"[58] hence invidious[59] and unconstitutional.[60]

Even if one completely accepts the *Levy* holding,[61] the decision

---

49. *See id.* (citing LA. CIV. CODE ANN. art. 2315 (West Supp. 1967) ("The right to recover . . . shall survive for a period of one year . . . in favor of: (1) the surviving . . . children of the deceased . . . [a] right to recover damages under the provisions of this paragraph is a property right which . . . is inherited by [a decedent's] legal, instituted, or irregular heirs. . . . As used in this article, the [word] 'child' . . . include[s] a child . . . by adoption . . . .")).
50. *See* Levy v. State, 192 So. 2d 193, 194 (La. Ct. App. 1966), *rev'd*, 391 U.S. 68 (1968).
51. *See id.* at 195. The court's decision was based in part on a finding that "morals and [the] general welfare" would be better preserved because the ruling would ostensibly have the effect of discouraging illegitimacy. *Id.*
52. *See* Levy v. State, 193 So. 2d 530 (La. 1967), *rev'd*, 391 U.S. 68 (1968).
53. *See* Levy, 391 U.S. at 71-72.
54. *Id.* at 71.
55. *See id.* at 71-72.
56. *See id.* at 70-72.
57. *See id.* Specifically, the State argued that its construction encouraged marriage and legitimization of children. *See id.*
58. *Id.* at 71.
59. *See id.* at 72.
60. *See id.* at 71-72.
61. *Id.* Justices Harlan, Black, and Stewart were critical of the majority holding. *See*

had no relevance to the issue in *Cager*. *Cager* was concerned with the grounds upon which the state, acting pursuant to its specific authority to administer AFDC for the purpose of protecting children, determines whether a child is living in a morally unstable, neglectful environment.[62] A holding that illegitimate children of any age cannot be denied standing under a statutory cause of action has no bearing on the questions at issue in *Cager*.[63] Furthermore, as discussed in more detail below in the context of *King v. Smith*,[64] the facts of *Cager* concerned a series of state actions intended to provide *better* living conditions and material well-being to illegitimate children.

The purpose of Section 52(f) was not to deny anything to illegitimate children. If Section 52(f) denied anything, it was the exposure of illegitimate children to home conditions that the legislature deemed harmful based on the findings and recommendations of the Commission.[65] Indeed, the trial judge in *Cager* did not address the legal rights of illegitimate children as such.[66] Rather, he addressed the authority of the state to act to protect the interests of putatively neglected minors.[67] Instead of being denied a state benefit or being discriminated against, the children in *Cager* were being

---

id. at 72, 76-82 (Harlan, Black, & Stewart, J.J., dissenting) (dissenting in a single dissent to the majority opinions in both *Levy* and Glona v. American Guar. & Liability Ins. Co., 391 U.S. 73 (1968)). *Glona* concerned an insurance claim for a deceased illegitimate child made pursuant to Louisiana's wrongful death statute. *See Glona*, 391 U.S. at 73-74. The dissenters argued that the majority had arbitrarily decreed that biological relation, rather than legal relation, was the proper basis for suit under the statute, asserting that such a notion is inconsistent with the nature of wrongful death suits. *See id.* at 75-76. The dissenters noted that such suits are inherently limited by the enabling statute's listing of proper plaintiffs, which historically have tended strongly to identify such plaintiffs in terms of legal, not biological relations. *See id.* at 76-79.

62. *See In re* Cager, 251 Md. 473, 476-77, 248 A.2d 384, 386-87 (1968); *see also supra* note 21 (providing full text of Section 56(f)).

63. *See supra* notes 50-51 and accompanying text.

64. 392 U.S. 309 (1968) (holding that a state may not deny AFDC assistance to dependent children based on a parents immorality or to prevent illegitimacy); *see infra* notes 73-109.

65. *See infra* notes 170-83 and accompanying text. The Commission Report stated that the purpose of Recommendations Two and Seven, which were adopted almost verbatim by the legislature as Section 52(f), was to protect children from being harmed by surroundings of moral squalor. *See* COMMISSION REPORT, *supra* note 9, at 25, 28.

66. *See generally Cager*, 251 Md. at 477-78, 248 A.2d at 387.

67. *See id.* at 478, 248 A.2d at 387.

afforded an extraordinary measure of protection which, prior to the passage of Section 52(f), would have been unavailable to them.[68]

The court of appeals utterly confused the matter by inferring that the issues in *Levy* and *Cager* were comparable. Logically, there is no parallel. In *Levy*, the Court's finding of invidious discrimination was based on an actual denial of a legal right—the right to bring a wrongful death action.[69] On the other hand, the issue in *Cager* was not a denial of a state right or benefit in any sense,[70] but an interpretation of a statute intended to protect children.[71] Therefore, while it may be unclear whether a child's best interests are invariably served by placing the child in foster care when there have been successive illegitimate births in the child's home, it is quite clear that *Levy* neither supports that conclusion nor addresses analogous issues.

In conjunction with *Levy*, the court of appeals also cited *King v. Smith*,[72] which stands for the proposition that a state may not deny AFDC assistance to dependent children "on the basis of their mother's alleged immorality or to discourage illegitim[acy]."[73] *King* concerned the "man in the house" or "substitute father" regulations, which had characterized state administration of AFDC plans throughout the history of the program.[74] *King* arose from Alabama's denial of AFDC benefits to an unwed mother based on the determination that she had maintained regular "cohabitation"[75] in her home with a man.[76]

---

68. Prior to the enactment of Section 52(f), the state did not have a means of removing such children from a home environment determined to be neglectful. *See infra* notes 164-93 and accompanying text.
69. *See supra* notes 48-52 and accompanying text.
70. The record did not disclose whether the children continued to receive AFDC benefits. *See Cager*, 251 Md. at 480, 248 A.2d at 388-89. AFDC eligibility is based solely on the financial situation of the legal guardian of minor children. *See* 42 U.S.C. § 602(a)(7)(A)-(B) (1997). Whether the children would be deprived of AFDC benefits in their new homes would therefore depend on an independent assessment of the neediness of the new home. *See generally id.*
71. *See supra* notes 63-64 and accompanying text.
72. 392 U.S. 309 (1968).
73. *Cager*, 251 Md. at 480, 248 A.2d at 388-89 (quoting *King*, 392 U.S. at 324).
74. *See* BELL, *supra* note 15, at 7, 28.
75. *See King*, 392 U.S. at 311. The term "cohabitation," as applied to the enforcement of substitute father regulations, invariably referred to sexual intimacy. *See* BELL, *supra* note 15, at 98-99. See *infra* note 76 for the text of the Alabama regulation.
76. *See King*, 392 U.S. at 315. The Alabama regulation provided:

> [A]n able bodied man, married or single, is considered a substitute

The regulation challenged in *King* allowed the state to disqualify families from receiving AFDC payments if the mother cohabits with a man.[77] This result was achieved by defining a man as a present, providing parent under circumstances where the man in question was not legally obligated to support the children,[78] not present in the home, or not supporting the children in fact.[79] The regulation was adopted to work in conjunction with AFDC eligibility requirements.[80] Since its inception, AFDC benefits were for children "deprived of parental support" due to a parent being "continually absent from the home."[81] Under the Alabama regulation challenged in *King* and similar regulations in other states,[82] a man cohabiting with a woman receiving AFDC assistance was designated a substitute parent or man in the house whose presence in the mother's life was determined to violate the statutory requirement that a parent be

---

> father of all the children of the applicant . . . (1) if 'he lives in the home with the child's . . . mother for the purpose of cohabitation'; or (2) if 'he visits [the home] frequently for the purpose of cohabiting with the child's . . . mother'; or (3) if 'he . . . cohabits with the child's natural or adoptive mother elsewhere.'

Id. at 313-14 (quoting ALABAMA MANUAL FOR ADMINISTRATION OF PUBLIC ASSISTANCE, pt. I, ch. II, § VI).

Between 1964, when Alabama adopted the regulation, and 1967, the state experienced a 22% decline in AFDC children recipients (the number of children receiving AFDC benefits). *See id.* at 315.

77. *See id.* at 314.

78. *See id.* at 327.

79. *See id.* at 314 (quoting ALABAMA MANUAL FOR ADMINISTRATION OF PUBLIC ASSISTANCE, pt. I, ch. II, § VI (defining a man as a substitute parent)).

80. *See id.* at 313.

81. 42 U.S.C. § 606(a) (1994). This section provides:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training).

Id.

82. *See* BELL, *supra* note 15, at 76-81, 88.

continually absent from a home for a remaining parent to be eligible for AFDC.[83] Thus, a finding that a substitute father was present would provide administrators with grounds for disqualifying the home from further AFDC benefits.[84]

While the Supreme Court conceded that such state rules had been both permissible and commonplace throughout most of the program's history,[85] the Court declared the Alabama rule invalid due to Congress's adoption of the "Flemming Ruling."[86] The Flemming Ruling, which was promulgated in 1961 by the Department of Health, Education and Welfare, provided that "[a] state plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, *while the child continues to reside in the home.*"[87] The ruling was subsequently enacted by statute, and incorporated into the Social Security Act.[88]

The issue in *King*, and the rationale for the Flemming Ruling upon which the *King* decision was based, was that to deny AFDC benefits to families without making alternate provisions for the welfare of children who had been supported through the program would not be in the best interest of the child.[89] The *King* decision

---

83. *See King*, 392 U.S. at 314.

84. *See id.* at 313.

85. *See id.* at 321; *see also* BELL, *supra* note 15, at 76-92.

86. *See King*, 392 U.S. at 325-26. The Flemming Ruling was named after Arthur F. Flemming, then Secretary of the United States Department of Health, Education and Welfare. *See id.* at 322. *See generally* BELL, *supra* note 15, at 147-51 (discussing the Flemming Rule).

87. *King*, 392 U.S. at 325-26 (citation omitted) (emphasis added).

88. *See id.* at 323; *see also* 42 U.S.C. § 602(a) (1994) (repealed 1996).

89. *See King*, 392 U.S. at 325-26 n.22; *see also* BELL, *supra* note 15, at 147. Secretary Fleming said of the ruling:

> Effective July 1, 1961, a state plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, *while the child continues to reside in the home.* Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.
>
> *It is of great importance that state agencies should be concerned about the effects on children of the environment in which they are living and that services be provided which will be directed toward affording the children maximum protection* and strengthening family life. Whenever there is a question of the suitability of the home for the child's upbringing, steps should be taken to correct the situation or, in the alternative, *to arrange for*

analyzed Alabama's demonstrated willingness to deny AFDC assistance in response to an unwed mother's behavior while leaving the children in a home situation that had been deemed unsuitable, thereby depriving the children of the needed care and assistance of AFDC benefits.[90] After the statutory adoption of the Flemming Ruling, and despite longstanding practice to the contrary,[91] the *King* Court held that there remained no permissible grounds for denying AFDC benefits to families otherwise qualified, including state efforts to control illegitimate childbearing or to discourage sexual promiscuity, if the children were to be left in the home after termination of benefits.[92]

Interestingly, the *Cager* majority acknowledged that *King* had specifically recognized the states' right to remove children from homes found to be neglectful or unsuitable.[93] Indeed, concerning illegitimacy and the states' right to take measures to discourage illegitimacy, the *King* Court stated:

> [T]he question of Alabama's general power to deal with conduct it regards as immoral and with the problem of illegitimacy [is not involved in this case]. *This appeal [only raises] the question [of] whether the State may deal with these problems in the manner that it has here—by flatly denying AFDC assistance to otherwise eligible dependent children.*

Alabama's . . . interests in discouraging immorality and illegitimacy . . . are not presently legitimate justifications for AFDC disqualification.[94]

The rationale for the Flemming Ruling and its statutory enactment could not be reasonably construed as an effort to discourage or otherwise affect state efforts to control or discourage illegiti-

---

> *other appropriate care of the child.* It is completely inconsistent, however, to declare a home unsuitable for a child to receive assistance and at the same time permit him to remain in the same home exposed to the same environment.

BELL, *supra* note 15, at 147 (emphasis added).

90. *See King*, 392 U.S. at 311.

91. *See* BELL, *supra* note 15, at 76-92; *see also id.* at 93-110.

92. *See King*, 342 U.S. at 324.

93. *See In re* Cager, 251 Md. 473, 480, 248 A.2d 384, 388-99 (1968).

94. *King*, 392 U.S. at 320 (emphasis added); *see also* Lewis v. Martin, 397 U.S. 552 (1970). The Court said of its ruling in *King*: "*King v. Smith* held only that a legal obligation to support [children] was a necessary condition for qualification as a [non-absent] 'parent' [under AFDC regulations]." *Lewis*, 397 U.S. at 559.

macy.[95] The provision was not intended to address state efforts to evaluate the moral stability of home conditions on grounds of serial illegitimacy, nor was it intended to otherwise speak to the moral belief that illegitimacy was socially harmful, inherently harmful to children personally, or properly within the purview of traditional state powers with respect to child welfare.[96]

In *Cager*, the very basis for suit was that Maryland authorities had made alternate provisions for the children in question, which had not been the case in *King*.[97] Therefore, the *King* Court's holding, striking down Alabama's categorical denial of AFDC benefits to women and their children as a means of discouraging illegitimacy, offered no guidance as to the pivotal issue in *Cager*: whether a child is in a stable moral environment.[98]

The *Cager* court's misplaced reliance on *King* was also obscured by two misleading arguments. First, the *Cager* court focused on the issue of AFDC benefits and their eligibility requirement.[99] The court declared that "a State may not deny AFDC assistance to dependent children 'on the basis of their mother's alleged immorality or to discourage illegitimate births.' "[100] Although legally correct, this statement was irrelevant to the facts in *Cager*. The children in *Cager* had not been denied AFDC assistance in the manner addressed in either *King* or the Flemming ruling. These children were not being left in a home which had been disqualified from AFDC eligibility on the grounds of poor home conditions.[101] To the contrary, the *Cager* children were placed in foster care,[102] and Maryland made "provision[s] . . . for adequate care and assistance" in compliance

---

95. *See supra* notes 87-89 and accompanying text.

96. The *King* decision was followed two years later by *Lewis v. Martin*, 397 U.S. 552 (1970), which went further by invalidating Man Assuming the Role of Spouse (MARS) regulations. Under MARS regulations, the income of a man actually residing in a home was counted in assessing a household's AFDC eligibility. *See Lewis*, 397 U.S. at 554. MARS regulations were fundamentally different from Man in the House rules because the latter made eligibility dependent on a mother's conduct. *See King*, 392 U.S. at 324. On the other hand, MARS regulations were not aimed at behavior modification, but were instead concerned solely with household members and their assets. *See Lewis*, 397 U.S. at 554.

97. *See Cager*, 251 Md. at 476-77, 248 A.2d at 386-87. The children were placed in foster homes. *See id.*

98. *See id.* at 477-78, 248 A.2d at 387.

99. *See id.* at 480, 248 A.2d at 388-89.

100. *Id.* at 480, 248 A.2d at 388-89 (quoting *King*, 392 U.S. at 324).

101. *See supra* notes 85-96 and accompanying text.

102. *See Cager*, 251 Md. at 477, 248 A.2d at 387.

with the AFDC requirements.[103]

Second, the majority imputed to the Prince George's County State's Attorney the purportedly evil motive of seeking only to punish mothers for engaging in behavior of which the State's Attorney personally disapproved.[104] The court indicated that the State's actions and ill motive proceeded outside the proper scope of state authority with regard to AFDC administration and lacked concern for the children.[105] The claim that the State's Attorney acted to "use the children as pawns in a plan to punish their mothers for their past promiscuity and to discourage them and other females of like weaknesses and inclinations from future [childbearing],"[106] however, is answered by the preceding discussion of the grounds for the *King* decision.[107] Maryland authorities had not acted in ways that *King* or statutory law had deemed impermissible. Rather, Maryland had provided for adequate care and assistance outside the context of AFDC.[108] Thus, if there had been a crusade against illegitimate childbearing, as the *Cager* majority characterized the State's Attorney's actions, it was a crusade mounted not by the State's Attorney, but by the legislature, acting within the constraints of legitimate authority.[109] If there was a crusade by the legislature, it could not be justifiably characterized as either impermissible or unwarranted.

The majority also found critical fault in the State's Attorney's use of confidential information from the plaintiffs' AFDC applications.[110] The mothers' applications revealed to county authorities that the names of the fathers and their respective children did not match, which provided the State's Attorney with statutory grounds to initiate investigations.[111]

The court found that federal guidelines[112] and accompanying

---

103. 42 U.S.C. § 604(b) (1994); *see also* MD. ANN. CODE art. 88A, § 48A (1995).

104. *See Cager* at 481, 248 A.2d at 389.

105. *See id.* at 480, 248 A.2d at 388-89.

106. *Id.* at 480, 248 A.2d at 389.

107. *See supra* notes 97-98 and accompanying text.

108. *See infra* notes 120-37 and accompanying text.

109. *See infra* notes 135-36 and accompanying text.

110. *See Cager*, 251 Md. at 481-82, 248 A.2d at 389.

111. *See id.* at 482, 248 A.2d at 389.

112. *See id.* The court simply refers to "[a] regulation of the United States Department of Health, Education and Welfare," without further explanation. *Id.* at 482, 248 A.2d at 390. The court was apparently referring to a statute which provided, "[A state plan must] provide safeguards which restrict the use or disclosure of information concerning applicants or recipients." 42 U.S.C. § 602(a)(9) (1994) (repealed 1996).

state regulations[113] forbade using information gathered for program administration in ways tending to subject applicants to "exploitation and embarrassment," or that would constitute use of information for a purpose other than that for which it was provided.[114] The court stated that such information must "be used only by persons with appropriate authority, and only for purposes *directly* connected with the administration of welfare programs."[115]

Again, the court's conclusion merits close examination. The statutory requirement of confidentiality regarding records of AFDC participants expressly permits the use of such information in furtherance of an investigation or civil proceeding that concerns plan participants.[116] The statute also provides that investigating and interceding in instances of suspected or actual neglect is not only permitted, but required of state plans.[117]

Other fundamental objections can be made about the *Cager* majority's assertions concerning proper administrative purposes within the context of an approved state AFDC plan and the scope

---

113. *See Cager*, 251 Md. at 482, 248 A.2d at 390. (citing MD. ANN. CODE art. 88A, § 5 (1995), and The State Department of Public Welfare Rule 1000, Confidential Nature of Records).

114. *Id.* at 482, 248 A.2d at 390.

115. *Id.* This language echoed the pertinent statutory provision, found in 42 U.S.C. § 602(a)(9) (1994) (repealed 1996), which mandated that a state plan:

> Provide safeguards which restrict the use or disclosure of information concerning applicants or recipients for purposes directly connected with (A) the administration of the plan of the State . . . (B) any investigation, prosecution, or . . . civil proceeding, conducted in connection with the administration of any such plan or program . . . (D) any audit or similar activity conducted . . . by any governmental entity which is authorized by law to conduct such audit or activity, and (E) reporting and providing information . . . with respect to known or suspected child abuse or neglect.

42 U.S.C. § 602 (1994) (repealed 1996). Furthermore, the prior § 602 (a)(16)(A) mandated that the state agency charged with administering AFDC "[r]eport to an appropriate agency or official, known or suspected instances of . . . negligent treatment or maltreatment of a child receiving aid . . . under circumstances which indicate that the child's health or welfare is threatened." *Id.*

116. *See supra* note 115.

117. *See* 42 U.S.C. § 602(a)(9)(B) (1994) (repealed 1996). Specifically, the statute authorized that civil proceedings be undertaken within the context of administering the plan, but monitoring and responding to neglect was an authorized administrative objective under § 602(a)(16)(A). See *supra* note 115 for text of both § 602(a)(9)(B) and § 602(a)(16)(A).

of state law enforcement authority within the context of AFDC administration. These objections, grounded in the origin and design of the AFDC program, are best addressed in the larger context of Judge Barnes's dissent.[118] In the course of his dissent, Judge Barnes persuasively rebutted the majority's reading of Section 52(f) and demonstrated that the majority's understanding of the statute was not only unreasonable, but would strip the statute of all meaning and effect.[119]

The dissent focused on the origin of Section 52(f) which was derived from recommendations of the Commission.[120] A review of the Commission's working assumptions, and the legislature's subsequent adoption of measures pursuant to the Commission's findings and recommendations, including the statutory provisions challenged in *Cager*, will provide the complete backdrop against which the majority decision can be fully appreciated.

III. JUDGE BARNES'S DISSENT AND THE COMMISSION TO STUDY PROBLEMS OF ILLEGITIMACY

In his dissent in *Cager*, Judge Barnes staunchly defended the State's Attorney's use of information acquired from welfare applications to initiate the child neglect investigations.[121] He argued that the State's Attorney's actions were proper and well within the scope of state and federal regulations,[122] whereas the majority found that the State's Attorney had abused his authority.[123] Judge Barnes also argued that the State's Attorney's actions in his capacity as an administrative agent, effectuating the intent of the statute which required his actions, were not only consistent with the goals of the AFDC program, but were essential to its proper fulfillment.[124]

Judge Barnes noted that state statutes and regulations governing the administration of AFDC[125] require that neglect proceed-

---

118. *See infra* notes 118-63 and accompanying text.

119. *See infra* notes 144-59 and accompanying text.

120. *See infra* notes 147-60 and accompanying text.

121. *See In re* Cager, 251 Md. 473, 501-02, 248 A.2d. 384, 400-01 (1968) (Barnes, J. dissenting).

122. *See id.* (Barnes, J., dissenting).

123. *See id.* at 483, 248 A.2d at 390.

124. *See id.* at 502, 248 A.2d at 401 (Barnes, J. dissenting). See *infra* notes 121-34 and accompanying text for a discussion of the purposes and guidelines governing administration of AFDC by the states and the breadth of administrative discretion the states were originally intended to exert over AFDC programs with respect to child welfare.

125. Each state plan must be submitted to the United States Secretary of Health

ings be instituted "when information obtained by the Welfare Department indicates that a child is neglected."[126] This regulation merely implements the federal requirement that state plans provide a means to ascertain and act upon apparent instances of neglect.[127] Moreover, although federal law specifies that detecting and preventing neglect is a proper administrative aim of state plans, it imposes no preemptive definition of neglect.[128] As Judge Barnes declared: "The information on Form 218 may be used in the investigation of cases of apparent neglect as such an investigation is directly connected with the welfare program."[129] The State's Attorney is unquestionably "an appropriate authority" to whom neglect should be reported, and investigating instances of alleged neglect for the purpose of possibly removing a child from a home is a "criminal or civil proceeding, conducted in connection with the administration of [a] plan."[130] Indeed, it is difficult to ascertain who, other than a prosecutor, could possibly be expected to conduct such an inquiry. Therefore, Judge Barnes observed, when acting on information concerning neglect, information provided in compliance with Section 48A of the Maryland Code, the State's Attorney "[is] merely an administrative agent for the Welfare Department . . . ."[131] Thus, "it [is] the duty of the State's Attorney to file an appropriate petition to ascertain whether or not the child was a neglected child as defined by the statute."[132]

It is instructive to consider Judge Barnes's statements concerning the fundamental purpose of AFDC in the context of the state actions challenged in *Cager*. Because the very purpose of the program is to advance the well-being of qualified children,[133] Judge

---

and Human Services (then Health, Education, and Welfare) for approval before a state may receive AFDC federal matching funds. *See* 42 U.S.C. § 601 (1994) (repealed 1996).

126. *Cager*, 251 Md. at 501, 248 A.2d at 400 (Barnes, J., dissenting) (citing MD. ANN. CODE art. 88A, § 48A (1996 Supp.)).

127. *See* 42 U.S.C. § 602(16)(A) (1996 Supp.). Section 602 (16)(A) requires that state agencies "report to an appropriate agency or official, known or suspected instances of . . . negligent treatment or maltreatment of a child receiving aid [from the state's public assistance program]." *Id.*

128. *See supra* note 115.

129. *Cager*, 251 Md. at 501, 248 A.2d at 400.

130. 42 U.S.C. § 602(a)(9) (1994) (repealed 1996).

131. *Cager*, 251 Md. at 502, 248 A.2d at 401.

132. *Id.*

133. *See* 42 U.S.C. § 601 (1994) (repealed 1996) ("[e]ncouraging the care of dependent children in their own homes or in the homes of relatives . . . and

Barnes observed that "[i]t can hardly be contended that it is a purpose of the AFDC program to subsidize those who neglect their children or to provide for the continuance of the neglect of a child!"[134] To the contrary, establishing means of shielding children from neglect is more than an administrative aim "directly connected with the administration of [AFDC]."[135] It is an indispensable component of any program with aims such as those envisioned by AFDC: "The removal of neglected children from that assistance, the placing of them in proper foster homes or providing for other proper methods for eliminating the neglect must, of necessity, be directly connected with the administration of the welfare program."[136]

Regarding Judge Barnes's remarks on the overreaching purpose of the AFDC program, it is also instructive to consider the policy goals behind the creation of AFDC. AFDC was originally intended as a program for orphans and widows,[137] for children and a parent or guardian who had been abandoned by a breadwinner or had been "deprived of support" due to the illness, death, or sudden incapacity of a breadwinner, or for minor children where other circumstances had left a mother, or other named relative or legal guardian,[138] incapable of supporting the children under his or her care. The program was not intended to redefine the family, to foreclose or preempt family formation, or to undermine the institution of fatherhood and the paternal ordering of American society.[139]

[to] strengthen family life and to help such parents or relatives *to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of parental care and protection"* (emphasis added)).

134. *Cager*, 251 Md. at 502, 248 A.2d at 401 (Barnes, J., dissenting). Furthermore, because the case was before the court on stipulated facts conceding the illegitimacy of the children in question, and determining such was the only purpose for which Form 218 was employed by the State, the issue of whether the use of Form 218 was appropriate was foreclosed from review by the court. *See id.* (Barnes, J., dissenting).

135. *Id.* (Barnes, J., dissenting).

136. *Id.* (Barnes, J., dissenting). Furthermore, although 42 U.S.C. § 602(a)(15)(A) provides that a state develop programs for family planning and contraception, it must be noted that this provision did not preclude other approaches to address out-of-wedlock childbearing. *See* 42 U.S.C. 602(a)(15)(A) (1994) (repealed 1996).

137. *See* Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 880 (1994); *see also* BELL, *supra* note 15, at 3-19.

138. *See* Irene Lurie, *Major Changes in the Structure of AFDC Program Since 1935*, 59 CORNELL L. REV. 825, 826 (1974) (discussing the origin of AFDC).

139. *See generally* STEVEN GOLDBERG, WHY MEN RULE: A THEORY OF MALE DOMINANCE

Family circumstances targeted by AFDC policy objectives are clearly distinguishable from those present in *Cager*,[140] as well as those to which Section 52(f)(6) could have applied. Because illegitimacy often involves men who have never acted as providers to their children, and who have never been present as a parent in the home, it is reasonable to doubt whether a child under such circumstances has been deprived of the support of a now-absent parent in the specific manner contemplated by the framers of AFDC. It is also reasonable to contemplate that children in multiple illegitimate sibling, single mother families, the situation to which Section 52(f) applies, are less deprived than neglected.[141]

The high ratio of women who were never married, particularly younger women on the AFDC roster, is a relatively recent development.[142] From 1942 to 1967, the percentage of women heads of households eligible for AFDC whose reason for eligibility was defined as the "single motherhood of a woman who had never been married" increased from ten percent to approximately twenty-eight percent.[143] While widowhood or physical disability combined to account for some fifty-nine percent of AFDC eligibility in 1942, those combined categories accounted for less than twenty percent of the basis for AFDC eligibility in 1967 and less than seven percent of the basis for AFDC eligibility as of 1992.[144] Moreover, because AFDC was instituted to "help *maintain* and *strengthen* family life"[145] and to "help . . . parents or relatives to attain or retain capability for . . . maximum self-support and personal independence,"[146] it is indisputable that serial illegitimacy, without means of support other than

---

(1993) (discussing the anthropological and sociological aspects of the writer's view of a paternalistic society).

140. *See Cager*, 251 Md. at 478 n.2, 248 A.2d at 387 n.2. In addition to being unwed, two of the mothers were teenagers. *See id.*

141. See *supra* note 21 for a discussion of § 52(f).

142. *See infra* note 143 and accompanying text.

143. *See* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING, DHH PUB.NO. (PHS) 95-1257, 63 (1995). [hereinafter REPORT TO CONGRESS]. The figure as of 1992 was fifty-eight percent. *See id.*

144. *See id.* However, the percentage of AFDC-eligible mothers for whom grounds for eligibility is separation or divorce from a husband has remained comparatively constant, increasing from approximately 25% in 1942 to approximately 35% in 1992. *See id.* The figure for 1992 actually represented a significant decline for this category of eligibility from a peak of nearly 45% in 1967. *See id.*

145. 42 U.S.C. § 601 (1994) (repealed 1996) (emphasis added).

146. *Id.*

public assistance, is profoundly contrary to the foundational objectives of the program.

The facts in *Cager* were typical of the rapidly changing structure of AFDC households at that time, and the increasing tendency of such households to be formed in a manner quite different from the average AFDC-eligible household when the program was first adopted.[147] Judge Barnes's assertions concerning the rationale underlying AFDC and the proper scope of state administrative discretion in light of AFDC's original aims were therefore entirely correct. It is a matter of speculation, of course, whether present circumstances, had they prevailed in 1935, would have altered or even prevented adoption of the AFDC program, or whether AFDC would be adopted today in the same form in response to present circumstances.[148]

Judge Barnes assailed the majority's reading of both the statute itself and the necessary interrelation of the provisions of Section 52(f).[149] In particular, he found indefensible the majority's conclusion that the legislature had not intended for serial illegitimacy to be sufficient grounds to constitute neglect.[150] Judge Barnes began by noting that the six primary criteria enumerated in Section 52(f) are separated by semicolons with the final criterion preceded by the disjunctive connector "or," indicating that the criteria are alternative rather than cumulative.[151] He also pointed out that the statute could not possibly have been meant to require a showing of all six criteria as a precondition to enforceability.[152] For example, Judge Barnes questioned how the fourth criterion, referring to a child whose guardian or parent fails to provide necessary medical, surgical, institutional or hospital care, could not be sufficient in itself to amount to neglect.[153] He also questioned how the legislature could have

147. *See supra* notes 143-44 and accompanying text.

148. The 105th Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which ended AFDC as a federal entitlement. *See* 42 U.S.C. § 603 (1994). PRWORA turned AFDC into a program of block grants given to the states. *See id.* The states have expanded discretion to independently administer all aspects of the program. *See id.* Also, for the first time, PROWRA mandates work requirements for specified adult beneficiaries. *See* 42 U.S.C. § 607(b)(2)(a) (1994).

149. *See In re* Cager, 251 Md. 473, 486-501, 248 A.2d 384, 392-400 (1968) (Barnes, J., dissenting).

150. *See id.*

151. *See id.* at 486, 248 A.2d at 392; *see also supra* note 21 and accompanying text.

152. *See Cager*, 251 Md. at 487-88, 248 A.2d at 393.

153. *See id.* at 487, 248 A.2d at 393.

meant for such neglect to be ignored by state officials *unless* another listed criterion of neglect were found to also be present. He reasoned that if the six primary criteria of neglect were not alternative, but could only be proven if concurrently present with at least one other criteria, it would be practically impossible for a child to ever be deemed neglected under the statute.[154] Criterion six and its five sub-criteria, Judge Barnes concluded, must be a self contained set of considerations, sufficient in themselves to establish whether an environment is morally stable.[155]

To further demonstrate that the majority's interpretation was untenable, Judge Barnes discussed the court of appeals's statutory construction in *In re Cromwell*.[156] *Cromwell* involved a determination of juvenile delinquency under Article 26, Section 52(e), which identically paralleled Section 52(f) in structure.[157] In *Cromwell*, the court found "delinquency" to be proven on the basis of a single criterion,[158] without any suggestion that a concurrence of multiple criteria was necessary. Judge Barnes applied this same reasoning in his dissent in *Cager*, observing that the six criteria of Section 52(f) must each be independently sufficient to establish neglect.[159] Further, Judge Barnes noted that the five sub-criteria for ascertaining a "stable moral environment" are set out in a format identical to that em-

---

154. *See id.* at 487-88, 248 A.2d at 393.

155. *See id.*

156. 232 Md. 409, 194 A.2d 88 (1963).

157. *Cromwell* quoted the pertinent section of the statute at issue, MD. ANN. CODE OF 1957 art. 26, § 52(e), as follows:

> (e) "Delinquent child" means a child
>
> (1) who violates any law or ordinance, or who commits any act which, if committed by an adult, would be a crime not punishable by death or life imprisonment;
>
> (2) who is incorrigible or ungovernable or habitually disobedient or who is beyond the control of his parents, guardian, custodian or other lawful authority;
>
> (3) who is habitually a truant;
>
> (4) who without just cause and without the consent of his parents, guardian, or other custodian, repeatedly deserts his home or place of abode;
>
> (5) who is engaged in any occupation which is in violation of law, or who associates with immoral or vicious persons; or
>
> (6) who so deports himself as to injure or endanger the morals of himself or others.

Cromwell, 232 Md. at 412, 194 A.2d at 89.

158. *See id.* at 414, 194 A.2d at 90.

159. *See Cager*, 251 Md. at 486, 248 A.2d at 392.

ployed in *Cromwell* for ascertaining delinquency[160] and, therefore, must also be both alternative and individually sufficient.[161] Indeed, as with the six primary criteria, a requirement that the five sub-criteria be understood as concurrent rather than alternative determinants of neglect would certainly doom the statute to unenforceability.[162]

To illustrate, a mother would need to have given birth to an illegitimate child in the twelve months prior to the filing of a neglect petition (sub-criterion five), and be currently pregnant with another illegitimate child at the time a petition is filed (sub-criterion six), before criterion six would be enforceable, a result Judge Barnes described as "absurd and unjust."[163] Therefore, Judge Barnes maintained that the statutory requirement that courts consider the five listed sub-criteria "among other things" should be understood to mean only that the court may look to other considerations beyond those listed in determining whether a home environment is morally unstable; however, establishing any one of the listed sub-criteria necessarily constitutes sufficient proof.[164]

Judge Barnes argued that even if some degree of ambiguity were conceded, a process of basic statutory construction would still lead to the conclusion that the legislature meant for serial illegitimacy to be sufficient grounds for finding neglect under Section 52(f).[165] He observed that the duty of the court when considering a statute is to carry out the clear legislative intent.[166] If a statute is "ambiguous, the courts should consider the evils or mischief which the Legislature sought to remedy and should construe the language so as to effectuate the general purposes and policies of the legislation."[167] Judge Barnes noted that there was no difficulty determining what the legislature wished to do when it adopted Section

160. *See id.* at 488, 248 A.2d at 396.

161. *See id.*

162. *See generally id.* at 488-91, 248 A.2d at 393-95 (discussing statutory ambiguity and legislative intent).

163. *Id.* at 489, 248 A.2d at 393.

164. *See id.* at 489, 248 A.2d at 393-94.

165. *See id.* at 490, 248 A.2d at 394.

166. *See id.* at 489, 248 A.2d at 394 (quoting Maryland Med. Serv., Inc. v. Carver, 238 Md. 466, 477-78, 209 A.2d 582, 588 (1965) ("The cardinal rule of construction of a statute is to discover and to carry out the real legislative intention.")).

167. *Id.* at 490, 248 A.2d at 394 (citing Cooley v. White Cross Health and Beauty Aid Discount Ctrs., Inc., 229 Md. 343, 350, 183 A.2d 381, 385-86 (1962)).

52(f)(6)[168] because the statute was an outgrowth of the work done by the "excellent Commission to Study Problems of Illegitimacy."[169] The following consideration of the Commission's work, and its recommendations which provided the basis for Article 26, Section 52(f), demonstrates with even greater certainty that the purpose of Section 52(f) was, without any ambiguity whatsoever, to perform the function that was essentially denied by the *Cager* majority.

IV. THE REPORT OF THE COMMISSION TO STUDY PROBLEMS OF ILLEGITIMACY

The Commission cited in its final Report (the Report) two propositions as the foundation of its inquiry: "1. That illegitimacy is, in itself, a social problem for the entire community; and 2. That illegitimacy among recipients of Aid to Dependent Children creates special problems of grave concern."[170] The Report further declared that

> Illegitimacy now presents a growing . . . problem to the community[,] . . . the 'home without a family.' Such homes have no fathers in the social sense, the illegitimate children residing with their mothers. This creates a form of 'family life' which is in conflict with all accepted standards of child welfare. These female centered families may consist of mother, daughters, other female relatives—all with illegitimate children, fathered by a series of non-resident males.[171]

The Commission opined that "American Society is based on the family as the basic unit of the social order through which husband and wife by their coordinated industry and self-sacrifice, provide for the religious, moral, social, emotional and economic needs of their growing children."[172]

There is a strong resemblance between the Commission's comments and observations concerning welfare and illegitimacy as it was waged twenty-five years ago and today's debate. For example, the Commission noted that "[r]eported increases in the extent to which illegitimacy appears in the Aid to Dependent Children program,

---

168. *See id.* at 489, 248 A.2d at 393-94.

169. *Id.* at 490, 248 A.2d at 394.

170. COMMISSION REPORT, *supra* note 9, at 12.

171. *Id.* at 13.

172. *Id.* (quoting GOVERNOR'S COMMISSION ON PROBLEMS OF ILLEGITIMACY, INTERIM REPORT 17 (1960).

have caused an aroused public to demand . . . action,"[173] and that "[i]t is strongly suspected by many that . . . Aid to Dependent Children . . . actually encourages illegitimacy . . . ."[174]

The Commission further observed that "[c]ritics of the [AFDC] program, pointing to the original objective of 'strengthening family life,' cite the reported increase in the number of second and third generation families with illegitimate children that have been receiving assistance over the past twenty-five years as indicative of the program's failure."[175] Furthermore, the Commission noted that these critics are increasingly of the opinion that "[AFDC] is merely a dole which continues undesirable conditions."[176] The Report suggested that "[t]he community's failure to . . . have confidence in the [AFDC] program is evidenced by its increasing unwillingness to support it without assurance of efforts to correct the problem."[177]

The core of the Commission's Report consisted of nineteen recommendations set out in chapter 3,[178] each accompanied by a

---

173. *Id.* at 14.

174. *Id.* at 14-15.

175. *Id.* at 15.

176. *Id.*

177. *Id.* The Commission also noted widespread doubts concerning both the competence and intentions of those administering the program: "The question is often raised as to whether [those] in executive positions possess sufficient background in management and personnel administration to handle such enormous amounts of money, and whether a majority of case workers are knowledgeable enough to control the distribution of money in the public's best interest." *Id.*

178. *See id.* at 22-38. Recommendation One proposed new procedures for establishing paternity and determining custody and guardianship, recommended that the bastardy law be repealed, and that § 38 of Article III of the Maryland Constitution be amended to allow delinquencies in child support payments of both legitimate and illegitimate children as exceptions from the prohibition against imprisonment for debt; Recommendation Two proposed what would become the five sub-criteria to MD. ANN. CODE art. 26, § 52(f)(6) (1966) (repealed 1969), concerning the determination of an unstable moral environment; Recommendation Three advised against passing legislation that would either recognize common law marriage or punish "illicit cohabitation"; Recommendation Four advised against legalizing abortion or sterilization as methods of addressing illegitimacy; Recommendation Five suggested that Congress be asked to consider whether children should be permitted to receive AFDC benefits through a man who has either acknowledged paternity or who has been declared a needy child's natural father in a court proceeding; Recommendation Six recommended that the Legislative Council investigate the desirability of permitting marriage by civil ceremony in Maryland; Recommendation Seven proposed that Maryland's legislation implementing the state AFDC

discussion of the Committee's underlying rationale and expectations. Recommendations Two and Seven are of particular significance to the holding in *Cager* and the dissent, because they were the source of the substance of Section 52(f).[179]

Recommendation Two proposed that the definition of a "neglected child" be revised and "broadened to provide that a child whether legitimate or illegitimate is neglected if living in a home which fails to provide a stable moral environment; and to further provide that the absence of such stable moral environment is prima facie established" if any of the five criteria are met.[180] The list of criteria suggested by the Commission to establish such prima facie evidence consisted almost verbatim of the sub-criteria that were codified as Section 52(f)(6)(i)-(v).[181]

---

program be revised to state that the overreaching goal of the program is to "strengthen family life" (this language is identical to that used in the AFDC statute, *see supra* note 133), and that suitable home and neglect standards be revised in a manner that was soon realized as MD. ANN. CODE art. 26, § 52(f) (1966) (repealed 1969); Recommendation Eight proposed creation of a statewide coordinated network of social work services for illegitimately pregnant women; Recommendation Nine proposed creation of a Division of Child Welfare and several related recommendations; Recommendation Ten suggested measures to facilitate a continuing state responsibility for the prevention and control of illegitimacy; Recommendation Eleven suggested implementation of a permanent illegitimacy reporting capacity; Recommendation Twelve suggested the appointment of a committee to inquire into personnel administration policies of the Department of Public Welfare; Recommendation Thirteen proposed that the Governor appoint a committee to study the matter of religious and moral education in the public schools of Maryland; Recommendation Fourteen recommended authorization for state entities to refer clients or patients for family planning services and counseling; Recommendation Fifteen recommended that the procedures and requirements relating to the issuance of birth certificates be revised in various ways to assist establishing a means for tracking paternity or illegitimacy; Recommendations Sixteen through Nineteen concerned various proposals for the gathering and sharing of information and related coordination among different state agencies with regard to illegitimacy and implementation of a continuous administrative capacity to monitor and control it. *See* COMMISSION REPORT, *supra* note 9, at 22-38.

179. *See generally* COMMISSION REPORT, *supra* note 9, at 24-25, 27-28.

180. *Id.* at 24.

181. *See id.* The full text of Recommendation Two provides:

> [T]he absence of [a] stable moral environment is prima facie established if the parent, guardian or person with whom the child lives:
>
> (1) Is unable to provide such environment by reasons of immaturity, emotional, mental or physical disability,
>
> (2) Is engaging in promiscuous conduct inside or outside the home,

In Recommendation Seven, the Commission suggested that Maryland's Aid to Dependent Children Law[182] be subject to three amendments.[183] First, the Commission recommended that a statement of policy be incorporated into the law declaring that the program's primary purpose is to strengthen family life and to assist qualified families toward maximum independence within a certain time frame and in homes suitable for children.[184] Second, the Commission recommended that the suitable home clause of the state's ADC law be amended to provide that assistance will not be given if there is reasonable cause to believe that a child in the home is neglected, with exceptions to allow for remedial actions.[185] Third, the

---

(3) Is co-habiting with a person to whom he or she is not married,

(4) Is pregnant with an illegitimate child, or

(5) Has, within a period of twelve months preceding the filing of the petition alleging neglect, either been pregnant with or given birth to an illegitimate child in addition to the child whose neglect is complained of.

Id.; *cf.* MD. ANN. CODE art. 26, § 52(f)(6)(i)-(v) (1966) (repealed 1969). *See generally supra* note 21 (providing full text of § 52(f)).

182. *See* MD. ANN. CODE art. 88A, § 48A (1966).

183. *See* COMMISSION REPORT, *supra* note 9, at 27-28.

184. *See id.* at 27.

185. *See* MD. ANN. CODE art. 88A, § 48A (1966). The provision then in force read as follows:

[A]ssistance shall be given to any dependent child who:

(a) Has resided in this State for one year immediately preceding the application for such assistance; or who was born within one year immediately preceding the application, if the parent or relative with whom the child is living has resided in this State for one year immediately preceding the date of application; or whose parent has resided in this State for one year immediately preceding the date of application; provided, however, that the State Department is authorized and empowered to make reciprocal arrangements with other states to waive residence requirements when, in their judgement, the same are deemed necessary, so long as the waiver does not invalidate federal matching, the foregoing State residence requirement shall be considered abrogated and rendered null and void simultaneously with the effective date of such federal enactment.

(b) Is living in a family home meeting the standards of care and health, fixed by the laws of this State and any rules and regulations adopted pursuant thereto, and in which home the child's particular religious faith should be fostered and protected, if possible.

Id.

Commission recommended that the welfare department of each political subdivision in Maryland be charged with alerting those on assistance of reasons why assistance may be suspended, to impose a thirty-day time limit for corrective action, and to file a petition alleging neglect and seeking action on the child's behalf when circumstances require.[186]

The comment accompanying Recommendation Seven is particularly enlightening. It stated that the neglect to which Recommendation Seven refers would include the type of neglect described in Recommendation Two—"failure to provide a child with a stable moral environment."[187] The Commission further stated:

> [T]he recommended legislation would not deprive any needy child of support because of the unacceptable conduct of the mother or other person having its care. It would provide the welfare departments with an opportunity to help the person through aggressive casework to either correct the undesirable conditions in the home *or place the child in an acceptable [home].* . . . The Commission believes that laws relating to [AFDC] should provide for the child's moral environment as well as . . . physical needs, and that neglect not corrected within a thirty-day period should be referred to the court and changes effected under its direction. Under the recommended legislation *the child is assured of continued support.*[188]

On the question of statutory construction, Judge Barnes noted that the original draft of the bill, which became Article 26, Section 52(f),[189] provided the phrase "the absence of such stable moral environment is prima facie established if"[190] followed by the language at Section 52(f)(6)(i)-(v).[191] By amendment, these words were later replaced with the phrase "[i]n determining whether such stable moral environment exists, the court shall consider, among other things . . . ."[192] Judge Barnes observed this change indicated that the legislature, while intending mandatory consideration of the listed crite-

---

186. *See* COMMISSION REPORT, *supra* note 9, at 27-28.

187. *Id.* at 28.

188. *Id.* (emphasis added).

189. *See In re* Cager, 251 Md. 473, 494, 248 A.2d 384, 397 (1968) (Barnes, J., dissenting).

190. COMMISSION REPORT, *supra* note 9, at 24 (Recommendation Two).

191. *See supra* note 21 (providing full text of § 52(f)).

192. *Cager*, 251 Md. at 495, 248 A.2d at 397 (Barnes, J., dissenting).

ria, wished to specify that they need not be exclusive considerations.[193] The legislature intended to broaden the court's discretion in assessing whether an environment is neglectful, not to erect obstacles to the court's ability to make such a determination.[194] Generally, Judge Barnes observed that bearing multiple illegitimate children while on public assistance has been deemed to be inherently neglectful, and removing children from such an environment was in keeping with other court decisions and child welfare statutes at that time.[195] Finally, the dissent observed that there was no attempt by the plaintiffs to present any actual evidence that the children were not living in neglectful circumstances.[196] "The failure to produce any such evidence," Judge Barnes stated, "indicates strongly to me that no such evidence was available."[197]

V. THE CONTEXT OF *IN RE CAGER*

The actions by Prince George's County authorities in *Cager* did not deprive the children of care and support, even as defined under *King*. The work of the Commission and the legislative history of Article 26, Section 52(f), combined with the history and statutory language of AFDC, amply demonstrate that the State's actions were not only justifiable administrative undertakings within the context of AFDC, but were essential to Maryland's ability to fulfill its obligations under the program.

The court's construction of the neglected child statute was not only contrary to the statute's plain meaning and legislative history, but also boldly illogical. However, the *Cager* court seems to have been more concerned with the matters of the AFDC supported children than with the children themselves. It was the mothers' predicament, not the children's, that seems to have been the true object of the court's solicitousness. Because AFDC is specifically for children, however, supporting adults only to the extent that doing so is deemed in the interests of children,[198] the court was forced to fash-

193. *See id.*

194. *See id.*

195. *See id.* at 500-01, 248 A.2d at 399-400 (citing *In re* Dake, 180 N.E.2d 646, 648 (Ohio Misc. 1961) ("[I]s a woman who is incapable of ordering her own life in accordance with the prevailing legal and moral codes, incapable of raising children without a father?")); *see also id.* at 501, 248 A.2d at 400 (citing *In re* Turner, 231 N.E.2d 502 (Ohio Misc. 1967)).

196. *See id.* at 499, 248 A.2d at 399.

197. *Id.*

198. *See* 42 U.S.C. § 601 (1994) ("For the purpose of encouraging . . . each State to

ion a decoy of reasoning focused on the children in order to defend the mothers.

Assuming this inference is correct, the picture changes dramatically. If protecting a mother's status under the program, and shielding her from the moral censure inherent in Section 52(f) is understood to have been the court's true objective, the opinion undergoes a metamorphosis: a dense and poorly reasoned opinion, utterly blind to obvious and essential distinctions and entirely inconsistent with logic, precedent, and legislative history, becomes a subtle maneuver by the court to impose a preferred policy result. Of course, such a motive is unprovable in the strict sense. Nonetheless, the prevailing jurisprudence and academic thinking at the time of *Cager* underscores the court's true motive.

In its early years, the AFDC program was tightly budgeted and highly moralistic.[199] The administrative policy was deeply concerned with individualized management and was characterized by a distinct emphasis on personal character, including sexual morality and the general conviction that failure in that regard was a primary factor in the onset and perpetuation of dependency.[200] Moreover, state administration of AFDC programs was often racially biased.[201] The Flemming Ruling, on the other hand,[202] was symptomatic of an emerging perspective toward welfare recipients and the proper administration of welfare programs that was far less inclined to attribute reliance on transfer payments as evidence of either poor character or even personal misfortune.[203] Instead, this new perspective viewed poverty as a symptom of larger structural inequalities inherent in the social framework and inextricable from larger economic and racial inequity.[204] Poverty bore only a secondary relation to the specific character and conduct of individuals receiving public assistance.[205]

Several United States Supreme Court decisions and administrative rule changes have reinforced this new way of thinking. For example, between 1961 and 1974 AFDC rule changes decreased eligi-

---

furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living.").

199. *See* BELL, *supra* note 15, at 111-23; *see also* Lurie, *supra* note 138, at 838.

200. *See* BELL, *supra* note 15, at 111-23.

201. *See id.* at 175, 181-86.

202. *See supra* notes 86-92 and accompanying text.

203. *See generally* MURRAY, *supra* note 18, at 24-40.

204. *See generally id.*

205. *See, e.g.*, Miller, *supra* note 14.

bility requirements,[206] imposed mandatory annual increases in benefit levels,[207] and increased benefit levels in absolute terms.[208] A breadwinner's unemployment became sufficient grounds for AFDC eligibility; this is a fundamental break from past rationale that the program was exclusively for those actually incapable of self-support.[209] Administrative changes in allowable levels of income also greatly increased the number of persons eligible to receive AFDC.[210]

During the same time AFDC eligibility requirements were liberalized, state authorities were given only limited discretion to monitor home conditions or to count the assets of unmarried adult males residing in the home toward figuring eligibility and benefit levels.[211] The Supreme Court even discerned a constitutional right to travel from state to state without experiencing disturbance to one's eligibility on account of varying state eligibility rules.[212] Overall, there was a rush to extirpate from public policy in general, and the administration of AFDC by the states in particular, what had from the inception been the standard approach of moral censure and suspicion concerning conduct and character among AFDC recipients.[213]

VI. DEVELOPMENTS SINCE *IN RE CAGER* AND THE COMMISSION ON ILLEGITIMACY

Whatever the actual causal relationship is between welfare programs and the growth in the illegitimacy rate, an examination of trends between out-of-wedlock childbearing and divorce strongly suggests that the phenomenal growth in illegitimacy among some sectors of the population since the mid-1960s is the result of larger social trends during that same time period and not unique to those receiving public assistance. For instance, between 1960 and 1993 the proportion of illegitimate births increased dramatically across the

206. *See generally* 42 U.S.C. § 602 (1970) (requiring that the first $30.00 plus one-third of income be disregarded toward determining AFDC eligibility).

207. *See* Engelman v. Amos, 404 U.S. 23, 24 (1971) (per curiam) (requiring that the $30.00 and one-third disregard be applied to any exclusions in state ceilings on gross income for AFDC eligibility).

208. *See id.*

209. *See id.*

210. *See, e.g.*, Lurie, *supra* note 138, at 836-37.

211. *See* Lewis v. Martin, 397 U.S. 552 (1970) (invalidating MARS regulations).

212. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). Specifically, the court held that residency requirements for AFDC eligibility violated the constitutional right to travel because the restraint fell exclusively on the poor. *See id.* at 630.

213. *See supra* notes 192-94.

entire population from approximately six percent of all births in 1960 to more than thirty percent in 1993.[214] Although this trend began prior to the 1960s, the increase in the number of illegitimate births between 1960 and 1980, as opposed to 1940 to 1960, was dramatic.[215] The growth in the number of illegitimate births is also partly attributable to a relational increase. The birth rate per 1,000 for all unmarried women ages fifteen to forty-four increased from 14.1 in 1950, to 26.4 in 1970, to 28.4 in 1980, and to 45.3 in 1993.[216] During the same time frame, the birth rate per 1,000 married women of the same age decreased substantially from 410.4 in 1950, to 443.7 in 1970, to 350.0 in 1980, and to 388.0 in 1993.[217]

These trends in the United States were similar to other industrialized countries at the time excluding Asian countries. In fact, since 1970, Sweden and Denmark have experienced far greater increases in rates of out-of-wedlock childbearing than has the United States.[218] Not surprisingly, these trends have been accompanied by a dramatic increase in the rate of divorce during the same time frame. Although the number of divorces per 1,000 married women actually fell between 1950 and 1960, from approximately ten to eight divorces per 1,000 married women, subsequent to this time period the rate began a steady increase.[219] The divorce rate per 1,000 married women was approximately fourteen in 1970 and twenty-three in 1980.[220] Since 1980, however, the rate has fallen slightly to approximately twenty-one per 1,000 married women.[221]

---

214. *See* REPORT TO CONGRESS, *supra* note 143. I have attempted to extract from graph form those numbers relevant to the time frame between the present and the time of the *Cager* decision. Figures describing a broader time frame reveal that between 1940 and 1993, the ratio of illegitimate to legitimate births increased from 38 per 1,000 births to 310 per 1,000 births. These figures illustrate an increase from less than 4% to more than 30%. *See supra* note 143.

215. *See* REPORT TO CONGRESS, *supra* note 143, at 9 (noting that in 1980, the proportion was approximately 20%).

216. *See id.* at 88 tbl.I-2.

217. *See id.* at 118 tbl.III-7.

218. As of 1992, half of all births in Sweden were to unmarried women; in Denmark, 46% of all births were to unmarried women. *See id.* at 67. The United Kingdom and the United States were nearly identical in this respect, reporting 31% and 30% of all births to unmarried women, respectively. *See id.* France also reported 31% of births out of wedlock. *See id.* Percentages for illegitimate childbearing for other industrialized nations were as follows: Canada 27%; Germany 15%; The Netherlands 13%; Italy 7%; and Japan 1%. *See id.*

219. *See id.* at 26.

220. *See id.*

221. *See id.*

This decrease in the divorce rate between 1980 and 1993 may be a function of an overall dramatic decrease in marriage rates during this period. Between 1955 and 1993, the percentage of married men aged twenty to twenty-four years old fell from fifty-one to eighteen percent, and the percentage of married men aged twenty-five to twenty-nine fell from seventy to forty-six percent.[222] In those same years, the percentage of married women aged twenty to twenty-four fell from sixty-nine to thirty-two percent, and the percentage of married women aged twenty-five to twenty-nine fell from eighty-six to fifty-nine percent.[223]

At the time of *Cager*, broad societal change was underway in which illegitimacy among the poor and welfare populations proved to be an exacerbated exception.[224] Poverty, as well as the overall growth in AFDC participation since the 1960s, cannot be attributed to economic factors. The rate of illegitimate births and the proportion of the population receiving AFDC began to increase dramatically beginning in the 1960s and continued throughout the 1980s regardless of economic growth, without any apparent connection to larger economic trends.[225]

---

222. *See id.* at 25.

223. *See id.* (providing the percentages of unmarried individuals).

224. *See generally* MURRAY, *supra* note 18, at 128, 130. Graphs illustrate that for all income levels illegitimate childbearing and single female households markedly increased from 1960 to 1980—the poorer the group, the more rapid the increase. Income status is a profound correlate to illegitimacy. Although race is a factor, it is much less correlative than income. *See id.* For a discussion of the way in which cultural and entitlement inducements to illegitimacy delivered a much greater impact among the poorer segments of the population, *see id.* at 154, 178.

225. *See* DANIEL PATRICK MOYNIHAN, FAMILY AND NATION 22 (1986). Speaking of his experiences as an official in the Bureau of Labor Statistics during the Johnson Administration, Moynihan stated:

> [T]he number of new cases in postwar years rose and fell very much as unemployment rose and fell. . . . [There was a] remarkably strong correlation [] between unemployment and all manner of family dysfunction. . . . [A]s we moved from the late 1950s into the early 1960s the correlations weakened and then quite disappeared. . . .
>
> This came to be known as "the scissors." Plotted on a graph, the various rates would go up and down as if chained together, but then the relation weakened, disappeared, and reappeared as its own opposite. Without exception the indicators of social stress— separation, welfare—would now go *up* while the economic indicator—unemployment—would now go *down*. These patterns were to be found both for whites and blacks, most strongly for blacks.

Id. at 22-23 (emphasis in original); *see also* MURRAY, *supra* note 18, at 58-68 (dis-

As for Maryland, the Commission Report contained numerical data concerning illegitimacy and various presumptively related factors[226] for each political subdivision of the state.[227] At that time, ap-

---

cussing and dismissing various economic explanations for the emergence of categories of unemployment and welfare dependency beginning in the 1960s which, for the first time, were unresponsive to larger economic factors).

226. *See* COMMISSION REPORT, *supra* note 9, apps. C & D at 131-65. Factors reported include race, political subdivision, age of mother, number of siblings, place of birth (in a hospital or not in a hospital), public assistance status, ages of siblings, and number of different fathers per household with more than one illegitimate child. *See id.*

227. See *id.* at 108-09 for a tabular breakdown of illegitimate children in the ADC program for the 23 counties and Baltimore City, and the federal versus state costs borne by government on behalf of illegitimate children. The percentage of out of wedlock births comprised of all births in each political subdivision in 1961 was determined to be as follows:

Allegheny	2.24
Anne Arundel	5.04
Baltimore (County)	2.75
Calvert	26.55
Caroline	6.51
Carroll	1.00
Cecil	4.11
Charles	13.71
Dorchester	16.69
Frederick	8.00
Garrett	6.85
Harford	6.85
Howard	2.91
Kent	12.57
Montgomery	2.25
Prince George's	3.94
Queen Anne's	12.62
St. Mary's	6.30
Somerset	16.83
Talbot	23.27
Washington	5.56
Wicomico	15.81
Worcestor	24.88
Baltimore City	17.55

proximately 8.9% of all births in Maryland were illegitimate.[228] Among recipients of AFDC, the percentage of illegitimate births was approximately 34.1%,[229] nearly four times as frequent.

It is not possible with today's data to precisely update the numerical data assembled by the Commission. Nor is it clear that it would be interesting to do so because the data substantially consists of breakdowns by each county and Baltimore City by race and other factors.[230] If the principle driving force of increasing illegitimacy in the United States has been larger cultural changes throughout the industrialized world, then the important correlations to illegitimacy are not municipal or racial, rather they are cultural, historical, and behavioral. Nonetheless, the illegitimacy rate for Baltimore City at the time of the Commission's Report was 17.5%.[231] In 1980, the ille-

---

Id. at 132 tbl.I.

228. The (projected) totals were as follows:

> 74,610 births in 1961
> 67,665 legitimate
> 6,665 illegitimate

COMMISSION REPORT, *supra* note 9, at 61-62, 132.

These numbers were projected on the basis of actual data generated by the Committee concerning January and February of 1961. *See id.* Projections were based on an investigation of records over the preceding five years, which revealed that January and February births during that period represented on average 15.66% of annual births in Maryland. The actual totals for January and February of 1961, which formed the basis for these projections, were:

> 11,658 births
> 10,617 legitimate
> 1,041 illegitimate

Id. at 62, 136.

Maryland birth records ceased to separately list illegitimacy as a reported attribute of newborns in 1938. *See id.* at 61. Data for January and February was specifically (and, one imagines, painstakingly) assembled by the staff of the Commission in conjunction with the State Department of Health and the Baltimore City Department of Health. *See id.* at 61. The criteria used to determine illegitimacy were as follows: differing last name of father and mother; last name of child differing from last name of either the mother or father; the absence of a father's name altogether; and a mother listing herself as a "Miss" in the mailing address she was required to inscribe on the certificate. *See id.* at 62.

229. *See id.* at 106-07. These statistics are as of December, 1958. This information was derived from unpublished research assembled by the State Department of Public Welfare prior to the formation of the Commission. *See id.* at 60.

230. The report acknowledged two races—"White" and "non-White"— and applied these designations to virtually every other statistical category. *See id.* at 143, 148, 154-55, 163-65.

231. *See* COMMISSION REPORT, *supra* note 9, at 132.

gitimacy rate for Baltimore City was 56.5%,[232] and in 1992 the rate was 60.8%.[233] For Maryland as a whole, the illegitimacy rate was 8.9% in 1961,[234] 25.1% in 1980,[235] and 32.4% in 1993.[236]

The potential significance of this dramatic increase in overall illegitimacy, locally, nationally, and throughout much of the industrialized world, can be gleaned from the growing body of research that strongly points to severe long-term behavioral and psycho-social consequences for children growing up in single parent families, particularly those families headed by women who never have married.[237] As one commentator stated:

> From the wild Irish slums of the nineteenth century eastern seaboard, to the riot-torn suburbs of Los Angeles, there is one unmistakable lesson in American History: a community that allows a large number of young men to grow up in broken families, dominated by women, never acquiring any stable relationship to male authority, never acquiring any rational set of expectations about the future—that community asks for and gets chaos. Crime, violence, unrest, disorder—most particularly the furious, unrestrained lashing out at the whole social structure—that is not only to be expected; it is very near to inevitable. And it is richly

---

232. *See* REPORT TO CONGRESS, *supra* note 143, at 106 tbl.II-6 (22.9% among whites; 74.2% among blacks).

233. *See id.* Regarding racial breakdown, the 1992 numbers were 29.1% for whites and 74.1% for blacks. *See id.*

234. *See* COMMISSION REPORT, *supra* note 9, at 132. This figure was derived based on the number of anticipated illegitimate births divided by the number of anticipated total births.

235. *See* REPORT TO CONGRESS, *supra* note 143, at 104 tbl.II-5. The figures were as follows: 11.4% among whites; 58.6% among blacks. *See id.*

236. *See id.* Regarding racial breakdown, the 1993 numbers were 17.9% for whites and 61.9% for blacks. *See id.*

237. According to a study by the Progressive Policy Institute, "[the] relationship between crime and one parent families [is] so strong that controlling for family configuration erases the relationship between race and crime and between low income and crime." ELAINE CIULLA KAMARCK & WILLIAM A. GALSTON, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990S 14 (Sept. 1990); *see also* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 246-53 (1985). Additional research has revealed a profound correlation between fatherlessness and maladjustments such as poor school performance, poor health, emotional disorders, and serious difficulties with personal relationships. *See* Deborah A. Dawson, *Family Structure and Well-Being: Data from the 1988 National Health Interview Survey on Child Health*, 53 J. MARRIAGE & FAM. 573, 573-84 (1991).

deserved.[238]

In light of subsequent developments, the conclusion is all but inescapable that the so called "enlightened" new way of thinking about welfare, illegitimacy, and the family that blossomed rather suddenly around the time *Cager* was decided, seems not to have been as enlightened or sophisticated as some confidently declared it to be.[239]

VII. CONCLUSION

For purposes of this Comment, it is ultimately of secondary importance whether welfare programs have been a substantial driving force behind the phenomenal growth in illegitimacy in the past few generations. The paramount issue in this examination of *Cager* concerns the proper source of guiding authority on matters of broad social policy. Whether or not illegitimacy trends have been grossly exacerbated by a well-intentioned but unwise welfare system, the fact remains that the proper authority to address matters of child welfare in general and prospectively, and to form social policies which look to influence the future shape of society, resides with the legislature. The courts, despite their authority to determine the best interests of the child, and their broad discretion in that regard, are still confined to exercising judicial authority. Under no circumstances can the reasonable and legitimate exercise of such authority extend to redesigning welfare programs in clear contravention of the intentions of the legislature, or substituting one set of assumptions and objectives with another. Regardless of what the direction or driving force behind illegitimacy trends was when *Cager* was decided, the legislature had spoken on the issue and devised a means of remedying the condition of serial illegitimacy. Furthermore, Article 26, Section 52(f) was grounded in an exhaustive and systematic examination of illegitimacy carried out by a broad and diverse cross-section of society.[240] Finally, nothing in statutory or decisional au-

238. MOYNIHAN, *supra* note 225, at 9.

239. As the majority stated in *King*, "[F]ederal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy-person' concept of earlier times. State plans are now required to provide for a rehabilitative program of improving and correcting unsuitable homes." King v. Smith, 392 U.S. 309, 324-25 (1968). Sophisticated, enlightened rehabilitative programs that proceed hand-in-hand with a 300% increase in rates of illegitimate childbearing and the virtual extinction of family structure among their target population make a strong case for crude, unenlightened social policies.

240. *See supra* note 9.

thority presented valid obstacles to the vigorous enforcement of Section 52(f).

The ultimate issue which emerges from an examination of *Cager* is not whether the method of addressing illegitimacy provided for in Section 52(f) was the best means of addressing that problem, nor whether that approach had any merit at all. The decision of the Court of Appeals of Maryland in *Cager* represented a direct assault on the proper separation of powers. As such, the opinion constituted an affront to representative government itself. Those inclined to forgive such overreaching on grounds that the ends realized justify the means used can find no basis for such a defense of *Cager* in the social developments in Maryland which followed that decision.

Kevin Kendrick