Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls

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Although the country may be nearing a legislative resolution to the most recent effort to reform welfare, these bills raise many concerns including the constitutionality of many of the provisions embraced in these, and other welfare reform bills. In addition, welfare reform proposals continue, as they always have, seeking to distinguish between the deserving and the undeserving poor.

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## TABLE OF CONTENTS

I. Introduction ................................................................. 474

II. History, Stereotypes, and Social Control .......................... 476
   A. Understanding the History .............................................. 477
      1. Exclusion of Women and People of Color from Social Welfare Benefits .......... 477
      2. Devaluation of Black Motherhood .................................. 481
   B. Revealing the Stereotypes ............................................. 483
   C. Debunking the Demographics .......................................... 486

III. Current Welfare Reform Proposals ................................... 488
   A. Norplant Proposals .................................................... 489
   B. Family Cap ............................................................. 492
   C. Implications for Welfare Reform .................................... 496

IV. Unconstitutional Conditions ........................................... 497
   A. Unconstitutional Conditions Doctrine ............................... 498
   B. Norplant and Family Caps ............................................. 502
      1. Identifying the Constitutional Right ................................ 503
      2. Strict Scrutiny ..................................................... 506

V. Equal Protection .......................................................... 511

VI. Conclusion ............................................................... 517

### I. INTRODUCTION

Although congressional reformers speak of personal responsibility for women receiving welfare in race-neutral terms, the racial modifier "black" lies implicit in the reform debate. No one misunderstands that the term "welfare queens" refers to black women. Messages about welfare are coded communications about social policy that substitute for more explicit racist statements that are no longer socially acceptable. As Jill Quadagno notes, when David Duke speaks to those who "'choose to work hard rather than abuse welfare' . . . [u]nspoken but understood [is] that the hard workers are white, the welfare abusers African American.

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3. Id.
4. Id.
The understood symbols in the welfare debate encode not only race, but also gender. Because "welfare" in the United States primarily refers to Aid to Families with Dependent Children ("AFDC"), welfare reforms primarily affect poor women and their children. In addition, attacks on "welfare cheats" are directed at black mothers in particular. It should not be surprising then that current welfare reform proposals "fight poverty" and eliminate "welfare dependency" by controlling the reproductive capacity of women who receive public assistance. Specifically, reformers advocate imposing or encouraging the use of Norplant by women who rely on public assistance. In addition, some proposals discourage and penalize a woman's choice to exercise her reproductive rights by denying her certain benefits if she has additional children. These reforms reflect a belief that social problems such as crime and poverty flow from motherhood outside marriage, and particularly from the motherhood of particular women.

Reform proposals that limit the reproductive rights of women of color reflect stereotypes about them, particularly stereotypes that relate to sexuality and motherhood. Social control of poor women's reproductive rights is consistent with the history of race-, gender-, and class-based American social policies. Eugenic concerns about pre-

5. Welfare is a somewhat ambiguous term because social welfare policies include both AFDC, as well as Social Security, unemployment insurance, and a host of other programs designed to help the disadvantaged. Barbara J. Nelson, The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mother's Aid, in WOMEN, THE STATE, AND WELFARE 123, 127 (Linda Gordon ed., 1990). The word "welfare" in America is used to refer to AFDC, while other programs are referred to by their statutory title. This two-track history explains, in part, the two-track attitude Americans have toward "welfare" recipients and Social Security beneficiaries. See id. at 124, 129; see also Nancy Fraser & Linda Gordon, A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State, 19 SIGNS 309, 321 (1994).

6. Aid to Families with Dependent Children is a means-tested program designed to aid families in poverty with dependent children. It is codified at 42 U.S.C. § 601. In 1988, the Social Security Act underwent its last major change through the Family Support Act ("FSA"). FSA (also known as "IV-A" programs because they are codified in Title IV-A of the Social Security Act, 42 U.S.C. § 601) amended AFDC to add a number of provisions including a work requirement called the Job Opportunities and Basic Skills Training Program ("JOBS"). FSA programs are jointly administered by federal, state, and county governments. At the federal level, the implementing agency is the Department of Health and Human Services ("HHS"). Each state maintains a IV-A agency to administer the AFDC programs, and in some states, there are county agencies as well. In order for a state to receive its share of federal AFDC funds, minimum state standards must be met by the state. For example, under Title IV-A, the state must provide child care for JOBS participants.

7. Further, a state cannot refuse aid to those who qualify. Although certain minimum guidelines are required, the federal government does not use its power to enforce many substantive protections for AFDC recipients. For example, the federal government uses its power neither to set minimum grant amounts nor to establish baseline qualification guidelines.

8. Fraser & Gordon, supra note 5, at 327.
serving “republican stock”\(^9\) and preventing the growth of the “under-
class”\(^{10}\) historically have supported the sterilization of poor women of
color, often without their knowledge or consent.\(^{11}\) In addition, the
problem of “the poor” has become the problem of a deviant popula-
tion in need of social control.\(^{12}\) Moreover, characterizing certain wo-
men as deviant is often a strategy for undervaluing their constitutional
liberties in social welfare policies.\(^{13}\)

This alarming trend toward control of the reproductive rights of
poor women raises significant constitutional questions. Specifically,
may the government indirectly impose severe restrictions on the exer-
cise of reproductive rights through conditions placed on receipt of
welfare benefits even though the government could not do so directly
through a straight prohibition on childbearing? Also, does the focus
on the reproductive rights of women, but not men, who receive public
assistance violate Equal Protection?

This article will first explore stereotypes of women of color and
their history of exclusion from social welfare provisions. Second, it
will examine the increased efforts at social control embedded in cur-
cent welfare reform proposals. Third, it will discuss the constitutional
concerns raised by these welfare policies in light of the historical stere-
otyping and exclusion of poor women of color from social welfare pro-
grams. We conclude that the attempts to control reproductive rights
that are embedded in the welfare reform proposals are unconstitu-
tional infringements of the right to procreative liberty. We also con-
clude that the implementation of programs mandating the use of
Norplant violate a woman’s guarantee of equal protection and perpet-
uate harmful stereotypes of women of color.

II. HISTORY, STEREOTYPES, AND SOCIAL CONTROL

Negative stereotypes of poor women of color maintain oppres-
sion based on race, class, and gender and become the point from
which other groups define their normality.\(^{14}\) Thus, stereotypes of

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\(^{9}\) See Gwendolyn Mink, The Lady and the Tramp: Gender, Race, and the Origins of the Welfare State, in Women, the State, and Welfare, supra note 5, at 92-93.

\(^{10}\) Fraser & Gordon, supra note 5, at 315.


\(^{12}\) See infra notes 51-57 and accompanying text.

\(^{13}\) See Fraser & Gordon, supra note 5, at 315.

\(^{14}\) Cf. Roberta Cepko, Involuntary Sterilization of Developmentally Disabled Women, 8 BERKELEY WOMEN’S L.J. 122, 148 (1993) (noting that judges consistently use language defining
poor women simultaneously demonstrate their exclusion from membership in society and demarcate the boundaries of that society. Moreover, stereotypical images of blacks become opposed to corresponding positive images of whites so that race becomes the referent for a number of personal characteristics. The facets of the "welfare queen" image become fused together so that poor always means black, black always means poor, and these characteristics attached to "woman" symbolize sexual irresponsibility, defective parenthood, and deviancy.

Drawing these rhetorical boundaries has facilitated excluding women and people of color from social welfare provisions in the United States. It has also been used to justify infringing upon the reproductive rights of women of color.

Understanding the contours of the welfare reform debate requires both a review of the history of exclusion and control of poor women of color and an explanation of stereotypes of women of color.

A. Understanding the History

Neither the exclusion of black women from social welfare programs nor control of their reproductive freedom are new social policies; even the connection between these policies is old. An historical analysis illustrates why it should not be surprising that modern welfare reforms explicitly link the denial of public assistance with social control of reproductive rights.

1. Exclusion of Women and People of Color from Social Welfare Benefits

Historically, women and people of color have been excluded from social welfare provisions. The first rudimentary form of American social welfare provision, Civil War pensions, benefited primarily northern white men by limiting pensions to Union veterans and their dependents. This system excluded not only all Confederate veter-

developmentally disabled women as "other" to devalue the worth of their reproductive rights and comparing that with the benefit to their caretakers and to the state resulting from the sterilization of these women).

16. Id.
ans, but also all African Americans. Tying benefits to Union veteran status also excluded women from the system, except through connection to their husbands. Consequently, women without husbands or women married to black men were deprived of pension benefits.

Progressive Era social welfare policies seem exceptionally generous in contrast to Civil War benefits because they provided benefits that targeted the poor, and particularly women, by tying benefits to private sphere activities such as motherhood, home life, and family. These benefits, however, did not reach most black families. White female social reformers focused their efforts largely on Northern urban poor women, ignoring African Americans, who remained concentrated in the South and in rural communities. Although white female reformers were able to obtain government programs of cash relief for the targets of their charity, black female reformers had no political power and were forced to build private institutions, such as schools, old people’s homes, and community centers to provide social welfare programs in black communities.

New Deal policies continued this exclusion despite their design as “universal” social welfare policies. For example, agricultural workers and domestic servants—mostly black men and women—were excluded from the core programs of the Social Security Act of 1935 to retain Southern political support for the program. The Social Security Act of 1935 also excluded teachers, nurses, hospital employees, librarians, and social workers—all occupations heavily dominated by women.

In 1939 Congress shifted primarily white widows and children of industrial workers from Aid to Dependent Children (“ADC”) (the precursor of AFDC) to old-age insurance programs leaving ADC

18. The original eligibility criterion for Civil War pensions allowed pensions only to veterans disabled in the battles of the Civil War and to the dependents of soldiers killed in the war. Eventually, however, Civil War pensions evolved into de facto old-age and disability pensions for elderly American men in the North. Ann Shola Orloff, The Political Origins of America’s Belated Welfare State, in The Politics of Social Policy in the United States 37, 39 (Margaret Weir et al. eds., 1988). In 1912 the Civil War pension system had 860,000 beneficiaries. Over 60% of the white native-born men over age 65 outside the South were covered by this system. Nelson, supra note 5, at 128.


21. Id. at 157.

22. Id. at 158.

as the last resort for divorced, single, and deserted women, many of whom were African American.24

Black women with dependent children were then excluded from ADC, and later AFDC, by the structure and administration of the Social Security Act. In response to southern demands, Congress left administration and implementation of social assistance programs to the states, which allowed state-level discretion to become a mechanism of discrimination against women of color.25 Discretionary “suitable home” requirements prevented women who did not meet the ideal of perfect motherhood from receiving ADC benefits.26 These women were primarily poor immigrant and black women who had to work outside the home to survive and single mothers whose chastity was suspect because they were not widows.27

The New Deal, then, left a legacy of two-track social welfare provision: “universal” programs such as social security tied to work-force participation, and means-tested programs such as AFDC.28 It is not, however, that more generous benefits flow to those who work while meager benefits are provided to those who do not. Some women receiving AFDC benefits do work in the paid labor force.29 Moreover, prior work force participation is not required for millions of adult recipients drawing benefits from programs nominally tied to work force participation.30 Indeed, widows of wage workers receive nearly four times as much as women deserted or divorced by wage workers.31 Thus, it appears that programs tied to work force participation benefit from a legitimating tie to the workplace, whereas means-tested pro-

24. QUADAGNO, supra note 2, at 157.
25. Id. at 119; see also Fraser & Gordon, supra note 5, at 321.
26. QUADAGNO, supra note 2, at 21. Given this history, Republican calls for block grants to states and state control of administration of AFDC programs should be considered in a new light.
27. Nelson, supra note 5, at 142-44; QUADAGNO, supra note 2, at 119-20.
28. In 1959 among single mothers, white women were twice as likely to receive ADC benefits as black women. Rickie Solinger, Race and “Value”: Black and White Illegitimate Babies in the U.S., 1945-1965, in UNEQUAL SxSTmRS, supra note 20, at 463, 472-473.
29. See Fraser & Gordon, supra note 5, at 321.
31. In December of 1993, more than 8 million adults received Social Security payments solely because of the status of their spouse as retired, disabled, or deceased. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 2D SESS., 1994 GREEN BOOK: BACKGROUND MATERIAL ON DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE OF WAYS AND MEANS 4 (Comm. Print 1994) [hereinafter GREEN BOOK].
grams do not. In addition, for women with dependent children, levels of support depend upon marital status rather than upon work force participation.

Some programs' connection to work force participation also excludes women and people of color from social welfare benefits. For example, Social Security benefits are tied to wage levels, years in the work force, and marital status. A lifetime of full-time work for wages is not the normal work pattern for most women, regardless of race, and for many men of color. For example, women tend to work in female-dominated occupations with traditionally low wages, in part because many occupations are closed to them because of discrimination. In addition, women who continue to bear primary responsibility for caring for children are at a disadvantage in the work force because many full-time jobs are structured to require a worker who is not the primary caretaker of children. Discrimination, lack of access to education, and the geographical relocation of job markets in suburban rather than urban neighborhoods result in chronic unemployment and underemployment for both black men and black women. Finally, basing entitlement on a woman's connection to a man through marriage denies her independence in her own right. Thus, tying social rights to work force participation excludes women and minorities by invoking the hidden social structures of racism and sexism. Moreover, sexist and racist stereotypes in the United States derive in part from the scope and administration of these programs.

32. A widow with two dependent children whose husband was a wage worker is supported by Social Security at an average benefit level of $1299 per month. Id. at 34-35. In contrast, women with dependent children who are deserted or divorced by their children's father are supported by AFDC at an average benefit level of $373 per family per month. Id. at 325.

33. Work force participation legitimates government largess in several ways. First, work force participation meshes well with the American ideology of self-sufficiency, independence, and industry. Second, the minimal contribution to these programs made by workers through taxes make them not look like the redistribution schemes that they are. See Fraser & Gordon, supra note 5, at 321-22.

35. Nelson, supra note 5, at 127.
36. Fraser & Gordon, supra note 5, at 324.
38. See id. at 287.
2. Devaluation of Black Motherhood

In addition to being excluded from social welfare provision, historically, black women have been devalued as mothers. This dynamic has its roots in slavery, where black women's reproductive capacity was a method of reproducing wealth for white slave owners, rather than an exercise of personal choice and autonomy by women. Outside of slavery more black women have worked outside the home earlier and in greater numbers than white women. Thus poverty prevented many black women from being the "ideal" stay-at-home mother supported by her husband. Also, black women have been devalued as mothers because of fears about the impact of the fertility of women who are not white, middle class, or married on the values of the country.

The devaluation of black women as mothers reflects the diminished social value placed on their children. Historically, attitudes toward out-of-wedlock births of black children have reflected judgments that these children were less "valuable" than their white counterparts. For black single mothers, but not for white single mothers, policy makers believed that "the baby's existence justified a negative moral judgment about the mother and the mother-baby dyad. The black illegitimate infant was proof of its mother's moral incapacity, its illegitimacy suggested its own probable tendencies toward depravity."

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41. Id. at 1437-40. "[I]n the eyes of the slave holders, slave women were not mothers at all; they were simply instruments guaranteeing the growth of the slave labor force." Angela Davis, Women, Race and Class 7 (Vintage Books 1983) (1981).
42. Davis, supra note 41, at 5. Davis notes, "[j]udged by the evolving nineteenth-century ideology of femininity, which emphasized women's roles as nurturing mothers and gentle companions and housekeepers for their husbands, Black women were practically anomalies." Id.
43. Collins, supra note 15, at 76.
44. This attitude is demonstrated by the disparate treatment of black and white single mothers between 1945 and 1965 in this country. White babies were valuable on the adoption market in part because they were born unclassed. Solinger, supra note 28, at 463, 468. "A poor 'white trash' teenager could have a white baby in Appalachia; it could be adopted by an upper-middle-class couple in Westport, Connecticut, and the baby would, in that transaction, become upper-middle-class also." Id. Black babies, in contrast, were not valued in the same way as white babies on the adoption market, in part because racism saddled any child born black with an immutable lower-class status in post-war America. Id. at 468, 470.
Rickie Solinger notes that these attitudes caused some policy makers to deny services to mothers because they were black. These policy makers then held black mothers responsible for the personal and social consequences of the lack of services for their children. To justify denying social welfare benefits to black women, policy makers argued that black deviant “culture” was inherited and that “the baby was likely to be as great a social liability as its mother.” This same evaluation, however, did not apply to white single mothers. Policy makers also claimed that a poor black woman’s choice to have a baby was an act of selfishness that deserved punishment. Thus motherhood has become the ultimate act of “selfishness” for black mothers because of the perceived inferiority of both the black mother and her children. Reflections of this idea appear in the welfare debate about the selfishness of women who have children they cannot support.

The intertwined images of sexual promiscuity and deviant motherhood attached to black women historically have supported systemic sterilization and attempts to cut off their reproductive rights. Moreover, these attempts have been a corollary to the dependence of black women on publicly-funded services. For example, in the 1970’s public assistance officials tricked black welfare recipients into consenting to the sterilization of their teenage daughters. Some doctors demanded that black women who were Medicaid patients consent to being sterilized before the doctor would agree to deliver these women’s babies. In one case two young black teenagers in Alabama were sterilized without their consent and knowledge. There, the federal district court found

uncontroverted evidence in the record that minors and other incompetents have been sterilized with federal funds and that an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various fed-

45. Id. at 470.
46. Id. at 471.
47. Id.
48. Id.
49. Id.
50. Id.
51. Some describe this as women who “breed more than they can feed.” CHI. SUN TIMES, Sept. 5, 1993, at 42 (editorial).
53. Id. at 46.
54. Id.
erally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization.55

These abuses continue. Classism and racism cause some doctors to urge sterilization of patients they feel are incapable of using other methods of contraception.56 Some doctors recommend hysterectomies for women they perceive as having too many children.57

As we will explain, the particular punitive measures chosen by welfare reformers reflect these negative stereotypes of women of color. Reducing poverty by lowering the birth rate in a particular community reflects fears of the increasing "underclass" and racist stereotypes about the sexual behavior of black women. Specifically, it assumes that the cause of poverty is poor women who refuse to limit the size of their families and continue to have children in order to collect a larger welfare check.58 Solving the problem of poverty and its correlates by restricting reproductive rights reflects a judgment that black women are bad mothers who do not deserve to have children.59 It also assumes a culture of poverty—a unified, isolated group vulnerable to poverty, rather than viewing poverty as a broader social and economic problem. This particular solution to poverty reflects not only stereotypes of women of color, but attempts to regulate a particular class of women stereotyped as dangerous, deviant, and inferior.

B. Revealing the Stereotypes

The historical treatment of black women and their children resulted in not only overt and covert attempts at controlling women’s reproducitivity, but also created stereotypes about black women as mothers. These stereotypes are perpetuated by the content of welfare reform debates.

Powerful cultural beliefs flow from the assumption that most welfare recipients are women of color.60 For example, welfare recipients

56. Id.
57. Nsiah-Jefferson, supra note 52, at 47.
58. Id. at 48.
59. Once again, women receiving public assistance do not have more children than women in the population in general. See infra note 88 and accompanying text.
60. To justify their welfare reforms, Republicans note that "children born out-of-wedlock are more likely to experience ... neglect," H.R. 4473, 103d Cong., 2d Sess. § 103 (3)(H) (1994); that "the likelihood that a young black man will engage in criminal activities doubles if he is raised without a father and triples if he lives in a neighborhood with a high concentration of single parent families," id. at § 103(3)(O); and that "the greater the incidence of single parent families in a neighborhood, the higher the incidence of violent crime and burglary." Id. at § 103
are stereotyped as sexually promiscuous because black women have long been portrayed as whores or sexually aggressive women. Historically, black women symbolized sexual savages, "the embodiment of female evil and sexual lust...[j]ezzebels and sexual temptresses." Popular culture treats "all black women [as] eager for sexual exploits, voluntarily 'loose' in their morals and, therefore, deserving of none of the consideration and respect granted to white women." The "welfare mother" in particular represents a woman of low morals and uncontrolled sexuality. All of these characteristics are presumed to contribute to her poverty.

Another stereotype that emerges in the welfare reform debate is that welfare recipients are poor because they are lazy. This image is another familiar stereotype of African Americans. Welfare reform rhetoric portrays women receiving public assistance as unwilling to work and lacking the American work ethic. Reformers argue that "welfare mothers" sit around, collect welfare, and pass their lack of work ethic on to their children, perpetuating the cycle of poverty. Because women receiving public assistance are presumed to be black, the laziness supposition finds implicit support in beliefs of the dominant culture about people of color. This rhetorical dynamic makes

(3)(P). Restricting birth rates as a solution implies that poor parenting, rather than lack of economic opportunity, drives these social ills.

61. See Fraser & Gordon, supra note 5, at 326-27 (noting that the black single mother has come to symbolize the welfare recipient).
63. Bell Hooks, Ain't I a Woman 33 (1981). The image of black women as wanton dates back to slavery and racist attempts to deal with its aftermath. The sexual exploitation of black women at this time was euphemistically described as "prostitution," and the alleged sexually aggressiveness of black women was used to rationalize widespread sexual assaults by white men against black women. Id. at 33-34; Collins, supra note 15, at 77. The myth that no black woman was capable of fidelity and that all were sexually loose was used to devalue black women in the hopes that no white man would marry one. Hooks, supra, at 63.
64. Gerda Lerner, The Myth of the "Bad" Black Woman, in Black Women in White America: A Documentary History 163, 163 (Gerda Lerner ed., 1972). "The Negro woman does not maintain any moral standard which may be assigned chiefly to qualities of race, any more than a white woman does. Yet she has been singled out and advertised as having lower sex standards." Elsie Johnson McDongald, In Defense of Black Women, in Black Women in White America, supra, at 169, 170.
65. This term appears in quotation marks throughout this article because the adjective "welfare" as applied to either mothers or families implies that these mothers or families are somehow abnormal, different from and inferior to some mythical standard for mother or family. This damaging rhetorical trope has come to dominate the welfare reform debate with little or no comment. See Fraser & Gordon, supra note 5, at 311.
67. Id. at 77.
68. Id.
black women seem personally responsible for their poverty and the poverty of their children, and conveniently shifts responsibility for poverty from systemic social circumstances to the shoulders of black mothers.\textsuperscript{70}

Given the stereotype that blacks are "lazy," it is ironic that black women historically have worked more than their white sisters because of economic necessity. Historically, married black women entered the work force many years before the influx of married white women, and more black women than white women have participated in the work force.\textsuperscript{71} Also contrary to this image of black women as lazy are data that indicate that most women who are on welfare remain on welfare for less than three years.\textsuperscript{72}

Through work, however, black women acquire other negative and stereotypic labels such as being the "matriarch" of the black family. Black matriarchs, that is, women who work to support their families, are held responsible for the widely touted breakdown of the black family. The rhetorical claim is that working black women fail to provide the attention and care that their children need, and consequently cause the later failure of those children.\textsuperscript{73} Black matriarchs are blamed for driving the fathers of their children out of the family by bringing in income and replacing their men's place in the family.\textsuperscript{74} Black women are charged with emasculating black men by failing to be submissive, dependent, and feminine women.\textsuperscript{75} Indeed, this characterization of the black family lies at the root of the "culture of poverty" trope.\textsuperscript{76}

\textsuperscript{70} In fact, intergenerational transmission of welfare dependency is far less common than the rhetoric would seem to support. Only one out of five of the daughters from families classified as highly dependent on welfare were themselves highly dependent on AFDC in their early twenties. \textit{Green Book}, supra note 31, at 447-48. (A family is considered to have "high welfare dependence" if it receives at least 25% of average family income from welfare. \textit{Id.} at 449.) Indeed, among families that are considered to be highly dependent on welfare, intergenerational transfer of welfare dependence was more common among whites than among blacks. \textit{Id.}

\textsuperscript{71} \textsc{Collins}, supra note 15, at 77. There is "a strong American tradition of blaming serious social problems on individual moral character rather than on institutions and economic structures." \textsc{Arlene Skolnick}, \textit{Embattled Paradise} 201 (1991). \textit{See also} Fraser & Gordon, \textit{supra} note 5, at 311.

\textsuperscript{72} Nelson, \textit{supra} note 5, at 132.

\textsuperscript{73} \textsc{Characteristics}, \textit{supra} note 30, at 30-31 (showing that 66% of families on AFDC have received benefits for less than three years and 42% of all recipients have never before received AFDC).

\textsuperscript{74} \textsc{Collins}, \textit{supra} note 15, at 74.

\textsuperscript{75} \textsc{Hooks}, \textit{supra} note 63, at 75.

\textsuperscript{76} \textsc{Collins}, \textit{supra} note 15, at 75; \textit{see also} Fraser & Gordon, \textit{supra} note 5, at 319, 325, 327.
Thus, the twin charges of laziness and matriarchy form an inescapable trap for black women. Black women who work hard to support their families “emasculate” their husbands by becoming the primary breadwinners and failing to fit into the Victorian ideal of the submissive, dependent, stay-at-home mother. Those women who stay home to care for their children, however, are perceived as bereft of the work ethic, so that the perceived failure of a “welfare mother” to subscribe to these values (by being poor) justifies denying her assistance and blaming her for her situation. Claims to the status of legitimate womanhood, then, require dependency, preferably on a man through marriage, so that the independence of black women who work justifies blaming them for the poverty of their community.

C. Debunking the Demographics

The term “welfare mother” brings to mind several key characteristics, all of which connect to stereotypes of women of color. First, a “welfare mother” is presumed to be black. Second, she is by definition poor. Third, she is presumed to be single and under the age of eighteen. Finally, she is commonly portrayed as the mother of several children, all of whom were conceived out of wedlock because of the availability of generous welfare benefits.

Unfortunately, it remains necessary to debunk these popular stereotypes of welfare recipients. First, the majority of women receiving welfare...
ing public assistance are not black. Despite the perception that the "typical" welfare recipient is African American, African Americans made up only 36.6% of AFDC families in 1993. White families comprised a larger percentage, 38.3%, of AFDC recipients. Of the remaining families, 18.4% were Hispanic, 2.9% were Asian, 1.3% were Native American, and 2.2% were of unknown origin.

Second, very few women receiving welfare are single mothers under the age of eighteen. In 1993 less than 6% of all AFDC recipients were teenage mothers. Of those teenage recipients 77% were either eighteen or nineteen years old. In addition, the percentage of mothers receiving AFDC benefits who are teenagers is actually decreasing. Between 1990 and 1992 the percentage of women receiving welfare benefits who were under the age of twenty fell from 7.9% to 7.6% of total AFDC rolls. Thus, the problem of teenage parenthood and AFDC dependence is slight compared to accounts by media and politicians. Indeed, savings that will be enjoyed by denying benefits to these families is small because eliminating benefits for families headed by mothers under the age of eighteen years would have resulted in the elimination of only 1.4% of families from the AFDC rolls in 1993.

Third, despite the perception that women have children in order to receive an increased AFDC cash grant, the average size of families receiving welfare has been steadily declining. Moreover, the data do not support the argument that women choose to have children to collect welfare because welfare is economically more rational and more rewarding than working. An individual working 40 hours per week at the minimum wage of $4.25 per hour for 50 weeks out of the year earns $8,500 before taxes. After federal income tax deductions, take

81. CHARACTERISTICS, supra note 30, at 28.
82. Id.
83. Id.
84. Id. at 42. In 1993 the median age of female AFDC recipients was 29 years. Id. at 2.
85. Id.
86. GREEN BOOK, supra note 31, at 400-01. There is one apparent rise in the number of teenage mothers between 1988 and 1990. This increase is probably due to the inclusion of 19 year-old AFDC recipients in the category that used to include 18 years and younger.
88. CHARACTERISTICS, supra note 30, at 28, 42.
Home pay is $7,221 annually. The national average cash grant for families, calculating AFDC by the "thirty and one-third method," is $1071.24 annually. The District of Columbia provides the highest average cash grant of $1,624.56 annually. Rhode Island provides the lowest: $456.84 annually. Even using other methods of grant calculation which produce larger cash grants, no state has an annual cash grant over $6,500, and most states provide significantly less. Adding other benefits such as food stamps to this calculation makes the figure higher for most women, but not all AFDC recipients also receive food stamps or housing benefits. In fact, even when food stamps are combined with the maximum cash grant, the combined benefits bring the recipient up to only 69% of the poverty threshold. Thus, AFDC cash grants already pay significantly less than a full-time minimum wage job, and do not offset the cost of an additional child to the family.

III. CURRENT WELFARE REFORM PROPOSALS

Welfare reform proposals tackle the problem of poverty by attempting to control personal decisions of welfare recipients. Welfare reform proposals currently under consideration at both the federal and state levels include provisions limiting the living arrangements of minors receiving AFDC cash grants, increasing paternity requirements, and denying AFDC for children born out of wedlock to

89. Green Book, supra note 31, at 401. "[Between 1969 and 1992], the average family size [of AFDC families] decreased from 4.0 persons to 2.9 [and] the share of AFDC families with no more than two children rose from 49.6 percent in 1969 to 72.7 percent in 1992." Id. at 400.
90. 1 Internal Revenue Service, Reproducible Federal Tax Forms for Use in Libraries 63 (1994).
91. Green Book, supra note 31, at 414-15. There are a number of ways to calculate the AFDC cash grant which is dependent on the circumstances of the applicant family. A majority of families receiving AFDC in fiscal year 1991 received their grant according to the "thirty and one-third" method of calculation. This method is called thirty and one-third because in calculating the amount of the grant, the first $30 a recipient earns is not considered income for purposes of calculating the grant. One-third of any other income is disregarded for calculating the grant.
93. Id.
94. Id.
95. The highest cash grant possible is for Alaskan families with some unearned income. These families receive a $6,419.76 cash grant annually, but this is a tiny fraction of all welfare recipients. Most recipients are calculated on the thirty and one-third method. The second most common calculation method is with the child care disregard, and the national average for that grant is $2,172.24 annually. Green Book, supra note 31, at 414-15.
96. Id.
97. Id. at 366-67. This figure represents the median AFDC state. The poverty threshold is met by a combination of maximum benefits in only two states, Alaska and Hawaii. Id.
mothers under the age of eighteen unless they legally marry the biological father or someone who legally adopts the child.99 Virtually every proposal imposes some new constraints on the life choices of AFDC recipients. Many proposals limit the reproductive choices of these women.100

Although all punitive requirements deserve attention, because proposals designed to reduce fertility raise both constitutional and policy concerns, this article addresses those reform provisions that burden reproductive rights of mothers receiving AFDC. Reformers advocate restricting the reproductive freedom of welfare recipients through the use of Norplant and provisions generally termed “family caps.” These proposals reflect the belief that one way to reduce the cost of welfare and to end the cycle of poverty is to prevent mothers who receive benefits from having additional children. Yet the reformers have not demonstrated how these provisions will help welfare recipients leave the welfare rolls and become self-sufficient. Indeed, much existing research suggests that these provisions will not have this intended effect.101

A. Norplant Proposals

Many welfare reformers advocate the use of Norplant as a way to reduce welfare dependency. Norplant is an implanted birth control device approved by the Food and Drug Administration in 1990.102 It consists of six flexible capsules inserted under the skin layer of the inside upper arm.103 The match-stick sized capsules gradually release the synthetic hormone, levonorgestrel, into the woman’s bloodstream. Levonorgestrel prevents conception in many ways, including preventing ovulation and the release of the egg by interfering with sperm entry into the uterus and by making the uterus less suitable for

100. HR 4, 104th Cong., 1st Sess. § 105(a)(3) (1995); see also H.R. 4473, 103d Cong., 2d Sess. § 202 (1994) (making all unwed mothers under a certain age (usually a minimum of 18 or 21, with the state option to increase, but not to decrease the age) ineligible for aid; The most extreme forms even exclude the child from receiving benefits until they reach the age of 18).
101. See infra part III §§ A, B.
implanting the egg. Norplant is unique in that it works for five years or until the capsules are removed, a process requiring a medical procedure. Norplant is highly effective, but users often experience side effects including headaches, depression, nervousness, enlargement of the ovaries or fallopian tubes, or both, inflammation of the skin, inflammation of the cervix, nausea, and prolonged or irregular bleeding.

Although welfare reform proposals that involve Norplant vary, proposals fit primarily into three models. First, and most insidiously, some reformers advocate conditioning the AFDC cash grant on the recipient’s acceptance of Norplant. For example, Washington, D.C. Mayor Marion Barry stated that, “[y]ou can have as many babies as you want.... But when you start asking the government to take care of them, the government now ought to have some control over you.... For people like that I would be for something like Norplant, mandatory Norplant.” According to some politicians and commentators, the state’s power to discontinue welfare benefits includes the power to impose any condition on benefits that the state deems appropriate. While not all reformers may accept such a broad view of the state’s power to set conditions on benefits, all advocates of making Norplant a condition for benefits at least implicitly accept the view that it is legitimate for the state to limit the reproductive capacity of certain segments of the population.

A second, less draconian but still troubling proposal provides a financial incentive in the form of a cash benefit for welfare recipients who “choose” to use Norplant. Nine states have introduced Norplant bills in which the AFDC recipient is “rewarded” for accepting Norplant. The cash bonuses proffered in these bills do not defray the

105. Id.
107. Flattum-Riemers, supra note 104, at 104-05.
108. Joe Urshel, Big Media Make Rush Limbaugh Appear Objective, USA Today, November 25, 1994, at 9A; see also, Sally Quinn, Childhood’s End, Wash. Post, Nov. 20, 1994, at C1 (quoting Washington D.C. Mayor Marion Barry: “If you don’t want the government in your business, then you don’t have to ask the government for any money”).
109. Id. See also Governor Highlights Welfare in Speech, Wash. Post, Jan. 15, 1993, at A20 (quoting Maryland Governor William Donald Schaefer’s State of the State Address: “I have some proposals to encourage use of Norplant for women and birth control methods, like vasectomies, for men. The extreme proposal would be to require women to get Norplant or require men to have a vasectomy if they’re on welfare and have a certain number of illegitimate children.”) While Governor Schaefer was clear that he was not proposing this solution, he was
cost of implantation; these costs already are covered by Medicare. Rather, these programs create an opportunity cost for women who choose not to have Norplant implanted, whether or not those women decide to have an additional child.

Third, some reformers encourage the use of Norplant by subsidizing the implantation procedure. Such proposals allow women who receive welfare to choose Norplant without cost. Currently, all states subsidize Norplant through Medicaid services or have established programs to ease poor women's access to the device.

All proposals that tie welfare benefits to the use of Norplant presume that by preventing female AFDC recipients from having children, the state can save money and break the "cycle of poverty." Norplant proposals seek to reduce the number of AFDC recipients and their dependents. First, theoretically Norplant will reduce the number of children receiving AFDC by preventing their births. Second, proponents believe that Norplant will prevent the births of children who would have eventually become AFDC dependent themselves as adults. Thus, reformers believe that Norplant will reduce welfare dependency now by "protecting" children from being born into poverty, and later, by protecting the state from intergenerational transfer of welfare dependency.

Reformers find Norplant attractive because it allows them to manage an AFDC recipient's reproductive capacity through technical means not within her control. By favoring this particular technical contraceptive, reformers presume that welfare recipients are either unable or unwilling to control their own fertility. Norplant preempts a

using the State of the State address to ask the Welfare Policy Commission to attempt to find a solution to the perceived problem of poor women having children, and he was not ruling out this proposal. In fact, by suggesting it in this context, the Governor is explicitly putting this type of proposal on the table for consideration. \( \text{Id. But see, AB 3593, 1993-94 Reg. Sess. (Ca.); Wyo. STAT. 42-5-101 (1995) (protecting recipients from termination of benefits or disciplinary action based on the recipient's refusal to use Norplant).} \)


113. \( \text{See Walter A. Graham, Norplant Can Aid Mothers, USA TODAY, Feb. 16, 1993, at 10A.} \)
recipient's fertility, however, for five years, regardless of how long she receives public assistance.114

Proposals to include Norplant as an integral part of welfare reform ignore statistical evidence that birth rates among families on welfare are low and declining.115 This disregard of demographic data suggests the emphasis on reproductive control is based on something other than an examination of the real situation of AFDC recipients. It reveals an underlying desire to diminish any and all further births to women in poverty. This agenda is alarming because it directly attacks the reproductive rights of women in poverty. Because women in poverty are disproportionately women of color,116 it also suggests racial engineering and eugenic objectives.

B. Family Cap117

Family caps create financial disincentives for women receiving public assistance to have additional children. Family caps may be loosely divided into two types: direct and indirect. Direct family caps deny additional benefits to recipients under certain circumstances associated with having a child. Indirect family caps impose burdens other than denying cash benefits when an AFDC recipient has an additional child.

Direct family caps burden procreative choice by allowing or forcing states to reduce per capita benefits by not counting some children for purposes of calculating the AFDC grant. Direct family caps take three basic forms. One version simply states that no matter how many children a recipient has, her grant will be capped at the entitlement level of a family of four. In other words, any family with more than four members will be treated as a family with four members for the purposes of calculating its grant.118

114. See, e.g., id. (arguing that "[t]he required use of Norplant is not punishment; it is a way to give poor women a chance to break the cycle of poverty for themselves and their children").
115. Removal of Norplant requires the assistance of a doctor and can be expensive and painful. Moreover, many women of color have experienced resistance from doctors when they sought to have Norplant removed. See Sally Jacobs, Norplant Draws Concerns Over Risks, Coercion, BOSTON GLOBE, Dec. 21, 1992, at 1; Norplant's Side Effects Lead Women to Remove Device (CNN television broadcast, Apr. 25, 1992) (available on LEXIS, News Library, CNN file).
116. See supra note 88 and accompanying text.
117. CHARACTERISTICS, supra note 30, at 44. Of all AFDC families, 36.6% are headed by African Americans, id. at 28, and 88.18% are headed by women. Id. at 2.
118. The family cap is sometimes referred to as the child exclusion. We use the term “family cap” because “child exclusion” is somewhat misleading. Although it is true that under family cap provisions, some children are excluded for purposes of determining the grant, those children are not excluded from the family. While the government would like to pretend they are simply
A second type of direct family cap instructs that the grant calculation be made only once, when a recipient first applies for aid.\textsuperscript{119} After a parent applies for aid, the number of children the applicant has is assumed to remain the same for the purposes of grant calculation. For example, if a woman applies for aid when she has two children, leaves welfare for five years, and then reappears for aid when she has four children, the grant calculation upon re-entry will be based on the assumption that she has only two children.

A third version of the direct family cap prohibits grant increases for children conceived while a parent receives aid.\textsuperscript{120} This common form of the family cap is included in almost every welfare reform proposal.\textsuperscript{121} Common language states that, "the amount of aid to families with dependent children paid to a family will not be increased by reason of the birth of a child to an individual included in such family for purposes of making the determination [of the grant]."\textsuperscript{122} Most bills additionally provide that benefits shall not be increased "where the individual is a custodial parent of a dependent child, [and] the child was conceived in a month for which the individual received aid."\textsuperscript{123} Similar language is used by the Republicans to deny aid to certain families.\textsuperscript{124}

"excluded" from the picture, they are not excluded from the family, and the family's grant will be used to support the "excluded" child. Therefore, the problem is not simply one for the "excluded child," it is a problem for the children whose portion of the grant will be used to pay for the normal expenses of the child who is receiving no benefit and for the parent who must feed and clothe her children on a smaller grant.

This section describes several bills introduced in Congress that include family cap provisions. These descriptions serve only to illustrate the different types of family caps. Because the content of bills frequently change throughout the legislative process, the final text of the bill as voted upon might be different from the text cited herein.

\textsuperscript{119} H.R. 4126, 103d Cong., 2d Sess. § 101 (1994).
\textsuperscript{120} H.R. 4473, 103d Cong., 2d Sess. § 202(a)(1)(C) (1994).
\textsuperscript{121} H.R. 4605, 103d Cong., 2d Sess. § 502(a)(3) (1994).
\textsuperscript{124} Id.
In some circumstances, this third variety of family cap also can result in complete denial of welfare eligibility, forcing some women off of the AFDC rolls because they choose to bear a child. For example, consider a married woman who conceives and bears a child: under the family cap provisions, both the mother and the child would be eligible for benefits due to the marital status of the mother at the time of conception. If she later divorced and then bore another child, both she and this second child could be ineligible for any aid. In other words, after becoming widowed or divorced this mother would receive a check for the grant amount for the expenses of the first child, but would be denied aid for the expenses of the second child and herself.

In contrast to direct family caps, indirect family caps penalize AFDC recipients in ways that do not deny cash benefits but impose other burdens when an AFDC recipient has another child. For example, unmarried women who apply for AFDC will be required to provide the name and address of the biological father of her children. If paternity is not established, the entire family becomes ineligible for aid. Also, women who conceive their children while receiving wel-

125. Speaker Gingrich laid out his plans for welfare reform in the Contract With America, a document which provided the game plan of the Republican leader for the first 100 days of the 104th Congress. See Contract With America: House Republican Conference, Legis. Dtl., Sept. 27, 1994, at 16. The welfare reform proposal from the Contract With America was introduced as H.R. 4, 104th Cong., 1st Sess. (1995). This bill, drafted by Representative Clay Shaw (R-Fla.), was signed by over one hundred House Republicans and fulfills their contract goal to “attack illegitimacy.” Id. at 16. H.R. 4 reads:

[A]id under the state plan shall not be payable with respect to a child born . . . to a recipient of aid under any State plan . . . or an individual who received aid . . . at any time during the 10-month period ending with the birth of the child, unless the recipient or individual was pregnant with the child at the time of application for such aid.

H.R. 4, 104th Cong., 1st Sess. § 106(a)(3) (1995). In addition, H.R. 3500, a Republican bill introduced but never passed in the 103d Congress, includes a state option to impose the family cap, but the default position, the position where the state will find itself upon the passage of this bill, is that the family cap is imposed. § 305 of this bill provides that:

[Unc]less the State has enacted a law exempting itself from the application of this paragraph . . . the plan shall not be payable with respect to a child born to — (a) a recipient under the plan; or (b) an individual who received such aid at any time during the 10-month period ending with the birth of the child.

H.R. 3500, 103d Cong., 2d Sess. § 305 (1994). Further, H.R. 4473, a Republican bill introduced but never passed in the 103d Congress, provides not only that AFDC shall not be payable: “with respect to a child if the custodial parent of such child was, at the time of the child’s birth — (i) a recipient of aid under the state plan; or (ii) an individual who received aid anytime during the 10-month period ending with the birth of the child.” H.R. 4473, 103d Cong., 2d Sess. § 202(a) (1994). Under this bill, these families also become ineligible for Food Stamps and Medicaid. Id. at § 202(b).

126. H.R. 4473, 103d Cong., 2d Sess. § 201(b) (1994).

127. H.R. 4, 104th Cong., 1st Sess. § 101(a)(3) (1995) (exempting from paternity requirements where “the child was conceived as a result of rape or incest; . . . or the State determines
Welfare Queens

fare will be denied the work deferral now provided while their children are infants. Although some may argue that indirect penalties are not family caps because these provisions often impose a heavy burden on reproductive decisions, they warrant mention here. All forms of family caps are a significant change because current law does not allow states to employ a family cap except under limited circumstances.

There are two ancillary issues here: exceptions and default positions. Exceptions to the family cap provisions are provided for parents who marry an individual who assumes paternity, lawful guardianship, and financial responsibility for the child. Family cap provisions also do not apply to children who are legally adopted or to children whose parents marry after the birth of that child. Thus, a pregnant unmarried woman may not receive additional aid for children conceived while she received benefits, but a pregnant widowed woman will receive the additional benefits when the child is born.

A second ancillary issue is whether the default position in a reform proposal requires family caps or provides them at the option of the state. For example, some provisions provide a default option that

that efforts to establish such paternity would result in physical danger to the child or the relative claiming such aid (See, e.g., Susan Bennett & Kathleen Sullivan, Dismantling the Poor: Waivers and Welfare 'Reform', 26 U. Mich. J.L. Ref. 741, 741 (1993)).

128. [Id.]

129. H.R. 4, 104th Cong., 1st Sess. § 201 (d) (1995). Currently, AFDC allows states to grant a three-year work deferral when a recipient has a child, and allows the state the option to reduce that deferral to one year. 42 U.S.C. § 602 (a)(19)(C)(iii) (West 1991).

130. There is one way that a state can impose a family cap under current law. The Social Security Act requires the grant calculation be based on the actual number of children in a family applying for AFDC, but § 1115(a) of the Social Security Act, 42 U.S.C. § 1315 (a) (1988), allows an exception to this requirement. The § 1115 waiver allows a state to apply to the Secretary of Health and Human Services (HHS) for a “waiver” of federal requirements in order to conduct experiments or trial welfare systems in the state. Waivers allow the states to select certain recipients to be part of a “demonstration project.” Demonstration projects attempt some change in the administration of AFDC which would otherwise be statutorily prohibited, allowing the states to become laboratories for experimenting with welfare design. Although President Kennedy’s idea for § 1115 was to implement programs that aid families in education and job training, since the implementation of JOBS and its resultant increase in state costs related to guaranteeing participants’ support services under federal requirements, waivers have been increasingly used to restrict recipient benefits. See, e.g., Susan Bennett & Kathleen Sullivan, Dismantling the Poor: Waivers and Welfare ‘Reform’, 26 U. Mich. J.L. Ref. 741, 741 (1993).

Three states currently enjoy waivers that allow a reduction of benefits related to a family size cap. New Jersey, Wisconsin, and Maryland all currently have some form of the family cap in place. California has recently passed a family cap provision to be implemented beginning Jan. 1, 1995. See Calif. Welf. & Inst. Code § 11450.04 (West 1995). The child exclusion, or family cap, requires a federal waiver before a state can legally implement such a change to the Social Security Act.


132. [Id.]
does not include a family cap. The default position the state finds itself in when it takes no action is significant. The political struggle a state would face if it tried to "increase" benefits would be prohibitive. The political climate makes increasing welfare benefits difficult, even where the "increase" simply makes the family size in the grant calculation mirror the actual family size. President Clinton's bill does not require states to impose the family cap but allows them to do so at their option.

C. Implications for Welfare Reform

Reproductive controls allow the state to intrude into the most personal and intimate aspects of welfare recipients' lives. Norplant proposals limit the procreative capacities of welfare recipients. Family caps penalize the procreative choices made by welfare recipients. Mandatory paternity reporting forces recipients to divulge information about intimate relationships. And penalties for out-of-wedlock births impose one vision of family values that is not universally shared by members of this society. Given that the average size of the AFDC family has been steadily decreasing for almost 20 years, such measures are unnecessary and, we will argue, constitutionally impermissible.

The innovations in current welfare proposals concerning the exercise of procreative rights by welfare recipients represents an ominous crystallization of the kinds of racist, sexist, and classist attitudes that have shaped American welfare policies for decades. Family cap provisions assume that welfare recipients are unable or unwilling to control their sexual desires or effectively utilize birth control. These views are intertwined with stereotypes about welfare recipients which have been readily accepted by the dominant culture. Because welfare recipients are presumed to be women of color, their sexuality is constructed through cultural stereotypes of women of color. Thus welfare recipients are treated as highly sexual, sexually irresponsible, and in need of regulation. Family caps and Norplant are attempts to control repro-

133. Id.
135. GREEN BOOK, supra note 31, at 400-01. Between 1969 and 1992 "the average family size [of AFDC families] decreased from 4.0 persons to 2.9 ... [and] the share of AFDC families with no more than two children rose from 49.6[%] in 1969 to 72.7[%] in 1992." Id. at 400.
136. See infra sections IV and V.
ductive capacities of black women consistent with past policies. Here, however, the policies of exclusion and control combine just as they did when women receiving public assistance were pressured to consent to sterilization. In these welfare reform proposals, however, the state explicitly uses its power to threaten withdrawal of benefits to obtain control over the reproductive capacity of poor women of color.

This use of state power raises constitutional issues. First, restriction on reproductive rights will not be protected from constitutional challenge simply because they are conditions on benefits rather than direct mandates. Second, the fact that Norplant policies apply to women, but not men, who receive AFDC may violate equal protection guarantees. Consequently, welfare reform proposals may be constitutionally suspect under the Fifth and Fourteenth Amendments. 137

IV. UNCONSTITUTIONAL CONDITIONS

Reproductive restrictions on welfare recipients such as requiring the use of Norplant and imposing family caps seem immune to constitutional challenge because they are not mandatory restrictions, but merely conditions for receiving benefits. Consequently, policy makers assert that any individual who objects to these conditions could simply refuse the benefits of welfare. Indeed, one commentator has noted:

It seems to me welfare is not a right. So the government may attach conditions to that service as it may attach conditions to all kinds of services. So, if you say, "What about a policy in which a woman is told, 'Yes, you may receive welfare on the condition that you use Norplant'?" That I find acceptable, because I don't think welfare is a right.138

This argument is incorrect. Even where the state does not mandate particular conduct by the recipient, but merely conditions receipt of a government benefit upon compliance with that condition, a constitutional challenge to that policy may be brought using the unconstitutional conditions doctrine. This doctrine recognizes that what the state cannot demand directly it should not be able to accomplish indi-
directly, because such use of government power is inappropriate and
overreaching.  

A. Unconstitutional Conditions Doctrine

Kathleen Sullivan describes the characteristics of an unconstitu-
tional conditions problem as follows:

Government offers a benefit that it is constitutionally permitted but
not compelled to offer, on condition that the recipient undertake (or refrain from) future action that is legal for him to undertake (or refrain from) but that the government could not have constitution-
ally compelled (or prohibited) without especially strong justification.

The implications for conditions on welfare benefits should be clear. The government offers a benefit that it is constitutionally permitted but not compelled to offer—namely welfare. In exchange for that benefit, the government demands that women receiving welfare benefits refrain from having additional children. The unconstitutional conditions doctrine holds that if the government could not constitutionally compel compliance with this requirement absent an especially strong justification, it cannot undermine constitutional protections by requiring compliance in exchange for welfare benefits—effectively buying those rights from individuals who rely on public assistance.

The unconstitutional conditions doctrine requires that courts apply strict scrutiny when reviewing policies that burden fundamental rights through conditions on benefits rather than through direct gov-
ernment mandates. In general, when a state action directly burdens a constitutional right, courts must apply strict scrutiny which requires that a policy be narrowly tailored to further a compelling state inter-
est. For most government offers of benefits, however, courts need apply only a minimal rational basis analysis. Under this analysis, a court will uphold a condition if it is rationally related to a governmen-
tal purpose.

140. Id. at 1427.
141. Id.
143. See supra notes 117-34 and accompanying text.
145. Sullivan, supra note 140, at 1425, 1457 n.180.
sis beyond this minimal scrutiny where a condition implicates a constitutionally protected liberty. In those cases, unconstitutional conditions analysis applies strict scrutiny to prevent the state from crossing the boundary between permissible and impermissible exercises of government power.

Determining when the unconstitutional conditions doctrine is implicated, however, has been neither easy nor straightforward. Courts have found conditions valid despite their burden on constitutional protections where a condition on a benefit closely relates to the benefit. For example, federal conditions on highway funds requiring states to set the drinking age at twenty-one are closely related to safety because, the government showed, that when legal drinking ages vary among states, people drive from one state to another to purchase alcohol and then drive home after drinking. Also, although the state may not penalize the exercise of a right by withholding an otherwise discretionary benefit, the state is not required to subsidize exercise of that right. Consequently, states can constitutionally refuse to subsidize abortion while simultaneously subsidizing childbirth without running afoul of this doctrine. Where the decision to subsidize one activity penalizes the exercise of another, however, this distinction does not apply. A bonus or reward for choosing one of two options, for example, necessarily penalizes those who choose the other. Subsidies render the choice without cost, whereas bonuses create a "penalty" for making the wrong choice.

A comprehensive review of the unconstitutional conditions doctrine is beyond the scope of this article. Kathleen Sullivan, however, offers a useful theory for approaching unconstitutional conditions problems. She describes three general theories—coercion, failure of the legislative process, also referred to as germaineness theory, and commodification of inalienable rights—that explain why courts some-

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147. For example, unconstitutional conditions doctrine has been used to protect a variety of rights, ranging from freedom of religion, Sherbert v. Verner, 374 U.S. 398, 404 (1963), to property rights, Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).
149. Dole, 483 U.S. at 209.
152. TRIBE, supra note 150, at 782.
153. Id. For example, voting for one candidate obviously penalizes the other candidates. Id. at 783. See also Note, Norplant Bonuses and the Unconstitutional Conditions Doctrine, 71 Tex. L. Rev. 189, 190 (1992) [hereinafter Norplant Bonuses].
times find government conditions on benefits unconstitutional. She concludes, however, that these theories focus on defects in either the exchange of rights for benefits, or the legislative process that produced the conditioned benefit itself. Consequently, these theories fail to address directly whether governmental burdens on constitutional rights should escape strict scrutiny simply because they come in the form of a conditioned benefit rather than as a command.

Sullivan argues for an alternative theory addressing "the systemic effects that conditions on benefits have on the exercise of constitutional rights." Her theory recognizes that preferred constitutional liberties not only protect individuals, but also distribute power between government and right holders generally, as well as among classes of right holders. Sullivan argues that unconstitutional conditions redistribute power in three ways. First, unconstitutional conditions alter the balance of power between government and right holders by intruding on a circle of autonomy, defined by the existence of a constitutional liberty, that should remain free from governmental encroachment. Second, unconstitutional conditions violate the governmental obligation of evenhandedness or neutrality among citizens by redistributing rights between those who do and those who do not comply with the condition. Third, government creates a "constitutional caste" by targeting the burdensome choice between benefit and constitutional liberty toward those dependent on governmental benefits.

The potential for and fear of the redistribution of power between government and individual is a central tension in democratic the-
Possession of private property has traditionally been viewed as an important means of protecting the individual from governmental power and intrusion. Indeed, in a case addressing unconstitutional conditions, the United States Supreme Court relied on property theories to find a condition unconstitutional.

Government benefits, including licenses and government contracts, in addition to cash payments available through Social Security programs, are a new form of property that expand rather than limit government power. Rather than intruding on liberty through direct coercion, government expands its power by creating a new largess, funded by tax dollars. By controlling conditions on this new property, government expands its control through dependency rather than force. Citizen dependence on this new form of property, in turn, allows government to “buy up” individual liberties indirectly and to expand its source of social control.

Moreover, conditions and restrictions on new property are not uniformly imposed. Thus, it is not only the existence of governmental power to infringe on constitutional liberties through extensions of the new property, but also the fact that the government may exercise this power unequally that warrants concern. Where infringement upon constitutional liberties is unequal, distribution concerns become particularly salient, because the government uses its power over benefits to intrude on both the liberty and equality guarantees expressed in the Constitution.

To address this extension of governmental control, Sullivan’s test would apply strict scrutiny “to any government benefit condition

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163. Id. at 771.
164. See Nollan v. California Coastal Comm’n, 483 U.S. 825, 837 (1987) (finding unconstitutional a provision that the owners of California beach front property must provide access to the coastline as a condition for receiving a building permit).
165. Reich, supra note 162, at 773.
166. Id. at 746-47.
167. Id. at 756-64, 777.
168. Id. at 764, 779. Obviously two conclusions can be drawn here — one is that unconstitutional conditions on benefits should not be allowed, the other is that largess created by centralized government should be abolished. While it is clear that the new Republican Congress is sympathetic to this second conclusion, it is important to note that this is true in some areas but not in others. It is interesting that the party of less government is willing to do away with many forms of regulation while simultaneously enacting minute regulation of the lives and choices of women receiving public benefits. The micro-regulation in the welfare reform bills is hardly consistent with Republican calls for less government and more individual liberty. In addition, the “new property” has become such a pervasive part of society that abolishing it is not practical.
169. Id. at 765.
whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government. A court must first identify the pressure on a constitutional liberty, with particular attention to conditions that violate governmental obligations of evenhandedness by unequally redistributing rights. Once pressure on a constitutionally protected right is identified, the court must demand a compelling justification for pressuring the exercise of those rights before finding the condition constitutional.

Although the unconstitutional conditions doctrine protects against government expansion of power through distribution of government benefits, the unequal exercise of that power is of concern. Where the government uses a condition to infringe unequally upon constitutionally protected liberties, the compelling justification must include justifications not only for infringing upon a protected liberty, but also for doing so unequally. This analysis is entirely consistent with a focus on the equality concerns raised by redistributing rights through the pressure imposed by unconstitutional conditions. Without such an analysis, judicial review of constitutionally suspect distributions of benefits would ignore the unequal exercise of government power that targets those individuals who must choose between constitutional liberties and benefits, in addition to the unequal status of certain segments of American society that informs the nature of that choice.

B. Norplant and Family Caps

Unconstitutional conditions doctrine provides the framework for challenging fertility control policies built into current welfare reform proposals. First, courts must determine whether the welfare reform burdens a constitutional right. Second, courts must strictly scrutinize welfare reforms that do burden constitutional liberties. Strict scrutiny requires that a government action be narrowly tailored to further a compelling government interest. Thus, strict scrutiny analysis involves

170. Sullivan, supra note 139, at 1499-1500.
171. Reich, supra note 162, at 765; Sullivan, supra note 139, at 1497-99.
172. See Catherine R. Albiston, The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class and Gender, 9 BERKELEY WOMEN'S L.J. 9, 50-55 (1994) (arguing that Norplant as a condition of probation is constitutionally suspect not only because it infringes upon a constitutional right, but also because it targets that infringement toward a particular class of citizens).
173. See supra section II.
inquiry into both the interests of the state and the means it has chosen to further those interests.

1. Identifying the Constitutional Right

Family cap provisions and Norplant conditions on welfare benefits infringe upon the constitutional right to procreative liberty. The Due Process Clause of the Fourteenth Amendment ensures a right to privacy, which includes "the right of the individual... to marry, establish a home and bring up children..." The right to privacy extends to decisions about contraception, abortion, and procreation, as well as the upbringing of children. In *Eisenstadt v. Baird* the Court recognized that "[i]f the right of privacy means anything, it is the right of the individual... to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That right includes the right to choose to be a parent, as well as the right to choose not to be a parent.

Norplant policies infringe upon that right because they burden an individual's choice whether or not to have a child. Recall that Norplant provisions come in three varieties: subsidizing Norplant implantation for welfare recipients, rewarding with a cash bonus those welfare recipients who "choose" Norplant, and requiring implantation of Norplant as a condition of receiving benefits. Subsidizing implantation of Norplant is the least problematic of these provisions because it does not force the choice between fertility and welfare benefits, but...
only removes a financial impediment to using Norplant. The state may constitutionally choose to subsidize Norplant over other birth control measures in order to remove the financial disincentive of its significant cost. 181 In fact, Medicaid already subsidizes the cost of Norplant in all 50 states. 182

Providing a reward or bonus beyond this subsidy for those women who choose to use Norplant, however, burdens procreative liberty by forcing a choice between the benefit of the bonus and the preservation of the right to bear a child. 183 Unlike a subsidy that defrays the cost of one option, a bonus creates an opportunity cost for every woman receiving public assistance who wishes to preserve her reproductive capability. 184 Moreover, forgoing the Norplant benefit to preserve one's reproductive choice may be particularly costly to poor women because the reward is substantial in light of their poverty.

Mandating Norplant in exchange for welfare benefits imposes a much larger cost upon the choice. Recipients of public assistance must either surrender all of their benefits or surrender their constitutional right to procreative freedom. This type of restriction most clearly burdens the constitutional right to determine whether or not to bear a child, and is unconstitutional under existing case law. 185

Similarly, family cap provisions burden the right to procreative liberty by imposing a substantial cost on a recipient's choice to have an additional child. Recall that family cap proposals vary. Some proposals terminate the recipient's grant if the recipient had an additional child while receiving welfare. Others cap the grant of the recipient, and provide no additional funds for additional children. This second form of cap either sets an upward limit on the size of all AFDC grants or denies any additional funds for children born while the woman is receiving welfare.

Courts may find it more difficult to determine that family cap provisions unconstitutionally burden the fundamental right to procrea-
ative liberty. In *Dandridge v. Williams*\(^\text{186}\) the Supreme Court found constitutional an upward cap on the size of public assistance grants.\(^{187}\) In that case, however, the cap was challenged on equal protection grounds, and the Court only applied minimal rational basis test, which simply determines whether a policy may be justified by any legitimate state goal.\(^{188}\) The Court did not address how strict scrutiny under due process analysis would evaluate the burden imposed by a limit on a recipient's reproductive decisions.

A court should subject to strict scrutiny "any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government."\(^{189}\) Arguably, family cap provisions do not burden the fundamental right to procreative liberty because a woman is free to have another child, she simply will not receive any additional funds to support that child. The practical effect of capping benefits, however, is to diminish the support granted to every other child in the family as a new child who lives with her siblings will be supported by the limited income available to the mother. The Supreme Court has already recognized this result.\(^{190}\) The arrival of the new child simply divides the pie into smaller pieces.

Sullivan notes that in some cases, including caps on welfare benefits, it may be ambiguous whether pressures on rights result from the intentional action of the government, or as a by-product of government attempts to target resources.\(^{191}\) She argues that in ambiguous situations, courts should err on the side of strict review because these policies burden fundamental liberties and implicate at least one of her distributional concerns by creating a constitutional caste in the enjoyment of reproductive freedom.\(^{192}\)

The financial grants under social security are significant enough to influence the choice whether or not to use Norplant or bear a child, particularly where public assistance is the only available means of support for a family. Individuals with fewer resources will be pressured to relinquish their liberty interest in bearing children, while those who can afford to spurn government assistance experience no such pres-

\(\text{186. } Dandridge v. Williams, 397 U.S. 471 (1970).}\)
\(\text{187. } Id.}\)
\(\text{188. } Id. \text{ at 485.}\)
\(\text{189. } Sullivan, supra note 139, at 1499-1500.}\)
\(\text{190. } See Dandridge, 397 U.S. at 477.}\)
\(\text{191. } Sullivan, supra note 139, at 1502.}\)
\(\text{192. } Id.\)
sure. Policies penalizing women receiving welfare for bearing children create a constitutional caste in the enjoyment of reproductive liberties: those with the means to remain free from government dependence enjoy greater liberty than those in more meager circumstances. Consequently, the government may buy up constitutional liberties through the creation of dependency.\textsuperscript{193}

In addition, it is far from clear that family cap provisions are tools for managing limited resources rather than a punitive measure against poor women who have children. Many family cap provisions are inconsistent in their logic, providing exceptions for women who marry the father of their children,\textsuperscript{194} for women who have additional children after they leave the welfare rolls (even if they subsequently return),\textsuperscript{195} and for women who adopt children rather than bear their own.\textsuperscript{196} Clearly, adding a child to the family increases the need of the family (and subsequently the need for public funds), regardless of how the child becomes a member of the family. These exceptions indicate that family cap provisions are intended as punishment for poor women who choose to have children, rather than efforts aimed at fiscal responsibility.

2. Strict Scrutiny

Determining that Norplant and family caps burden fundamental rights does not end the inquiry, because pressure upon a right does not mean the condition must be struck down. Where the condition is narrowly tailored to further a compelling state interest, the condition may be upheld.

The two interests primarily offered to justify requiring Norplant use by welfare recipients are reducing welfare costs and “breaking the cycle of poverty.”\textsuperscript{197} The state interest of reducing welfare costs is articulated as an attempt to save taxpayers’ dollars.\textsuperscript{198} “Breaking the cycle of poverty” translates to reducing the number of children born

\textsuperscript{193} Reich, \textit{supra} note 162, at 764, 779.

\textsuperscript{194} \textit{See}, e.g., H.R. 4, 104th Cong., 1st Sess. § 105(a) (1995). Not every family cap has this exception. \textit{See supra} section III-B.

\textsuperscript{195} H.R. 4, 104th Cong., 1st Sess. § 105(a) (1995). Not every family cap has this property. \textit{See supra} section III-B.

\textsuperscript{196} Id.


\textsuperscript{198} \textit{Cf.} Shapiro v. Thompson, 394 U.S. 618, 627 (describing state interest as “preserv[ing] the fiscal integrity of state public assistance programs”).
to poor women, protecting children from being born into poverty and reducing the financial burdens of poor women.\textsuperscript{199}

Although states may have a legitimate interest in conserving taxpayers' dollars,\textsuperscript{200} \textit{Shapiro v. Thompson} holds that this interest cannot be accomplished by drawing distinctions between citizens based on their exercise of a constitutionally protected liberty.\textsuperscript{201} In that case, plaintiffs challenged the constitutionality of state statutes denying welfare assistance to individuals who had not resided in the state for at least one year preceding application for assistance.\textsuperscript{202} The state justified the restriction as necessary to protect the public coffers from an influx of needy newcomers requiring welfare.\textsuperscript{203} The state further argued that individuals who required welfare assistance during their first year of residency were likely to become permanent burdens on public assistance programs.\textsuperscript{204} The residency requirement deterred the entry of these needy newcomers, preserving the states' resources for longtime residents.\textsuperscript{205} Although the Supreme Court acknowledged the state's interest in saving tax dollars, it struck down the residency requirement as a violation of a citizen's fundamental right to travel "uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."\textsuperscript{206} Thus, in this case, saving taxpayer dollars did not justify infringement of constitutionally protected liberties.

This decision, while resting on a defense of fundamental rights, must also be understood as a prohibition against unequal infringement of those rights. A particular state could refuse to provide welfare benefits to anyone regardless of residency and create the same disincentive to interstate travel, but the right to travel would not require states to offer a minimum level of welfare benefits.\textsuperscript{207} Rather, \textit{Shapiro} indicates that the uneven infringement of the fundamental rights, as well as the infringement of the right itself, requires heightened scrutiny.\textsuperscript{208} Again, this is consistent with the theory that conditions on government benefits should be found unconstitutional when they create a

\begin{itemize}
\item \textsuperscript{199} See, e.g., H.R. 4, 104th Cong., 1st Sess. § 100 (1995).
\item \textsuperscript{200} Shapiro, 394 U.S. at 633.
\item \textsuperscript{201} See id. at 627, 633.
\item \textsuperscript{202} Id. at 622-23.
\item \textsuperscript{203} Id. at 628.
\item \textsuperscript{204} Id. at 627-28.
\item \textsuperscript{205} Id. at 628.
\item \textsuperscript{206} Id. at 629.
\item \textsuperscript{207} Tribe, supra note 150, at § 16-50.
\item \textsuperscript{208} See id. at n.11. See also Albiston, supra note 172, at 52-55.
\end{itemize}
constitutional caste members of which experience diminished enjoyment of constitutionally guaranteed rights.209

The rule in Shapiro indicates that states cannot pursue an interest in preserving taxpayer dollars by financially penalizing those women who choose to exercise their constitutional rights to procreative freedom. This policy violates the governmental obligation of evenhandedness in giving state benefits by redistributing benefits among welfare recipients based on their sacrifice of a constitutional right. While the state may have an interest in saving money, it cannot accomplish that interest by distinguishing among citizens on the basis of their exercise of a constitutionally protected right.

State justifications of breaking the cycle of poverty adopt a policy of reducing the number of children born to mothers in poverty, and of consequently preventing children from being born into poverty. Unlike the state's interest in protecting the public coffers, it is far from clear that a state can have a legitimate interest in protecting unborn children from being born into poverty. Although decisions supporting the right to choose an abortion recognize a limited state interest in protecting the fetus,210 requiring the use of Norplant can only protect potential fetuses. Before there is a viable fetus, the state has no interest in the welfare of the unborn that can support regulation of a woman's behavior.211 Thus, it is unclear that the state has a legitimate interest in protecting potential fetuses from being born into poverty in order to "break the cycle of poverty."

State justifications for family cap provisions seem similarly misguided. Family cap provisions merely exacerbate the poverty of children born to welfare recipients by reducing or eliminating the meager support available to their mothers. The logic of the state justification is that family caps will deter childbearing by poor women. This theory, however, rests on the stereotype that poor women bear children solely to collect the welfare check. The legitimacy of that assumption has already been challenged above.212

Even if the state establishes that it has a compelling interest that justifies infringing a fundamental right, the state must demonstrate

210. See supra note 180.
211. Albiston, supra note 172, at 34 n.165.
212. See supra section II-A.
that such infringement is narrowly drawn to further this compelling interest, and not some other, invidious interest. Here, the means-end fit between the state’s policy of pressuring welfare recipients to forgo their fundamental liberties in order to save taxpayer dollars and reduce poverty seems tenuous at best. The primary means of reducing poverty advocated through these policies is reducing the growth of a particular community. This approach ignores the fact that family size among welfare recipients does not significantly differ from the general population, and is decreasing.\textsuperscript{213} It also does nothing to reduce the poverty of the existing welfare population, and suggests that other state interests lurk behind these reforms.

Courts must consider not only the proffered interests of the state, but also other possible and less legitimate interests being served by the challenged policy.\textsuperscript{214} Fighting poverty by reducing the birth rates of poor and minority communities indicates a more sinister state interest lurks behind these policies. The historical context of exclusion of women of color from the benefits of social welfare legislation and the rhetorical climate of using “welfare mother” as a euphemism for poor women of color raises questions about the legitimacy of the government’s purpose. The historical connection between eugenic policies and welfare programs, as well as the particular group targeted by this policy raises the possibility that Norplant conditions are a hidden eugenic policy against poor people of color. Given past sterilization abuse of welfare recipients, particularly poor women of color, and the historical devaluation of the motherhood of women of color, courts must be suspicious of policies designed to lower the birth rate of subordinate communities.\textsuperscript{215}

The right to procreative freedom exists in part because of the dangers of eugenic policies. As Justice Douglas warned in \textit{Skinner v. Oklahoma},

\begin{quote}
[w]e are dealing here with ... one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant
\end{quote}

\textsuperscript{213} See \textit{supra} note 88 and accompanying text.

\textsuperscript{214} See, e.g., Shapiro v. Thompson, 394 U.S. 618, 628 (1969) (finding that the impermissible interest of excluding the poor from the state was the specific objective of one-year waiting periods for benefits).

\textsuperscript{215} Roberts, \textit{supra} note 40, at 1446; see \textit{supra} notes 51-57 and accompanying text (about sterilization abuse).
group to wither and disappear. . . . [S]trict scrutiny . . . is essential, lest . . . invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.  

Indeed, even where the Court has allowed limited burdens on procreative liberty to encourage childbirth, it has made clear that an eugenic objective would not justify similar burdens to prevent childbirth.  

To the extent that the state’s real interest is an eugenic one in limiting the birth rate in certain disfavored communities, the state interest is not legitimate, let alone compelling enough to support infringing on the fundamental right to procreative liberty.  

Another potentially invidious interest of the state hidden behind claims to reduce poverty through limiting the birth of children to poor women is depriving poor women of color of the social benefits provided through welfare rights. Historically, women and people of color have been excluded from social programs in this country. Moreover, where poverty, race, and gender intersect the exclusions have been most drastic. Thus, attacks on social welfare benefits that protect poor women of color, particularly when contrasted with the provision for other disadvantaged, but more socially acceptable, members of our society, such as the disabled, the elderly, the short-term unemployed, and widows of wage workers, illustrate the discriminatory purpose behind the elimination of welfare benefits. It is the social position of welfare recipients, not their poverty, that drives these punitive reforms.  

In addition, it is far from clear that reforms will serve the purposes of saving taxpayer dollars and reducing the cycle of poverty. The Norplant proposal is underinclusive in that Norplant will only reach women who receive public assistance, while fathers who receive


218. See supra section II-A-1.


220. GREEN BOOK, supra note 31, at 48-50.

221. Id. at 5-7.

222. Id. at 265.

223. Id. at 6. Women with dependent children whose husbands die are supported by Social Security. A widow with two minor children would receive an average benefit of $1299 per month for her family. Id. at 34-35 (1992 figures). In contrast, women with dependent children who are divorced or deserted by their children’s father are supported by AFDC at an average monthly benefit of $373. Id. at 325 (1993 figures).
public assistance remain free to have additional children. In addition, Norplant is overinclusive because it imposes an involuntary contraceptive on many women who would not have additional children regardless of welfare requirements. It simply presumes that anyone receiving public assistance will continue to have additional children in order to receive a larger check. Finally, some Norplant proposals may not serve the state interest of saving money at all. Some proposals include additional expenditures beyond the AFDC grant designed to induce women to use Norplant — expenditures that presumably must be funded from tax dollars.

V. EQUAL PROTECTION

The absence of debate over the reproductive choices of fathers of children dependent upon public assistance is striking in welfare reform proposals. Reformers' focus on women, and particularly upon the reproductive capabilities of women, violates the Equal Protection Clause of the Fourteenth Amendment. Although family cap provisions could apply to both men and women, because Norplant is a female contraceptive the burdens of Norplant requirements or incentives fall only upon women. Consequently, Norplant provisions create a gender classification in the imposition of a welfare requirement. This classification must be substantially related to an important government interest in order to be constitutional.

Before addressing an equal protection analysis of the gender classification, it should be noted that although a policy targeting welfare recipients implicates both race and wealth discrimination, an equal protection challenge on these grounds is likely to fail. Race-based classifications are likely to fail because a large percentage of welfare recipients are white women. In addition, Norplant can be imposed on black women, but will not affect black men. Although the case for a poverty classification may be stronger because these restrictions necessarily affect only individuals who rely on public assistance, the mini-

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224. This result is obviously significant for equal protection analysis. See infra section V.
226. Welfare recipients are by definition poor. In addition, although the numbers of white and black welfare recipients are equivalent, much of the reform debate is driven by reference to stereotypes of women of color. Cf. Jefferson v. Hackney, 406 U.S. 535, 575 (1972) (Marshall, J., dissenting) (noting that the state of Texas funded AFDC at a lower level than other social welfare programs because it is politically unpopular, that a stigma attaches to those who receive AFDC but not to recipients of other forms of aid, and that a high proportion of AFDC recipients are people of color).
227. See supra notes 80-82 and accompanying text.
mal scrutiny applied to classifications based on wealth offer little hope of overturning these provisions.\textsuperscript{228} The doctrinal barriers to establishing an equal protection claim based on multiple axes of subordination have been well established, and need not be elaborated here.\textsuperscript{229}

A pragmatic constitutional challenge\textsuperscript{230} must focus upon a gender classification while remaining mindful of the race- and class-based underpinnings of these social policies. Gender classifications have been held unconstitutional where they reinforce and perpetuate stereotypes of women.\textsuperscript{231} These stereotypes include treating women as nonparticipants in the work force,\textsuperscript{232} focusing on their primary role as mothers and nurturers,\textsuperscript{233} and presuming their identity is derived from their biological reproductive abilities.\textsuperscript{234} The Court's analysis of traditional gender stereotypes addresses not only the harm to the particular plaintiff, but also the harm to all women and men posed by limiting life choices through the perpetuation of stereotypical roles.\textsuperscript{235} Thus, not only the negative effects, but also the social meaning of the gender classification, are at issue.


\textsuperscript{230} We would like to see a better approach to the problem of equal protection that recognizes the limitation of essentialized categories.

\textsuperscript{231} Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . . ; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship — other than pure prejudicial discrimination — to the stated purpose for which the classification is being made.

\textsuperscript{232} Mathews v. Lucas, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting). For examples of the Court's inquiry into whether gender classifications are based on traditional stereotypes of women or "real" differences between men and women, see Craig v. Boren, 429 U.S. 190 (1976); Kahn v. Shevin, 416 U.S. 351 (1974); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

\textsuperscript{233} See, e.g., Stanton v. Stanton, 411 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); Frontiero v. Richardson, 411 U.S. 677, 684 (rejecting a statutory presumption of female economic dependency as "romantic paternalism" operating to put women in a cage rather than on a pedestal); see also Califano v. Westcott, 443 U.S. 76 (1979) (holding that providing benefits to the dependents of unemployed mothers but not to those of unemployed fathers violates equal protection); cf Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (affirming a state statute that denied women admission to the state bar and noting that, "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfit[s] it for many of the occupations of civil life").

\textsuperscript{234} See generally Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) (finding that the actual statutory purpose of allowing survivors' benefits to widows but not to widowers was to enable the surviving widow to remain at home to care for a child).

\textsuperscript{235} Cf. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (recognizing that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities").

\textsuperscript{236} See Stanton, 421 U.S. at 14-15.
Statutes that create classifications based on gender are analyzed using intermediate scrutiny. Intermediate scrutiny requires that a gender classification be substantially related to an important government interest. Here, the proffered government interests are saving the taxpayer's dollars and breaking the cycle of poverty. Although we question the legitimacy of these interests, if they were legitimate and important, the inquiry would focus upon the fit between the classification and the ends it purports to serve. Where the connection between the classification and its objectives rests on traditional stereotypes of women, the classification is constitutionally prohibited.

Norplant provisions are connected to the interests of saving taxpayer dollars and breaking the cycle of poverty by relying on stereotypes of women. These policies seek to prevent poverty and save taxpayer money by reducing the birth of children to poor women. As human reproduction is not an asexual endeavor, the genetic contribution of both a man and a woman are necessary for procreation, so that even the arguably eugenic goals of reducing the birth rate may be accomplished by both male and female contraception. Why then does the state focus on women by choosing Norplant as a strategy?

The answer lies in the traditional role of women as caretakers for children. AFDC benefits provide for poor children and their caretaking parents. The caretaking parent of a poor child may be either a man or a woman, and indeed men are eligible for and receive AFDC. An additional child may be added to a poor family headed by either a man or a woman. The state's focus on women's but not men's reproductive capacity, however, reveals the assumption that the already-poor woman will be the custodian of the child that she bears. Not subjecting men to the same requirements presumes that the

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237. See id. at 197.
238. See supra notes 112-13 and accompanying text.
240. In fact, the cynic might argue that male reproductive control might be more efficient, given the relative reproductive capacities of men and women.
241. The objection, of course, will be the paucity of male contraceptive measures. Methods such as vasectomies do exist, however. Also, the absence of male-directed contraceptive methods also implicitly reflects the stereotype that women are responsible for contraception. See Vance, supra note 110.
242. Id.
243. In 1993 the average monthly number of adult male AFDC recipients was 53,885. Characteristics, supra note 30, at 2.
mother of a child fathered by a man receiving AFDC will care for that child, not that father.244 Consequently, the state does not believe that controlling male reproductive ability is necessary to reduce poverty or save taxpayer dollars.

In addition, pretending that pregnancy causes poverty ignores the challenges women face in entering and remaining in the work force. Focusing on a woman’s reproductive capacity, rather than her ability to support and care for her children through work, defines her identity through her biological capacity. This connection is clear in the one escape from many of the policies that burden reproductive choices of welfare recipients—marriage to the father of the pregnant woman’s child.245 Thus, not only the Norplant policy, but also the choice toward which it pressures women, is based on stereotypical conceptions of women as wives and as vessels for reproduction.

The social meaning of the Norplant policy lies deeper, however, than a focus on traditional stereotypes of women reveals. Searching for traditional stereotypes of women disregards the intersection of race, gender, and class in the Norplant policy. Equal protection doctrine has developed around gender stereotypes—namely nonparticipation in the work force, primary role as mother and nurturer, and an identity derived from biological characteristics—that are stereotypes of a white, economically privileged woman. Stereotypes of poor women of color are radically different. Unlike their economically privileged sisters, poverty required many women of color to work to support themselves and their family long before most white women entered the labor force.246 While privileged white women have been valorized as mothers, women of color historically have been devalued as mothers and nurturers.247 Unlike excessive concern over the reproductive capacity,248 women of color have been subjected to systemic efforts to cut off their reproductive rights.249 Stereotypes of women of color as promiscuous, evil, dishonest, lazy, and as poor mothers are as pervasive as the traditional “white” stereotypes previously recognized in equal protection jurisprudence. Indeed, many stereotypes of wo-

244. Cf. Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982) (noting that prohibiting a male defendant from fathering a child while on probation was not related to future child abuse if the defendant did not have custody of that child).
245. See supra notes 193-195 and accompanying text.
246. See supra note 71 and accompanying text.
249. See supra notes 51-57 and accompanying text.
men of color arose during the same historical period as the development of Victorian ideals of womanhood that inform stereotypes of white women. Thus, any equal protection analysis must take into account these stereotypes as well.

Using Norplant's fertility control as the means to save taxpayer dollars and to reduce the number of children born into poverty presupposes stereotypical assumptions about poor women of color. Focusing on the reproductive abilities of mothers, but not fathers, of poor children implicitly accepts the "welfare queen" stereotype—that is, a welfare recipient is a black woman who has children in order to live a life of leisure on the taxpayer’s money. Norplant policies can connect to state interests only by assuming that the cause of poverty is unwed motherhood, and the cause of unwed motherhood is the financial incentive of the welfare check. Moreover, this connection seems plausible because the "welfare queen" stereotype incorporates a number of other cultural assumptions about women of color. For example, stereotypes of women of color as dishonest and lazy drive the assumption that they would prefer bearing children for the additional welfare money to working for support, despite evidence that the financial incentive is already low. Stereotypes of dishonesty also drive the assumption that poor women of color will cheat the welfare system by falsifying their eligibility and lying about their status.

Similarly, stereotypes of women of color as sexually promiscuous and lascivious drive the assumption that they will continue to become pregnant. This "promiscuity" myth, coupled with stereotypes of women of color as ignorant, causes policy makers to assume that women of color need non-user controlled contraception because they are too ignorant and irresponsible to use other contraceptives effectively. These stereotypes of promiscuity and ignorance drive assumptions that poor women have children by "mistake." Seen through the eyes of policy makers, having a child destroys the "bright future" of young women. Treating parenthood as the cause of poverty, however, obscures the fact that the economic bright future assumed by this policy is nowhere to be seen for many young women, and that parenthood is an affirmation of identity for many, rather than a mistake.

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250. See Hooks, supra note 63, at 70.
251. See Quadagno, supra note 2, at v.
252. See supra notes 89-96 and accompanying text.
253. A Georgia woman tells how she feels about family planning: they try to get you to plan your kids . . . . The truth is, they don't want you to have any, if they could help it. To me, having a baby inside me is the only time I'm really alive. I
Just as gender historically has been used as a proxy for the role of a non-breadwinner and primary caretaker of children in traditional gender cases, the intersection of race and gender has become a proxy for "welfare queen" and inadequate parent in welfare reform proposals. Moreover, Norplant policies employ that proxy by focusing on biological reproductive capacity of women, making pregnancy the cause of poverty. Focusing on women's reproductive abilities, however, defines their identity through biology. Moreover, focusing on the reproductive abilities of poor women of color reinforces racist and sexist stereotypes that they are bad mothers, "welfare queens," and sexually promiscuous.

Reinforcing these stereotypes not only harms women who receive public benefits, it also affects women of color in general. Patricia Williams writes of her struggles to overcome how people "greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute." 254 Anita Hill faced the same stereotype while testifying in the Clarence Thomas confirmation hearing. "Simply to comprehend Hill's identity as a highly educated, ambitious, black female Republican imposed a burden on American audiences, black and white, that they were unable . . . to shoulder." 255 Stereotypes about black women affect not only public perception, but also whether black women's stories are believed, 256 whether the harms to them are taken seriously, 257 and whether the invasions of their autonomy and privacy are deemed acceptable. 258 Thus, not only does the fit between the Norplant gender classification and the state's interest of reducing poverty rely on and reinforce stereotypes of poor women of color, those stereotypes in turn harm all women of color, not only women in poverty.

Know I can make something, do something, no matter what color my skin is, and what names people call me. When the baby gets born I see him, and he's full of life, or she is; and I think to myself that it doesn't make any difference what happens later, at least now we've got a chance, or the baby does. You can see the little one grow and get larger and start doing things, and you feel there must be some hope, some chance that things will get better . . . . If we didn't have that, what would be the difference from death?


257. Id. at 413.
258. See Albiston, supra note 172, at 43-50.
It is important to note that racializing the gender standard in equal protection doctrine does not create a different standard for each woman dependent on her race and class. Indeed, even though stereotypes of women of color are radically different from those of white women, they rest upon the characteristics found in traditional stereotypes: primary responsibility for child care and the biological ability to become pregnant. The gender standard is already "racialized" to recognize stereotypes of white, economically privileged women. A more sophisticated gender standard simply recognizes that not all gender stereotypes are white.

VI. CONCLUSION

In response to Republican proposals for welfare reform, a California Democrat, State Assemblyman John Burton, introduced legislation making it a felony to be poor. Specifically, the bill prohibited "intentionally and maliciously hav[ing] a yearly income below the federally established poverty level." Assemblyman Burton's tongue-in-cheek legislation reflects the rising sentiment that the poor are not full members of society, and that their plight is their responsibility and their personal failings. It highlights the implicit assumption of fault behind attempts to limit or eliminate aid to the poor through punitive measures.

Making poverty a matter of fault allows policy makers to conclude that poverty justifies excluding those who are poor from society altogether. Welfare reforms that limit reproductive freedom accomplish this exclusion in a number of ways. First, they presume that accepting government assistance justifies depriving welfare recipients of liberties protected in the Bill of Rights, liberties that form the very definition of what it means to be a member of American society and that are designed to protect traditional areas of liberty from infringement by state and federal power. Moreover, these reforms violate the value that fundamental liberties such as the right to have chil-

259. Id. at 39.
260. Id. at 38.
261. Greg Lucas, Burton Offers Bill That Would Make Poverty a Crime, S.F. CHRON., Dec. 13, 1994, at A15. This bill was part of a three bill package. The second bill created a state system of orphan asylums and a state-run system of gruel provision. The third bill, a response to comments made by Republican legislators that welfare was easier to get than a building permit, would allow anyone who receives welfare to be eligible for a building permit. Id.
262. Id. The federal poverty level for a family of four is $14,763. Id.
dren are not luxuries to be enjoyed only by those with financial means, but flow from membership in a free society. The right to procreative liberty is protected in part because it is "basic to individual dignity and autonomy." Having children expresses individual humanity and dignity, as well as a hope for the future. Reforms that restrict these rights deny both humanity and membership in society to welfare recipients.

Second, these welfare reforms violate constitutionally protected liberties in a manner that is eugenic. That is, not only do reforms deny welfare recipients liberties fundamental to citizenship, as defined by the constitution, reforms do so in a way explicitly designed to cause welfare recipients "to wither and disappear." This policy forecloses the possibility of temporary poverty, allowing no chance that people may be poor at one point in their lives but move on to prosperity later. Rather, it presumes that poverty is a personal failing, and moreover, one that is genetic, that can only be overcome through eugenic controls.

This genetic link is accomplished by equating poverty with other subordinated and despised communities—people of color, and particularly women of color. This connection strengthens the belief that the poor are somehow different from the "norm," chronically poor, and poor through individual and personal failure. The interweaving of racist and sexist stereotypical images of welfare recipients facilitates the belief that the poor are the "Other," and consequently not entitled to membership in society. Portraying women and people of color as the "Other" makes infringement upon their fundamental rights palatable because these rights are apportioned diminished value. Women

265. Cf. Zablocki v. Redhail, 434 U.S. 374 (1978) (finding unconstitutional under the Fourteenth Amendment a state statute that required that persons who did not have custody of their children show proof of compliance with child support agreements and obtain a court order before getting married).
267. See supra note 253.
269. Cf. Cepko, supra note 14, at 148. The welfare reforms debate makes the easy assumption that providing the gratuity of welfare justifies imposing restrictions on the lives of recipients, particularly restrictions that seem related to the cause of poverty—having children they cannot afford. We have tried to demonstrate above that this connection between reproductive controls and reducing poverty relies on stereotypes of women of color as lazy, promiscuous, dishonest, and bad mothers. This viewpoint reduces the value placed on the right of welfare recipients to have children. Consequently, their reproductive freedom seems less deserving of protection than, say, the right of women to obtain abortions, a privilege vigorously supported by white feminists.
and people of color have long been excluded from full membership in society.\textsuperscript{270} To the extent that access to social welfare rights splits along race and gender lines, this exclusion continues.

The politics of exclusion will not solve the problem of poverty. Moreover, the exclusionary policies chosen by welfare reformers violate constitutional liberties and equal protection. In this article, we have argued that this impermissible exercise of governmental power has been masked by rhetoric that constructs welfare recipients through racist and sexist stereotypes of women of color. This rhetoric has also masked the real and devastating effects these reforms will have on families whose only "fault" is poverty. True attempts to eradicate poverty must address the systemic causes of poverty, racism and sexism, rather than ignoring the social conditions that generate poverty in favor of punishing the poor.

\textsuperscript{270} White women could not vote until 1920, and both black women and black men were effectively denied the right to vote until the civil rights movement of the 1960s. Similarly, segregation and separate spheres ideology kept women and people of color from economic membership in society through equal participation in the work force. See QUADAGNO, supra note 2, at 17-19.