Controlling the Reproductive Rights of Impoverished Women: Is This the Way to "Reform" Welfare?

Melynda G. Broomfield
CONTROLLING THE REPRODUCTIVE RIGHTS OF IMPOVERISHED WOMEN: IS THIS THE WAY TO “REFORM” WELFARE?

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It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

I. Introduction

These are the words of Oliver Wendell Holmes in a 1927 Supreme Court decision which upheld Virginia’s right to sterilize a woman who was “feeble-minded.”2 As horrifying as his words seem, the theory that certain people in our society are unfit to reproduce has resurfaced and is an underlying theme of many recent welfare “reforms.”3 The American public is calling for a complete overhaul of the current “welfare” system.4 Unfortunately, the brunt of the attack has fallen on the backs of impoverished women who are seen as responsible for the problems plaguing this system.5 Several of the current welfare “reform” proposals

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* Topics Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.
3 See Roberts, supra note 2, at 20.
4 As a presidential candidate, Bill Clinton promised to “end welfare as we know it.” Joel F. Handler, “Ending Welfare as We Know It”—Wrong for Welfare, Wrong for Poverty, 2 GEO. J. ON FIGHTING POVERTY 3, 3 (1994). The word “welfare” itself has begun to take on negative connotations and is portrayed by reformers as hand-outs which are given to unworthy and lazy individuals. See infra Part II. I would contrast the use of this word with “public assistance,” which seems to serve as a better reminder of what these programs are all about—assisting members of our society in their time of need.
5 Barbara Kantrowitz & Pat Wingert, The Norplant Debate, Newsweek, Feb. 15, 1993, at 36. Alexander Cockburn writes, “As always, blame the victims—for the profoundest myth of all is that
effectively punish poor women and control their rights to procreate, either by limiting the benefits for additional children, or by giving cash bonuses to women who submit to the implantation of birth control devices. Such measures have little to do with eliminating poverty, and in fact, may push those in need of assistance even further below the poverty line.

The American people have shown their desire for change by electing Bill Clinton to the Presidency in 1992, and then even more so in 1994, by placing Republicans in control of a Congress which had been controlled by Democrats for the last forty years. This passion for change is further evidenced by the support for the Republican "Contract With America." The “Contract With America” is a group of bills that the Republicans promised to bring for a vote before Congress in the first one hundred days of the 1995 session. One of these bills, the Personal Responsibility Act, seeks to reform welfare and to “[d]iscourage illegitimacy and teen pregnancy by prohibiting welfare to minor mothers and denying increased AFDC [Aid to Families with Dependent Children] for additional children while on welfare, cut spending for welfare programs, and enact a tough two-years-and-out provision with work requirements to promote individual responsibility.” The current public assistance system does certainly require change, considering the fact that there are still too many people who currently live below the poverty line. But what the system needs is meaningful

which makes poor, young, unmarried mothers responsible for drug abuse, slums, poverty, stagnation, the falling rate of profit, [and] America’s declining role in the world economy.” Cockburn, supra note 2, at 16.


11 CDF REP., supra note 9, at 1.


change which will address the causes of poverty and will allow more
women to live better lives by creating easier access to improved educa-
tion, child care, and health care.14

However, most of the change that the American people are seek­
ing is based on faulty information and serious misconceptions as to
who is actually on public assistance, and what life on public assistance
is really like.15 It is in response to the stereotype of the “typical” welfare
mother who gets pregnant to earn more benefits that legislatures have
passed bills which attempt to prevent these women from having more
children.16

Some of these current measures, which include the “family cap”
and Norplant-bonuses, are not only unconscionable, but are also uncon­
stitutional.17 Such legislation violates the fundamental rights of
women who are on public assistance, without a compelling interest by
the state which would justify such extreme measures.18

Part II of this Note will discuss the current incorrect perception
of the welfare mother, by explaining the myth and the reality of women
on public assistance. Part III will examine two currently popular legis­
lative proposals: the “family cap” and Norplant-bonuses. Part IV will
explore the Supreme Court’s legal standards for cases involving public
assistance, with respect to the rights guaranteed under the United
States Constitution. Part V will address the unconstitutionality of the
current “welfare reform” proposals using the Court’s analysis, and Part
VI concludes that these two reforms in particular are unconstitutional.

II. THE BASIS OF THE WELFARE MYTH

At the turn of the century, the eugenics movement in the United
States gained popularity.19 Eugenics is a scientific theory which at­

6, 1995, at 4. Overall, there were 38.1 million Americans who were living in poverty in 1994, and
although this is a slight decrease from the previous year, the group who continues to suffer the
highest rates of poverty are children. Id.

14 Jennifer S. Madden, Family Caps Threaten Women and Their Children, 10 BERKELEY
WOMEN’S L.J. 171, 173 (1995); Testimony Before the Subcomm. on Human Resources, House Ways
Young, Vice President of Women’s Freedom Network on welfare reform).

15 Susan Bennett and Kathleen A. Sullivan, Disentitling the Poor: Waivers and Welfare “Reform,”
26 U. MICH. J.L. REF. 741, 758 (1993); Marc Stuart Gerber, Equal Protection, Public Choice Theory,
and Learnfare: Wealth Classifications Revisited, 81 GEO. L.J. 2141, 2141 (1993); Greenstein Testi­
mony, supra note 10.

16 See, e.g., 1995 MASS. S.B. 1778 § 8 (f); 1993 KAN. H.B. 2776 § 1(a).

17 See infra Part VI.

18 See infra Part IV.

19 Roberts, supra note 2, at 20. “During the first half of the 20th century, the eugenics
tempts to improve the human species by influencing and encouraging reproduction by persons presumed to have desirable genetic traits. Supporters of this theory argue for the compulsory sterilization of people likely to produce allegedly defective traits. Eugenicists believe that "the condition of the oppressed was caused by their own incurable, inherited deficiencies, and was unrelated to political, economic, or social realities." In the early 1900's, an estimated 70,000 people were involuntarily sterilized under state statutes which were directed at members of society deemed to be undesirable: mainly the mentally retarded, the mentally ill, epileptics, and criminals.

Current welfare reformists are not strict eugenicists in that they are not arguing social status is inherited. However, one theory behind welfare reform is based on the same premise—that certain people in our society do not deserve to procreate. The public perception of people on welfare is often incorrect, and is based on stereotypes which are grounded on racism, sexism, and classism.

This racist, sexist, and classist viewpoint translates into a stereotype of typical welfare recipients: "unmarried, young black women with several children, who are long-term dependents of the welfare system and whose dependency is in turn passed on from generation to generation." Legislators, as well as the media, point to these women as being responsible for our social ills. Such blame only serves to further

21 Roberts, supra note 2, at 20.
22 Id. "This social experimentation often imposes the majority's view of 'desirable' behavior onto the minority—in this case the poverty-stricken." Gerber, supra note 15, at 2142–43.
23 Id.
24 Id.
27 Handler, supra note 4, at 7; see Welfare Queen, supra note 26, at 209; see also Lucy A. Williams, Race, Rat Bites & Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate, 22 Fordham Urb. L.J. 1159, 1165 (1995) [hereinafter Race, Rat Bites].
28 See Kantrowitz & Wingert, supra note 5, at 36.
alienate those on public assistance, a group which already has very little power in our society.29

Many of the welfare reform proposals attack Aid to Families with Dependent Children (AFDC), which is the largest need-based cash welfare program providing grants to families.30 AFDC provides direct cash assistance to "needy children who have been deprived of parental support or care because their father or mother is absent from the home continuously, is incapacitated, is deceased or is unemployed, and certain others in the household of such child."31 Over two-thirds of current recipients of AFDC are children.32

The definition of what constitutes "need" is determined by each state, and must be uniformly applied to similarly situated families.33 To determine eligibility for AFDC benefits, the recipient must report all income, which is counted against the potential grant of benefits.34

A. The Demographics of Those On Public Assistance—Myth versus Reality

Because the perception of a typical AFDC recipient is one of a lazy teenaged mother sitting around having children and waiting for her next check, some reformers believe that preventing recipients from having more children will solve the problems of AFDC.35 Reflecting the viewpoint that the fertility of poor women should be controlled, one Illinois judge stated: "How many children of a parent should the

29 See id. The Reverend Janet Swift, pastor of the Trinity African Methodist Episcopal Church of Utah, characterizes some of the current welfare “reforms” as punishment for those members of society unfortunate enough to fall into the category of a “have-not” and she states, “[W]e would hope that, as a nation, we would not be so mean-spirited as to be punitive to the most vulnerable people in our society. This is inhumane and inhuman. It's hostile, hateful, unkind, unloving and un-Christian.” Nancy Hobbs, Family Cap Proposal Has Many Critics; No Aid for Welfare Babies? ACLU Vows to Sue Over Legislators’ Family Cap’ Bill, SALT LAKE TRIB., Dec. 13, 1994, at Cl.


31 Welfare Queen, supra note 26, at 2018. The framework for AFDC is established in the Social Security Act and through regulations promulgated by the Department of Health and Human Services.


33 Welfare Queen, supra note 26, at 2019 n.27.

34 Id. at 2019.

35 See Bennett & Sullivan, supra note 15, at 756; see also Testimony Before the Committee on Economic and Educational Opportunities, U.S. House of Representatives, 104th Cong., Jan. 18, 1995 [hereinafter Rector Testimony] (statement of Robert Rector, Policy Analyst, the Heritage Foundation).
taxpayers of this state have to support in foster homes or alternate care before the state has the right to say, "[y]ou can’t have any more children until you take care of the ones you already have?" Unfortunately, because these perceptions are not supported by fact, proposals to prevent further births will not achieve their desired effect; "[t]he underlying assumptions . . . that AFDC mothers have many children, that they have free access to medical options for family planning, and that they get pregnant in order to receive additional benefits—are unsound." Consequently, these reforms are unduly harsh and will not alleviate poverty, which should be the ultimate goal of overhauling the system.

There are many erroneous and inaccurate perceptions of public assistance recipients. The belief that all AFDC recipients are African American is a misconception. There are actually more white people receiving assistance than African Americans; in fact, African Americans constitute only 37% of those receiving public assistance. White families account for approximately 39%, and the remainder consists of Hispanics, Asian Americans, and Native Americans.

The perceived size of families on public assistance is also inaccurate: "[A]n underlying assumption of child exclusion principles is that families on welfare are larger than families in general." In fact, the average AFDC family is approximately the same size as a non-AFDC family. As of 1992, 72.5% of all AFDC families had one or two children, and 89.9% of families on AFDC had no more than three children. In fact, over the past few decades, the size of AFDC families has been decreasing; in 1969, 32.5% of AFDC families had four or more

37 Ideology of Division, supra note 26, at 737.
38 Handler, supra note 4, at 8. "While the welfare system has several problems, the problem that we should focus on is poverty, which is much broader and more serious than welfare alone is." Id.
39 Id. at 7.
40 Madden, supra note 14, at 171.
41 Race, Rat Bites, supra note 27, at 1190.
42 Id.
43 Nicholson, supra note 32.
44 Ideology of Division, supra note 26, at 737; Welfare Queen, supra note 26, at 2020. But see Christina Del Valle & Mike McNamee, Welfare Surprises, BUSINESS WEEK, Mar. 13, 1995, at 44. (stating that AFDC recipients on average have 2.6 children, while non-welfare mothers average 2.1 children).
45 Nicholson, supra note 32. Nineteen-ninety-two is the most recent year for which complete statistics are available. Id.
children, whereas that figure dropped to 9.9% by 1990.\textsuperscript{46} If AFDC benefits induce women to have more children, arguably, the studies should reveal a more direct correlation between average family size and benefit value.\textsuperscript{47} However, the data does not support that such a correlation exists since these figures are no larger than those found among two-parent families in the general population.\textsuperscript{48}

Furthermore, the perception that most recipients are on welfare for long periods of time is misleading; two-thirds of AFDC recipients receive benefits for less than two years, and of those recipients who received benefits for more than two years, many are not continuous users.\textsuperscript{49} Approximately 70% of women who join the welfare rolls are off public assistance within two years.\textsuperscript{50} However, the long term users do accumulate, and at any given point in time, they will represent a substantial portion of the welfare population.\textsuperscript{51} This is true even though the percentage of those continuously on welfare is less than 15%.\textsuperscript{52} Additionally, 64% of young women who grew up in families receiving welfare did not go on to receive assistance as they reached adulthood.\textsuperscript{53}

Furthermore, a very low percentage of those receiving public assistance are teenagers; only 7.6% of families receiving AFDC were headed by teens.\textsuperscript{54} And the large majority of those are either eighteen or nineteen; only 1.2% of mothers receiving AFDC are less than eighteen years old.\textsuperscript{55}

\textsuperscript{46} Ideology of Division, supra note 26, at 738.
\textsuperscript{47} Welfare Queen, supra note 26, at 2020.
\textsuperscript{48} Ideology of Division, supra note 26, at 737–38.
\textsuperscript{49} Welfare Queen, supra note 26, at 2022.
\textsuperscript{50} Jesse Malkin, Investor’s Business Daily, Dec. 6, 1993, at 1 (National Issue Section).
\textsuperscript{51} Handler, supra note 4, at 14. The House Ways and Means Committee explains this point with the following example: “Consider a 13-bed hospital in which 12 beds are occupied for an entire year by 12 chronically ill patients, while the other bed is used by 52 patients, each of whom stays exactly 1 week. On any given day, a hospital census would find that about 85% of the patients (12/13) were in the midst of long spells of hospitalization. Nevertheless, viewed over the course of a year, short-term use clearly dominates: out of 64 patients using hospital services, about 80% (52/64) spent only 1 week in the hospital.” Id.
\textsuperscript{52} Welfare Queen, supra note 26, at 2022. “Continuously on welfare” refers to those receiving public assistance for periods of two years or longer. Id.
\textsuperscript{53} Race, Rat Bites, supra note 27, at 1190 n.159 (citing Greg Duncan & Martha Hill, Welfare Dependence Within and Across Generations, Science, Jan. 1988 at 467, 469).
\textsuperscript{54} Id. at 1190 n.160 (citing 1994 GreenBook at 401).
\textsuperscript{55} Id. (citing U.S. Dept. of Health and Human Services, Aid to Families With Dependent Children: Characteristics and Financial Circumstances of AFDC Recipients 42 (1992)). In the summer of 1993, only 32,000 of the 3.8 million mothers receiving AFDC were under 18 and unmarried, and the average age of recipients is 30. Del Valle & McNamee, supra note 44, at 44.
Despite these figures, many people "believe that welfare itself is the problem at the root of entrenched 'intergenerational' poverty . . . [W]elfare policy . . . causes families, especially those headed by women, to be and to remain poor." People believe this because of the images repeated again and again by the media of what is perceived to be a "typical" woman on public assistance. Consequently, more realistic views of women on AFDC who are living difficult lives, struggling through school, who are not drug-addicted or child-abusers, and who are simply trying to raise their families, are ignored in both news reports and legislative debates. As a result, these debates and resulting legislation are driven by the exception, and in practice will not have any positive effect on reforming the lives of most AFDC recipients.

Advocates of welfare "reform" believe that the welfare system itself is responsible for encouraging self-destructive behavior because it "insidiously, creates its own clientele; by undermining work ethic and family structure, the welfare state generates a growing population in 'need of aid.' Welfare bribes individuals into courses of behavior which in the long run are self-defeating to the individual, harmful to children, and increasingly, a threat to society." However, even the assumption that welfare itself is the cause of the problem is not based in fact. Although the real value of welfare benefits has actually fallen more than 45% since 1970, the percentage of illegitimate births has risen dramatically during that time. Again, this correlation simply does not support the theory that welfare itself is responsible for the behavior. But for the many people who hold this belief, the only way to break this cycle of poverty is to prevent future births, even at the cost of punishments and penalties on impoverished women, whose only crime is their poverty.

B. The Fiscal Side of Public Assistance—Myth versus Reality

One misconception is that AFDC constitutes a large portion of government spending. In reality, AFDC spending is much less expensive than other federal benefit programs. In fact, in 1993, the total

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56 Welfare Queen, supra note 26, at 2023.
57 Race, Rai Bites, supra note 27, at 1163.
58 Id. at 1191.
59 Id.
60 Rector Testimony, supra note 35.
62 Handler, supra note 4, at 12.
63 Id.
AFDC assistance payment was $22.3 billion, with $12.2 paid by the federal government. In contrast, the Food Stamps programs cost $23 billion in federal funds, Medicaid cost $132 billion, Medicare approximately $143 billion, and Social Security Retirement and Disability cost $419 billion. Because of concerns for the increasing federal deficit, taxpayers are urging legislators to balance budgets and trim government spending. Although the average state spends only 3.4% of its budget on welfare, and at the federal level, AFDC (including cash benefits, emergency assistance, child support enforcement, Title IV-A child care, and "at-risk" child care) constitutes only 2% of entitlement spending and 1% of total federal spending, the public perception is that these programs are responsible for the huge debt. This perception, coupled with the public distaste for those on welfare, has resulted in a situation where "some states have found it politically easier to deal with their fiscal pressures by cutting welfare benefits rather than services used by the middle-class."

The small increase in benefits from each additional child does not appear to provide a strong incentive for AFDC recipients to have children. A Georgia welfare director remarked, "[A]nyone who thinks that a woman goes through nine months of pregnancy, the pain of childbirth, and 18 years of rearing a child for $45 more a month . . . has got to be a man."

The lack of a correlation between having more children and obtaining more benefits is evident from a comparison of benefit levels from state to state. Maine and Vermont are the two states with the lowest percentage of families with four or more children, and both have AFDC grant levels which rise above the national median. On the other hand, Mississippi has the lowest AFDC grant level of any state in

64 Id. at 13.
65 Id. Of families receiving public assistance (federal, state, and local) in 1993 only 24% received means-tested aid (such as AFDC) in contrast to the 38% who received Social Security, Medicare, unemployment, veterans', and other non-means tested government benefits. James A. Krauskopf, The Administration of Public Assistance, 22 FORDHAM URB. L.J. 883, 892 (1995).
66 See Gerber, supra note 15, at 2141.
67 Id. at 2173 n.6.
68 Greenstein Testimony, supra note 10. "The perception that welfare costs are spiraling out of control lies close to the heart of reform proposals." Bennett & Sullivan, supra note 15, at 753.
69 Gerber, supra note 15, at 2141.
70 See Ideology of Division, supra note 26, at 737–39.
71 Welfare Queen, supra note 26, at 2026 n.81 (citing Ann Plant, Director of Clayton County Dep't of Family and Childrens Services).
72 See Ideology of Division, supra note 23, at 740 n.132.
73 Id.
the nation, and at the same time has the highest percentage of families with four or more children.\textsuperscript{74} Ironically, Georgia, the home state of the Speaker of the House of Representatives, Newt Gingrich, has one of the highest rates of unwed teen mothers while giving some of the lowest benefits in the country.\textsuperscript{75} Writers Christina Del Valle and Mike McNamee point out, "Money apparently isn't the lure Newt thinks it is."\textsuperscript{76}

The small increase in benefits for additional children does not even cover the basic essential costs of raising a child, including such expenses as diapers, clothing, and formula.\textsuperscript{77} Currently, no state provides enough assistance that would even bring a mother of two to the poverty line, and experts believe that the children in these families are getting less than half of the funds necessary for them to be safe and healthy.\textsuperscript{78} Robert Greenstein, the Executive Director of the Center on Budget and Policy Priorities, states, "While some believe the AFDC system provides overly generous benefits to recipients, the typical AFDC family of three receives between $8,000 and $9,000 annually in cash and nutrition aid, or less than three-quarters of the poverty line."\textsuperscript{79}

By denying a mother the right to have future children, or by reducing the benefits for any additional children that she does have, the state has imposed a major burden on both the mother and her children.\textsuperscript{80} The attempt seems to be to force the mother to feel the burden of her poverty and to behave more responsibly.\textsuperscript{81} Reformers argue that for the rest of the working population, a raise is not given by a boss with each additional child, so why should it be any different for a family receiving public assistance?\textsuperscript{82} This argument, however, can be countered by the fact that when another child is born into a working family, the benefit received through federal tax deductions is actually

\textsuperscript{74} Id.
\textsuperscript{75} Del Valle \& McNamee, \textit{supra} note 44, at 44.
\textsuperscript{76} Id.
\textsuperscript{77} \textit{Ideology of Division, supra} note 26, at 740. Likewise, Bruce Nicholson of the American Bar Association notes that "the increment of money added currently for a child born to a family on federal assistance is too small . . . compared to additional expenses incurred to reasonably maintain that this amount motivates conception." Nicholson, \textit{supra} note 32, at 5.
\textsuperscript{78} Marion Buckley, \textit{Eliminating the Per-Child Allotment in the AFDC Program}, \textit{13 Law \& Inequality} 169, 180 (1994).
\textsuperscript{79} Greenstein Testimony, \textit{supra} note 10.
\textsuperscript{81} Welfare Queen, \textit{supra} note 26, at 2026.
\textsuperscript{82} Id.
higher than the small increase received by AFDC families in most states for each additional child. 83

The proliferation of this stereotype of a typical welfare mother shifts the focus of meaningful welfare reform away from the eradication of poverty, and instead centers on punishing poor people for what is perceived as irresponsible behavior. 84

III. TWO CURRENT WELFARE "REFORMS"

Two welfare "reforms" which seem to be gaining popularity are the "family cap" 85 and Norplant-bonuses. 86 Both of these "reforms" involve a woman's decision to bear another child, which is one of the most intimate decisions a woman can make. 87 These "reforms" attempt to impose restrictions on the number of children that a woman on public assistance can bear. 88

A. The Family Cap

The "family cap" refers to a program whereby a mother already receiving AFDC would be prevented from getting an increase in the standard monthly cash grant if she gives birth to another baby. 89 This type of program is also often referred to as "child exclusion," "new baby penalty," or a "family development plan." 90 Whatever this "reform" is called, its effect is the same: to prevent additional children from resulting in additional benefits to families on welfare. 91

New Jersey was the first state in the nation to enact a family cap; and Arkansas, Indiana, and Wisconsin have also recently received fed-

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83 Ideology of Division, supra note 26, at 739 n.128; Welfare Queen, supra note 26, at 2026–27.
84 For example, a married couple with one child and income up to $48,700 in 1992 receives a federal tax savings of $345 per year for an additional child; a married couple with one child and income between $48,700 and $99,450 receives a federal tax savings of $645 a year for an additional child. Ideology of Division, supra note 26, at 739 n.128.
88 See infra notes 86-95, 128–35 and accompanying text.
89 Bennett & Sullivan, supra note 15, at 754; Claiborne, supra note 6, at A7; Tom Weidlich, Class Actions Target Cuts in Welfare Aid to Mothers, NAT’L LJ., Jan. 16, 1995, at A12.
90 Hobbs, Family Cap Proposal Has Many Critics, supra note 29, at C1; Cockburn, supra note 2, at 16.
91 Cockburn, supra note 2, at 16 (referring specifically to New Jersey’s family cap).
eral permission to institute a cap.\textsuperscript{92} Overall, ten states have approved family caps in 1995, and some, including Massachusetts, are still awaiting federal approval.\textsuperscript{93} Five states have caps that are enforced.\textsuperscript{94} The Massachusetts legislation provides in relevant part: "[T]he department shall not provide any increased assistance or incremental wage payment . . . because of the addition to a family or any child born after the 'child of record.'"\textsuperscript{95} In December of 1995, House Republicans passed compromise welfare legislation by a vote of 245 to 178.\textsuperscript{96} The legislation includes regulations which prohibit states from using federal funds to increase cash benefits to families who have children while on welfare; however, states may pass laws to exempt themselves from this "family cap."\textsuperscript{97} President Clinton is expected to veto this legislation, and the 67-vote margin is not enough to override the President's veto.\textsuperscript{98}

1. Proponents of a "Family Cap"

Supporters of a benefits cap feel that the current system of granting additional benefits with the birth of additional children bribes impoverished women to behave irresponsibly.\textsuperscript{99} Supporters believe that reforms are needed to discourage this irresponsible behavior and can find "no reason to provide expanded welfare benefits to single mothers

\textsuperscript{92} Horowitz, \textit{supra} note 85, at A1.


\textsuperscript{94} \textit{Congress Bickers, supra} note 93, at 10A.

\textsuperscript{95} 1995 MASS. S.B. 1778 § 8(f). Section 8(a) defines child of record as "the youngest child of a parent receiving assistance on July 1, 1995 or at the time a family first applies for assistance after July 1, 1995; provided however, that a child born to a woman who was pregnant on July 1, 1995 or at the time of first applying for assistance shall be the child of record; provided further that the Commissioner shall establish exemptions to allow a latter born child to be the child of record if such child was born as a result of rape, incest, or other extraordinary circumstances as determined by the Commissioner. The designation of child of record shall not change, even if the child no longer lives in the household, or subsequent children are born to the parent, or benefits are terminated and the parent subsequently reapplies for assistance." 1995 MASS. S.B. 1778 § 8(a).


\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.} President Clinton has promised to veto the compromise as a "cover to advance a budget plan and not real welfare reform." Vanessa Gallman, \textit{Veto of Welfare Bill Sure, Clinton Says}, \textit{THE NEWS TRIB.}, Dec. 22, 1995 at A7.

\textsuperscript{99} Rector Testimony, \textit{supra} note 35.
who have additional illegitimate children after they are already dependent on welfare.\footnote{100}

Reformers believe that if AFDC benefits are limited, then there will be fewer illegitimate births among women on welfare.\footnote{101} Studies to determine whether this correlation does exist have been conducted, and proponents of the cap allege that the results indicate that this premise is true.\footnote{102} Research conducted by Dr. June O’Neill found that a 50% increase in the monthly value of AFDC and other benefits led to a 43% increase in the number of out-of-wedlock births.\footnote{103}

In a study that was conducted in New Jersey after the passage of their “family cap,” mothers in a control group received benefits without any cap for each additional child, and mothers in an experimental group were subject to the cap and did not receive additional AFDC payments when they gave birth to additional children.\footnote{104} This study found that the family cap policy had a substantial effect in reducing out-of-wedlock births among welfare recipients in that it resulted in a 29% decrease in future illegitimate births among women enrolled in AFDC.\footnote{105}

Additionally, New Jersey’s then Governor, Jim Florio, boasted that the family cap had resulted in a 16% drop in births to women on AFDC in the first 100 days that the program was instituted.\footnote{106} The state has since revised this claim to a drop of 9%.\footnote{107}

2. Critics of the “Family Cap”

Opponents of the family cap have interpreted these same studies very differently, and point to other findings that indicate that the cap actually has no effect on the birth rate.\footnote{108} Researchers have found no statistical difference in birth rates among women subject to the cap and those in a control group; there was a 6.9% birth rate for women whose benefits were capped and a 6.7% rate for those in the control

\footnotesize{\begin{itemize}
\item \footnote{100} Id.
\item \footnote{102} Id.
\item \footnote{103} Rector Testimony, \textit{supra} note 35.
\item \footnote{104} Rector, \textit{supra} note 101, at 50.
\item \footnote{105} Id.
\item \footnote{106} Cockburn, \textit{supra} note 2, at 16.
\item \footnote{107} Id.
\item \footnote{108} Id.; Negri & Flint, \textit{supra} note 6, at 1.
\end{itemize}}
In response to the claims that the cap in New Jersey had in fact resulted in fewer births, critics have responded that “simply looking at the difference in the number of births over time and attributing the apparent decline to any given factor is without merit and is universally rejected by serious researchers.”109 These numbers have also been criticized on the grounds that the overall birth rate in New Jersey has dropped, and that since the measure became law, many mothers do not report births anymore.110 Additionally, even if any decline in births is a consequence of the family cap, this decline only represents one-fourth of 1% of New Jersey’s caseload.111

Furthermore, critics contend that in order for New Jersey to achieve this claim of a monthly reduction of 94 births, 458 new-born babies had to be cut off from the additional cash benefits.112 Michael Laracy, author of a study called The Jury is Still Out, states that “on this perverted logic, five children starve so that one might not be born. And for those kids whose mothers are denied the cash increment, there lies, down the line, increased chances of child abuse, neglect and related suffering.”113

In effect, increasing the burden of poverty on families will cost the country even more, both fiscally and socially.114 The social costs are severe; for example, “brain dysfunction in poor children . . . interferes with language and cognitive development, resulting in learning and social problems for these children at school.”115 Another strong predictor of adolescent problems (including violent behavior), is early school failure.116 Furthermore, “education is a crucial determinate of future employment, and low income, regardless of race, is the strongest predictor of school dropout.”117

A study by the Urban Institute in Washington, D.C., has found that the GOP plan would increase the number

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110 Cockburn, supra note 2, at 16.
112 Friedman, supra note 84, at 657 n.109.
113 Cockburn, supra note 2, at 16.
115 See Buckley, supra note 78, at 200–01.
116 Handler, supra note 4, at 9.
117 Id.
118 Id.
of Americans living in poverty by 1.2 million. Can we as a society really “afford” these cuts in public assistance? By ignoring the long-term effects of these cuts, any short-term savings seem questionable at best.

Additionally, critics of the “family cap” cite studies which refute the supporters’ position. For example, a 1992 study in Washington state, found that there was no difference in birthrates between women on welfare and women who were not receiving any public assistance. In fact, this study found that the more children a woman has, the poorer she gets. This finding shows that women are not getting pregnant and having children for more money.

Similarly, a national study concluded that welfare benefits only slightly influenced a woman’s decision to have her first child, and had no impact on her decision whether to have more children. Women on AFDC have children not for the money, but for some of the same reasons that all women do—for the babies they want to love, take care of, and be loved by. This study also confirms that punitive measures aimed at behavior modification seem to be ineffective. Jodie Levin-Epstein of the Center for Law and Social Policy, agrees with this finding, stating, “It’s illogical to think a woman’s sexual behavior is motivated by the promise of welfare, which is typically seven dollars a day—including food stamps—per person in a family of three.”

Lastly, some family caps simply ignore social reality. Most obviously, they ignore the large role that men play in procreation.
also, the caps may encourage or even induce some women to have abortions, which is a problematic position for the state to be advocating. Additionally, family caps ignore the reality that many pregnancies are unplanned, in that even some of the most effective forms of birth control fail approximately 5–20% of the time. The cap also ignores the situation of multiple births, like twins or triplets, which are unforeseeable and out of a woman’s control.

B. Norplant-bonuses

Another controversial welfare “reform” which attempts to affect the reproduction of women receiving public assistance is the Norplant-bonus. Norplant is a new method of birth control consisting of six matchstick-size capsules which are surgically implanted in the arm. These capsules slowly release a low dosage of levonorgestrel, one of the synthetic forms of the natural hormone progesterone, which has the effect of preventing pregnancy. Norplant works on a time-release basis and is effective for up to five years.

Since Norplant’s approval by the Food and Drug Administration in 1990, several states have proposed and passed legislation which would seek to entice or require women receiving welfare benefits to be implanted with Norplant through monetary incentives. All fifty states currently cover all or part of Norplant-related costs as a part of their Medicaid programs, and all offer reimbursement for the cost of implanting Norplant into poor women. At least thirteen states have considered measures encouraging or requiring poor women to receive

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130 Sullivan, supra note 129, at 143. Over one-half of all pregnancies in the United States each year are unintended, and a failure of contraception is the reason for 43% of those unintended pregnancies. Friedman, supra note 84, at 659 n.126.

131 Sullivan, supra note 129, at 143.


133 Kantrowitz & Wingert, supra note 5, at 36; Smith & Easton, supra note 36, at 24.

134 Kantrowitz & Wingert, supra note 5, at 36; Smith & Easton, supra note 36, at 24.

135 Kantrowitz & Wingert, supra note 5, at 36; Smith & Easton, supra note 36, at 24.

136 Kantrowitz & Wingert, supra note 5, at 36; David S. Coale, Norplant Bonuses and the Unconstitutional Conditions Doctrine, 71 Tex. L. Rev. 189, 190 (1992).

An example of such a measure was the one passed by the Kansas legislature which states in relevant part:

The secretary of social and rehabilitation services shall establish a program to make available the Norplant contraceptive implant . . . to each public assistance recipient who is a woman who is able to become pregnant and who is receiving Aid to Families with Dependent Children. Each such public assistance recipient . . . shall be eligible to receive under this program a special financial assistance grant in the amount of $250 and a special annual financial assistance grant in the amount of $50 during the period that the contraceptive remains implanted and continues to be effective in preventing pregnancy.

1. Proponents of Norplant-bonuses

Supporters of Norplant-bonuses feel that in order to encourage welfare recipients to break the cycle of welfare dependency, they must be persuaded to change their behavior. David Duke, a former Ku Klux Klan Grand Wizard, recently proposed a Norplant bonus in Louisiana. Duke believes that our social problems can be corrected by preventing future "undesirable" births, a belief that reflects his eugenicist beliefs.

Certainly, not all supporters of Norplant-bonuses are eugenicists like David Duke, rather their support is based on the stereotype that people choose to be on welfare and need an incentive like money to act responsibly. For example, Walter Graham, a Mississippi State Senator, commented that, "there's a point where if people want to continue to receive assistance, they will have to have an implant. . . . [E]veryone supports the idea of helping the person who cannot. They just don't support the concept of helping the person who will not."

138 Mink, supra note 25, at 894.
139 1993 KAN. H.B. 2776 § 1 (a). The Kansas statute further provides for "examinations by health care providers to provide for the health and safety of public assistance recipients who are to have the contraceptive implanted under the program." Id.
140 Kantrowitz & Wingert, supra note 5, at 36.
141 Burrell, supra note 137, at 432.
142 Kantrowitz & Wingert, supra note 5, at 432.
143 Id. at 36.
144 Id.
2. Critics of Norplant-bonuses

Critics of Norplant-bonus statutes feel that this type of legislation impermissibly infringes on a woman’s right to decide whether or not to conceive a child. Generally, these statutes do not only cover the cost of the implantation of Norplant, but offer the woman a cash “bonus” of up to $500 for agreeing to this surgery. Such an amount of money to a woman on public assistance may be great enough to coerce her into using a birth control method which she cannot control. Dr. Sheldon Segal, the developer of the Norplant contraceptive device, is very concerned about the use of the device as a legislative control, and points out that “the line between incentive and coercion gets very fuzzy” because the temptation to give up her fertility for cash may prove to be too much for a woman desperate to pay her bills. In fact, if the majority of the women receiving public assistance choose the $500, then those who do not are in effect penalized $500.

Possible side effects of Norplant pose additional concerns that must be considered before encouraging women to be implanted with the device. The most frequently reported side effects are: altered menstrual bleeding patterns (either prolonged bleeding in the first several months after the implant, spotting between periods, or no periods at all), headaches, acne, weight gain, or depression. Furthermore, the woman must depend on someone else to insert the device, and then also to remove it. Consequently, the cash incentive may involve a dangerous form of coercion: “A $500 check could be big

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146 See Hand, supra note 132, at 716.
147 Smith & Easton, supra note 36, at 24.
148 Burrell, supra note 137, at 432.
149 Hand, supra note 132, at 720.
150 Smith & Easton, supra note 36, at 24.
151 Id. Currently, several thousand women have filed lawsuits against Wyeth-Ayerst, the makers of Norplant. The majority of the lawsuits concentrate on the removal difficulties, the side effects not properly warned about, and an accusation that Wyeth-Ayerst withheld information that the capsules are made of silastic, a type of silicone, which has caused immune system problems in some women. Jamie Talan, Medical Report: The Norplant Controversy, GLAMOUR, Apr., 1995, at 66–69. See Welfare Reform supra note 127, at 160.
152 Smith & Easton, supra note 36, at 24. The surgical removal of the implant by a doctor can also cause problems—in some women: the surgery to remove the device has taken hours, others have been forced to undergo multiple procedures to remove all of the capsules, others have been left with noticeable scars, and in some cases the capsules were hard for a doctor to even locate without the use of a sonogram or X-ray. Talan, supra note 151, at 68.
enough to tip a poor woman’s decision toward Norplant even if it’s not safe for her.”

Many of the arguments against Norplant-bonuses are the same as those against a family cap—the bonuses allow legislatures to make moral judgments about poor women’s sexual behavior, and assume that a monetary incentive is all that is necessary to prevent future welfare dependents. Ironically, Dr. Segal, the developer of the device, said, “The team that worked on Norplant had been concerned that a government would misuse the device to enforce birth control. But they were worrying about China, not California.”

In addition to the moral and political arguments regarding Norplant-bonuses and family cap welfare “reform” proposals, there are constitutional arguments on both sides of the debate. Through an examination of the Supreme Court’s unconstitutional conditions doctrine and its protection of fundamental rights, and the Equal Protection Clause, it can be argued that these proposals are in violation of the U.S. Constitution.

IV. THE COURT’S LEGAL STANDARDS FOR PUBLIC ASSISTANCE CASES

A. Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine put simply, states that the government cannot bribe people with benefits and privileges to forego rights with which the government could not interfere directly. This doctrine prevents the government from regulating the conduct of its citizens through the allocation of benefits. The crux of this analysis is that if the state cannot directly interfere with any recognized fundamental right, then it cannot do so indirectly, and doing so is a violation of the substantive Due Process Clause of the Fourteenth Amendment.

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153 Don’t Use Norplant Against Welfare Mothers, USA TODAY, Feb. 16, 1993, at 10A.
154 See generally Cockburn, supra note 2, at 16.
155 Burrell, supra note 137, at 402.
156 See infra Part V.
157 See infra Part V.
158 Friedman, supra note 84, at 643; Hand, supra note 132, at 716.
The Due Process Clause includes a substantive component which "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."\textsuperscript{161} If the right involved is not fundamental, the regulation will only be held to the rational basis standard, which is fairly deferential and merely protects against arbitrary or capricious governmental acts.\textsuperscript{162}

The Court has been somewhat inconsistent in its analysis of unconstitutional conditions cases, and the standards that the Court uses in evaluating restrictive conditions are not necessarily applied uniformly across cases involving different types of assistance.\textsuperscript{163} This inconsistency makes it difficult to make predictions with a high level of certainty.\textsuperscript{164} Nevertheless, it can be generally asserted that in the cases involving public assistance, the Court has held "conditions that act either as a penalty on or are likely to deter the exercise of a fundamental right are invalid under the unconstitutional conditions doctrine unless supported by a compelling state interest."\textsuperscript{165} The difficulty lies in establishing what constitutes a penalty on the exercise of a fundamental right.

The Court has applied various rationales to reach this determination.\textsuperscript{166} Merely losing funds associated with the exercise of a right does not always constitute a penalty on that right, in that "a refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."\textsuperscript{167} This was the reasoning in the abortion-funding cases, \textit{Harris v. McRae} and \textit{Maher v. Roe}, where the Court allowed the states to refuse to fund abortions, even though the right to an abortion was a constitutionally protected right.\textsuperscript{168} In other cases, the court has found that a governmentally-enforced choice concerning a fundamental right was an unconstitutional penalty,\textsuperscript{169} as is a governmental deterrence of a fundamental right.\textsuperscript{170}

\textsuperscript{161} Reno v. Flores, 113 S. Ct. 1439, 1447 (1993).
\textsuperscript{162} Hand, \textit{supra} note 132, at 750.
\textsuperscript{163} Friedman, \textit{supra} note 84, at 645 n.45; Bogle, \textit{supra} note 159, at 195; Hand, \textit{supra} note 132, at 724; Cass R. Susstein, \textit{Is There an Unconstitutional Conditions Doctrine?}, 26 \textit{SAN DIEGO L. REV.} 337 (1989).
\textsuperscript{164} See Friedman, \textit{supra} note 84, at 645; see also Bogle, \textit{supra} note 159, at 200.
\textsuperscript{165} Bogle, \textit{supra} note 159, at 208.
\textsuperscript{166} See Friedman, \textit{supra} note 84, at 651.
\textsuperscript{168} \textit{Harris}, 448 U.S. at 317; \textit{Maher}, 432 U.S. at 464.
Thus, the relevant analysis with respect to the family cap or Nop-plant-bonuses seems to fall on whether this type of legislation impermissibly penalizes a fundamental right. The right to parent and to procreate gained fundamental rights status not through express provisions in the Constitution, but through a long line of Supreme Court case law.\footnote{171}

1. The Fundamental Right to Parent

One of the first cases to recognize the fundamental right to parent was \textit{Meyer v. Nebraska}.\footnote{172} This case held that the liberties guaranteed by the Fourteenth Amendment include not only freedom from bodily restraint, but also the right of the individual to marry, establish a home, and bring up children.\footnote{173} In \textit{Walter M. Pierce v. Society of the Sisters}, the Court held that parents have a fundamental right to rear children in the manner they choose.\footnote{174} Likewise, in \textit{Cleveland Board of Education v. Lafleur}, the Court held that freedom of personal choice in marriage and family matters is protected from government intrusion by the Fourteenth Amendment.\footnote{175} The Court held that natural parents have a fundamental liberty interest in the care, custody, and management of their child in \textit{Santosky v. Kramer}.\footnote{176}

2. The Fundamental Right to Procreate

The fundamental right to procreate has been similarly protected by the Court. In \textit{Skinner v. Oklahoma}, the Court held that marriage and procreation are fundamental rights.\footnote{177} In that case, the Court struck down a statute that required the sterilization of some felons on the grounds that the act involved "one of the basic civil rights of man" and that "marriage and procreation are fundamental to the very existence and survival of the race."\footnote{178}

Similarly, in \textit{Griswold v. Connecticut}, the Court held that the right to marital privacy is fundamental and concluded simply that the right of married couples to be free from government intrusion into their

\footnote{171 See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 525 (1942).}
\footnote{172 262 U.S. 390, 399 (1923).}
\footnote{173 Id.}
\footnote{174 268 U.S. 510, 534–35 (1925).}
\footnote{175 414 U.S. 632, 639–40 (1974).}
\footnote{176 455 U.S. 748, 753 (1982).}
\footnote{177 316 U.S. 535 (1942).}
\footnote{178 Id. at 541.}
sexual relations and decisions to bear or beget children was a long-lasting tenet of American legal history.\textsuperscript{179}

In \textit{Eisenstadt v. Baird}, the Court invalidated a Massachusetts statute which permitted contraceptives to be distributed only to married couples because it involved "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\textsuperscript{180} And in \textit{Carey v. Population Services International}, the Court found a fundamental right of an individual to decide whether or not to procreate.\textsuperscript{181}

B. Equal Protection Claims

In addition to the Due Process Clause, the Equal Protection Clause prohibits the state from treating similar classes of people differently.\textsuperscript{182} The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal Protection of the laws."\textsuperscript{183} The Court has stated, "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification."\textsuperscript{184} As a result, statutory discrimination will not be considered rational unless it furthers some substantial goal of the state.\textsuperscript{185}

For example, even though a state is not required to provide welfare benefits to its citizens, once it does so, it is constitutionally required to distribute it equitably.\textsuperscript{186} However, the Court has been willing to give considerable latitude to states in allocating their AFDC resources, since "each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program."\textsuperscript{187}

In \textit{Dandridge v. Williams}, the Court upheld a Maryland statute which placed an upper limit on the amount of benefits that a family

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\textsuperscript{179} 381 U.S. 479, 496 (1965).
\textsuperscript{180} 405 U.S. 438, 453 (1972).
\textsuperscript{181} 431 U.S. 678, 685 (1977).
\textsuperscript{182} Sullivan, supra note 129, at 134.
\textsuperscript{183} U.S. CONST. amend. XIV, § 1.
\textsuperscript{184} Kramer v. Union School District, 395 U.S. 621, 626 (1969) (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).
\textsuperscript{186} Sullivan, supra note 129, at 139.
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could receive, and held that this ceiling on benefits was not a violation of equal protection rights. The Court held that the effect of the statute was to diminish the lot of the entire family, rather than to totally deprive the youngest children of any aid. The Court stated that the statute merely had the effect of creating an equitable balance between working families who do not get a raise with each additional child, and families on welfare.

Additionally, the Court has held that the state cannot penalize children as a means of influencing their parents' behavior because such action would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. Two cases illustrate the premise that the state cannot control the conduct of adults through their children: Trimble v. Gordon and Plyler v. Doe. In Trimble, the Court struck down an Illinois statute which allowed illegitimate children to inherit through intestate succession only from their mothers, while legitimate children could inherit by intestate succession from both their mother and their father. The Court held that because no child is responsible for his or her birth, it was unjust to penalize the child for the behavior of the parent. This was based on the reasoning that "the parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents conduct, nor their own status."

Similarly, in Plyler, the Court struck down a Texas statute which sought to withhold funds from local school districts for the education of children who were not "legally admitted" into the United States as a violation of the Equal Protection Clause. The Court felt that because these children could neither affect their parents, conduct nor their own undocumented status, it was unfair to hold them accountable for such status. The Court stated that "imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." Although the Court recognized the state's interest in

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189 Id. at 477-78. The statute in this case only affected families with more than six people.
190 Id. at 486.
193 430 U.S. at 763.
194 Id. at 770.
195 Id.
196 457 U.S. at 205.
197 Id. at 220.
198 Id.
the preservation of limited resources, it found that, when taking into consideration the costs to the innocent children who were the victims of the statute the discrimination could hardly be considered rational. 199

V. Analysis

A. Under the Unconstitutional Conditions Standard

Because the family cap and Norplant-bonuses both ultimately interfere with a woman’s decision regarding procreation and parenting through monetary inducements, they are affecting fundamental rights. 200 Thus, strict scrutiny should be applied to the regulations to determine if they impermissibly interfere with these rights. 201 These “reforms” give women on public assistance the government-enforced choice not to bear further children, or at the very least, government deterrence from doing so. 202 The state should be required to prove first that the law in question promotes a compelling governmental interest, and, second, that no less intrusive alternatives be available to serve the same purpose. 203

There may be compelling interests behind welfare reform including cutting costs, decreasing poverty, and encouraging responsible behavior. 204 These are all legitimate goals of the state, and should play a substantial role in any welfare reform program. 205 As a result, it will probably not be difficult for the state to meet this burden. 206

However, the state will also have to show that there were no less intrusive means to achieve these interests. 207 This burden should be extremely difficult for the government to meet, considering how overinclusive these regulations are with respect to the actual welfare population. 208 These “reforms” are made in response to the stereotypical woman on welfare, not the actual population of women receiving

199 Id. at 224, 229.
200 See Friedman, supra note 84, at 656–57.
201 See id. (family cap); see also Hand, supra note 132, at 722 (Norplant-bonuses).
203 Id.
204 Friedman, supra note 84, at 657; 883 F. Supp. 1004.
205 See Shapiro v. Thompson, 394 U.S. 618, 633. In Shapiro, the court notes that the state does have a valid interest in preserving the fiscal integrity of its programs, but notes that the saving of welfare costs cannot justify an otherwise invidious classification. Id.
206 See id.
207 See, e.g., Hand, supra note 132, at 749.
208 Sullivan, supra note 129, at 142.
There is not enough empirical evidence that these reforms will be effective, in terms of their economic or their social goals. A classification that is merely the result of inaccurate assumptions or an unproven empirical relationship is not substantially related to the state interest it is supposed to advance. Substantiality is required to insure that a classification is made with reasoned analysis, rather than as a result of inaccurate assumptions. If all of the stereotypes were in fact, accurate, this might be a closer question, but because they are not, these reforms should be found unconstitutional under this standard.

However, a court could find that these “choices” do not interfere with a woman’s right to reproduce, but merely represent the government’s unwillingness to subsidize it. This logic would include the viewpoint that the government is not affirmatively preventing a woman from having children, it is just refusing to pay for her to have more children. It follows then that a woman is still entitled to conceive and give birth to more children without any reduction in the benefits she currently receives; she just will not be given more money with the birth of another child. Similarly, under the Norplant-bonus statutes, the argument is that the government is not requiring any woman to receive the implant, it is just creating an incentive for women to use it.

This reasoning would be similar to the Court’s analysis in the abortion-funding cases. However, this should not be the appropriate analogy, because abortion has not always been granted the same fundamental status as other fundamental rights, like the rights to parent and procreate. In fact, after Planned Parenthood of Southeastern Pennsylvania v. Casey, although abortion is still recognized as a decision which merits constitutional protection, its regulations are no longer subject to a strict scrutiny analysis, but rather to a lower standard requiring that the regulations not establish an “undue burden.”

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209 Friedman, supra note 84, at 659 (“Family Cap imposes the previously described inaccurate and negative stereotypes of welfare mothers on the seventy-five percent of the recipients who do not deserve it.”).
210 Hand, supra note 132, at 723.
211 Gerber, supra note 15, at 2169.
212 See Friedman, supra note 84, at 657-58.
213 See, e.g., Harris v. McRae, 448 U.S. 297 (1980).
214 Friedman, supra note 84, at 651.
215 883 F. Supp. at 1015; Friedman, supra note 84, at 651.
216 See generally Coale, supra note 136, at 211.
217 Hand, supra note 132, at 743.
Court does not give abortion the highest level of protection and it has been observed that "the Court disfavors abortion rights and refuses to protect those rights in the same way that it protects other fundamental rights."\(^{219}\) Consequently, welfare "reform" statutes are much more similar to the fundamental rights cases than the abortion-subsidy cases, and should be treated that way.\(^{220}\)

**B. Under the Equal Protection Clause**

These statutes should also fail on equal protection grounds because they do not treat AFDC recipients equitably and they effectually punish the child (either the additional child born or the unborn child that the state is seeking to prevent) for the behavior of the parent.\(^{221}\) Family caps and Norplant-bonuses are distinguishable from the benefits ceiling upheld in *Dandridge*, in that the ceiling was not intended to limit the reproductive rights of recipients, but rather to apportion limited funds among families.\(^{222}\) Conversely, family caps and Norplant-bonuses were specifically intended to affect the reproductive rights of these women.\(^{223}\)

Also, these statutes treat families of identical size differently depending on whether the child was born before or after the mother began receiving AFDC.\(^{224}\) A family can enroll in AFDC with any number of children, and receive benefits for each and every child, yet when a woman who is currently enrolled in AFDC has even one more child, she is denied additional benefits, regardless of the circumstances.\(^{225}\) This contradicts the constitutional requirement that if a state distributes welfare benefits, it must do so in an equitable manner.\(^{226}\) It is simply not equitable that one family of three would enjoy a certain level of benefits that another family of the same size would not, with the only distinguishing factor being the time that they enrolled for assistance.\(^{227}\)

Additionally, the Court has held that "obviously, no child is responsible for his birth and penalizing . . . the child is an ineffectual—as

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\(^{219}\) Hand, *supra* note 132, at 743.

\(^{220}\) See Ballard, *supra* note 145, at 174; see also Sullivan, *supra* note 129, at 137–38.


\(^{222}\) Sullivan, *supra* note 129, at 140.

\(^{223}\) See id. (referring to family caps).

\(^{224}\) Sullivan, *supra* note 129, at 141.

\(^{225}\) Buckley, *supra* note 78, at 203.

\(^{226}\) Sullivan, *supra* note 129, at 139.

\(^{227}\) See Buckley, *supra* note 78, at 203; see also Sullivan, *supra* note 129, at 141.
As unjust—way of deterring the parent.” That is precisely what statutes like these attempt to do—deter the parent from having more children, even if the brunt of the penalty falls on the child.229

VI. Conclusion

In fact, the family cap statute in New Jersey has been challenged on constitutional grounds.230 In addition to several administrative claims, both the National Organization for Women and the American Civil Liberties Union argued that welfare mothers have a constitutional right to the benefits that are cut by the family cap legislation on both due process and equal protection grounds.231 These groups also argue that the New Jersey law “violates women’s constitutional rights to privately make decisions about conception and childbirth without governmental intrusion.”232 Lawrence Lustberg, an ACLU attorney in the case, states that “it is unconstitutional for a state to intrude on a woman’s privacy in any respect . . . . Constitutionally, it steps over the line.”233

However, the judge in that case decided that the family cap did not violate either the Due Process or Equal Protection Clause of the Constitution.234 Judge Politan held that the “family cap” did not deny the child benefits, but merely required them to share in the entire household’s benefits.235 He found that the cap only placed welfare recipients on par with the rest of America who do not receive a raise with an additional child.236 The cap merely constituted the state’s choice not to subsidize an individual’s right to procreate.237

However, Legal Services Corporation is appealing this decision, and has affiliates who are challenging the family caps recently enacted in both Arkansas and Indiana.238 Hopefully, these other courts and the Third Circuit will recognize the imposition these caps and reforms place on impoverished women. Certainly, the welfare state needs reforming. But reform should be about the elimination of poverty, not

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228 Plyler, 457 U.S. at 220 (citing Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).
229 See id.
231 Id. at 1012–15.
232 Claiborne, supra note 6, at A7.
235 Id. at 60.
236 883 F. Supp. at 1013.
237 Id. at 1014–15.
the punishment of poor people. Meaningful welfare reform programs should help recipients acquire the job skills necessary to get a decent paying job, the life skills necessary to raise a family, and offer support and encouragement from the community, not hate or mistrust.239 "The primary goal of welfare reform must be to alleviate generational destitution through education and the creation of employment opportunities," which must be contained in a plan which would address all of the reasons that people end up in poverty.240

In conclusion, because there is not a state interest strong enough to withstand a strict scrutiny analysis, these welfare "reforms" must fail. They intrude on rights which the Court has held to be fundamental and guaranteed by the Constitution, and without a compelling state interest, the measures are in violation of the United States Constitution.

239 See Butts, supra note 7, at 901.
240 Id. at 901–02.