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WHEN THE WAR ON POVERTY BECAME THE WAR ON POOR, PREGNANT WOMEN: POLITICAL RHETORIC, THE UNCONSTITUTIONAL CONDITIONS DOCTRINE, AND THE FAMILY CAP RESTRICTION

The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.¹

In the 1870s, this was the public conception of women's ability to work in the public sphere – the wage-earning world. *Bradwell v. Illinois* highlights the expectations of women at the time: stay home and take care of the “family organization [and] ... domestic sphere....”² Women were expected to be primary caregivers for the elderly and young, and not to earn wages in the public economic forum. Even a highly educated woman could be denied the right to work, as the following demonstrates:

The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.... It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.³

In *Bradwell*, the plaintiff was denied the right to practice law because she was a woman.⁴ As the above quotations demonstrate, it was thought improper for a married woman to work when she ought to be taking care of the home and children instead.⁵ While this may once have been true, expectations of women have changed drastically over the years.

1. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

2. *Id.*

3. *Id.* at 141-42.

4. *Id.* at 140.

5. *See id.* at 141-42.

This change in expectations of women is apparent in the history and evolution of federal assistance programs.⁶ These assistance programs are influenced by conflicting visions of the proper role of women. Current streams of political thought alternate between the 1870 view of women staying at home taking care of children ("family values"),⁷ and a more modern view of women as coequals of men, also in the working world earning money ("welfare-to-work").⁸ Current federal law, in theory, allows women to hold nearly any job.⁹ Furthermore, no longer are unmarried women unaffected by the duties, complications, and incapacities the Court in *Bradwell* suggested arose out of the married state.¹⁰ Many women who are unmarried have children, and many married women do not have children. The traditional view of married women with children is unraveling. This change both contributes to, and strikes against, the myth of the welfare queen; that is, the idea that women on welfare act like a Queen Bee, lounging at home and doing nothing more than procreating while waiting for everything to be delivered

6. See generally CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950 - 1980* (1984) (discussing and evaluating many different federal assistance programs throughout American history).

7. There are many who argue the "family values" theory is based on a sexist view of males as the wage-earner in the family, and promotes the traditional married family structure when it may be inappropriate. See MIMI ABRAMOVITZ, *UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES* 11 (2000); see also Katha Pollitt, *Did someone say 'Hypocrites'?*, THE NATION, Apr. 13, 1998, at 9 ("[The Personal Responsibility and Work Opportunity Reconciliation Act] begins with a hymn to marriage and is based on the theory that poverty and social dysfunction are based on the untrammelled sexuality of poor women."). Others have argued there were many moral issues in the creation of assistance for single mothers and their children, and these continue to persist. "In spite of the apparent success of the early ADC legislation, relief for single mothers and their children has always been highly controversial. At issue were such societal values as the patriarchal family, the domestic code, and the perceived responsibility of men to support their families." JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 92 (1995).

The hypocrisy and internal contradictions inherent in this "family values" rhetoric is clarified by Mimi Abramovitz: "[t]oday's call for a return to 'family values' is part of an effort to restore the family ethic and its gender division of labor by stigmatizing nontraditional family and by pushing women (except welfare mothers) to return to their 'rightful' place in the home." ABRAMOVITZ, *supra* at 91.

8. Gary Burtless, *The Employment Experiences and Potential Earnings of Welfare Recipients*, in WELFARE REFORM, 1996-2000: IS THERE A SAFETY NET? 51 (C. John E. Hansan & Robert Morris eds., 1999) ("In particular, each state must now ensure that a rising percentage of its adult aid recipients is engaged in approved work. The head of each family on welfare is required to work within two years after assistance payments begin."); see also David M. Kennedy, *California Welfare Reform*, in ETHICS AND POLITICS 266-79 (Amy Gutmann & Dennis Thompson eds., 1997) (discussing the different views towards "workfare" options in California in the early 1980s).

9. See 42 U.S.C. § 2000e-2(a) (1994) (prohibiting employment discrimination "based on sex").

10. See *Bradwell*, 83 U.S. at 141-42.

to her by the worker bees.¹¹ In a less metaphorical description, it has also been defined as a myth based on the image of "the lazy mother on welfare who breeds children at the expense of the taxpayer in order to increase the amount of her welfare check."¹²

The second view, women as coequal wage earners, tends to influence welfare policy more than the view of women as the caretaker. The woman as caretaker role is reserved only for women who have sources of income that allow them to stay home, generally their husband's income. The common opinion of women on welfare, furthered by many political leaders, is they ought to work rather than collect assistance services, and they should not be allowed to have more children if they cannot support them financially.¹³ No longer should women with children avoid working, but exactly the opposite: these women should be forced to work outside the home without regard to their desire to do so.

Welfare has historically been a women's issue. At its inception, the federal government wanted to provide for single women with children who, presumably, could not provide for themselves economically. "In subsidizing the family and women's unpaid labor in the home, the state helped families. But it also reinforced both the family ethic and the work ethic, and thus perpetuated the economic dependence of women on men."¹⁴ In fact, the vast majority of people currently receiving public assistance benefits are women. "Poverty itself is very much a women's issue, and so is welfare. Most adults who receive welfare are mothers of young children."¹⁵ Because of this, the impact of new welfare programs on women, the majority of the recipients, is very important. Societal expectations of women

11. For a thorough discussion of the definition of the "welfare queen" see *infra* notes 45-53 and accompanying text. See also Risa Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 313 (1997) (discussing the welfare queen myth at great length, including the origin of the term and current conception of it); Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 474 (1995) (describing many of the inaccurate assumptions and stereotypes of welfare recipients used in Welfare Reform rhetoric).

12. Dorothy Roberts, *Exploding the Myths Behind New Jersey Welfare Reform*, N.J. L.J., Jan. 25, 1993, at 21.

13. See generally Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339 (1996) (describing typical public opinion of women having children while receiving public assistance). Even with all of the literature explaining welfare recipients are not lazy and greedy, there is still ambiguity as to what they do with their time. For an excellent examination of this topic, see DAVID ZUCCHINO, MYTH OF THE WELFARE QUEEN (1997).

14. ABRAMOVITZ, *supra* note 7, at 97.

15. Nat'l Organization for Women Legal Defense and Education Fund (NOW LDEF), *Economic Justice for All Women*, available at <http://www.nowldef.org/html/issues/wel/index.htm> (last visited Apr. 30, 2001).

have profoundly affected the different elements of the current, and indeed even former, programs.¹⁶

While welfare programs in the United States originally aimed to provide for widows (and their children) so that they did not have to work outside the home,¹⁷ this has changed.¹⁸ The former program, Aid to Families with Dependent Children¹⁹ (AFDC) was a joint federal and state program established under Title VI-A of the Social Security Act.²⁰ Under the current system, Temporary Assistance for Needy Families²¹ (TANF), women not only are expected to work outside the home in wage earning positions, but they also are expected *not* to have families at all. Specifically, women are expected not to increase the size of these families after they start receiving public assistance. Twenty-three state governments discourage women from having children under the current family cap laws in place.²² While women in these states may still receive in-

16. For an analysis of how single mothers in general are portrayed in, and affected by, current welfare laws, see Parvin Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. WOMEN & L. 341, 343-50 (2001).

17. MURRAY, *supra* note 6, at 18 ("The New Deal sponsors of AFDC had intended to help the widow with small children. The support she received would tide her over in the interim between the loss of her husband and the day when the children were old enough to take over her support."); see also REPUBLICAN NATIONAL COMMITTEE, CONTRACT WITH AMERICA; THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 65 (Ed Gillespie & Bob Schellhas eds., 1994) [hereinafter REPUBLICAN NATIONAL COMMITTEE] ("Established in 1935 under the Social Security Act, AFDC was created to help widows care for their children."); Lucy Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 723 (1992) ("Aid to Dependent Children (ADC), assisted the children of women who were white, widowed, and had been connected to men for a substantial portion of their lives.");

18. The current trend in federally sponsored assistance programs began in 1988 with the passage of the Family Support Act. ABRAMOVITZ, *supra* note 7, at 25 ("The FSA [Family Support Act] transformed AFDC from a program to help single mothers stay home with their children into a mandatory work program."). This transformation continued with the Welfare Reform activism of 1996. See MARTHA R. BURT ET. AL., THE SOCIAL SAFETY NET AT THE BEGINNING OF FEDERAL WELFARE REFORM: ORGANIZATION OF AND ACCESS TO SOCIAL SERVICES FOR LOW-INCOME FAMILIES 2 (Urban Inst. Press, Occasional Paper No. 34, 2000) ("In August 1996, Congress fundamentally changed the nature of that safety net for families with children when it passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.").

19. 42 U.S.C. §§ 601-687 (1988).

20. C.K. v. Shalala, 883 F. Supp. 991, 997 (D.N.J. 1995) (citing 42 U.S.C. § 601 (1988)).

21. 42 U.S.C. § 1315 (1988).

22. L. JEROME GALLAGHER, MEGAN GALLAGHER, KEVIN PERESE, SUSAN SCHREIBER, KEITH WATSON, ONE YEAR AFTER FEDERAL WELFARE REFORM: A DESCRIPTION OF STATE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) AS OF OCTOBER 1997 41 (Urban Inst. Press, Occasional Paper No. 6, 1998). These states include: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Virginia, Wisconsin. For a description of the individual states' programs, see *id.* at 36-43. A 2001 GAO report listed slightly different

kind benefits, such as vouchers for diapers, or food stamps, these women forfeit cash assistance when they have more children after they begin receiving public assistance.²³ "The cap would prevent welfare mothers from getting another \$50 to \$60 a month, on average, if they have another child while on welfare, but they would get additional Medicaid and Food Stamp benefits."²⁴

The government's goal of preventing low-income, assistance-receiving women, from having children is carried out through the family cap, or child exclusions program. While the specific programs vary from state to state, they all generally prevent the increase in benefits that traditionally accompanied an increase in family size. These programs effectively prevent children born to a woman, after she has begun to receive assistance, from receiving the same benefits their older siblings receive. While states are not *required* to enact family cap legislation under TANF, such a requirement was considered during the debates regarding passage of TANF.²⁵ In the final TANF legislation, the concept of the family cap was inserted as an option that states may choose to implement.²⁶ Under the previous assistance program (AFDC), if a state wanted to enact such a limit, the federal government had to grant it a waiver.²⁷ Interestingly, there was a strange coalition of anti-

states adding Wyoming and leaving New Hampshire off the list. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO-01-924, WELFARE REFORM; MORE RESEARCH NEEDED ON TANF FAMILY CAPS AND OTHER POLICIES FOR REDUCING OUT-OF-WEDLOCK BIRTHS 15 (2001).

For a more partisan evaluation of the family cap legislation, see NOW LDEF, *Reproductive Rights*, available at <http://www.nowldef.org/html/issues/wel/advrepro.htm> (last visited Apr. 30, 2001); NOW LDEF, *Reproductive Rights and Welfare: Update on Recent Child Exclusion Developments*, available at <http://www.nowldef.org/html/issues/wel/chexdv.htm> (last visited Apr. 30, 2001).

Incidentally, the terminology used in this sort of legislation is highly politically motivated. For instance, the NOW LDEF tends to use the phrase "child exclusion" to emphasize the fact that the benefits being denied to these women are supposed to provide for their children. See *id.* More conservative sources use phrases such as "paying unwed mothers to have more children on welfare" instead. Howard Kurtz, *30-Second Politics*, WASH. POST, Jan. 23, 1996, at A6 (quoting Phil Gramm, a noted conservative politician). Phrases like these emphasize a flawed economic interpretation of what was occurring under AFDC programs.

23. *ACLU Will Appeal Welfare "Family Cap"*, THE RECORD (Bergen, N.J.), Dec. 17, 1999, at A11 ("Medicaid and food stamps are provided for the new baby....").

24. GARY BRYNER, *POLITICS AND PUBLIC MORTALITY* 200 (1998).

25. ABRAMOVITZ, *supra* note 7, at 37.

26. *Id.*

27. 42 U.S.C. § 1315(a) (1988). See generally *C.K. v. Shalala*, 883 F. Supp. 991, 997 (D.N.J. 1995) (describing the waiver situation which New Jersey found itself in 1995); HANDLER, *supra* note 7, at 89-99 (detailing the history of waiver requirements and the applications for waivers from AFDC requirements). In fact, there were many other program alternatives for which states were required to obtain waivers. The most popular of these restrictions on welfare benefits were: work requirements, school attendance, family planning mandates, immunization requirements, and immigration restrictions. See *id.* at 98.

abortion, feminist, and pro-choice groups lobbying to prevent the passage of any requirement for family cap limits in TANF.²⁸ This coalition of unlikely teammates has so far been unable to convince any court that this family cap should not be allowed. This Note suggests why this finding by the courts has been wrong, and ways in which to convince courts to prevent the family cap restrictions from being enforced.

The first part of this Note examines the common (mis)conception of welfare recipients, defines the stereotype of the "welfare queen," and considers how this leads to support for family cap laws. The second part examines current welfare law and how the welfare reform activities in 1996 changed this. The third part considers the individual right to procreate and applies it to a recent case in New Jersey, suggesting a different theory upon which the case could have been brought. The conclusion of this Note suggests a need for further litigation in this area.

STEREOTYPES OF THE WELFARE RECIPIENT

Society is full of misconceptions, and the idea of the "typical" welfare recipient is just as flawed as any other negative societal stereotype. For instance:

[t]he statistics might show that whites have always been the largest single group of AFDC recipients, but the stereotype that enraged the critics was the family of four, five, six and more children reared at government expense, and somehow stories about such families always seemed to talk about black families.²⁹

Politicians and the public at large have been reluctant to accept what the statistics show, and instead believe the stereotypes and the horror stories. This is a dangerous premise from which to make laws. As one legal writer commented:

28. ABRAMOVITZ, *supra* note 7, at 37; *see also* BRYNER, *supra* note 24, at 262 (noting that in Illinois anti-abortion and abortion rights groups joined in criticizing the family cap); BRYNER, *supra* note 24, at 109 (noting "representatives of the United States Catholic bishops, Catholic Charities, and Feminists for Life joined the National Right to Life Committee" speaking out against certain welfare reform proposals).

29. MURRAY, *supra* note 6, at 18. *See also* McClain, *supra* note 13, at 379 ("For example, many critics of welfare rhetoric observe that the stereotypical image of the welfare recipient is a black, unmarried woman. Although white women in fact constitute a slightly greater percentage of all AFDC recipients, 'no one has a clear image of who or where these [white] recipients are'" (quoting Andrew Hacker, *The Crackdown on African-Americans*, THE NATION, July 10, 1995, at 45-46)).

[T]he current rhetoric of irresponsible reproduction cannot serve as an adequate basis for serious public debate about reproduction and responsibility or for changing law and public policy. Its models are flawed, reflect a problematic gender ideology and troublesome stereotypes about people in poverty, and rely upon reductive accounts of human motivation in the area of reproductive behavior.³⁰

To a large extent, politicians and activist groups use the horror stories and stereotypes because they draw attention and motivate public outcry.³¹ Far from conveying the true profile of a welfare recipient, these practices tend to distort the truth. Negative stereotypes abound and public opinion reflects those stereotypes. "[T]he welfare recipient as victim gives way to the welfare recipient as culpable exploiter of the system: the images of the able-bodied idler, the welfare queen, the deadbeat dad, or the food stamp cheater all suggest evasion of responsibility by imposing costs upon, or shifting them to, others."³² Whether this is accurate, true, or a matter of opinion, it is the image that motivates the public to support the political leaders' misguided initiatives.

Deserving Poor vs. Undeserving Poor

Historically, stereotypes and myths of the poor have informed the creation, shape and scope of public assistance programs. Specifically, myths which differentiate the "undeserving" poor from the "deserving" poor justify punitive welfare policies on the basis that certain populations (unwed mothers "lazy" and shiftless paupers) are responsible for their poverty and must be discouraged and prevented from depending upon public assistance.³³

There has always been a difference in public opinion and legislative actions between the deserving and undeserving poor.³⁴ This difference was created commonly to answer the question "[w]ho should — and...who should not — receive help?"³⁵ An easy distinction was,

30. McClain, *supra* note 13, at 342.

31. DEBORAH A. STONE, POLICY PARADOX; THE ART OF POLITICAL DECISION MAKING 146-47 (1997).

32. McClain, *supra* note 13, at 376-77.

33. Kaufman, *supra* note 11, at 308.

34. See, e.g., MICHAEL B. KATZ, THE UNDESERVING POOR; FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 9-16 (1989). The author would like to thank Mr. Katz for inspiring the title of this Note.

35. *Id.* at 9.

and still is, race. When welfare programs were first created in the United States, many people felt white widows deserved assistance, while for black widows they “s[aw] no reason why the employable Negro mother should not continue her usually sketchy seasonal labor or indefinite domestic service rather than receive a public assistance check.”³⁶

During welfare reform’s first transformation in the early 1980s, the difference in the public conception of deserving and undeserving poor was evident in public commentary. “The concept of the social safety net entered the public policy arena during the early 1980s, as changes initiated by the Reagan administration sought to streamline government programs while maintaining supports for people termed ‘the truly needy.’”³⁷ Of course, the people deciding who fit into this category had motivations beyond just providing for the welfare state.

The “Welfare Queen”

“[T]he average citizen considers all AFDC recipients as part of the ‘underclass,’ i.e., African-American, long-term welfare recipients who live in inner-city ghettos and regularly have babies.”³⁸ The common vision of the “welfare mother” is a woman receiving public assistance for many years, who does not work, does not want to work, and has children irresponsibly.³⁹ While public opinion — and indeed, legislative action — may reflect this belief, the facts simply do not reflect this impression.⁴⁰ For instance, studies have shown that families receiving government assistance are *smaller* than families in the general population.⁴¹ The average family size for the entire population of the United States was 3.18 in 1995,⁴² while the

36. Williams, *supra* note 17, at 724 (quoting Winifred Bell, AID TO DEPENDENT CHILDREN 9-13 (1965)).

37. BURT ET AL., *supra* note 18 (citing MARTHA BURT & KAREN J. PITTMAN, TESTING THE SOCIAL SAFETY NET (Urban Inst. Press, 1985)).

38. Williams, *supra* note 17, at 742.

39. See McClain, *supra* note 13, at 345 (“In contrast ‘irresponsible’ reproduction takes place...where parents are not self-sufficient but instead, encouraged by the incentive of welfare benefits, shift the financial costs of parenting to others (e.g., the taxpayer-supported welfare state).”). See generally Kaufman, *supra* note 11 (discussing the stereotype at great length).

40. See generally NOW LDEF, 1999-00 *Background on Child Exclusion Proposals*, III. *Problems with Child Exclusion Programs*, available at <http://www.nowldef.org/html/issues/wel/childep.shtml> (last visited Apr. 30, 2001) (detailing various misconceptions about child exclusion programs) [hereinafter NOW LDEF, *Background on Child Exclusion Proposals*].

41. See *id.*

42. See Table 1: *Families by Type, Age, Metropolitan-Nonmetropolitan Residence, and Race and Hispanic Origin of Householder, March 1998*, at <http://www.census.gov.html> (last visited

average family size for AFDC recipients was 2.8.⁴³ The notion that women receiving federal assistance have children in order to receive more assistance is another misconception that is flatly untrue.⁴⁴

WELFARE REFORM AND A REVIEW OF CURRENT WELFARE LAW

Historical Significance of Welfare Programs

There has been a paradigm shift in the purpose of public assistance in recent years. As mentioned in the introduction of this Note, the original goals of public assistance were to provide for single-parent (generally female-led) families.⁴⁵ In the original AFDC legislation, Congress stated it authorized familial financial aid:

for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . .⁴⁶

As late as 1974, United States Federal Courts were still citing this need to provide for single parent families as the reason for federal welfare programs.⁴⁷

May 1, 2001).

43. BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, 105TH CONG., TABLE 7-24, at 454 (2d Sess. 1998).

44. See NOW LDEF, *Background on Child Exclusion Proposals*, *supra* note 40; see also Kaufman, *supra* note 11, at 311 (citing William Julius Wilson & Kathryn M. Neckerman, *Poverty and Family Structure*, in *FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T* 248-51 (Sheldon H. Danziger & Daniel Weinberg eds., 1986) (citing studies indicating no association between the receipt of welfare benefits and out of wedlock births)).

45. See *supra* notes 29-44 and accompanying text.

46. 42 U.S.C. § 601 (1988) (cited in *C.K. v. Shalala*, 883 F. Sup. 991, 998 (D.N.J. 1995)); see also MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 306 (rev. ed. 1996) ("When Aid to Dependent Children originated in 1935, relatively few married women worked for wages, its sponsors intended to help widows with children remain at home.").

47. See, e.g., *Doe v. Gillman*, 479 F.2d 646, 648 (8th Cir. 1974) ("The AFDC provisions of the Social Security Act envision aid to strengthen the entire family unit, including the dependent child's parent, so as to encourage the care of the child within his [or her] home.").

President Kennedy was much more idealistic in his characterization of the goals for public welfare programs:

The goals of our public welfare program must be positive and constructive.... [The welfare program] must stress the integrity and preservation of the family unit. It must contribute to the attack on dependency, juvenile delinquency, family breakdown, illegitimacy, ill health, and disability. It must reduce the incidence of these problems, prevent their occurrence and recurrence, and strengthen and protect the vulnerable in a highly competitive world.⁴⁸

President Kennedy is considered to be the first President to conceive such a role for the American federal government in any situation.⁴⁹ Not all actors in the United States government shared President Kennedy's idealism, but it is a poignant example of an alternative point of view.

Whatever the original goals and accomplishments of AFDC were, they all changed drastically in 1996, when "Congress fundamentally changed the nature of that safety net for families with children when it passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996."⁵⁰ The Personal Responsibility and Work Opportunity Reconciliation Act, ("PRWORA") changed AFDC to TANF and effected a drastic change in the way in which federal welfare programs are administered.⁵¹ It also demonstrated a paradigm shift in the government's attitude towards assistance programs.⁵² Beginning in the early 1980s, some governmental actors characterized welfare as a social evil engendering economic and moral degradation: "Welfare became the centerpiece of an explanation for economic stagnation and moral decay. As a

48. MURRAY, *supra* note 6, at 15 (quoting President John F. Kennedy's welfare message to Congress in 1962).

49. *Id.*

50. BURT ET AL., *supra* note 18, at 2. These reforms did not create legislation with identical goals of the original AFDC program in the Social Security Act. Rather, they took place during a paradigmatic shift of public opinion of government sponsored welfare programs. "Earlier themes in welfare reform or antipoverty policy appeared liberal anachronisms inappropriate to the new obsession with dependence, embodied mainly in young unmarried mothers and their 'illegitimate' children. Welfare reform focused more on changing behavior than helping people survive with some comfort and dignity." KATZ, *supra* note 34, at 301.

51. BURT ET AL., *supra* note 18, at 2.

52. KATZ, *supra* note 34, at 301 ("Welfare reform focused more on changing behavior than helping people survive with some comfort and dignity.").

causal theory this conservative criticism was largely wrong, but it was nonetheless plausible and coherent."⁵³

Family Cap in Welfare Reform

"Child exclusion provisions seek to 'promote individual responsibility' and 'strengthen and stabilize the family unit' by discouraging welfare recipients from having additional children."⁵⁴ Phrases such as "promoting individual responsibility" and "strengthen and stabilize the family unit" encourage support for these family cap programs, even though the programs might not accomplish these goals. Logically, it is difficult to understand how preventing poor women from having children by denying them cash benefits will strengthen and stabilize their families. It is clear, however, this sort of rhetoric is closely tied with family cap policy and its growing support throughout the nation.

"Implicit in this purpose [of promoting individual responsibility and strengthening and stabilizing the family unit] is the assumption that recipients, lacking a sense of responsibility and a stable family structure, require punitive restrictions to curtail their propensity to have numerous children for the purpose of getting welfare benefits."⁵⁵ This type of ideology reflects the idea poverty is self-inflicted and may stem from those people above the poverty line having difficulty understanding how those in poverty became impoverished.⁵⁶ The conclusion often reached is that poverty is the fault of the impoverished person and such a conclusion may drive society's response to the able-bodied unemployed.⁵⁷

"In contrast to a benefit schedule tailored to children's needs, family caps and child exclusion provisions send a 'moral message' about responsible procreation and parenting, procreation within marriage and with financial resources, and the limits of governmental responsibility for such procreation, thus ensuring fairness to taxpaying working families."⁵⁸ Through family cap legislation the government in effect steps in to control women who, presumably,

53. *Id.* at 139.

54. Kaufman, *supra* note 11, at 313 (quoting *C.K. v. Shalala*, 883 F. Supp. 991, 1013 (D.N.J. 1995)).

55. *Id.*; see also McClain, *supra* note 13, at 396-419 (describing the theory of the proper role of the government as interrupting immoral reproduction among welfare recipients); KATZ, *supra* note 34, at 13-16 (discussing the history of the moral judgments inherent in the distinction between poverty and pauperism).

56. HANDLER, *supra* note 7, at 89.

57. *Id.* at 91-92.

58. McClain, *supra* note 13, at 372.

have no other controls on their procreative habits. The family cap was the solution to what many people saw as a widespread problem: lazy welfare recipients willing to live off the welfare state.

New Jersey State Welfare Reform

New Jersey applied for a waiver of the federal program to allow a family cap provision in its state welfare program in 1992, six years before PRWORA was enacted with its blanket allowance for state-level experimentation.⁵⁹ At the time, the family cap "directly conflict[ed] with existing federal law."⁶⁰ President Clinton and his administration, however, encouraged states to apply for such waivers, and most were approved.⁶¹ Although waivers had been available since 1988,⁶² few states applied for these waivers prior to President Clinton's encouragement of the waiver program.⁶³ Even when state proposals conflicted with federal law, they were approved as long as they were "cost neutral" and include[d] "rigorous evaluation."⁶⁴ New Jersey was the first state in the country to enact the family cap in a form as it exists today, and therefore is an ideal state in which to examine the family cap.

SPECIFIC CASE REVIEW AND THE INDIVIDUAL RIGHT TO PROCREATE

The Doctrine From Eisenstadt v. Baird⁶⁵ Forward

The proponents of family cap legislation choose not to financially support children born to women on welfare to prevent them

59. See *C.K. v. Shalala*, 883 F. Supp. 991, 997, 1000-01 (D.N.J. 1995) (discussing the history of New Jersey's family cap legislation, part of the state's Family Development Program ("FDP"), while considering a challenge to the FDP).

60. *Id.* at 1000.

61. KATZ, *supra* note 34, at 310-11.

62. 42 U.S.C. § 1315(a) (1988). Under this section of the United States Code, the state must apply to the Department of Health and Human Services for a waiver from the federal program requirements. *Id.*

63. KATZ, *supra* note 34, at 310.

64. *Id.* at 311 (citing Robert Pear, *Dole Reversal; A Welfare Revolution Hits Home, But Quietly*, N.Y. TIMES, Aug. 13, 1995, at § 4, 1). While these waivers were granted without extensive analysis regarding their constitutionality, many of the programs have been incorporated into TANF or remain at the state level. For an example of a program that granted a waiver and then subsequently found it unconstitutional, see *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994) (holding a program that cut benefits to new residents an unconstitutional violation of the right to travel). For a pre-reform analysis of the efficacy of waivers, as well as the proliferation of them, see HANDLER, *supra* note 7, at 89-99. Some of the most unique state level programs are analyzed by Handler as well. See *id.* at 99-109.

65. 405 U.S. 438 (1972).

from having more children. The flawed reasoning behind this movement is women, and indeed most families, do not have children because they know they have the money to do so. "Most people do not view having a baby as the prize for having made it economically...."⁶⁶ In fact, even taxpaying women do not "...have a child to gain an additional tax deduction for a dependent."⁶⁷ The use of flawed economic reasoning to withhold a constitutional right, that to bear children, is a dangerous action in which the government engages.⁶⁸

At this program's inception, many experts did not believe women would stop having children just because they ceased to receive more cash benefits for them.⁶⁹ In fact, the monetary incentive to women receiving public assistance to have more children is more mythological than real:

66. Williams, *supra* note 17, at 739.

67. *Id.*

68. For a discussion of why this is troubling, see *infra* notes 100-11 and accompanying text.

69. Interestingly enough, although research has shown that welfare benefits will not induce a woman to have children, see *supra* note 48 and accompanying text, the opposite is true in that the restriction of the benefits will prevent a woman from having children. See Suzanne Fields, *Smaller Families on Welfare*, THE COMMERCIAL APPEAL (Memphis, TN), Nov. 7, 1998, at A6 (citing study by Rutgers University showing that New Jersey, the first state to institute a family cap of any sort, reduced births to welfare mothers by just over 14,000); Cheryl Wetzstein, *Welfare Policy Gets Credit for Reduction in Births; 'Family Cap' Leads to Rise in Abortions*, WASH. TIMES, Nov. 3, 1998, at A1; NOW LDEF, *What Congress Didn't Tell You: A State-by-State Guide to the Welfare Law's Hidden Reproductive Rights Agenda, Introduction and Overview of Reproductive Rights and TANF*, available at <http://www.nowldef.org/html/courts/economic.htm> (last visited Apr. 30, 2001).

The Rutgers University multivariate regression analysis used the probit (more or less likely) method and controlled for the race, age, education level, marital status, monthly earnings, and length of time on AFDC of the mother, as well as the number of AFDC available children in the family. This is a common method of trend analysis that allows statistics to isolate the effect of each different variable controlled for, as well as the key examination variable. It showed the number of children expected to be born to New Jersey AFDC recipients, without the family cap legislation, is 14,057 more than was observed with the family cap restriction. See Michael Camasso, Carol Harvey & Mark Killingsworth, *New Jersey's Family Cap and Family Size Decisions: Some Findings From a 5-Year Evaluation* 59 (May 14, 1999) (unpublished study, on file with author) (evaluating the Family Cap Law in New Jersey and estimating that it was responsible for "reduc[ing] births among the AFDC population by 14,057 births").

It is interesting to note that the number of abortions welfare recipients are electing to have has increased in New Jersey. See *id.* Increasing abortions was not a goal of the supporters of Family Cap and is generally not acceptable to them. Of course, as they do not generally provide contraception or family planning methods to these women, it is hard to guess just how they expected family sizes *would* be reduced. The federal government, through such means as the Hyde Amendment, has long avoided providing financial support for programs that provide information on family planning or contraception. See Pub. L. No. 96-123, 93 Stat. 923, 926 (1979).

[T]he incremental increase that an AFDC family receives when a new child enters the family is so small that it does not even cover such basic essentials such as diapers, clothing, bottles and formula. In Wisconsin, for example, an additional third child adds \$100 to the grant; in New Jersey, \$64; in Mississippi, \$24. Thus if economics were really the driving factor in an AFDC mother's decision to have a child, she would make the "rational" decision not to do so.⁷⁰

The monetary incentive to a *taxpayer* (who does not receive any welfare assistance from the government) to have children is much more real.⁷¹ Furthermore, the idea women have children to receive welfare benefits is simply incorrect. "[S]ocial science research indicates that receiving welfare does not motivate recipients to get pregnant."⁷² This, like the idea of the "welfare queen,"⁷³ is an example of the flawed reasoning and common stereotypes that further welfare policy in the United States.

Public opinion also holds that most Americans can afford to support their children.⁷⁴ The government does not only support, however, the children of those families who cannot afford to support them. The government assists nearly all parents by providing tax breaks for parents with dependent children, which generally are greater than direct benefits it confers to welfare recipients.⁷⁵ "[W]hen another child is born into a 'working' family, the 'benefit' received through a federal tax deduction is higher in actual dollars

70. Williams, *supra* note 17, at 740.

71. Michael Wines, *Taxpayers Are Angry. They're Expensive Too.*, N.Y. TIMES, Nov. 20, 1994, § 4, at 5; see also *supra* note 53 and accompanying text. There are many value judgments associated with the perceived difference between a "tax break" for a dependant child and a welfare check for the same dependant child. *Id.* Frequently, the truth behind these value judgments is not examined as closely as the size of the assistance check.

72. Kaufman, *supra* note 11, at 311 (citing William Julius Wilson & Kathryn M. Neckerman, *Poverty and Family Structure*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 248-51 (Sheldon H. Danziger & Daniel Weinberg eds., 1986) (citing studies indicating no association between the receipt of welfare benefits and out of wedlock births)).

The research by Wilson & Neckerman summarizes ten years of research using many different statistical sampling methods and structures. See *id.* Despite this lack of a connection, many politicians continued to insist that AFDC was causing women to have children to receive benefits. "Government programs designed to give a helping hand to the neediest of Americans have instead bred illegitimacy, crime, illiteracy, and more poverty." REPUBLICAN NATIONAL COMMITTEE, *supra* note 17, at 65.

73. See *supra* notes 54-58 and accompanying text.

74. See McClain, *supra* note 13, at 357 ("[I]f the test for responsible reproduction is reproducing without expecting to shift the costs of support to others, few families would pass the test when one considers the many subsidies, tax benefits, and credits upon which American families depend.").

75. The most notable and substantial of these is the deduction a taxpayer may take for a dependant child. I.R.C. § 24 (2001).

than the incremental amount received by an AFDC recipient in most states.⁷⁶ The general public does not recognize these benefits to the taxpayer as a form of government assistance. Instead, these benefits are often referred to as "tax expenditures."⁷⁷ This form of assistance is often glossed over when public figures talk about the government paying poor people to have children.⁷⁸ The truth is that the government pays many people to have children.

The goal of reducing the size of welfare-receiving families is rather misplaced. "[T]he number of children born to an average welfare recipient is no larger than the number born to her non-recipient counterpart."⁷⁹ Recent research has shown AFDC families had fewer children than the national average.⁸⁰ This indicates states are not trying to keep the family size of welfare recipients "within reason," but instead are trying to keep these numbers to an unnaturally low number, expecting them to have smaller families than their non-recipient counterparts.⁸¹

In *Skinner v. Oklahoma*,⁸² the Supreme Court first recognized the right to procreate, declaring it "a sensitive and important area of human rights."⁸³ The Court in *Skinner* recognized the right of "a person who was convicted two or more times for crime 'amounting to felonies involving moral turpitude' to have children."⁸⁴ As one commentator states, "[i]f convicted felons cannot be stripped of this

76. Williams, *supra* note 17, at 719 n.128.

77. See also Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1157-62 (1988) (chronicling the development of the tax expenditures concept). See generally STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985) (tracing the development of the concept of tax expenditures).

78. See, e.g., McClain, *supra* note 13, at 375-76 ("People on welfare are victims of a cruel system, caught - to use imagery from the floor debate over the Personal Responsibility Act - in a 'trap of dependency and irresponsibility' rather than buoyed up by a 'social safety net.'" (citing 141 CONG. REC. H3352-53 (statements of Reps. Archer, Camp and Johnson); 141 CONG. REC. H3764 (statement of Rep. Greenwood)).

79. Kaufman, *supra* note 11, at 311 (citing MARK R. RANK, *LIVING ON THE EDGE: THE REALITIES OF WELFARE IN AMERICA*, 301 (1994)); see also *supra* notes 33-36 and accompanying text.

80. See, e.g., NOW LDEF, *Background on Child Exclusion Proposals*, *supra* note 40.

81. This Note does not consider the racial impact of family cap legislation. For a discussion of the racial implications of child exclusion policies, see generally Kaufman, *supra* note 11. It is interesting to note, however, many authors have accused the American government of engaging in a eugenics-oriented program with the recent welfare legislation. See generally Nicole Huberfeld, *Recent Development: Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent 'Workfare' Law*, 9 U.C.L.A. WOMEN'S L.J. 98 (1998).

82. 316 U.S. 535 (1942).

83. Laura M. Friedman, *Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637, 647 (1995) (quoting *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

84. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

right, it is difficult to condone taking it away from law-abiding citizens simply because they are poor."⁸⁵ The government may remove some rights, such as voting rights for convicted felons, without violating constitutional protections,⁸⁶ but may not restrict the right to procreate. It is therefore unconscionable for the government to do so with poor American women receiving welfare benefits.

In 1965, the Court in *Griswold v. Connecticut*⁸⁷ found "the fundamental right to privacy is embedded in the penumbras of the Bill of Rights."⁸⁸ This right to privacy was soon extended to various other areas including reproduction. For instance, in 1972, the Court in *Eisenstadt v. Baird* upheld the right of unmarried persons to use contraceptive devices.⁸⁹ The Court expressly disallowed the deterrence of premarital sex as a constitutional legislative aim:

[T]he goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims.... And we hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.⁹⁰

Despite this strong wording, both state governments and the federal government continue to try to do exactly what Justice Breyer prohibited by implementing child exclusion legislation.⁹¹

In 1995, a class action suit challenged the family cap in New Jersey.⁹² In *C.K. v. Shalala*,⁹³ the plaintiffs alleged the United

85. *Id.*

86. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding the right of States to disenfranchise convicted felons); *Qualification of Voters*, VA CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."); see also WILLIAM C. KIMBERLING, *FEDERAL ELECTION LAW* 96 (1996) (explaining that while there is no federal law on the topic, the right of convicted felons to vote is a matter of state law).

87. 381 U.S. 479 (1965).

88. Friedman, *supra* note 83, at 647.

89. 405 U.S. 438 (1972); see also Friedman, *supra* note 83, at 647 (quoting Justice Breyer in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.")).

90. *Eisenstadt*, 405 U.S. at 443.

91. Under the old AFDC system, the family cap and child exclusion was purely state initiated; the state had to apply for a waiver to the federal government. See *supra* note 24 and accompanying text. Under the newer TANF plan, however, the federal government encourages these restrictions. See *supra* note 23 and accompanying text. Under both plans there is a collaboration of the state and federal government when initiating a family cap.

92. See *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995).

93. *Id.*

States Secretary of Health and Human Services, Donna Shalala, acted unconstitutionally when she approved New Jersey's family cap waiver.⁹⁴ The plaintiffs in this case were a class of New Jersey residents receiving welfare benefits through AFDC.⁹⁵ They challenged the creation of the law on the grounds that Secretary Shalala violated the Administrative Procedure Act⁹⁶ ("APA") in accepting the application for waiver.⁹⁷ They also challenged the substance of the law on many grounds claiming it violated:

(1) the APA since the Secretary [violated it], (2) various provisions of the Social Security Act and implementing regulations, (3) HHS [Department of Health and Human Services] regulations protecting human subjects in experiments that involve pregnant women and fetuses, and (4) the Equal Protection and Due Process Clauses of the United States Constitution.⁹⁸

This case was dismissed by the court on summary judgment.⁹⁹

The Unconstitutional Conditions Doctrine

The Unconstitutional Conditions Doctrine originated in the early years of the twentieth century.¹⁰⁰ The Supreme Court first recognized this doctrine in *Frost & Frost Trucking Co. v. Railroad Commission of California*.¹⁰¹ The Court held the state:

may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.¹⁰²

94. *See id.* at 997.

95. *See id.*

96. 5 U.S.C. § 551 (1994).

97. *See Shalala*, 883 F. Supp. at 997.

98. *Id.*

99. *See id.* at 1015 (holding Secretary Shalala's "action in approving New Jersey's new welfare reform ... [was] neither arbitrary nor capricious ... [and] reflect[s] her rational determination that the New Jersey Plan was unlikely to promote the objectives of the AFDC program.... [T]he Family Cap provision of the FDP does not violate any statutory or constitutional mandate.")

100. *See generally Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583 (1926) (holding the Commission cannot require certain actions by the Frost & Frost Trucking Co. merely because it is required to obtain a permit from the Commission).

101. *Id.*

102. *Id.* at 593-94.

The Supreme Court expanded on this principle, bringing it into different forums. It explained further in *44 Liquormart, Inc. v. Rhode Island*:¹⁰³ "even though the government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right."¹⁰⁴ Thus, once the government chooses to provide a benefit, it may not force the recipient to surrender a constitutional right to receive it.¹⁰⁵

This argument can be applied easily to state-implemented public assistance program family cap laws. First, courts do not recognize any inherent right to welfare benefits.¹⁰⁶ Second, the family cap legislation expressly discourages women receiving welfare benefits from having children.¹⁰⁷ Considering these factors, it is clear if "the government is barred from indirectly violating a right which the Constitution forbids it to violate directly,"¹⁰⁸ then it may not restrict the right of women receiving public assistance to

103. 571 U.S. 484 (1996).

104. *Id.* at 513.

105. Courts have not considered the question of whether private groups may engage in this behavior, however. For instance, there is a private group based in California paying drug-addicted (and likely low-income) women to obtain permanent, or semi-permanent birth control. See Pam Belluck, *Cash-for-Sterilization Plan Draws Addicts and Critics*, N.Y. TIMES, July 24, 1999, at A8 ("intended to persuade drug-addicted women to get sterilized or get long-term birth control like Norplant or Depo-Provera. Once the women offer proof that they have done so, they will be given \$200 in cash."). This group, Children Requiring a Caring Community (C.R.A.C.K.), hosts the internet site <http://www.cashforbirthcontrol.com>. In the opening letter, the organizers refute charges they are racist, and profess they are not targeting any specific mothers, except for those who are drug addicted. See *id.* For a discussion supporting this program, see generally Juli Horka-Ruiz, Note, *Preventing the Birth of Drug-Addicted Babies Through Contract: An Examination of the C.R.A.C.K. Organization*, 7 WM. & MARY J. WOMEN & L. 473 (2001) (describing the organization in terms of contract rights, and advocating for its proliferation and extension to governmental actors).

106. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970).

107. Friedman, *supra* note 83, at 637 ("This program [family cap] deters families who receive Aid to Families with Dependant Children (AFDC) benefits from having children while on welfare by denying them additional benefits."). While Ms. Friedman was ostensibly discussing AFDC, the family cap restrictions format has not changed substantially since then.

108. *Id.* at 643 ("In other words, because the government cannot enact a law forbidding welfare mothers to have children, it cannot use a condition on their benefits to achieve the same result.").

For an in depth analysis of the origins of the Unconstitutional Conditions Doctrine, see *id.* at 643-46 (citing various authors discussing and developing the unconstitutional conditions doctrine, including Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); Richard A. Epstein, *The Supreme Court, 1987 Term - Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990)).

procreate.¹⁰⁹ In fact, Lenora Lapidus, legal director for the American Civil Liberties Union (ACLU) of New Jersey, argued this when talking to reporters about a recent case — *Sojourner A. v. New Jersey Department of Human Services*.¹¹⁰ A newspaper article quoted Lapidus as acknowledging “the state [is] not constitutionally obligated to have a welfare program, but that ‘once the state has decided to give out welfare, it must do so in an even-handed way.’”¹¹¹ Once a state or federal government chooses to award these public assistance benefits, it must do so in a manner that avoids discrimination.

Applying The Unconstitutional Conditions Doctrine to Sojourner A. v. New Jersey Department of Health and Human Services

The family cap legislation in New Jersey has had many vocal opponents, including the American Civil Liberties Union, who have challenged consistently this law in court.¹¹² Since its approval in 1992, the ACLU has challenged this provision repeatedly on many different grounds. For instance, in 1997 the ACLU of New Jersey filed the *Sojourner A.* case, along with the National Organization for Women Legal Defense and Education Fund (NOW LDEF) lawyers and others, challenging the child exclusion provisions as violating

109. See Friedman, *supra* note 83.

110. See Randall J. Peach, *Judge Uphold N.J.'s Welfare Cap Linked to Birth of Added Children, Finds No Equal Protection Violations or Interference With Right to Procreate*, N.J. L.J., Sept. 4, 2000. *Sojourner A. v. N.J. Dep't Human Servs.*, No. ESX-L-10171-97 (Essex County Ct. 1997), is an unpublished decision issued by Judge Anthony Iuliani in 1997 and described in detail in the above cited article.

111. *Id.* Throughout American history the courts have held there is no right to welfare, and states may restrict access, so long as they operate within the requirements set forth in the federal Social Security Act. See generally *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding states may invoke many restrictions, including the restriction in question of a maximum family grant (similar to the family cap) on AFDC recipients).

112. *ACLU Will Appeal Welfare 'Family Cap'*, THE RECORD (Bergen County, NJ), Dec. 17, 1999, at A11 (“The state American Civil Liberties Union announced Thursday it is going to court again to fight a policy that freezes cash benefits for women who have a baby while they are on welfare.”); see also Donna Leusner, *ACLU Challenge New Jerseys 'Family Cap' Welfare Law*, THE STAR-LEDGER, Aug. 29, 2000 (examining how the ACLU is seeking to create a case from the idea that family cap requirements coerce women to have abortions, and combining this with a quote from the state Chief Justice in a recent ruling that “the state should not attempt to tip the scale against the right to choose an abortion absent compelling reasons to do so”).

“The New Jersey Supreme Court ... in *Planned Parenthood v. Farmer* said the state may not seek to tip the scales. The state may not seek to influence, even indirectly, a woman's decision whether to bear a child or have an abortion.” *Id.* (quoting Lenora M. Lapidus, legal director of ACLU of New Jersey).

the State Constitution's equal protection and right to privacy clauses.¹¹³

Since its inception, the NOW LDEF has opposed the many different forms of what they term the "Child Exclusion" legislation.¹¹⁴ They challenged the New Jersey Law on racial grounds as well,¹¹⁵ asserting "the law is based on racially discriminatory stereotypes about poor women of color, in violation of Title VI of the Civil Rights Act."¹¹⁶ The case was dismissed without prejudice when there was insufficient proof of the state's intent to discriminate.¹¹⁷

This Note focuses on *Sojourner A. v. New Jersey Department of Health and Human Services*. The case was brought challenging the New Jersey State Constitution.¹¹⁸ Judge Iuliani, the judge in the case, rejected the dual challenge in it "interfered with a woman's fundamental right to decide whether to have children [and] the argument that the law denied equal protection to children born to families already receiving benefits."¹¹⁹ Judge Iuliani explained his reasoning, stating the law "promotes personal responsibility in order to alter and alleviate the cycle of welfare dependency."¹²⁰ Once again, the rhetoric and stereotypes concerning welfare recipients influenced the decision in this case, as well as the creation of the challenged legislation.

Particularly disturbing is evidence that Judge Iuliani does not understand the relevance of a benefit check. His commentary during the oral arguments demonstrates this lack of understanding. At one point during oral arguments, Judge Iuliani commented on the loss of the minimal cash benefits a woman having an additional child foregoes as a result of the family cap: "[m]aybe they'll eliminate buying the lottery ticket."¹²¹ This flippant, misinformed attitude is based on the "welfare queen" stereotype and similar rhetoric surrounding the policy debate, rather than accurate statistical data.

In his decision, Judge Iuliani "acknowledged that the exclusion might impose a 'slight burden' on a woman who decides to have

113. NOW LDEF, 1999-00 Legal Docket; *Economic Justice for All Women*, "Eliminating Child Exclusion Policies," available at <http://www.nowldef.org/html/courts/economic.htm> (last visited Apr. 30, 2001) [hereinafter NOW LDEF, 1999-00 Legal Docket].

114. See generally *id.* (describing various cases in which the NOW LDEF represents a party).

115. *In re New Jersey Family Development Act*, No. 02-92-3111 (H.H.S.).

116. NOW LDEF, 1999-00 Legal Docket *supra* note 113 (describing various cases in which the NOW LDEF is involved).

117. *Id.*

118. Peach, *supra* note 110.

119. *Id.*

120. *Id.*

121. *Id.*

another child, but ruled that the exclusion did not 'substantially intrude' on a woman's reproductive rights.¹²² While cash benefits are small enough that they do not encourage women to have children,¹²³ they can still provide basic subsistence for a new child. The loss of these benefits is, in fact, substantial. Judge Iuliani confuses the constitutionality of a law with the impact of it. A law may be unconstitutional, even if the impact is vague or slight. It is clear Judge Iuliani had good intentions when he mentioned, "[g]et them educated. They deserve it. Get them trained. They deserve it. Opportunities are abundant."¹²⁴ These goals are not enough, however. The government must not withhold cash benefits while trying to allow those receiving benefits to get educated and trained.

Speaking on the holding of a recent case in New Jersey, *New Jersey v. Farmer*,¹²⁵ Ms. Lapidus argued "the court misconstrued the standard for analyzing whether the rights to privacy and equal protection have been infringed."¹²⁶ The court in *Farmer* did not appear to understand a constitutional right is violated when any imposition occurs which can potentially cause harm to the individual seeking remedy.¹²⁷

It is estimated the family cap was responsible for 14,057 fewer births to New Jersey welfare recipients.¹²⁸ When a case is brought under a class action claim, as the *Sojourner A.* case should have been, it is easy to see that Judge Iuliani's contention the law did not have much affect is wrong. Because this law affected a large number of female welfare recipients, Judge Iuliani's analysis is erroneous, and the law must be reevaluated.

122. *Id.*

123. See *supra* note 43 and accompanying text.

124. Peach, *supra* note 110.

125. See *supra* note 40 and accompanying text.

126. Peach, *supra* note 110. The article quotes Ms. Lapidus as saying "The state's obligation is to remain neutral' when it comes to reproductive decisions.... It can't tip the scale in either direction." *Id.*

127. In *Sherbert v. Verner*, 374 U.S. 398 (1963), Justice Brennan summarized this principle. If a person must choose between an individual right to practice one's own religion and receiving unemployment benefits from the state government, it is unconstitutional coercion by the state. *Id.* at 404. As such, choosing between the individual right to bear children and public assistance benefits is also an unconstitutional restriction. See Friedman, *supra* note 83, at 649-50.

128. Camasso et al., *supra* note 69, at 59; see *Appeal Likely on Welfare Cap*, N.J. LAW., Sept. 4, 2000, at 2 ("Lenora M. Lapidus ... said plaintiffs in *Sojourner A. v. New Jersey Department of Human Services* expect to appeal Essex County Superior Court Judge Anthony J. Iuliani's decision upholding the state's 'family cap law' denying welfare payment to recipients who bear additional children.").

CONCLUSION

If the *Sojourner A.* case were brought as a class action, with women receiving benefits as the plaintiff class, and using the unconstitutional conditions doctrine to argue against family cap legislation, the impact from the legislation would have been made clear. This would have avoided the error made in *Sojourner A.* when Judge Iuliani held the law did not affect many people. In the future, cases challenging the family cap should proceed under the federal Constitution. The doctrine of the right to bear children is more developed under the federal Constitution than it is under state constitutions. Using the federal Constitution's guarantee of the right to procreate, plaintiffs can demonstrate easily the family cap legislation clearly infringes on their right to procreate. Therefore, it ought to be struck down. Coincidentally, under the New Jersey Constitution, a challenge can be brought claiming the law encourages abortions, and that the state government cannot enter this realm. The family cap laws can be shown to profoundly impact women, and the reproductive choices they make. This impact, combined with the irrational and erroneous stereotypes the law is based upon, present ample opportunity for future challenges.

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