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I. INTRODUCTION

In an era where courts are reaffirming landmark right to privacy decisions,[1] such as *Griswold v. Connecticut*,[2] *Eisenstadt v. Baird*,[3] and *Roe v. Wade*,[4] and expanding the scope of a constitutionally protected right to privacy, it is seemingly unthinkable to imagine that the exercise of such rights is being legally perverted to promote eugenic ideals. However, this is precisely what has been happening. In particular, this Note addresses how the state of California and private actors within the state are using legally sanctioned means to coerce women into making decisions regarding their reproductive capacities that are in effect, and perhaps in purpose, eugenic in nature.

Today, the application of eugenics[5] is thought of as a bygone horror.

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1. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding the right to privacy protected by the Constitution includes the right to engage in intimate conduct undisturbed by the government).

2. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding a Connecticut restriction on contraceptive use a violation of the constitutional right to marital privacy).

3. Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the holding of *Griswold*; unmarried individuals also have a constitutional right to privacy that precludes a restriction on contraceptives).

4. Roe v. Wade, 410 U.S. 113 (1973) (holding the constitutional right to privacy includes the right to abortion).

5. Eugenics is defined as "[t]he study of hereditary improvement of a breed or race, especially of human beings, by genetic control." THE AMERICAN HERITAGE DICTIONARY (2nd ed. 1983).

Most notably, eugenical thought was the basis of a series of crimes against humanity utilized to further the racist ideologies of fearsome regimes like that of Hitler[6] or Pol Pot.[7] Yet, the United States has its own intimate history with the pseudo-science.[8] A dark moment in our judicial history is forever recorded in the Supreme Court opinion of *Buck v. Bell*.[9] In *Buck*, the Court upheld a Virginia law that provided for the sterilization of persons who were institutionalized for insanity or imbecility.[10] It is from this case that we get Justice Wendell Holmes' infamous quote, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."[11] The Court has since criticized the case, and even very recently had occasions to reference it, yet the Court never overturned the holding.[12]

6. JAMES M. GLASS, "LIFE UNWORTHY OF LIFE": RACIAL PHOBIA AND MASS MURDER IN HITLER'S GERMANY (Basic Books 1997). In an effort to "[rebuild] a genetically fit race" after World War I, German officials used means of applied biology and negative eugenics to cleanse society of the *diseased* and *criminal* aspects of society: Jews and other *undesirables*. *Id*. at 31. From 1934-1945, an estimated 1 percent of Germans were sterilized under a 1933 sterilization law (aimed at Jews). *Id*. at 39. The German bureaucrats saw this as a way to save national funds and get rid of welfare for the biologically inferior. *Id*. The actual numbers of sterilizations performed by the Nazis is hard to pinpoint; the numbers vary from 360,000 to 3,500,000 between 1933 and 1945 alone. Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 12 (1996); Holocaust Museum Houston Holocaust Facts, http://www.hmh.org/ed_faqs.asp (last visited April 11, 2006). In the end, the Nazis began the "Final Solution" to completely rid Europe of Jews. Overall an estimated 5,830,000 Jews were killed during the Nazi regime, plus other undesirables, such as Communists, trade unionists, Socialists, Roma and Sinti (Gypsies), Jehovah's Witnesses, Soviet citizens, Soviet prisoners of war, and homosexuals.

7. The Cambodian Genocide Program, http://www.yale.edu/cgp/ (last visited April 11, 2006). The Khmer Rouge regime, led by Pol Pot, killed an estimated 1,700,000 Cambodians (21 percent of the population) between 1975-1979. The purpose of the genocide was to reconstruct Cambodia as a Communist Peasant society. Thus, large numbers of professionals, military personnel, and ethnic minorities were killed. Those who were spared were relocated from the urban areas to the countryside, where they were starved and forced to work as laborers. Peace Pledge Union Information, *Talking about Genocide-Genocides Cambodia 1975*, http://www.ppu.org.uk/genocide/g_cambodia1.html (last visited April 11, 2006).

8. Eugenics has largely been debunked, but lives on in works such as that of RICHARD HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (The Free Press 1994).

9. 274 U.S. 200 (1927).

10. *Id*.

11. *Id*. at 207.

12. Justice Souter in his concurrence in *Tenn. v. Lane*, cited the case in reference to the "situation of disabled individuals before the courts." 541 U.S. 509, 534 (2004). Buck was a footnote in Chief Justice Rehnquist's opinion in *Board of Trustees v. Garrett*, 531 U.S. 356, 369 (2001): "The record does show that some states adopting the tenets of the eugenics movement of the early part of this century, required extreme measures such as sterilization of persons suffering from hereditary mental disease. These laws were upheld against constitutional attack 70 years ago in *Buck v. Bell*. But there is no indication that any

In 2003, California Governor Gray Davis issued a formal apology to the victims (and their families) who were sterilized under California's eugenics laws.[13] Davis said, "The people of California are deeply sorry for the suffering you endured over the years. Our hearts are heavy for the pain caused by eugenics. It was a sad and regrettable chapter in the state's history, and it is one that must never be repeated again."[14] The strong implication in Davis's statement is that eugenic measures that deny citizens their reproductive rights are a thing of the past. Yet, today in California, there exist several forms of coercive measures that result in the loss of reproductive rights.

In this Note, I will first traverse the history of the eugenics movement in California. Next, I will look at the California welfare system's use of a family cap (or child exclusion) program to limit the number of offspring born to poor women. Then I will discuss Project Prevention, a California-based organization that coerces poor, drug-addicted women into relinquishing their fertility for a drug fix. Next, I will briefly address the creative sentencing used in the probation terms of semi-permanent contraception proposed in two California cases. Finally, I will ground these discussions in the right to bodily integrity that is held within the constitutional right to privacy. Throughout this Note I will also focus on the trope of deserving poor versus undeserving poor that underlies our laws and attitudes.

II. A BRIEF HISTORY OF EUGENICS IN CALIFORNIA

A. EUGENICS

The ideology of eugenics is at odds with the American ideals of freedom and bodily integrity. Even now, however, in a time when personal autonomy has been cemented by American jurisprudence, eugenical means of population control continue and thrive. These methods, which interfere with reproductive privacy, are not mere remnants from a bygone era when America played a leading role in the eugenics movement worldwide; these methods are recreated every day.

1. A General Look

Rooted in hard science, eugenics promised to solve some of the biggest social problems plaguing the modern world. Eugenics comes from the Greek; it means "to be well born."[15] The eugenics movement developed

state had persisted in requiring such harsh measures as of 1990 when the ADA was adopted." (Citation omitted.)

13. *California Apologizes for Sterilization Law*, Associated Press, Mar. 12, 2003, http://www.cnn.com/2003/US/West/03/12/davis.sterilization.ap (last visited April 11, 2006).

14. *Id*.

15. *California's Compulsory Sterilization Policies, 1909-1979: Informational*

from the early genetic work of Gregor Mendel.[16] Biological in theory, "[t]he goal of the eugenics movement was to improve the human race by preventing the *genetically unfit* from passing on their *undesirable* traits to their offspring."[17] Francis Galton, a European geneticist and the father of eugenics, defined it as "the study of the agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally."[18] Eugenics became a global phenomenon.[19] In America, during the Progressive era,[20] many people were concerned with "modern" problems like crime, poverty and overcrowding in the urban areas. Eugenics seemed to provide a solution.[21] At the turn of the twentieth century in America, there were already several mechanisms for controlling "the face of the body politic": 1) immigration;[22] 2) institutionalization; 3) regulation of entry into marriage;[23] and, in the extreme, 4) sterilization of the *unfit*.[24] The remainder of this discussion will focus on the sterilization of the *unfit*, and, in particular, California's past and present role in eugenics.

Hearing Before the S. Select Comm. on Genetics, Genetic Technologies and Public Policy, 2003 Leg. 1242-S at 3 (Cal. 2003) (presentation by Dr. Alexandra Minna Stern, "The Darker Side of the Golden State: Eugenics Sterilization in California," July 16, 2003).

16. Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 864-65 (2004). An argument can be made that eugenics predates Mendel. For example, Spartans committed infanticide against any infant showing birth defects. Archaeological excavations have also found proof of "baby disposal" areas inside Roman bordellos that were the resting place of "undesired" babies born to prostitutes. Oana Iftime, *A Few Considerations on Ancient and Modern Eugenics*, 13 EUBIOS J. OF ASIAN AND INT'L BIOETHICS 221 (2003), http://www2.unescobkk.org/eubios/EJ136/ej136j.htm.

17. *California's Compulsory Sterilization Policies, 1909-1979: Hearing Before the S. Select Comm. on Genetics, Genetic Technologies and Public Policy*, 2003 Leg. iv (Cal. 2003). "[U]ndesirable traits often included 'feeblemindedness,' epilepsy, alcoholism, 'moral or sexual degeneracy,' drug addiction, and pauperism."

18. Silver, *supra* note 16, at 865.

19. Stern, *supra* note 15, at 3.

20. Silver, *supra* note 16, at 865: "Eugenics 'fit perfectly with Progressive ideology' because eugenicists 'were scientifically trained experts who sought to apply rational principles to solving problems of anti-social and problematic behavior by seeking out the cause, in this case poor heredity.'"

21. *California's Compulsory Sterilization Policies*, *supra* note 17, at iv.

22. "The eugenicist thought [Jewish and Italian] immigrants would threaten public morality, poison the 'American' gene pool, and were 'liable to become. . . public charge[s]'." The national origins quota system was premised on eugenic thought and was enforced under the Federal Immigration Restriction Act of 1924 until it was replaced by the Immigration and Nationality Act of 1965. Lombardo, *supra* note 6, at 5-6 (quoting ALAN M. KRAUT, SILENT TRAVELERS: GERMS, GENES AND THE "IMMIGRANT MENACE" (Basic Books 1994)).

23. Eugenics theorists "characterized miscegenation (racial mixing) as a threat to the health of the white gene pool." An example of the laws that existed in many states was that of Virginia's 1924 Racial Integrity Act, which was found to violate the constitutionally protected right to privacy in 1967's *Loving v. Virginia*, 388 U.S. 1. Lombardo, *supra* note 6, at 19-20.

24. Stern, *supra* note 15, at 4.

2. Eugenics in California[25]

In the Golden State, the eugenics movement had a uniquely Californian flavor. "It was always linked to the use of land: to agriculture and plant hybridization."[26] It was breeding applied to humans.

A powerful network of social workers, doctors, psychiatrists, biologists and philanthropists furthered the ideas of eugenics.[27] They were mostly white Protestants who helped enact exclusionary laws to the detriment of California's Indian, Mexican, and Asian populations.[28] A primary goal of eugenics, besides developing a genetically *better* human race, was to save the state money.[29] The idea was that the state could reduce, or eliminate, the amount of money that would otherwise go towards welfare and relief programs.[30]

In 1909, California became the second state to pass a sterilization law.[31] The statute, called the Asexualization Act, provided for the involuntary sterilization of certain categories of people, including inmates of state hospitals, certain institutionalized persons, prisoners convicted for life sentences, repeat offenders of certain sexual offenses, or just repeat offenders.[32] The caveat was that sterilization had to be thought to benefit the individual physically, mentally or morally.[33] The decision of whether to sterilize, however, was largely left in the hands of the hospital or institutions.[34] The State Commission in Lunacy, founded in 1896 and in charge of regulating the mental institutions of California, promulgated rules to secure consent from the patient's nearest relative before the sterilization occurred.[35] However, some sterilizations were performed without consent, and in cases where consent was given, it is unknown how many of the relatives were coerced into giving it by doctors and other personnel.[36]

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25. *See* Jon Gottshall, The Cutting Edge: Sterilization and Eugenics in California, 1909-1945, http://www.gottshall.com/thesis/article.htm (last visited April 11, 2006) for a concise, yet thorough discussion of California's sterilization laws.

26. Stern, *supra* note 15, at 4.

27. *Id*. at 5.

28. *Id*. at 4.

29. *Id*. at 6.

30. *Id*.

31. *Id.* Indiana was the first state to pass such a law in 1907. Eventually over thirty states would enact such laws. Mike Anton, *Forced Sterilization Once Seen as Path to a Better World; Decades of Files on Mental Patients Reveal How a Group of Noted Californians Hoped to Influence the Fate of the Human Race*, L.A. TIMES, July 16, 2003, at A1.

32. *California's Compulsory Sterilization Policies*, *supra* note 17, at v-vi.

33. *Id.* at vi.

34. *Id*.

35. *Id*.

36. *California's Compulsory Sterilization Policies*, *supra* note 17. In some cases, family members even *requested* sterilization be performed for the benefit of the patient. In particular, "mothers of young girls with unfortunate histories have requested that the work be done for protection's sake." Anton, *supra* note 31: "Today, scholars believe consent for

In 1913, the statute was repealed and replaced with another statute that made sterilization a condition of discharge.[37] In 1917, the sterilization law was changed again, and further emphasized the genetic transmission of *undesirable* traits.[38] Under California's sterilization law, 83 percent of sterilizations in the United States had been performed in California by 1921.[39] In the 1920s, the Human Betterment Foundation (HBF) was founded in Pasadena, California.[40] HBF, a nonprofit corporation with high profile members and supporters, worked to promote eugenic sterilization through research and information for the public.[41]

The eugenics movement in the United States culminated in the late 1930s.[42] The Supreme Court's 1927 decision in *Buck v. Bell* upheld the constitutionality of a Virginia sterilization law, similar to California's law.[43] Carrie Buck, the woman whose fertility was at issue in *Buck*, was allegedly "feeble minded," thus institutionalized and sterilized to prevent her from producing more *undesirables*.[44] Yet, recent detective work has uncovered that Buck was of normal intelligence. The real reason she was sent to an institution was to have a baby out of wedlock; and she was sterilized "as a matter of sexual morality and social deviance."[45]

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many of California's sterilizations were obtained through coercion. It was something promoters knew at the time and kept hidden."

37. *California's Compulsory Sterilization Policies*, *supra* note 17, at vii. SB 881 (Butler), Chapter 363, Statutes of 1913: "Before any person who has been lawfully committed to any state hospital for the insane, or who has been an inmate of the Sonoma State Home, and who is afflicted with hereditary insanity or incurable chronic mania or dementia shall be released or discharged there from, the state commission in lunacy may in its discretion, after a careful investigation of all the circumstances of the case, cause such person to be asexualized, and such asexualization, whether with or without the consent of the patient, shall be lawful and shall not render the said commission, its members or any person participating in the operation liable either civilly or criminally."

38. *Id*.

39. *Id*.

40. *California's Compulsory Sterilization Policies*, *supra* note 17, at iv.

41. *Id*. And the public, by and large, supported eugenics. "Every president from Theodore Roosevelt to Herbert Hoover was a member of a eugenics organization, publicly endorsed eugenic laws, or signed eugenic legislation without voicing opposition." Lombardo, *supra* note 6, at 1.

42. Stern, *supra* note 15, at 7.

43. 274 U.S. 200; *Buck* was a "radical departure from existing Supreme Court medical jurisprudence." The case "was the first and only instance in which the Court allowed a physician, acting as the agent of state government, to perform an operation. . . neither desired or needed by the 'patient.'" Silver, *supra* note 16, at 867.

44. 274 U.S. at 205.

45. The detective work of both Stephen Jay Gould and Paul A. Lombardo revealed that Carrie Buck was likely raped and impregnated and sent to an institution to hide that fact and the identity of her rapist. In other words, it was a cover-up. Also, Carrie herself was illegitimate, thus the sterilization was based more on the inheritance of social traits rather than biological ones. Lombardo, *supra* note 6, at 9-10; Stephen Jay Gould, *Carrie Buck's Daughter: A Popular, Quasi-Scientific Idea Can Be a Powerful Tool for Injustice*, NAT. HISTORY, July/Aug. 2002, at 12.

This paved the way for other states to pass sterilization laws.' Under these laws, an estimated 60,000 people were involuntarily sterilized.[47] One-third of these persons, 20,000 people, were sterilized in California alone.[48]

Although at first more men than women were sterilized, the numbers evened out as more and more girls and women were sterilized.[49] The sterilization of women "was very much about controlling the sexuality of young single women and girls: those deemed to be wayward or promiscuous."[50] Additionally, a disproportionate number of people of color and foreign born individuals were sterilized.[51] The same was true for individuals from broken homes, or whose parents were laborers.[52]

3. The Descent of Eugenics

Eugenics began to experience a public relations setback during World War II.[53] Initially the setback was due to a national physician shortage, then the Nuremberg trials in 1945 exposed the horror of Hitler's eugenics.[54] However, the sterilization laws remained and sterilizations continued; but instead of protecting society, the sterilizations were then seen as *therapeutic*.[55] California's sterilization law was finally repealed in 1979.[56] Today, *voluntary* sterilization, with the individual's full knowledge and consent, is legal in California.[58]

The state of California has tried to make amends for its part in the eugenics history of America.[59] Governor Davis issued a formal apology in 2003.[60] The California Senate Select Committee on Genetics, Genetic Technologies and Public Policy has created Senate Concurrent Resolution

46. Stern, *supra* note 15, at 6-7.
47. *Id.* at 7.
48. *Id*.
49. *Id*. at 8.
50. *Id*. at 9. Anton, *supra* note 31: "'One of the giggling dangerous type — a delinquent sexually, morally. Forged checks, remained away from home nights,' reads the case file of a 16-year-old girl who was sent to the Sonoma State Home, sterilized and released."
51. *Id*. at 8; Anton, *supra* note 31.
52. Anton, *supra* note 31.
53. *California's Compulsory Sterilization Policies*, *supra* note 17, at viii.
54. *Id*.
55. *Id*. "Up until the 1960s, the popular assumption was that patients' [sic] accepted, and often approved of, their sterilization."
56. Stern, *supra* note 15, at 6-7.
57. *Id*. at ix.
58. *Id.*; CAL. PROB. CODE §§ 1950-1969.
59. Another state complicit in the sterilization nightmare, North Carolina, has proposed legislation to compensate its victims with $20,000 to each survivor who files a claim by 2009. Editorial, *North Carolina Could Make Amends for One of the Most Shameful Practices in Its History with a Bill that Would Compensate Sterilization Victims*, NEWS & RECORD (Greensboro, NC), May 17, 2005, at A8.
60. *California Apologizes for Sterilization Law, supra* note 13.

47.[61] This resolution acknowledges California's participation in the eugenics movement and resolves to express its regret in that participation, to honor all individuals, and to "urge every citizen of the state to become familiar with the history of the eugenics movement, in the hope that a more educated and tolerant populace will reject any similar abhorrent pseudoscientific movement should one arise in the future."[62] Yet, there are now in existence several forms of eugenics that are being tolerated by the state of California.

II. MODERN FORMS OF EUGENICS IN CALIFORNIA

As "[t]he history of involuntary sterilization of institutionalized persons demonstrates . . . society has sometimes not hesitated to pursue what it perceived to be cost-saving measures at the expense of personal liberties."[63] Now, however, instead of forced sterilization of those with *undesirable* traits, poor women in California are faced with new means of interference with their personal liberties. These methods include: (1) limiting the number of children for whom a woman on welfare can get state support; (2) coercing drug-addicted women to surrender their reproductive capacities; and (3) forcing contraception use as a term of probation.

A. FAMILY CAPS IN CALIFORNIA AND THE CONTRAVENTION OF REPRODUCTIVE RIGHTS

1. The History of Family Cap Programs[64]

Unlike the flagrant violation of past *undesirables'* right to reproductive autonomy, experienced by thousands of individuals under the California sterilization laws, current *undesirables'* reproductive rights are being impinged covertly by the welfare system. In particular, the family cap (or child exclusion) policy forces poor women to choose between the well-being of her existing family and having more children.[65] The history of family cap programs is short. Each state makes the decision of whether and how to implement a program. Family cap programs, in general, prohibit families on welfare from receiving an increase in their benefits if

61. Filed with Secretary of State September 12, 2003.

62. Senate Concurrent Resolution 47.

63. PHILLIP REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 165 (1991).

64. For an in-depth discussion of the history of family caps, *see* Kelly J. Gastley, Note, *Why Family Cap Laws Just Aren't Getting It Done*, 46 WM. & MARY L. REV. 373 (2004).

65. *See* Christina E. Norland Audigier, Comment, *Starving Five to Prevent the Birth of One?: An International Human Rights Analysis of Child Exclusion Provisions and the Failure of Federal and State Constitutional Challenges*, 77 TEMP. L. REV. 781 (2004) (arguing family caps are punitive measures, and that while they have been continually upheld by federal and state judiciaries, they cannot survive an international human rights analysis).

they have another child while on welfare.[66] In California, a woman who would have received an incremental increase of $3.50 per day upon the birth of a new child prior to the implementation of the family cap program, now must stretch her existing welfare payments to cover the cost of the new child.[67]

In 1996, the Temporary Assistance for Needy Families ("TANF") block program, which gives states the power to set up their own welfare plans, eligibility requirements, and program elements, replaced Aid to Families with Dependent Children ("AFDC").[68] Prior to TANF, beginning in 1992, several states had implemented family cap programs under AFDC, which required a special waiver for a state to implement the program.[69] Now, under TANF, waivers are not required, making it easier for states to adopt such programs. California and 23 other states currently have some type of family cap program.[70] The programs are not uniform; there are variations from state to state.[71] California, specifically, exempts children conceived as a result of rape, incest, or failure of certain birth control methods (IUD, Norplant, and sterilization.)[72]

2. The Rationale of Family Caps and Indications of Failure

The objective of the California maximum family grant ("MFG") statute (family cap program) is "to promote personal responsibility of welfare recipients by discouraging growth in family size while they received public assistance and by encouraging them, through work incentives, to support their families and thereby eliminate their dependence on welfare."[73]

66. Williams v. Martin, 283 F. Supp. 2d 1286 (N.D. Ga. 2003). More specifically, there are two types of family caps. The first and more popular type is where there is no increase in benefits upon the birth of a new child. In the second type, an increase is given but is reduced for each child born. Additionally, the caps are implemented in three different ways: (1) benefits are fixed; (2) the state issues vouchers instead of cash; or (3) the state provides all families with the same flat grant regardless of the size of the family. *Family Caps: Do They Promote Personal Responsibility? After Nine Years, the Jury is Still Out*, http://www.ku.edu/~rlevy/public_Benefit_Law/reform_papers/familycaps.pdf (last visited May 22, 2005).

67. Center for Law and Social Policy, *Caps on Kids: Family Cap in the New Welfare Era,* http://www.clasp.org/publications/caps_on_kids.pdf (last visited April 11, 2006).

68. 42 U.S.C. §§ 601-608 (2004); Marion Banzhaf, *Welfare Reform and Reproductive Rights: Talking about Connections,* http://www.fwhc.org/tanf.htm (last visited April 11, 2006).

69. Legal Momentum, *Background On Child Exclusion Proposals* (Apr. 2000), http://www.legalmomentum.org/issues/wel/childep.shtml (last visited April 11, 2006).

70. Center for Law and Social Policy, *Lifting the Lid Off the Family Cap: States Revisit Problematic Policy for Welfare Mothers,* http://www.clasp.org/DMS/Documents/1071852641.91/family_cap_brf.pdf (last visited Sept. 6, 2004).

71. Susan L. Thomas, "*Ending Welfare As We Know It," or Farewell to the Rights of Women on Welfare? A Constitutional and Human Rights Analysis of the Personal Responsibility Act*, 78 U. DET. MERCY L. REV. 179, 195 (2001).

72. CAL. WEL. & INST. CODE § 11450.04(b) (1)-(3) (2004).

73. Sneed v. Saenz, 120 Cal. App. 4th 1220, 1230 (2004). A secondary objective may be to send the message "that government is not in the business of 'rewarding'

However, the methods of achieving this and other similar goals are of dubious merit.[74] These programs attempt to further these goals via behavior modification and the promotion of heterosexual marriages[75] through the elimination of benefits for "capped" children.[76] Morality guides the legislation, which arguably coerces women into *normal* families.[77] These underlying issues are, perhaps, indicated best by the California Legislature (in reference to CalWORKS): "The Legislature finds and declares that the family unit is of fundamental importance to society in nurturing its members, passing on values, averting potential social problems, and providing the secure structure in which citizens live out their lives."[78] Further, "[c]ontemporary welfare reform in the United States is . . . framed by a moral panic about promiscuity among poor women in general — and among poor women of color in particular."[79]

The dichotomy of the *undeserving* vs. *deserving* poor informs public assistance programs of who should and should not receive benefits.[80] Professor Judith Koons traces the *undeserving/deserving* trope to the beginning of American welfare in colonial America.[81] There was a dual system in place in which the *deserving*, elderly, widows, children, and the sick, were given more relief and held in higher esteem than those seen as *undeserving*, the able-bodied poor.[82] The *undeserving* category included "women who did not 'abide by societal norms — and were abandoned or never married'."[83] Today, this latter group is seen as the poster child of the *undeserving* — the "Welfare Queen."

In essence, these policies were and are based on stereotypes and myths.[84] In opposition to the stereotypical image of the "Welfare Queen" who has children to get more money, empirical studies to date have not shown any correlation between receipt of benefits and the procreative

childbearing among welfare recipients." Sometimes, the message may even be as important as the policy itself. Jane Gilbert Mauldon, *Providing Subsidies and Incentives for Norplant, Sterilization and Other Contraception: Allowing Economic Theory to Inform Ethical Analysis*, 31 J.L. MED. & ETHICS 351, 355 (2003).

74. Center for Law and Social Policy, *supra* note 69.

75. Personal Responsibility Work and Opportunity Reconciliation Act, Pub. L. No. 104-93, 101 Stat. 2110 (codified as amended at 42 U.S.C. § 601(a)(3)(1996)): The Congressional findings begin with "Marriage is the foundation of a successful society."

76. Thomas, *supra* note 71, at 187.

77. Risa E. Kaufman, *State ERAs in the New Era: Securing Poor Women's Equality By Eliminating Reproductive Based Discrimination*, 24 HARV. WOMEN'S L.J. 191 (2001).

78. CAL. WEL. & INST. CODE § 11207 (2004).

79. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview,* 8 MICH. J. GENDER & L. 121, 124 (2002).

80. Carole M. Hirsch, Note, *When the War on Poverty Became the War on Poor, Pregnant Women*, 8 WM. & MARY J. WOMEN & L. 335, 339-40 (2002).

81. Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy,* 19 WIS. WOMEN'S L.J. 1, 29 (2004).

82. *Id*. at 30.

83. *Id*.

84. Hirsch, *supra* note 79; Kaufman, Thomas, *supra* note 71, at 194.

decisions of unmarried women.[85] Also, the size of the welfare family is steadily decreasing in both family cap and non-family cap states.[86] Thus, the rationale for the programs is questionable.

Moreover, studies of the effects of the family cap programs themselves have been negative or inconclusive.[87] A 1998 study by Rutgers University showed a small decrease in births after implementation of the New Jersey family cap program, but it also showed an increase in abortions among poor women.[88] This fact has caused an unusual alliance between women's rights and anti-abortion groups, all of whom do not want to force women into having abortions rather than have children they cannot afford under the family cap policy.[89] This alliance became apparent in the bipartisan effort in New Jersey to ban the family cap policy in that state.[90] That effort, however, like most of the legal challenges thus far, failed.

3. Recent Legal Challenges to the Family Cap Program[91]

Litigation in the context of family cap policies is heavily informed, if not doomed to failure, by the Supreme Court decision in *Dandridge v. Williams*.[92] In *Dandridge*, Maryland welfare recipients challenged the Maryland maximum grant regulation (family cap policy) as a violation of the Equal Protection Clause and the Social Security Act of 1935.[93] In short, the appellees claimed that the regulation illegally 'capped' the size of a family at six members and, in effect, "denies benefits to the younger children in a large family."[94] The Court held that the regulation complied with both the Social Security Act because it did provide some assistance to all qualified families; and the Equal Protection Clause, reviewed under a reasonable basis standard, because the cap was justified by Maryland's

85. Thomas, *supra* note 71, at 197.
86. Smith, *supra* note 79, at 170.
87. Center for Law and Social Policy, *supra* note 67.
88. *Id*.; Kaufman, *supra* note 77, at 206.
89. Hirsch, *supra* note 80, at 339-40.
90. H.R. 4066 (1998), *available at* http://thomas.loc.gov/cgi-bin/query/ z?c107:h.r. 4066: (last visited May 23, 2005); *Payne Takes Lead in Bill to Eliminate Family Cap*, http://www.house.gov/payne/press/pr980617.html (last visited April 11, 2006).
91. Additional, unsuccessful challenges have been brought in other jurisdictions on the following grounds: 1) a family cap itself is unconstitutional, under the New Jersey state constitution (Soujourner A. v. N.J. Dep't of Human Servs, 177 N.J. 318 (N.J. 2003)); 2) the requirement of assignment of child support payments for a 'capped' child constitutes a taking, in violation of the fourteenth amendment (Williams v. Martin, 283 F. Supp. 2d 1286 (N.D. Ga. 2003) and Williams v. Humphreys, 125 F. Supp. 2d 881 (Ind. 2001)); 3) a family cap infringes the right of family association (N.B. v. Sybinski, 724 N.E. 2d 1103 (Neb. 2000). For an informative discussion of family cap challenges across America, the problems with constitutional challenges to family caps, and an alternative legislative focus to combat family caps, *see* Kelly J. Gastley, Note, *Why Family Cap Laws Just Aren't Getting It Done*, 46 WM. & MARY L. REV. 373 (2004).
92. 397 U.S. 471 (1970).
93. *Id*. at 473.
94. *Id*. at 476.

rationales of moving individuals from welfare to the workforce, equalizing the welfare recipient and the worker, and encouraging family planning.[95] This decision "lends support to the view that States can impose limits on family size without fear that their decisions will be subjected to rigorous scrutiny by the courts."[96] Thus, a woman on welfare's decision to bear a child is preempted by the state's decision not to provide support.

The litigation regarding family caps continues. California recently issued a decision on the breadth of its family cap program.[97] In *Sneed v. Saenz*, a California appellate court ruled that the California family cap plan applies to all welfare recipients, and not just to "hard-core" ones.[98] The plaintiffs in this case were welfare recipients who also had additional non-welfare income.[99] They challenged the application of the family cap program to their families.[100] The court held that the cap applied to all families, including those with earned income, and this was consistent with the Legislature's legitimate "goals of gradually reducing the cash grant, while allowing a family's income to increase without being discounted, as the family works toward becoming self-sufficient."[101] The court also found that "the MFG statute has no coercive effect so as to make it unconstitutional."[102] The court dismissed the notion that the statute interferes with fundamental privacy rights, and stated that no suspect class is involved so as to require heightened scrutiny under equal protection.[103] Under a rational basis standard of review the court held the legislature's purpose was legitimate.[104]

In contrast to the California case, in *Mason v. State of Neb*., the Nebraska Supreme Court found there were exceptions to their family cap program.[105] The plaintiffs were disabled single mothers who did not have the capacity to work.[106] The court rejected the State's argument that interpreting the statute in question as not applicable to the plaintiffs would raise an equal protection problem because there is a rational basis for treating the plaintiffs differently from others who are subject to the family cap.[107] The court affirmed the finding that the family cap program did not

95. *Id*. at 487. Kirstin Andreasen, *Part One: Family, the Constitution, and Federalism: Dandridge v. Williams: The Supreme Court and Acceptable Family Size*, 14 J. CONTEMP. LEGAL ISSUES 41, 42, 44 (2004).

96. Andreasen, *supra* note 95, at 46.

97. 120 Cal. App. 4th 1220 (2004).

98. *Sneed*, 120 Cal. App. 4th 1220.

99. *Id*. at 1228.

100. *Id*.

101. *Id.* at 1244.

102. *Id*. at 1249.

103. *Id*. at 1250.

104. *Id.*

105. *Mason*, 267 Neb. at 44.

106. *Mason*, 267 Neb. at 46.

107. *Id*. at 54.

apply to families in which there was no adult with the capacity to work because "[a]bsent a clearly expressed legislative intent to apply the family cap to such families, we must construe the Act in the manner which best achieves its beneficent purposes."[108]

A comparison of these two cases dealing with exceptions to family cap programs highlights the underlying theme of *deserving* vs. *undeserving* poor. In *Mason*, the plaintiffs were disabled and unable to work; they are the *deserving* poor. In *Sneed*, the plaintiffs were welfare recipients who were capable of working; they are the *undeserving* poor. It is not surprising that the courts had opposite holdings.

4. Family Cap Programs as a Mechanism of Social Control

The family cap program seeks to enforce morality through coercive and punitive methods, while possibly impinging on women's reproductive rights. The reasoning behind the programs is to decrease *irresponsible procreation*, especially out-of-wedlock births, and to reduce government funding.[109] The methodology of the program is seemingly ineffective, based on stereotypical images of undeserving poor and myths of welfare mothers who have children to get more money. Yet, the recent legal challenge does not seem to reach this stage of analysis. California courts have found that family caps are rationally related to the government's legitimate purposes and the interest in being paid support is not fundamental. California could, hypothetically, act more directly to contravene a woman's reproductive control and condition the receipt of welfare payments on use of birth control.[110] Perhaps this is the future of welfare, or perhaps it is unconstitutional for the state to interfere so overtly with a woman's fundamental rights, but a growing and controversial private organization does just that without legal intervention.

108. *Mason*, 267 Neb. at 55.

109. Kaufman, *supra* note 77, at 204-5.

110. *See* Kimberly A. Smith, *Conceivable Sterilization: A Constitutional Analysis of a Norplant/Depo-Provera Welfare Condition*, 77 IND. L.J. 389 (2002). Smith's analysis finds that conditioning welfare on use of Norplant and Depo-Provera may be constitutional. This conclusion may be based more in fact than in speculation since, as discussed above, California, for example, has an exception to its family cap for those whose birth control failed. The result is that those who use permanent or semi-permanent means of birth control will get an increase in their benefits if they have additional children on welfare. Thus, use (and failure) of birth control equals more welfare relief. Further, in 1990, shortly after Norplant became available, policymakers suggested it be used to decrease the number of children born to welfare mothers. All proposals made, however, faced heavy opposition, and none successfully became law. Mauldon, *supra* note 73, at 354.

B. PROJECT PREVENTION/CHILDREN REQUIRING A CARING KOMMUNITY (C.R.A.C.K.)

1. Project Prevention — How It Works

Project Prevention, a privately-run organization, calls itself "a common sense approach to a very serious problem," but its logic is strikingly similar to that of the progressive eugenicists of an earlier time.[111] In 1996, foster mom Barbara Harris, who saw firsthand the devastating effects of pregnant women's illegal drug use on their offspring, unsuccessfully sought to get the Prenatal Neglect Act passed, which would have created the crime of prenatal child neglect.[112] Then in 1997, Harris founded an organization called Children Requiring A Caring Kommunity, or C.R.A.C.K., now renamed Project Prevention, in Pasadena, California.[113] The purpose of the organization is to "save our welfare system" and reduce the number of drug addicted births.[114] The methodology of the program is, however, very controversial. Project Prevention attempts to achieve its worthy goals[115] by offering drug-addicted women $200 to get permanent or long-term birth control.[116] According to their website, Project Prevention has *helped* 1558 drug addicts by giving them the proffered payment upon proof of use of Depo-Provera, Essure, IUD, Norplant, tubal ligation or vasectomy.[117] In essence, Project Prevention buys women's reproductive capacities. There

111. Project Prevention *at* http://www.projectprevention.org (last visited April 11, 2006).

112. Lynn M. Paltrow, *Why Caring Communities Must Oppose C.R.A.C.K./Project Prevention: How C.R.A.C.K. Promotes Dangerous Propaganda and Undermines the Health and Well Being of Children and Families*, 5 J.L. SOC'Y 11, 17 (2003).

113. Vida Foubister, *Crackdown on drug-addicted pregnancies draws concern, available at* http://www.ama-assn.org/amednews/2000/11/20/prsa1120.htm (last visited April 11, 2006).

114. Theyn Kigvamasud'Vashti, Communities Against Rape and Abuse, Fact Sheet on Positive Prevention/CRACK (Children Requiring A Caring Kommunity), *at* http://www.cwpe.org/sex%20lies%20contraception%20pack/fact%20sheet%20crack.pdf (last visited Feb. 9, 2005).

115. The problem of substance exposed infants gained headlines in the late 1980s and early 1990s. Estimates are that between eleven and fifteen percent of children born in the United States have been exposed in utero to illegal drugs. Jennifer Mott Johnson, Note, *Reproductive Ability for Sale, Do I Hear $ 200?: Private Cash for Contraception Agreements As an Alternative to Maternal Substance Abuse*, 43 ARIZ. L. REV. 205 at 205, 207 (2001).

116. Men also have gone through the program, but their numbers are small. For example, as of June 2005, only 27 of the 1558 participants were men. Project Prevention *at* http://www.projectprevention.org/programs/faqs.html (last visited June 27, 2005).

117. Project Prevention *at* http://www.projectprevention.org/program/index.html (last visited June 27, 2005); Project Prevention *at* http://www.projectprevention.org/program/faqs.html (last visited June 27, 2005). In August of 2002, the manufacturer of Norplant suspended sales after settling the claims of thousands of women who said they had not been adequately warned about Norplant'' side effects. Andrew Harris, *Ruling Finishes off Norplant Suits*, NAT'L L.J., Sept. 30, 2002 at B6. Other forms of implantable contraceptives still exist.

are several ethical and legal issues that arise from the program's scheme.

2. Project Prevention — Eugenics as a Means of Population Control

"Don't let a Pregnancy Ruin Your Drug Habit" read billboards and flyers placed in poor neighborhoods in urban areas by Project Prevention workers and volunteers.[118] Instead of the "feeble minded" or others with *undesirable* traits being targeted for negative eugenic measures, now it is "poor, drug addicted, and often homeless women [who] are being coerced into forever forgoing this fundamental right [of procreation]."[119] The difference between the forced or coerced sterilization under the Asexualization Act and the coerced sterilization of drug addicts through contract with Project Prevention, is that instead of targeting individuals who are perceived as *genetically* inferior, Project Prevention is targeting those who are *socially* inferior, and whose children, like those of their eugenic antecedents, will be a burden on the welfare system.[120]

Supporters of Project Prevention argue unpersuasively that the program is not eugenical in nature. One argument is that recipients of both the permanent and the long-term methods of birth control receive the same $200, thus it is far removed from the sterilization horrors of the eugenics age.[121] However, when Project Prevention first began it had a sliding scale.[122] Participants who opted for sterilization received more money than their counterparts who had Norplant implanted or had a series of Depo-Provera shots.[123] A second argument is that $200 is not enough of an incentive for an individual to sell her fertility.[124] But even a scholar who finds the program "efficient" and "ethical" acknowledges that "[f]or an addict seeking an instant high, any incentive payment, no matter how small might be a motivator."[125] A third argument is that no individual would choose to get sterilized if he or she truly did not want to and was not physically forced.[126] Each individual has her own reasons for participating in the program, but underlying all the decisions is the fact that these women are drug addicts in need of cash. It is not paternalistic to acknowledge the

118. Kigvamasud'Vashti, *supra* note 114; Adam B. Wolf, *What money cannot buy: a legislative response to C.R.A.C.K.*, 33 U. MICH. J.L. REFORM 173 at 178 (2000); Margaret Merritt-Planned Parenthood Affiliates of CA, In a presentation to the Senate Select Committee on Genetics, Genetic Technologies and Public Policy, July 16, 2003.

119. Wolf, *supra* note 118, at 189.

120. *See* Lisa Powell, Note, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481 at 499 (2002).

121. Janet Ashley Murphy and Robert A. Pugsley, *Successful Pregnancy Prevention Program for Addicts Remains Under Siege*, 5 J.L. SOC'Y 155, 170 (2003).

122. Renee Chelian, *Remarks on the "Crack" Program: Coercing Women's Reproductive Choices*, 5 J.L. SOC'Y 187, 189 (2003).

123. *Id*.

124. Murphy, *supra* note 121, at 170.

125. Mauldon, *supra* note 73, at 360.

126. Murphy, *supra* note 121, at 170.

vulnerability of Project Prevention's clients. Further, societal stereotypes and myths, promulgated by Project Prevention, may play a role in why some women have chosen to participate.

3. Project Prevention and Societal Myths

Project Prevention, like the eugenicist movement and welfare reform, is based on myths and stereotypes. The image of the typical client of Project Prevention is that of the crack cocaine addict, reminiscent of the "Welfare Queen": lazy, drug-addicted prostitutes, who are irresponsible and do not love their children.[127] Certainly this image pre-existed Project Prevention. In the 1980s the "crack baby crisis" made regular headlines, as did the punitive measures taken against some of the mothers.[128] Even now, when medical research shows that fetal cocaine exposure is not as harmful as previously thought, the image is still powerful.[129] Project Prevention, or C.R.A.C.K. as it was first named, capitalized on these images to draw attention to itself. Although the organization vehemently denies charges that it is racist,[130] the choice of the name C.R.A.C.K. alone is questionable considering that crack cocaine is widely known as a drug that is more popular in African-American communities than in white communities.[131] If the goal of the program is to "stop children winding up in foster care or with long-term health problems, whose care puts an enormous burden on the taxpayer,"[132] then why target crack cocaine users in particular? Further, most of the advertising has been in poor communities of color.[133]

Racism aside, another myth is that drug addicts have large numbers of children.[134] This is untrue. "[S]tudies have shown that low-income women with publicly identified drug problems have an average of two to three children each."[135] Yet, this image is reified by the organization itself. Harris has been quoted as saying "[t]hese women literally have litters of

127. Paltrow, s*upra* note 112, at 23-24.

128. For an informative discussion of the criminalization of drug addiction and the history of the sterilization of Black women in America, *see* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies*, 104 HARV. L. REV. 1419 (1991).

129. Murphy, *supra* note 121, at 172.

130. "It is racist, or at least ignorant, for someone to learn about our program and assume that only black addicts will be calling us. Not all drug addicts are black." Project Prevention *at* http://www.projectprevention.org/program/faqs.html (last visited June 27, 2005).

131. Roberts, *supra* note 128, at 1419.

132. Clare Murphy, *Selling Sterilisation to Addicts*, BBC NEWS ONLINE, Sept. 2, 2003, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/americas/3189763.stm. Further if the goal of Project Prevention is to give poor women "access" to birth control, why not use the money and efforts to promote sex education in the schools or inner city clinics? Project Prevention *at* http://www.projectprevention.org/program/faqs.html (last visited June 27, 2005).

133. Chelian, *supra* note 122, at 190.

134. Andrew Gumbel, *America's New Family Values*, INDEP. (London), Nov. 25, 2003, at 4.

135. Paltrow, *supra* note 112, at 38.

children! They're not acting any more responsible than a dog on heat."[136]

Finally, another myth is that these women have unintended pregnancies because they are unusually irresponsible.[137] "C.R.A.C.K. portrays its clients as breeding machines, uniquely prone to unintended pregnancies."[138] However, more than half of all pregnancies in the United States are "mistakes."[139] Further, viewing a woman as a "dog on heat" (sic) shows the failure of Project Prevention "to see women who struggle with substance abuse as capable of the same sort of motivation for having children as all women."[140] Thus, Project Prevention appears to be a new means of controlling the population. The question remains — is it legal?

4. Project Prevention- Unstoppable by the Laws of Contract?

a. Informed Consent and the Capacity to Contract

One issue regarding the legality of Project Prevention is whether a valid informed consent can be given by its drug addicted clientele. In addition to the addiction problem, many of these poverty-stricken women, to whom $200 is a powerful incentive, also experience "disproportionate rates of sexual and physical violence, HIV, mental illness, homelessness, instability, imprisonment and death row sentences, posttraumatic stress disorder, and repetitive micro- and macro-aggression and insults as a result of oppression."[141] Thus, Project Prevention is on notice that not only may the woman be impaired since drug addiction is a requirement of the program, but she is likely dealing with other issues that will affect her ability to make rational decisions.[142]

There is an argument that the women who contract with C.R.A.C.K. are not capable of making a valid contract with the organization.[143] If a woman was under the influence of drugs at the time of the formation of the contract, it is questionable whether she had the capacity to make it.[144] However, it would be unlikely that at the time she was actually sterilized she would be under the influence of drugs, since the medical facility should have tested her to make sure there were no substances in her body that

136. Gumbel, *supra* note 134.
137. Paltrow, *supra* note 112, at 40-41.
138. *Id*. at 40.
139. *Id*. at 41.
140. Chelian, *supra* note 122, at 191.
141. Kigvamasud'Vashti, *supra* note 114.
142. Johnson, *supra* note 115, at 230.
143. *Id*.
144. Johnson, *supra* note 115, at 230. It would probably be unlikely that the individual's drug addiction would make a court find the person incompetent. "Illustrations of incompetence severe enough to make a party's contractual obligations voidable include brain damage caused by accident or organic disease, mental illness with symptoms such as delusions and hallucinations, and congenital intelligence deficiencies. One could question whether the law should consider addiction an 'incapacity' at all."

would interfere with the surgery.[145] Thus, incapacity is unlikely to be a successful attack to void the contract.

b. Unconscionable and Against Public Policy

Alternatively, a court might find the contract to be unconscionable. "C.R.A.C.K.'s clients are coerced into relinquishing their reproductive rights; it is an arrangement between two parties with grossly unequal bargaining power."[146] One's reproductive capacity in exchange for $200 seems to fit the definition of unconscionable.[147]

The strongest argument to invalidate a contract between Project Prevention and a client is that the contract is unconscionable *and* is against public policy. By drawing an analogy between surrogacy agreements and agreements such as Project Prevention's pay for sterilization, there is a cogent line of reasoning that the latter would also be found invalid if challenged.[148] Surrogacy and adoption agreements that involve the exchange of money for the custody of a child are held against public policy for several reasons under state law, such as: the prohibition of money for child exchange; termination of parental rights requires proof of that parent's unfitness; revocable surrender of custody; and the idea that children should be raised by their natural parents.[149] Another reason to hold against surrogacy agreements, albeit a paternalistic one, is that these agreements particularly attract poor women who "need to be protected from exploitation."[150] It is this latter reason that most aptly mirrors the circumstance of the Project Prevention client: severely uneven bargaining positions.

Another analogy can be drawn between the selling of body parts or organs and Project Prevention's buying of reproductive capacity.[151] The National Organ Transplant Act prohibits the receipt of money for an organ.[152] The idea behind the Act was to prevent the commodification of human organs.[153] "Simply put, it is wrong to buy or sell irreplaceable body parts."[154] Similarly, it can be said that it is wrong to buy or sell one's reproductive capacity, the potential to have children, because it is a fundamental right. One argument against this analogy is that the Project Prevention client has the choice whether to have permanent or long-term

145. Johnson, *supra* note 115, at 230.
146. Wolf, *supra* note 118, at 181-83.
147. An unconscionable agreement is defined as "an agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept." BLACK'S LAW DICTIONARY 28 (2nd Pocket ed. 2001).
148. Wolf, *supra* note 118, at 180.
149. Johnson, *supra* note 115, at 232-33.
150. *Id*. at 233.
151. Wolf, *supra* note 118, at 181-83.
152. *Id*. at 181; National Organ Transplant Act of 1984, 42 U.S.C. § 274e (1994).
153. Wolf, *supra* note 118, at 181-83.
154. *Id*. at 183.

birth control as opposed to permanent organ removal.[155] However, that argument would mean that it is acceptable to "lease" one's fertility, but not to "sell" it.

c. Contract Defenses Fall Short

Contract defenses, even if successful, fall short in very practical ways. First, Project Prevention itself would never seek court enforcement of its contract with a client because the contract is not formed until *after* the client has had the medical procedure for sterilization or long-term birth control.[156] Second, it will be useless for a woman to have the contract invalidated *after* she has performed her part of the contract and gone through with the surgery. A sterilization procedure is permanent, even if a court later decides that the contract was invalid because of lack of informed consent, lack of capacity, unconscionability or invalidity as against public policy.[157] Since contract law does not offer any solution to the Project Prevention problem, a private actor may be legally able to coerce a woman into surrendering her fertility. But this leaves open the issue of whether a state could similarly make an unconscionable deal with a woman in compromising circumstances.

C. CONTRACEPTION AS A TERM OF PROBATION

A third type of modern eugenics is contraception as a term of probation. Like family caps and Project Prevention, it acts punitively to prevent the *undeserving* from reproducing. In 1991, in a California Superior Court, Darlene Johnson pled guilty to child abuse and was given an unusual term of probation.[158] Johnson, an unwed mother of four and pregnant with her fifth child, became the first woman ordered by a court to be implanted with Norplant.[159] This form of "creative sentencing,"[160] while

155. Jane Gilbert Mauldon, *Providing Subsidies and Incentives for Norplant, sterilization and other contraception: allowing economic theory to inform ethical analysis*, September 22, 2003, Gale Group, Inc., American Society of Law & Medicine, Inc., JOURNAL OF LAW, MEDICINE & ETHICS.

156. Johnson, *supra* note 115, at 232-3.

157. *Id*. at 231.

158. NARAL Foundation, Reproductive Freedom & Choice, *Unjust Punishment, Forced Contraception, and Poor Treatment of Women by the Courts and Prisons*, http://www.prochoiceamerica.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm+PageID=1784 (last visited Feb. 15, 2005).

159. *Id*. Norplant is a long-term contraceptive that is implanted under the skin of a woman's arm. It is made up of six tubes the size of matchsticks that contain synthetic hormones. It is very effective, lasts for about five years, and then must be removed surgically by a physician. Additionally, like most drugs, Norplant has side effects and is not appropriate for women with certain heath conditions. Janet F. Ginzberg, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 980 (1992).

160. Johnson's probation condition was never fulfilled because it was rendered moot when, for a violation of another condition of her probation, Johnson was sentenced to prison. Ginzberg, *supra* note 159, at 979 n.1.

a first of its kind, is not totally unprecedented. In fact, since the 1960s there have been at least 20 cases where judges have ordered convicted persons not to procreate or to use some form of contraception, or even to be sterilized.[161] Compulsory contraception is arguably unconstitutional as an interference with constitutionally fundamental privacy rights,[162] and is being used to further eugenic goals.[163]

1. Sterilization as Punishment

Not long after the Supreme Court upheld Virginia's sterilization law in *Buck v. Bell*,[164] it called procreation "a basic liberty" and "one of the basic civil rights of man."[165] In *Skinner v. Oklahoma ex rel. Williamson*, the Supreme Court invalidated, on equal protection grounds, Oklahoma's Habitual Criminal Sterilization Act,[166] which provided for the sterilization of persons convicted of two or more crimes "amounting to felonies involving moral turpitude."[167] The statute distinguished between individuals convicted of embezzlement and those, like Mr. Skinner, who had been convicted of larceny.[168] However, *Skinner* did not overturn *Buck*. The Court instead distinguished *Buck* in part because "the defendant [was] given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring" and the state did not attempt to prove that larcenous individuals have "biologically inheritable traits which he who commits embezzlement lacks."[169] Thus, the Court stuck by its earlier pro-eugenics stance, but decided that there was no compelling reason why only one group of criminals should be so punished and not the other.[170] Nevertheless, *Skinner* has come to be remembered as the first case to establish that procreation is a fundamental right.[171]

161. NARAL Foundation, *supra* note 157. An early "no pregnancy" case was that of *People v. Dominguez*, 256 Cal. App. 2d 623 (1967). In *Dominguez*, the defendant was a young unmarried mother of two pregnant with her third child. *Id*. at 625. She was charged with second degree robbery for driving the get-away car. *Id.* at 624-25. She was placed on probation. *Id.* at 625. One of the conditions of her probation was: "The third condition is that you are not to live with any man to whom you are not married and you are not to become pregnant until after you become married. . . . You have already too many of those . . . Do you know where the Planned Parenthood Clinic is?" *Id.* On appeal, the condition was found void because it was not directly related to the crime of robbery. *Id*. at 628.

162. A discussion of the constitutional right to privacy and how those concepts interact with modern forms of eugenics follows this section.

163. *See* Ginzberg, *supra* note 159, at 984.

164. 274 U.S. 200.

165. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

166. OKLA. STAT. ANN. tit. 57, § 171 (1935), *invalidated* by Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

167. *Skinner*, 316 U.S. 535 at 536, 538.

168. *Id.* at 538-39.

169. *Id*. at 538, 541.

170. *Id.* at 542.

171. Silver, *supra* note 16, at 869.

2. Governmental Coercion

If procreation is a fundamental right, then one would think that the state must have a compelling objective in order to require contraception as a term of probation. Actually, courts get to sidestep this issue because the individual can *choose* between the proffered terms of probation or to go to prison. *It is his or her choice.* This distinction is well illustrated in a recent case involving a deadbeat dad.

David Oakley pled no contest to three counts of intentional refusal to pay child support.[172] Oakley was sentenced to probation, but the judge imposed a special condition: "while on probation, Oakley cannot have any more children unless he demonstrates that he had [sic] the ability to support them and that he is supporting the children he already had."[173] Oakley's history, which warranted such creative sentencing, showed that he was the father of nine children by four different women and that he was a repeat offender.[174] The Supreme Court of Wisconsin upheld the lower court because it reasoned: (1) "probation conditions — like prison regulations — are not subject to strict scrutiny analysis;" (2) "incarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint, which in turn encompasses and restricts other fundamental rights, such as the right to procreate;" and (3) Oakley still has a choice — he can procreate if he can support all of his children.[175] While this case is decidedly different from California's *Johnson* case because here the defendant is not physically implanted with a contraceptive device, *Oakley* parallels the infringement on the right to procreate as punishment.

The dissent in *Oakley* astutely points out that the *choice* presented to Oakley is illusory. The trial court imposed the condition on Oakley fully aware that he would never be able to support all of his children.[176] Thus, for the probation term, Oakley will be in violation if he fathers another child. In other words, "the birth of a child [will] carry criminal sanctions."[177] Also, the court proscribed only the fathering of another child, not engagement in sexual intercourse.[178] This means that if Oakley impregnates a woman during the probationary period, she will be forced to

172. State of Wisconsin v. Oakley, 2001 WI 103, ¶ 4, 245 Wis. 2d 447, 453, 629 N.W.2d 200, 202.

173. *Id*. at ¶ 6, 245 Wis. 2d at 454, 629 N.W.2d at 203.

174. *Id.* at ¶ 3, 245 Wis. 2d at 452, 629 N.W.2d at 202.

175. *Id.* at ¶ 16 n.23, ¶ 19, ¶ 20, 245 Wis. 2d at 465 n.23, 468, 473, 629 N.W.2d at 208 n.23, 209, 212.

176. *Id.* at ¶ 49, 245 Wis. 2d at 485, 629 N.W.2d at 217 (Bradley, A.W. dissenting) quoting the trial judge: "You know and I know you're probably never going to make 75 or 100 thousand dollar [sic] a year. You're going to struggle to make 25 or 30. And by the time you take care of your taxes and your social security, there isn't a whole lot to go around, and then you've got to ship it out to various children."

177. *Id.* at ¶ 41, 245 Wis. 2d at 482, 629 N.W.2d at 216.

178. *Id.* at ¶ 47, 245 Wis. 2d at 483, 629 N.W.2d at 217.

decide between having an abortion or sending Oakley to prison.[179] So either the government is coercing abortion or is creating a situation in which Oakley's children will continue to suffer because their father is imprisoned and unable to work to support them.[180]

Returning to the State of California, Johnson, like Oakley, was to surrender her right to procreate, but further was also to forgo her right to refuse a medical procedure.[181] Yet, California has made some headway into finding restrictions on procreation as terms of probation violative of state and federal constitutions. In *People v. Zaring*, a California Court of Appeal found that a judge's[182] condition that the defendant not get pregnant during the probationary period was invalid because it was impermissibly overbroad.[183] In *Zaring*, the defendant had been convicted of heroin charges, and not child abuse like in *Johnson*.[184] The court did not, however, decide whether it would ever uphold a no pregnancy term if the underlying crime related to the well-being of a child born or unborn.[185]

The court in *Zaring*, however, noted that the rationale of the sentence was more morality driven than rehabilitative in purpose.[186] The judge made this distinction fairly obvious when he told the defendant: "I want make [sic] to make it clear that one of the reasons I am making this order is you've got five children. You're thirty years old. None of your children are in your custody or control. Two of them [are] on [welfare]. And I'm afraid that if you get pregnant we're going to get a cocaine or heroin addicted baby."[187] While the court addresses this issue, it does not expressly say that moral judgments of how many children one has and at what age is not the business of the law. Instead it says: "In our view, the morality of having children while on public assistance, and the imposing of any constitutionally permissible legal deterrences to such a practice, are matters

179. *Id.* at ¶ 57, 245 Wis. 2d at 489, 629 N.W.2d at 219.

180. *Id*. at ¶ 60, 245 Wis. 2d at 490, 629 N.W.2d at 220.

181. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the Supreme Court acknowledged that there is a significant liberty interest in refusing medical treatment under the Fourteenth Amendment of the Constitution.

182. The judge was, in fact, the same judge as in the Darlene Johnson case. Judge Howard R. Broadman was later publicly censored for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The Supreme Court of California, in upholding Broadman's censure, reviewed both the Johnson case and the Zaring case. Broadman v. Comm'n on Judicial Performance, 18 Cal. 4th 1079, 1087 (1998).

183. 8 Cal. App. 4th 362, 372 (1992).

184. *Id.* at 365.

185. *Id*. at 372; In a recent out-of-state case, a Georgia mother of seven pled guilty to voluntary manslaughter of her 5- week-old daughter rather than face a life sentence if convicted of murder. A condition of her sentence is that she undergo a tubal ligation. Errin Haines, *Ga. Mom Admits Killing, to be Sterilized*, Feb. 9, 2005, BOSTON.COM, http://www.boston.com/news/nation/articles/2005/02/09/ga_mom_admits_killing_to_be_sterilized/.

186. *Zaring*, 8 Cal. App. 4th at 373.

187. *Id*. at 368.

properly left to the wisdom and judgment of the legislature elected by the people, and not to the morality of individual judges."[188] In other words, if the legislature wants to restrict the procreation of a woman receiving assistance, as in the instance of family caps, it can. And it can do so because of *morality*. The court's statement in *Zaring* regarding preference for letting the legislature make the moral decisions, is telling of the true rationale for procreative restrictions: preventing the *unfit* from becoming parents.[189]

IV. THE RIGHT TO PERSONAL AUTONOMY AS ENCOMPASSED IN THE RIGHT TO PRIVACY

The modern forms of eugenics impinge on the right to procreate. Since *Skinner*, other Supreme Court cases have cemented and clarified the right to procreate as a fundamental right encompassed in the right to privacy. *Griswold v. Connecticut*, an early reproductive rights case, established the right of married people to use contraceptives.[190] The Court found the fundamental right to privacy in the penumbras of the Bill of Rights.[191] Douglas, writing for the majority, said that the guarantees in the Bill of Rights create "zones of privacy."[192]

In *Eisenstadt v. Baird*, the right established in *Griswold* to use contraceptives, was extended to unmarried individuals on equal protection grounds.[193] In *Eisenstadt*, the Court made it clear that the right of privacy belongs to the individual. "If a 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."[194]

Next in *Loving v. Virginia*, from which the strict scrutiny standard was born, an interracial married couple challenged Virginia's miscegenation statute and won.[195] The Court, while discussing equal protection in great depth, founded its decision on privacy grounds and on the fundamental right to marriage.[196] The Court proclaimed: "Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival. . . . The 14th Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the

188. *Zaring*, 8 Cal. App. 4th at 374.

189. *See California's Compulsory Sterilization Polices 1909-1979: Hearing Before the S. Select Comm. on Genetics, Genetic Technologies and Public Policy*, 2003 Leg. (Cal. 2003) (statement of Valerie Small Navarro, ACLU).

190. 381 U.S. 479.

191. *Id.* at 483.

192. *Id*. at 484.

193. 405 U.S. 438.

194. *Id*. at 453.

195. 388 U.S. 1 (1967).

196. *Id*.

individual and cannot be infringed by the State."[197]

In the controversial landmark case, *Roe v. Wade*, the Court founded its decision to protect a woman's right to choose an abortion prior to viability in the 14th Amendment's Due Process Clause.[198]

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.[199]

A woman has a right, but not an absolute right, to terminate her pregnancy.[200]

The abortion right declared in *Roe*, however, was limited in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[201] In *Casey*, the Court set forth a new standard of an undue burden or substantial obstacle test.[202] Thus, states can now discourage abortion, so long as its methods do not create a substantial obstacle in the path of a woman seeking an abortion pre-viability.

More recently, *Lawrence v. Texas* has reinforced the idea of a right to sexual privacy.[203] In *Lawrence*, the Court invalidated a Texas sodomy law that made homosexual sex illegal.[204] The Court decided in this case that the constitutionally protected right to privacy encompassed sexual activity regardless of whether it was heterosexual or homosexual in nature.[205] The Court also stated that moral condemnation of homosexual activity does not have a place within our laws:

> It must be acknowledged, of course, that . . . for centuries there have been powerful voices to condemn homosexual conduct as

197. *Loving*, 388 U.S. at 12.

198. 410 U.S. 113.

199. *Id*. at 153.

200. *Id*. at 154: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." The Court goes on to establish a trimester system in which the government is allowed to create restrictions on abortion after viability of the fetus.

201. 505 U.S. 833 (1992).

202. "[T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Id*. at 876.

203. 539 U.S. 558 (2003).

204. *Id*.

205. *Id*.

> immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society. . . . Our obligation is to define the liberty of all, not to mandate our own moral code.[206]

Lawrence overruled *Bowers v. Hardwick*,[207] which held that laws making sodomy illegal were constitutional.[208] In *Bowers*, the Court held that there is no constitutional right to homosexual sexual privacy.[209] While Lawrence did not hold that there is a fundamental right to homosexual sex, it did hold that the Texas statute in question violated the privacy rights of homosexuals under a rational basis test.[210]

Thus, the evolution of the Supreme Court's recognition of a constitutionally protected right to privacy has resulted in an increasingly strong right to freedom in the realms of sexual and reproductive rights. The Court has also made the individual the central decision-maker regarding his or her own reproductive or sexual privacy and restricted the use of moral condemnation as a limitation of fundamental rights. Yet, the modern forms of eugenics permitted by the California are products of moral condemnation. They are being utilized as means of restricting and/or thwarting an individual's expression of her fundamental right to procreate.

V. CONCLUSION

In sum, California has made many advances in acknowledging and moving away from its eugenic past, yet it still has a long way to go. California is at a crossroads. While the State apologized for its past abuses to further eugenic goals, it now uses or allows semi-cloaked eugenic practices to continue. Modern eugenics takes the form of family caps, exchanges of money for sterilization, and the looming threat of prohibition on procreation as a term of probation. The target population has not really changed, the terminology has just been adjusted ever so slightly: it is no longer the biological defective who will produce *undesirable* offspring, but instead, the socially *unfit* parent who will raise *undeserving* offspring.

206. *Id*. at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) (internal quotations omitted)).

207. "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Id*. at 578 (Stevens, J., concurring).

208. 478 U.S. 186 (1986).

209. *Id*.

210. *Lawrence*, 539 U.S. 558.

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I first became interested in this project in 1998 while volunteering at the Holocaust Museum Houston, and then again when I began pursuing my Masters degree in cultural anthropology, but each time I felt that the legal issues prevented me from truly exploring the topic. I did the majority of the research for this Note in fall 2004. Since then I have done follow-up research and have integrated some recent material that I feel adds significantly to the Note. Other relevant recent material not used in this project includes the following:

-Tiesha Rashon Peal, *The Continuing Sterilization of Undesirables in America*, 6 RUTGERS RACE & L. REV. 225 (2004).

- Rachel Roth, "*No New Babies?": Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems*, 12 AM. U. J. GENDER SOC. POL'Y & L. 391 (2004).

- Kelly R. Skaff, *Pay Up or Zip Up: Giving Up the Right to Procreate as a Condition of Probation*, 23 ST. LOUIS U. PUB. L. REV. 399 (2004).

- Felecia Epps, *Unacceptable Collateral Damage: The Danger of Probation Conditions Restricting the Right to have Children*, 38 CREIGHTON L. REV. 611 (2005).

- Alexandra Minna Stern, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (THE UNIVERSITY OF CALIFORNIA PRESS, 2005).