Conceivable Sterilization: A Constitutional Analysis of a Norplant/Depo-Provera Welfare Condition

KIMBERLY A. SMITH*

INTRODUCTION

The new technology in birth control, along with the recent experimentation of state welfare plans, raises the question of whether government-promoted sterilization through the use of this new birth control could be part of a constitutionally sound welfare policy. The two new forms of birth control are Norplant, which involves the insertion of six silicone rubber tubes containing synthetic progestin hormones into a woman's upper arm,[1] and Depo-Provera, which involves the injection of progestin medroxyprogesterone acetate hormones into a woman's buttocks or upper arm.[2] Both methods offer women longer lasting, more effective, and verifiable birth control that essentially "sterilizes" their ability to become pregnant for a limited time period.[3] The incorporation of these forms of birth control into a welfare program, however, raises some very important legal and coustitutional issues.

This Note addresses these issues and considers whether a welfare plan that offers recipients the option to receive an *additional* benefit on the condition that they take either Norplant or Depo-Provera would be found legally permissible.[4] Most legal analyses of this welfare condition have concluded that conditioning the receipt of an additional benefit on the temporary waiver of an individual's right to have a child is constitutionally impermissible.[5] The basis of their conclusion, however, has fallen almost exclusively on the relationship between the right to procreate and the

---

* J.D. Candidate, 2002, Indiana University School of Law—Bloomington. I would like to extend my gratitude to my father, Tom W. Smith, for helping me develop this topic and for his editorial reviews of my Note. Thanks also to Professor Patrick L. Baude for reviewing my Note and for his thoughtful comments and suggestions. Additionally, thanks to Professor Daniel O. Conkle, Professor Roger B. Dworkin, and Professor Susan H. Williams for taking the time to discuss various aspects of my Note with me. Finally, thanks to my student editors, especially David Storey.

1. Darci Elaine Burrell, *The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 UCLA WOMEN'S L.J. 401, 402 (1995).

2. American Academy of Family Physicians, *Depo-Provera: An Injectable Contraceptive* (1999), *at* http://www.familydoctor.org/handouts/043.html.

3. *See id.*; *see also* Burrell *supra* note 1, at 402.

4. This Note refers to this proposed welfare plan as "the Norplant/Depo-Provera welfare condition." Please notice the emphasis on the word "additional"; this welfare condition is only proposing that recipients be given the option to receive an extra benefit rather than conditioning their receipt of welfare payments in general on the use of birth control. *See infra* Part III.B.

5. *See, e.g.*, David S. Coale, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189, 193 (1992); Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15, 33-37 (1994); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 931-32 (1995).

Unconstitutional Conditions Doctrine.[6] Moreover, these analyses of the right to procreate are flawed in two respects: (1) they fail to recognize the potential implications that the Supreme Court's decision in *Planned Parenthood v. Casey*[7] may have on cases involving reproductive rights and (2) they fail to assert why privacy rights involving reproductive matters are different from the privacy rights that may be limited upon the receipt of welfare benefits. In addition, most of their legal arguments have overlooked the sterilization aspect of these conditions—specifically, the vast differences that exist between this new form of temporary sterilization and the traditional methods of sterilization.

This Note specifically focuses on the issues implicated by the Norplant/Depo-Provera welfare condition and concludes that this welfare condition may be constitutionally permissible.[8] Essentially, the permissibility of conditioning the receipt of an extra welfare benefit on the agreement of temporary sterilization through one of these two forms of birth control raises two constitutional questions: (1) whether the traditional analysis of sterilization applies to these modern forms of temporary sterilization and (2) whether a Norplant/Depo-Provera welfare condition violates an individual's constitutional right to procreate. Both of these issues entail a larger question of whether the Norplant/Depo-Provera welfare condition could be constitutional under the Doctrine.[9] This Note examines these issues to determine ultimately under what circumstances a Norplant/Depo-Provera welfare condition could be permissible.

The basis of Parts I and II of this Note is the Supreme Court's opinion in *Skinner v. Oklahoma*.[10] Part I focuses on the sterilization issues raised in this case. More specifically, this Part considers the case law, philosophy, and methods of traditional sterilization in comparison to the modern forms of sterilization. The goal is to determine whether the modern forms of temporary, medical sterilization through the

---

6. *See, e.g.*, Coale, *supra* note 5, at 204; Nolan, *supra* note 5, at 36; Roberts, *supra* note 5, at 931-32. The Doctrine holds that the government may not offer a benefit where acceptance of this benefit directly or indirectly restricts the recipient's constitutional right. Nolan, *supra* note 5, at 17. *See also infra* Part III.

7. 505 U.S. 833 (1992).

8. The focus of this Note is to discuss the constitutional issues raised by the Norplant/Depo-Provera welfare condition and to determine whether this type of welfare condition could be constitutionally permissible based on current law. Therefore, while the Norplant/Depo-Provera welfare condition may also raise some morality and religious questions, this Note is limited to a discussion of the relevant legal and constitutional issues.

9. Some legal scholars believe the Doctrine should be abandoned. *See, e.g.*, 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, 595 (1990) (arguing that the Doctrine should be replaced with direct questions of whether "the government has constitutionally sufficient justifications for affecting constitutionally protected interests"); *see also infra* note 124. This Note, however, regards the Doctrine as the major threshold to the permissibility of the Norplant/Depo-Provera welfare condition for the following reasons: (1) the Doctrine has not been explicitly rejected by the Supreme Court, and (2) this Doctrine has been utilized in recent Supreme Court decisions regarding reproductive/privacy rights.

10. 316 U.S. 535 (1942).

use of Norplant and Depo-Provera require a modified analysis of the traditional scrutiny of permanent, surgical sterilization.[11] Part II then reviews *Skinner* in regard to its influence on the establishment of a right to procreate and the subsequent case law that has since considered reproductive decisionmaking rights. In addition to arguing that the applicable standard for restrictions on reproductive rights is unclear, Part II reviews the existing permissible limitations on some of the privacy rights of welfare recipients. Part III then addresses whether the sterilization and procreation aspects of the Norplant/Depo-Provera welfare conditions violate the Unconstitutional Conditions Doctrine.

I. STERILIZATION

The proposal to offer women additional welfare bonuses on the condition that they use either Norplant or Depo-Provera inevitably means women must agree to temporary sterilization while they are on welfare in order to receive an extra bonus. While mention of the word "sterilization" alone causes alarm and feelings of uneasiness, many are starting to view the new methods of birth control as a means of promoting family responsibility and as a viable solution to the welfare problem. This Part argues that the vast differences between this new form and the old form of sterilization warrant a fresh analysis of the sterilization issue. Specifically, the case law, philosophy, and methods of traditional sterilization are reviewed to determine whether the rationale against traditional sterilization also applies to the modern birth control forms of sterilization.

A. The Supreme Court's Response to Sterilization

The first Supreme Court response to sterilization was in *Buck v. Bell*[12] in 1927, where the Court upheld the sterilization of a "feeble minded white woman."[13] The Court held that the state sterilization law was not unconstitutional and did not violate the Equal Protection Clause.[14] At the time this decision was made, the states viewed the decision not only as indicating the Court's acceptance of the already thousands of sterilizations of mentally ill or retarded individuals, but also as indicating its

---

11. Norplant and Depo-Provera require medical assistance [hereinafter referred to as "medical" or "nonsurgical" sterilization]. Norplant requires the insertion of six silicone rubber tubes just beneath the skin of a woman's upper arm. Burrell, *supra* note 1, at 402. Depo-Provera requires the injection of a progestin type hormone. American Academy of Family Physicians, *supra* note 2. Conversely, traditional sterilization involved a surgical procedure [hereinafter referred to as "surgical" sterilization]. Castration involved the surgical removal of a male's testicles. STEDMAN'S MEDICAL DICTIONARY 299 (27th ed. 2000). A vasectomy required an excision of a major organ of the male. *Id.* at 1932. A hysterectomy was the removal of a female's uterus. *Id.* at 867. An oopherectomy was the removal of a female's ovaries. *Id.* at 1263.

12. 274 U.S. 200 (1927).

13. *Id.* at 205.

14. *Id.* at 207.

allowance of the tens of thousands of sterilizations yet to be performed.[15] In the aftermath of this decision, the number of individuals sterilized reached its peak during the 1930s.[16]

The Supreme Court's next and most recent ruling on the constitutionality of a state sterilization law was in 1942 in *Skinner v. Oklahoma*.[17] The Court held that the sterilization of criminal habitual offenders was not constitutionally permissible.[18] The Court stated that the implication of the right to procreate in sterilization required "strict scrutiny of the classification [that] a State makes in a sterilization law."[19] Moreover, the Court emphasized the potential "far-reaching and devastating effects" that the power to sterilize entailed and stressed that the reckless use of this power could cause "races or types [that] are inimical to the dominant group to wither and disappear."[20]

As a result of this opinion, many legal scholars view the *Skinner* decision as signaling the end of sterilization.[21] The Court's decision, however, was based on very "narrow grounds and did not overrule *Buck*."[22] Moreover, despite the Court essentially prohibiting the enactment of other habitual sterilization laws, the existing state policy that advanced the sterilization of institutionalized, noncriminal individuals remained in effect.[23] While the Court's declaration that sterilization "forever deprive[s] [individuals] of a basic liberty"[24] in part triggered the eventual end of the involuntary sterilization era, the question remains whether this almost sixty-year-old rationale against sterilization demands strict scrutiny,[25] and thus effectively prohibits the use of modern sterilization. Additionally, the Court's decision in 1978[26]

---

15. *See* PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 87 (1991).

16. *Id.* at xiii. Within a few years of the *Buck* decision, the number of procedures performed increased and the number of states with sterilization laws rose to thirty. *Id.* at 87.

17. 316 U.S. 535 (1942).

18. *Id.* at 535.

19. *Id.* at 541.

20. *Id.*

21. *See, e.g.*, REILLY, *supra* note 15, at 128.

22. *Id.*; *see also Skinner*, 316 U.S. at 538-41.

23. *See* REILLY, *supra* note 15, at 129.

24. *Skinner*, 316 U.S. at 541.

25. To satisfy the strict scrutiny test, the regulation or classification must be necessary to serve a compelling state interest, and must be narrowly drawn to achieve that end. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 416 (Aspen Law & Business 1997). Alternatively, satisfaction of rational basis review only requires the regulation or classification to be rationally related to a legitimate state interest. *Id.* at 415.

26. Stump v. Sparkman, 435 U.S. 349, 358 (1978). This case involved the mother of a mentally incompetent woman petitioning the court to have her daughter involuntarily sterilized. *Id.* at 349. Despite no statutory language on this subject, the judge granted the sterilization. *Id.* The daughter was secretly sterilized, and upon determination of the sterilization years later she filed suit. *Id.* The focus of the Court in *Stump* was whether a judge had judicial authority to grant sterilization absent statutory authorization, not on the legality of court-ordered sterilization. *Id.* at 356-57.

that sterilization could be authorized absent express statutory permission has led to numerous cases ordering the sterilization of mentally incompetent individuals based on the common law *parens patriae* doctrine.[27]

B. Traditional Sterilization

While the Supreme Court's stance against sterilization in *Skinner* is clear, a complete understanding of the emergence and eventual decline of sterilization is necessary to determine the viability of modern sterilization. Through a review of the philosophy, the methods, and the motive for the sterilization laws during the first half of the twentieth century, this section considers whether the exceptionality of these factors warrants a fresh analysis of the modern forms of sterilization that exist today.

1. The Philosophy Behind the Rise and Fall of the Sterilization Era

The first trace of sterilization ideology dates back to Darwinism when Charles Darwin in 1859 introduced the theory that human traits and behavior are inherited.[28] From this notion of inherited traits, the eugenic movement emerged in the early twentieth century arguing that unfitness was hereditary.[29] Eugenicists proclaimed "insanity and feeble-mindedness were expressions of mental degeneracy and that criminals were moral degenerates."[30] Through these classifications, state sterilization laws were implemented, and the practice of sterilizing these so-called inferior beings emerged. The first state to pass a sterilization law was Indiana, in 1907.[31] By 1922, fourteen more states had enacted sterilization laws, and pursuant to those laws, 3,233 individuals had been sterilized.[32] The Supreme Court's decision in *Buck* in 1927 "signaled a new era in eugenics."[33] By the early 1930s, the number of states with sterilization laws almost doubled the number in 1922, and the practice of sterilization increased dramatically to its peak in the mid-1930s.[34]

For a number of reasons, however, sterilization began to decline in the 1940s: (1) sterilization became a lower priority when physicians were sent off to fight in World War II, which gave the opponents of sterilization an opportunity to speak against it

---

27. Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 157-58 (1993). "Parens patriae power is an 'inherent authority' of a court 'to protect those persons within the state who cannot protect themselves because of a legal disability.'" *Id.* at 158 n.245 (quoting *In re* Terwilliger, 450 A.2d 1376, 1381-82 (Pa. Super. Ct. 1982)).

28. STEPHEN TROMBLEY, THE RIGHT TO REPRODUCE 5 (1988).

29. *Id.* at 2.

30. REILLY, *supra* note 15, at 5.

31. Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1433 (1981) (citing Act of March 9, 1907, 1907 Ind. Acts ch. 215).

32. REILLY, *supra* note 15, at 45, 48-49.

33. *Id.* at 88.

34. *See id.* at 96-97.

more loudly;[35] (2) the Supreme Court's decision in *Skinner* in 1942 essentially precluded the enactment of habitual criminal sterilization laws and emphasized the right of procreation;[36] and (3) the civil rights movement and a newfound support for human rights emerged after the public witnessed the killings of Jews by Adolf Hitler during World War II.[37] Nonetheless, in the 1960s involuntary eugenic sterilization was still in existence in over twenty-five states.[38] The publication in 1978 of the Department of Health, Education, and Welfare's ("HEW") rules prohibiting federal funding of sterilization under certain programs, however, triggered the repeal of many of these state sterilization laws or at least a substantial decrease in the states' practice.[39]

2. The Targets and Methods of Traditional Sterilization

The main advocates of sterilization were eugenicists. As discussed above, they branded the mentally ill, the retarded, and criminals as unfit.[40] They believed sterilizing, and thus preventing the so-called unfit beings from passing their feeblemindedness on to their child, was a necessity for the good of the public welfare.[41]

The procedure required the individuals to undergo major surgery that was dangerous and that resulted in permanent sterilization.[42] Men were initially sterilized by castration, which involved the surgical removal of the testicles.[43] Castration was replaced with the new procedure of a vasectomy in the 1890s.[44] While the vasectomy was a simpler and safer procedure, it still involved surgery of a major organ with permanent effects.[45] Before the development of tubal ligation, which is the blocking of the fallopian tubes, women were sterilized in one of two procedures: hysterectomy, the removal of the uterus, or oopherectomy, removal of the ovaries.[46]

Ultimately, during the sterilization era of the first half of the twentieth century,

---

35. *Id.* at 128.

36. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); *see also supra* notes 17-25 and accompanying text.

37. *See* Karl A. Menninger, *Proof of Qualification for Sterilization of a Person with a Mental Disability*, 49 AM. JUR. 3D *Proof of Facts* § 7 (1998); *see also* REILLY, *supra* note 15, at 128.

38. REILLY, *supra* note 15, at 148.

39. *See id.* at 152.

40. *See supra* text accompanying note 30.

41. *See* REILLY, *supra* note 15, at 2-5, 9-11.

42. While the success of reversing some of these procedures has grown substantially in the last few decades, these procedures were considered permanent and irreversible during the first half of the twentieth century. *See* 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* §§ 8, 14 (1968).

43 Menninger, *supra* note 37, § 5.

44. TROMBLEY, *supra* note 28, at 50.

45. *Id.*

46. Menninger, *supra* note 37, § 4.

over 60,000 individuals were involuntarily sterilized.[47] The procedures were dangerous, permanent, and caused serious side effects. Those individuals had no option; the sterilization was forced. Their perceived inferiority was due to their alleged mental deficiency or criminal tendencies. These individuals were not considered just "unfit to procreate"; "their kind" were viewed as "unfit to live." This is what sterilization was; this is what people think of when they hear the word "sterilization"; and this is why the Supreme Court stressed the "devastating effects"[48] of sterilization.

C. New Technology Demands a New Rationale

Optioual, temporary, and medical sterilization of today is nothing like the forced, surgical sterilization of yesterday.[49] This section illustrates the modern philosophy and methods of sterilization and compares them to the traditional era. The large differences between the modern and traditional era, in addition to the outdated rationale against sterilization in *Skinner*, demand a new look at the constitutionality of sterilization.

1. Modern Philosophy

The number of welfare recipients staying on welfare for longer periods and not becoming financially self-sufficient has been a continuing concern over the last couple decades.[50] While the public has always lent support to helping the poor become economically self-sufficient, the public has become displeased with the lack of family responsibility among the welfare recipients.[51] While the public does not view these individuals as feebleminded, criminal, or mentally deficient, a growing number believe that welfare recipients should not have children while they are on welfare due solely to their inability to be financially self-supporting.[52]

The modern classification that individuals should not have children while they are on welfare is not based on any personal or inheritable quality. Rather, this objective, economic classification is based on welfare recipients' inability to provide for their current family without the assistance of federal funds.[53] This is a far cry from the philosophy of the nineteenth and twentieth centuries, which based its classifications of "unfit" individuals on their purported inheritable, inferior traits of feeblemindedness and mental deficiencies.[54] While the goal of traditional sterilization

---

47. REILLY, *supra* note 15, at 94.

48. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

49. *See supra* text accompanying note 11.

50. A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 17-19 (1999).

51. *Id.* at 21-27.

52. *See* 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, 637 (1995).

53. Anne-Marie Funk, Note, *Norplant Use in Conjunction with the Welfare System*, 2 S. CAL. INTERDISCIPLINARY L.J. 147, 151-53 (1993).

54. *See supra* text accompanying notes 29-30.

was to eliminate a class of unfit beings by taking away their ability to have offspring,[55] the goal of today's sterilization is to promote family responsibility and to encourage welfare recipients to wait to have children until they are economically capable of raising them.[56]

2. Modern Technology: Norplant and Depo-Provera

The advancement in birth control with the introduction of Norplant and Depo-Provera in the last decade puts a new twist in the old debate on sterilization by offering a less-intrusive, short-term method of sterilization for the purpose of encouraging family responsibility. Moreover, while the traditional methods involved surgery, dangerous side effects, and irreversible results,[57] the modern forms are medical, temporary, and involve only minor side effects.[58]

Norplant was approved by the Federal Drug Administration ("FDA") as a form of birth control in 1990.[59] It involves the insertion of six silicone rubber tubes, which are implanted beneath the skin of the inner part of the woman's upper arm.[60] These tubes are about the size of a matchstick and are barely visible under the skin.[61] The insertion of the tubes takes only about fifteen minutes and requires the woman only to be under a local anesthetic.[62] The tubes contain synthetic progestin hormones that are released in the bloodstream, causing temporary sterilization for up to five years.[63] In a simple procedure, Norplant can be removed at any time, and one's fertility will return at a normal rate within months.[64]

While the effectiveness of Norplant is not absolute, the rate of error is only about 0.2 to 1.5 pregnancies per 100 women per year.[65] The effectiveness of the birth control is not dependent on anyone, except for its removal, which requires medical assistance.[66] The side effects of Norplant are relatively minimal due to the low-

---

55. *See supra* text accompanying note 41.

56. *See* Funk, *supra* note 53, at 151-53.

57. *See supra* text accompanying notes 42-46.

58. *See infra* text accompanying notes 59-81.

59. Press Release, Food and Drug Administration, Norplant Approved (Dec. 10, 1990), *available at* http://www.fda.gov/bbs/topics/NEWS/NEW00027.html [hereinafter Norplant Approved].

60. Burrell, *supra* note 1, at 402.

61. Norplant Approved, *supra* note 59.

62. Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. LOUISVILLE J. FAM. L. 311, 329 (1995-96).

63. Norplant Approved, *supra* note 59.

64. Coale, *supra* note 5, at 189; *see also* James H. Taylor, *Court-Ordered Contraception: Norplant as a Probation Condition in Child Abuse*, 44 FLA. L. REV. 379, 384 (1992). The removal of Norplant, however, has been described as a "longer, more difficult process than implantation." Nolan, *supra* note 5, 20-21 (citing WYETH-AYERST LABORATORIES, WOULD YOU LIKE UP TO 5 YEARS OF CONTINUOUS BIRTH CONTROL THAT IS REVERSIBLE? (1992)).

65. Taylor, *supra* note 64, at 384.

66. Unlike the birth control pill, which a woman must take daily in order ensure its effectiveness against pregnancy, the effectiveness of Norplant does not require any additional

dose hormone utilized.[67] The most common side effect that arises, however, is abnormal menstrual patterns and bleeding.[68] Less common side effects include headaches, nausea, nervousness, and dizziness.[69] Another downside to Norplant in regard to a proposal for Norplant/Depo-Provera welfare conditions is the restricted use by certain types of women. Women experiencing abnormal vaginal bleeding or who suffer from liver disease, breast cancer, or blood clots should not use Norplant.[70] Unlike the birth control pills, however, older women, women who smoke, and women who have high blood pressure are able to use Norplant.[71]

In 1992, the FDA approved Depo-Provera as a form of birth control.[72] While Norplant involved a minor medical procedure, Depo-Provera is an injection in the buttocks or upper arm of synthetic progestin medroxyprogesterone acetate hormones.[73] The hormones enter the bloodstream and block pregnancy for three months.[74] This method is 99.6% effective.[75]

A minor inconvenience of Depo-Provera is the initial irregular menstrual period or spotting.[76] However, this side effect is ouly temporary, and a woman's menstrual period completely stops after twelve months.[77] Other side effects that some women

---

steps once it has been inserted into a woman's arm. *See* Nolan, *supra* note 5, at 21. In addition, the requirement of medical assistance to remove the tubes assures the government that any forgetfulness or intentional actions by a woman using Norplant will not disturb its effectiveness.

67. Taylor, *supra* note 64, at 384.

68. Rachel Stephanie Arnow, *The Implantation of Rights: An Argument for Unconditionally Funded Norplant Removal*, 19 BERKELEY WOMEN'S L.J. 19, 20 (1996); *see also* Norplant Approved, *supra* note 59; Engender Health, *Norplant Implants: Questions & Answers*, *available at* http://www.engenderhealth.org.wh/fp/cnor2.html#advantages (last visited Oct. 1, 2001).

69. Nolan, *supra* note 5, at 21.

70. Taylor, *supra* note 64, at 384-85 (citing Marian Segal, *Norplant: Birth Control at Arm's Reach*, FDA CONSUMER, May 1991, at 11).

71. These types of women may use Norplant because it does not contain the hormone estrogen, which is contained in birth control pills. Ameriean Academy of Family Physicians, *supra* note 2.

72. J.M. Lawrenee, *The Safe (and Secret) Option; Injection a Popular Choice For Birth Control*, BOSTON HERALD, Nov. 18, 1998, at 003, *available at* LEXIS, News Library, BHERLD File.

73. American Academy of Family Physicians, *supra* note 2.

74. William Green, *Consumer-Directed Advertising of Contraceptive Drugs: The FDA, Depo-Provera and Product Liability*, 50 FOOD & DRUG L.J. 553, 553 (1995).

75. Toni Driver Saunders, Comment, *Banning Motherhood: An RX to Combat Child Abuse?*, 26 ST. MARY'S L.J. 203, 239 (1994).

76. *See* American Academy of Family Physicians, *supra* note 2.

77. Pharmacia & Upjohn, *About Depo-Provera*, *available at* http://www.depo-provera.com/consumer/about_depo/expect.htm (last visited Jan. 28, 2002). "The reason your period stops is because Depo-Provera causes a resting state in your ovaries. When your ovaries do not release an egg each month, the growth of your uterus does not occur. So menstrual bleeding does not occur . . . ." *Id.*

have reported include "nervousness, dizziness, stomach discomfort, headache, and fatigue."[78] Although side effects are rare and generally only minimal,[79] one drawback to using Depo-Provera is that it cannot be reversed immediately and one must wait until the hormone level subsides.[80] Another restriction of Depo-Provera is that women who have unexplained periods, breast cancer, blood clots, liver disease, or a history of a stroke should not use this form of birth control.[81]

Overall, the nonsurgical procedure, the temporary effectiveness, and only minimal side effects of Norplant and Depo-Provera establish that this new type of sterilization is significantly different from the traditional forms of sterilization. In addition to these technical distinctions, the implementation of the Norplant/Depo-Provera welfare condition would vary considerably from the traditional forced sterilization. The use of Norplant and/or Depo-Provera would not be mandated—rather, the woman will have the self-selected option[82] to balance the low risk of any side effects with the opportunity to gain additional bonuses.[83] Moreover, use of these types of birth control is consistently growing more popular and widespread among the public.[84] Thus, the public's perception of these forms of birth control is bound to be vastly more favorable than it was of traditional sterilization.

The significance of these differences in philosophy and methods of sterilization is further recognized by a review of the Supreme Court's remarks about sterilization in *Skinner*. The Court feared the elimination of a class and emphasized the "irreparable injury."[85] These are not realistic fears of modern sterilization. Under the current federal welfare program,[86] welfare recipients may only be on welfare for a maximum of five years over the course of their lifetime.[87] Hence, at most, welfare recipients may delay their decision to procreate for five years. This delay does not

---

78. *Id.*

79. *See id.* (asserting that "[a] woman using Depo-Provera sometimes experiences symptoms similar to women using other forms of birth control . . . ").

80. *See* American Academy of Family Physicians, *supra* note 2 ("Depo-Provera [] works for three months." If a woman chooses not to get another shot at the end of the three months, "her normal ovarian function will return after a short time."); *see also* Pharmacia & Upjohn, *About Depo-Provera, available at* http://www.depo-provera.com/consumer/about_depo/faq.htm (last visited Jan. 30, 2002) ("Most women who want to become pregnant after stopping Depo-Provera are able to do so within 1 year of their last injection.").

81. *See* Pharmacia & Upjohn, *About Depo-Provera, available at* http://www.depo-provera.com/about/index.htm (last visited Nov. 17, 2001).

82. This option will only be available when use of Norplant and/or Depo-Provera is medically suitable. Thus, women that fall within the restricted categories will not have this option. *See supra* text accompanying notes 70 & 81.

83. For a discussion of the varying types of bonuses that may be offered, see *infra* Part III.B.2.

84. Kristin Elliot, *Are U.S. Women Interested in Long-Acting Methods?*, 32 FAM. PLAN. PERSP. 306, 306 (2000).

85. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

86. Temporary Assistance to Needy Families ("TANF"), enacted in 1996, is the current federal welfare program. 42 U.S.C. §§ 601-619 (Supp. V 1999).

87. 42 U.S.C.A. § 608(a)(7)(A) (West Supp. 2001).

equate with the Supreme Court's fear of a class being eliminated or their classification of sterilization as having irreversible effects.[88] First, there is no class. The only universal characteristic that welfare recipients lack in comparison with the rest of the country is their financial status. More importantly, the effects of Norplant and Depo-Provera are not "farreaching [or] devastating,"[89] nor do they "forever deprive[]"[90] individuals of their ability to have children. Moreover, these forms of birth control have been proven to be safe and cause few side effects. While these forms of birth control may not be a viable option for all recipients due to health problems, many women do not encounter any significant side effects from their use of Norplant or Depo-Provera.

Therefore, based on this review of the traditional and modern philosophies and methods of sterilization, the extreme differences necessitate reconsideration of sterilization in the modern era. Part II focuses on the decision in *Skinner* in regard to its emphasis on an individual's right to procreate, and then reviews subsequent case law on related topics to determine whether a Norplant/Depo-Provera welfare condition violates a fundamental right.

II. THE RIGHT TO PROCREATE AND PRIVACY INTERESTS

In addition to raising concerns about the permissibility of temporary sterilization, the Norplant/Depo-Provera welfare condition also evokes criticism due to the procreation element involved in this condition.[91] The Supreme Court in *Skinner v. Oklahoma*[92] introduced the right to procreate as a fundamental right by emphasizing that this right is "one of the basic civil rights of man."[93] Additionally, opponents of this welfare condition assert that dicta in Supreme Court cases dealing with contraception and abortion implicitly have protected this right of procreation.[94]

A. Support for the Right to Procreate

The Court's decision in *Griswold v. Connecticut*[95] established the notion of a "penumbra" of rights that protects an individual's privacy rights from government intrusion.[96] The Court found that an individual's right to contraception was one of these rights and struck down a statute making the use of contraception criminal.[97]

---

88. While a woman taking birth control may consider its effects irreversible and long lasting due to her moral and/or religious beliefs, the point of this section is to establish that the use of Norplant or Depo-Provera does not equate with the effects the Supreme Court was specifically dealing with in *Skinner*. *See supra* text accompanying note 8.

89. *Skinner*, 316 U.S. at 541.

90. *Id.*

91. *See supra* text accompanying note 5.

92. 316 U.S. 535 (1942).

93. *Id.* at 541.

94. Taylor, *supra* note 64, 386-90.

95. 381 U.S. 479 (1965).

96. *Id.* at 484-86.

97. *Id.* at 485.

When a subsequent statute attempted to restrict the use of contraception to only married couples, the Court in *Eisenstadt v. Baird*[98] struck down the statute on equal protection grounds, arguing the right to privacy included "[an individual's right] to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[99] The application of strict scrutiny in these privacy matters was clearly established by the Court in *Carey v. Population Services International*[100] when the Court stated that "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[101]

Despite the Court's recognition that some privacy rights are protected, the Court has not provided a clear analysis of why some rights receive more protection than other rights do. Moreover, it is not clear what would constitute an "unjustified intrusion by the state,"[102] or for that matter, a justified intrusion by the state. For instance, is a government's regulation of a protected right less intrusive when an individual calls upon the government for assistance?

B. The Effect of the "Undue Burden" Standard

The Court's most recent decision on these privacy-based, reproductive rights opens the possibility that the standard of review utilized in cases involving reproductive decisionmaking remains a question until the Court addresses the specific matter. For instance, after holding that the right to an abortion was a fundamental right requiring strict scrutiny in *Roe v. Wade*,[103] the Court reexamined this right and applied a new standard of review in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[104] While the Court expressly upheld its decision in *Roe*,[105] the Court in *Casey* refrained from calling the right to abortion a fundamental right. Moreover, *Casey* did not apply strict scrutiny, which requires the state's interest to be compelling and necessary to meet the state's interest; rather, the Court applied a new "undue burden" test.[106] This test essentially holds that "[o]nly where state regulation imposes an undue burden on a woman's ability to make [the decision whether to abort] does the power of the State reach into the heart of liberty protected by the Due Process Clause."[107] Moreover, the Court stated that a state regulation constitutes an "undue burden" only if the regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[108]

Whether the Court will limit the use of the undue burden test to abortion cases is

---

98. 405 U.S. 438 (1972).
99. *Id.* at 453.
100. 431 U.S. 678 (1977).
101. *Id.* at 687.
102. *Id.*
103. 410 U.S. 113, 155 (1973).
104. 505 U.S. 833, 876 (1992).
105. *Id.* at 846.
106. *Id.* at 878-79.
107. *Id.* at 874.
108. *Id.* at 877.

unclear. The fact that the right to abort inevitably involves the right not to bear a child raises the possibility that future restrictions on affirmative reproductive rights may be permissible if they only create an incidental effect, as opposed to an undue burden, on the privacy right at issue.[109] If the undue burden standard was applied to the Norplant/Depo-Provera welfare condition, the optional, temporary nature of the condition indicates a strong possibility that any resulting restriction would ouly be incidental.[110] This welfare condition does not require recipients to take birth control and thus not have children. The burden on a woman's right to procreate is only a temporary restriction, and this restriction only occurs if a woman opts to take Norplant or Depo-Provera. Even if the standard applied in *Casey* is not specifically extended to the welfare condition, this case certainly demonstrates the Court's willingness to reconsider, and in some cases modify, its prior analysis as it is faced with new aspects of reproductive rights and the continual struggle to define the right of privacy.

C. Permissible Restrictions on Privacy Rights of Welfare Recipients

The element of procreation in the Norplant/Depo-Provera welfare condition poses the question of how the Court will deal with the temporary limitations that this condition imposes on a woman's procreation right, provided she makes the choice to opt into this condition. For instance, does the fact that welfare recipients call upon the government for support warrant more lenience in the government's ability to impose limitations on the recipient's reproductive decisions? The Supreme Court has rejected the argument that "conditions on food stamps or welfare payments unconstitutionally burden rights to speech, expressive association, intimate association, or freedom from unwarranted searches."[111] More specifically, the Court upheld the government conditioning the "receipt of Aid to Families with Dependent Children (AFDC) on [a] recipient's submission to warrantless searches of [their] home" as a matter of free

---

109. In *Casey* the Supreme Court created the undue burden standard to permit some limitations on a woman's right to have an abortion, or her right not to have a child. *See id.* Moreover, the fact that an abortion decision inevitability contains the right not to have children raises two questions: (1) Does *Casey* set a new standard for cases involving the right not to have children, or even more broadly, cases involving reproductive decisions in general? If this is the case, then the future validity of the strict scrutiny standard in *Griswold* and the other prior contraception cases is uncertain, and (2) Does *Casey* simply reiterate the unpredictability of the Court's position on the right not to have children, and more generally, rights involving reproductive decisions? In either event, the application of the undue burden standard, or at least the possibility of a lesser standard than strict scrutiny in cases involving temporary limitations on a woman's right to procreate (such as the Norplant/Depo-Provera welfare condition) raises a clear possibility that this condition could be legally permissible.

110. *See* Califiano v. Azanavorian, 439 U.S. 170, 174-78 (1978) (finding a statute that discontinued certain social security benefits for recipients who spent time outside of the United States only an incidental burden to the recipients' constitutional right to international travel).

111. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1417 (1989) (citing Lyng v. Int'l Union, UAW, 485 U.S. 360 (1988)).

choice.[112] Additionally, the Court has upheld other restrictions on privacy rights of welfare recipients on grounds that the deterrent effect was either minimal or insufficiently direct.[113] Hence, the government's apparent authority to infringe on at least some privacy rights of a welfare recipient suggests that the government's request for family responsibility through welfare conditions could be found permissible.

Thus, this Part has suggested the following: (1) the standard utilized by the Supreme Court to review regulations involving reproductive rights has not been constant; (2) the Court's creation of an undue burden standard of review in *Casey* may be applied in other reproductive-type cases; and (3) the restriction of some privacy rights of welfare recipients reaffirms the possibility that a limitation on one's right to procreate could also be permissible. Moreover, Part I concluded that the vast differences between traditional and modern sterilization demanded a fresh analysis utilizing a lesser level of scrutiny for the modern form. The next Part considers whether the sterilization and procreation elements of the Norplant/Depo-Provera welfare condition violate the Unconstitutional Conditions Doctrine.

III. NONSUBSIDY VS. PENALTY: THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The Norplant/Depo-Provera welfare condition may encounter problems with the Unconstitutional Conditions Doctrine. This Doctrine essentially holds that the government cannot do indirectly what it cannot do directly.[114] In other words, if a direct restriction on an individual's right is unconstitutional unless strict scrutiny is satisfied, then indirectly causing a restraint of this right would also require the satisfaction of strict scrutiny to be legally valid. Hence, even though the Norplant/Depo-Provera welfare condition does not force the use of birth control on welfare recipients, it may be found impermissible under this Doctrine because it indirectly restricts a woman's right to procreate by conditioning a benefit on the temporary waiver of this right.

The proposed welfare condition involves two potential rights that may require strict scrutiny: the right not to be sterilized and the right to procreate. The conclusions of Parts I and II, however, argued that the appropriate standard of review for the Norplant/Depo-Provera welfare condition was unclear due to the unique aspects of modern sterilization and the lack of any definitive analysis of procreation rights. While it has been suggested that strict scrutiny may not be the appropriate test for this condition, either of the following findings by a court would likely result in the application of strict scrutiny, and thus a possible violation under the Doctrine: (1) the new technology of sterilization does not warrant a fresh analysis or (2) the temporary

---

112. *Id.* at 1437.

113. *Id.* at 1437-38 nn.90-91.

114. Whether the government has an obligation to render the benefit to the recipient is not relevant. Rather, according to the Doctrine, the government may not bestow a benefit on the condition that a recipient surrenders one of her constitutional rights. Nolan, *supra* note 5, at 17; *see also* Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) (allowing the state to offer a valuable privilege on the surrendering of a constitutional right would essentially allow the state to compel a surrender of the right).

delay of procreation violates the principles recognized in *Griswold*, *Eisenstadt*, and *Carey*.[115]

Nonetheless, even upon one or both of these findings, the application of strict scrutiny under the Doctrine to the Norplant/Depo-Provera welfare condition is not absolute. A review of the Court's application of the Doctrine over the last century reveals (1) its inconsistent application and (2) the possibility that the Court will conclude this condition only requires rational basis review,[116] and thus would be found permissible.[117] The following Subpart first reviews the inconsistent application of the Doctrine throughout its history, and then focuses the analysis of the proposed welfare condition on the Supreme Court's recent interpretations of the Doctrine in related subject matters.

A. Application of the Unconstitutional Conditions Doctrine

The Doctrine was first established during the "Lochner Era" to protect economic liberties under substantive due process from the threats of regulatory government.[118] While the historical standard of review for economic legislation has been rational basis review,[119] the standard utilized today in matters involving the Doctrine are far less clear.[120] The liberties protected under the Doctrine expanded after the New Deal

---

115. Part I argued that the new form of sterilization is inherently different from the traditional method and that these differences warranted a fresh analysis under a lesser standard. Moreover, Part II asserted that the right to procreate has not been firmly established; the varying standards applied in subsequent case law indicate that the choice to delay one's right to procreate on the receipt of a benefit may also be permissible under a lesser standard. I have recognized, however, that a court may find that these differences are not significant and apply strict scrutiny to the Norplant/Depo-Provera welfare condition. Although this condition may successfully meet the strict scrutiny standard, I concede for purposes of this Note that the application of this standard would likely result in a finding of unconstitutionality. I have instead chosen to focus on the more promising arguments regarding the constitutionality of this condition.

116. *See supra* text accompanying note 25.

117. My analysis reveals the clear possibility that the Supreme Court will view the Norplant/Depo-Provera welfare condition as social and economic legislation, which historically has only required satisfaction of the rational basis review. Additionally, the government's interest in encouraging family responsibility and protecting children from being born into homes that are not financially self-supporting will undoubtedly be considered legitimate interests, and the welfare condition will likely be found rationally related to these governmental interests.

118. Coale, *supra* note 5, at 198; *see also* Sunstein, *supra* note 9, at 597.

119. *See supra* text accompanying note 25.

120. As briefly stated, if the Doctrine were literally applied as it is stated, then a condition on a protected right would be reviewed with strict scrutiny. However, not only has rational basis review been traditionally applied to social/economic legislation under the Doctrine, but the Court also has increasingly upheld conditions involving reproductive privacy issues as social/economic legislation—requiring only rational basis review. *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5,

in the 1930s to include unwarranted intrusions into the private realm.[121] However, this transition of the Doctrine to the private realm has not been smooth, thus yielding inconsistent results and employing inconstant factors in the analyses.[122]

As recognized above, a strict reading of the doctrine indicates that the Norplant/Depo-Provera welfare condition would probably be unconstitutional if the Court decided that direct restrictions on an individual's right not to be sterilized or an individual's right to procreate required strict scrutiny. Recently the Court, however, has modified the Doctrine by differentiating between "direct state interference with a protected activity" (hereinafter referred to as a "penalty") and "the state's mere refusal to subsidize a protected activity" (hereinafter referred to as a "nonsubsidy").[123] A penalty is viewed as violating a protected right unless strict scrutiny is satisfied, while a nonsubsidy only requires satisfaction of the rational basis test to be legally permissible.[124] Because the Court has recently distinguished

---

6-14 (1988) (referring to the Doctrine as "mysterious" because of the varying application in different contexts); *see also* Sullivan, *supra* note 111, at 1415-16 (arguing that the Doctrine as applied "is riven with inconsistencies").

121. Sunstein, *supra* note 9, at 597; *see also* Sherbert v. Verner, 374 U.S. 398, 405-10 (1963) (introducing the use of the Doctrine in the area of public assistance programs).

122. Friedman, *supra* note 52, at 645 (asserting that the Doctrine lacks a clear test due in part to the aberrant shift in focus of the Doctrine); *see also* Nolan, *supra* note 5, at 33-35 (evaluating the permissibility of a condition under the Doctrine by considering varying theories of germaneness, inalienability, and coercion). The most recent test utilized by the Supreme Court to determine whether the Doctrine has been violated is the penalty/nonsubsidy distinction. *See* Coale, *supra* note 5, at 200. This theory is discussed further in the text following this footnote.

123. Roberts, *supra* note 5, at 936; *see also* Coale, *supra* note 5, at 198-203 (discussing cases concerning the penalty/nonsubsidy distinction in the area of state-sponsored medical care).

124. Sullivan, *supra* note 111, at 1415. The lack of definitiveness as to the distinction between a penalty and a nonsubsidy has received criticism. *See, e.g.*, Sunstein, *supra* note 9, at 602 (stating that "generating the appropriate baselines from which to distinguish subsidies from penalties is exceptionally difficult"). In fact, various theories have been proposed to replaee the penalty/nonsubsidy distinction. *Id.* at 595 (advocating the replacement of the penalty/nonsubsidy test under the Unconstitutional Conditions Doctrine with a query as to "whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting [the] constitutionally protected interests"); *see also* Charles R. Bogle, *"Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193, 216-18 (1994) (discussing proposals by Kenneth Simons and Seth Kreimer for establishing a baseline to determine "whether a proposed conditional benefit is an offer or a threat"); Sullivan, *supra* note 111, at 1499-1500 (arguing that strict review should be applied to "any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty"). While the criticism regarding the lack of clarity in the distinction between a penalty and a nonsubsidy has some merit, each of these proposals has also received criticism. *See* Bogle, *supra*, at 217 (finding the baseline theory "speculative"); *see also id.* at 216 n.112 (citing David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of*

nonsubsidy from penalty conditions in a number of cases involving the reproductive decisions of indigent women, the focus of the analysis of the Norplant/Depo-Provera welfare condition will comprise of this differentiation.[125] Moreover, the similar nature of the abortion funding cases and family cap laws to the Norplant/Depo-Provera welfare condition should be given the greatest weight in the analysis of the welfare condition.

1. The Abortion Funding Cases

Over the last twenty-three years, the Supreme Court has applied the nonsubsidy/penalty distinction in three cases involving the funding of childbirth services but not abortion services.[126] The Court expressed that "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[127] Applying this rationale to each case, the Court has upheld the state's policy choice to encourage childbirth over abortion by limiting the availability of funds only to childbirth services rather than abortion services.[128]

The Court in 1977 first addressed this issue in *Maher v. Roe*,[129] which involved an indigent woman bringing suit on equal protection grounds against a Connecticut Welfare Department regulation that funded childbirth expenses but limited the availability of Medicaid benefits to first trimester abortions that were "medically

---

Neutrality in Government-Funded Speech, 67 N.Y.U. L. REV. 675, 701 n.100 (1992)) (calling Sunstein's alternative approach "too vague to be helpful"); *id.* at 218-20 (referring to Sullivan's neutrality theory as "radical" and her "notion of rights" as being outside the usual framework of "rights as individual protections against government intrusion"). Thus, because the penalty/nonsubsidy distinction is the mainstream constitutional approach for determining whether the Unconstitutional Conditions Doctrine has been violated, and because no clear consensus exists as to which proposed approach would be most effective (or even more effective than the current approach) for determining the permissibility of conditional benefits, the penalty/nonsubsidy test is viewed as the most likely approach to be applied by the Supreme Court with regard to the Norplant/Depo-Provera welfare condition. Sunstein, *supra* note 9, at 601.

125. While most of the analysis in this Note focuses on the penalty/nonsubsidy distinction, the principles advanced in the other theories of germaneness, coercion, and inalienability are incorporated into the analysis. In any event, many legal scholars have criticized all of these theories as determinants of the Doctrine's applicability. *See, e.g.*, Sullivan, *supra* note 111, at 1419-22 (asserting that each of these theories yields inconsistent results and, thus, proposes a new, more systematic approach to matters implicating this Doctrine). *See also supra* text accompanying note 124.

126. *See* Rust v. Sullivan, 500 U.S. 173 (1991); *see also* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

127. *Maher*, 432 U.S. at 475.

128. *See Rust*, 500 U.S. at 200; *see also* Harris, 448 U.S. at 317-18; *Maher*, 432 U.S. at 474.

129. 432 U.S. 464 (1977).

necessary."[130] The Court, however, held that the regulation did not violate the Equal Protection Clause—a state's policy choice to pay the expenses incident to childbirth did not require it to pay expenses incident to nontherapeutic abortions.[131] Moreover, the Court rejected the woman's assertion that "financial need alone identifies a suspect class for purposes of equal protection analysis."[132] The Court reasoned that making childbirth a more attractive alternative may affect a woman's decision, but it does not impose any new restrictions on a woman's ability to have an abortion.[133] Rather, the "difficult[y,] and in some cases, perhaps, [the] impossib[ility,] for some women to have abortions is neither created nor in any way affected by [this] regulation."[134] Accordingly, the regulation was not viewed as a penalty, and thus only rational basis review was applied. Further, the "state's strong interest in protecting the potential life of the fetus" was found to be a sufficient reason to uphold this regulation.[135]

Three years later, in 1980, the Supreme Court addressed a similar regulation, the Hyde Amendment,[136] in *Harris v. McRea*.[137] The issue raised here, however, was whether a state participating in the Medicaid program was required under Title XIX "to fund [the cost of] medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment."[138] The Court analogized this case to *Maher*[139] and reaffirmed their finding that a state making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds" did not violate the protected rights recognized in *Roe v. Wade*.[140] Additionally, the Court restated that "poverty, standing alone, is not a suspect

---

130. *Id.* at 466-67. In other words, the regulation prohibited the funding of abortions that were not medically necessary.

131. *Id.* at 474-77.

132. *Id.* at 471.

133. *Id.* at 474. "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service[s] she desires." *Id.*

134. *Id.*

135. *Id.* at 478.

136. In 1965 the Medicaid program was created under Title XIX of the Social Security Act to provide federal financial aid to states opting to compensate certain costs of medical treatment for indigents. Harris v. McRea, 448 U.S. 297, 301 (1980). The Hyde Amendments in 1967 "prohibited . . . the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances." *Id.* at 302. The Supreme Court in *Harris* considered constitutional and statutory challenges to the validity of the Hyde Amendments. *Id.* at 300.

137. 448 U.S. 297 (1980).

138. *Id.* at 307.

139. "The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315.

140. *Id.* at 314 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

classification"[141]—the state has no obligation to remove obstacles preventing an individual from exercising a protected right that was not of their own creation.[142]

Most recently in 1991, the Supreme Court once again addressed this issue of providing for childbirth expenses, but not abortion costs, in *Rust v. Sullivan*.[143] The case concerned the legal validity of Section 1008 of the Public Health Services Act,[144] which prohibited the use of federal funds for the Act's Title X family-planning services when the utilized method was abortion.[145] An amendment to the Act in 1988 added additional prohibitions to Title X projects.[146] Projects including counseling, referrals, and other activities that advocated abortion as a family planning method were required to maintain "an objective integrity and independence from the prohibited [abortion] activities" by the use of separate facilities, personnel, and accounting records.[147]

The Court upheld these regulations and stated that they did not "'create [any] affirmative legal barriers to access to abortion.'"[148] Moreover, the Court reclaimed its authority to subsidize family planning services that will lead to childbirth, while declining to promote or encourage abortion, from *Maher*.[149] The Court stressed yet

---

141. *Harris*, 448 U.S. at 323.

142. *Id.* at 316. The Court affirmed its rationale applied in *Maher v. Roe* by reiterating that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* This basic principle has also been recognized in *Webster v. Reproductive Health Services*, 492 U.S. 490, 507 (1989) (citing DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989)) (stating "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual").

143. 500 U.S. 173 (1991).

144. 42 U.S.C. §§ 300-300a-6.

145. *Id.* § 300a-6

146. 42 C.F.R. §§ 59.2, 59.5, 59.7-.10.

147. *Rust*, 500 U.S. at 180-81.

148. *Id.* at 182 (quoting New York v. Sullivan, 889 F.2d 401, 411 (1989) (citing *Webster*, 492 U.S. at 509-10 (1989))). The Court compared the prohibitions in the instant case to *Webster* and determined that the restrictions permitted on the performance of abortions in *Webster* were "substantially greater in impact than the regulations challenged in the instant matter." *Id.* (citing *Sullivan*, 889 F.2d at 411). Moreover, the Court rejected the view that the "[regulations'] restrictions on the subsidization of abortion-related speech... [were to be held to unconstitutionally] condition the receipt of a benefit, . . . Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling." *Id.* at 196. The Court based its conclusion on *FCC v. League of Women Voters*, 468 U.S. 364 (1984), that held these regulations "do not force [anyone] to give up [their] abortion-related speech; [rather] they merely require that [such activity be kept] separate and distinct from [the activities of the Title X project]." *Rust*, 500 U.S. at 196.

149. The Court in the instant case referred to its decision in *Maher*, where it held that the government may "make a value judgment favoring childbirth over abortion, and... implement that judgment by the allocation of public funds." *Rust*, 500 U.S. at 192-93 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

again that "the government choos[ing] to subsidize one protected right [does not mean they] must subsidize analogous counterpart rights";[150] nor is it a constitutional violation for the government to "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[151] Accordingly, the Court concurred with the finding in *Harris* that "'[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity'"[152]—meaning that the denial of funds for abortion services was considered a nonsubsidy requiring satisfaction of only rational basis review.

Like the abortion funding cases, the Norplant/Depo-Provera welfare condition could be interpreted as the government making a "value judgment," but in this instance to promote family responsibility, rather than childbirth. In both instances, the judgment is based on what is in the best interest of the public. Moreover, the consistent finding by the Court that none of the abortion funding cases "place[d impermissible] obstacles in the path of a woman's exercise of her freedom of choice"[153] should apply to the Norplant/Depo-Provera welfare condition.

Some opponents, however, have asserted this type of welfare condition varies from the abortion funding cases because "women on welfare would be required to pay more than wealthier women to exercise a constitutional right."[154] As discussed further in Part III.B. below, the welfare conditions do not inhibit a woman's ability to have a child; rather, "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency."[155]

---

150. *Id.* at 194. The Court, in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), also applied this rationale and rejected this notion that government must subsidize analogous counterpart rights. *Id.* at 550.

151. *Rust*, 500 U.S. at 193. The Court specifically announced the broad authority that the government has in defining limits to programs publicly funded. *Id.* at 193-94.

152. *Id.* at 193 (quoting Harris v. McRae, 448 U.S. 297, 317 n.19 (1980)).

153. *Harris*, 448 U.S. at 316; *see also Rust*, 500 U.S. at 182 (recounting the holding of the Second Circuit, in New York v. Bowen, 889 F.2d 401 (2nd Cir. 1989), that Title X regulations did not impermissibly burden a woman's right to an abortion by favoring childbirth); *Maher*, 432 U.S. at 474 (noting that *Roe v. Wade* does not prohibit the state from "mak[ing] a value judgment favoring childbirth over abortions, and . . . implement[ing] that judgment by the allocation of public funds.").

154. Coale, *supra* note 5, at 209-10.

> The programs upheld in *Harris* and *Maher* did not make a poor woman pay more to exercise her right to an abortion than a woman able to earn a subsistence income. They just made a poor woman pay the going market price for an abortion, which is the same price that other women pay. But a Norplant bonus makes a poor woman forego $1000 in consumption possibilities to exercise her right to not take Norplant that a wealthier woman does not have to forego to exercise her right.

Id.

155. *Rust*, 500 U.S. at 193 (quoting *Harris*, 448 U.S. at 316). The validity of the opponent's argument in regard to a bonus involving cash incentives is discussed further in the

The next section further establishes this point by arguing that the growing implementation of the family caps in state welfare programs indicates the Norplant/Depo-Provera welfare condition should be analyzed analogously to the family cap and abortion funding cases.

2. The Family Cap Laws

Traditionally, welfare recipients received an increase in benefits when they had a child (or another child) while on welfare. In the last decade, however, states have incorporated family caps into their state welfare programs. Family caps basically eliminate the increase in benefits for children born to recipients while they are on welfare.[156] This conception of a family cap law was originally upheld by the Supreme Court in 1970 when it declared that a cap on the total amount of benefits an Aid to Families with Dependent Children ("AFDC")[157] family can receive is permissible regardless of the size of the family.[158] Although the AFDC typically provided an increase in benefits for a child born to an AFDC recipient, the AFDC also contained a provision that permitted the implementation of family cap laws.[159] Specifically, under the AFDC, states could bypass the federal requirements and implement their own reform measures upon approval by the Secretary of the Department of Health and Human Services ("HHS").[160]

In 1992, the New Jersey reform measure, the Family Development Program ("FDP"), was the first state plan approved by HHS that included the implementation of a family cap.[161] The family cap aspect of the FDP eliminated the awarding of additional benefits for the birth of children to families already receiving AFDC benefits.[162] The intent of the New Jersey family cap law, as for most state family caps,

---

following section, Part III.B.2.

156. Family cap laws are implemented at the state level, and thus their exact application varies according to relevant state law.

157. 42 U.S.C.A. § 601 (West Supp. 2001). Until 1996, the AFDC was the main federal welfare program that provided direct cash assistance to eligible needy. *Id.* All individuals were entitled to state assistance, provided they satisfied the eligibility requirements. *Id.* A state received federal funds on the condition that its AFDC administration plan complied with the federal guidelines. *Id.*

158. Dandridge v. Williams, 397 U.S. 471, 473-87 (1970). The Court concluded a Maryland program that placed a ceiling on the welfare benefits that any one family could receive passed the rational basis test. *Id.* at 472-73, 487.

159. 42 U.S.C.A. § 601 (West Supp. 2001).

160. 42 U.S.C.A. § 1315(a) (West Supp. 2001).

161. Robyn R. Bender, Note, *Implementation of the Family Cap: Models for Integrating Family Planning Services*, 4 GEO. J. ON POVERTY L. & POL'Y 379, 381 (1997).

162. N.J. STAT. ANN. § 44:10-3.5 (West 1993) (repealed 1997). The elimination of increased benefits for a child did not apply under the family cap law if the child was born within ten months of the recipient's application for the AFDC benefits. *Id.* The ten-month grace period was intended to provide for those children conceived prior to the recipient's application for AFDC benefits. However, if an individual had received AFDC benefits within ten months before the birth of a child, the FDP did not grant an increase of bonuses for that child. Bender,

is to "promote family stability" by encouraging recipients to make responsible childbearing decisions and to be self-sufficient. [163]

Since the implementation of the FDP, the District Court of New Jersey held that "the [f]amily [c]ap provision of the FDP does not violate any statutory or constitutional mandate."[164] Moreover, mirroring the reasoning applied in *Maher*, *Harris*, and *Rust*, the court concluded that

> the family cap provision does not attempt to fetter or constrain the welfare mother's right to bear as many children as she chooses, but simply requires her to find a way to pay for her progeny's care. This is not discrimination; rather, this is the reality known to so many working families who provide for their children without any expectation of outside assistance.[165]

Additionally, by August of 1996, only four years after the family cap provision of FDP was approved, family cap laws in eighteen states were also approved.[166] While the family cap plans vary to some degree from state to state, most of them do not provide any increase in benefits for additional children born while the parents are recipients of welfare.[167]

The Personal Responsibility and Work Opportunity Act of 1996[168] yielded a dramatic change in welfare laws by replacing the AFDC program with the Temporary Assistance for Needy Families ("TANF") welfare reform.[169] Under TANF states receive a lump sum of federal funds to set up their own welfare program.[170] Unlike

---

supra note 161, at 381 (citing § 44:10-3.5; N.J. ADMIN. CODE tit. 10, § 82-1.2(b) (1992)). Additionally, "FDP provided that an AFDC family would receive benefits through an increased earned income disregard up to fifty percent of the monthly AFDC grant, adjusted for family size." *Id.* (citing § 44:10-3.5).

163. Bender, *supra* note 161, at 381 (citing N.J. STAT. ANN. § 44:10-3.7(c) (West 1993) (repealed 1997)).

164. C.K. v. Shalala, 883 F. Supp. 991, 1015 (D.N.J. 1995).

165. *Id.*

166. Bender, *supra* note 161, at 381 (citing State Welfare Reform Waivers on file at the Center for Law & Social Policy). The HHS has approved the incorporation of a family cap in the welfare reform programs of the following states: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, South Carolina, Tennessee, Virginia, and Wisconsin. *Id.* at 395 n.37. Additionally, all of these states, except Wisconsin, have continued to keep their waiver programs under the Temporary Assistance for Needy Families ("TANF") or have implemented their program directly under TANF. *Id.* at 395 n.38.

167. *Id.* at 383. However, in most states these newly born children, who are not covered under TANF, will still be eligible for Medicaid assistance. *Id.* at 384.

168. 42 U.S.C.A. § 1305 (West Supp. 2001).

169. Bender, *supra* note 161, at 380-83; *see also* Greg J. Duncan & Gretchen Caspary, *Welfare Dynamics and the 1996 Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 605, 608 (1997).

170. Laura C. Conway, Note, *Will Procedural Due Process Survive After Aid to Families with Dependant Children Is Gone?*, 4 GEO. J. ON FIGHTING POVERTY 209, 212 (1996).

under AFDC, HHS only determines that the state has provided them with the necessary information; HHS does not approve or disapprove state plans.[171] The authority of states to design their own welfare programs under TANF further suggests family caps will continue to be implemented as part of state welfare plans. Moreover, under TANF, individuals meeting the eligibility requirements are no longer *entitled* to assistance like they were under the AFDC's principle of entitlement.[172]

Additionally, the restrictions and limited availability of federal assistance that states must sustain under TANF suggests that even more ambitious programs than the family cap plan will be proposed. The following are some new prohibitions and restrictions that TANF already requires states to follow: (1) TANF does not include a mandatory time that states must offer assistance to needy families;[173] (2) states are prohibited from using TANF funds to provide assistance to certain families;[174] and (3) the maximum time a family can receive assistance via TANF is 60 months or five years.[175]

Under TANF there is not a requirement that states with family cap plans offer recipients family planning services, though states are not prohibited from providing these services.[176] The states, through family cap laws, are essentially "trying to stop women from pursuing their right to have a child by denying them necessary aid if they exercise it."[177] Hence, the success of the family caps are dependent on the recipients thinking ahead and realizing that they will not receive any additional benefits if they have another child while they are receiving assistance. Inevitably these plans will encourage the use of birth control by recipients. In this respect, the Norplant/Depo-Provera welfare plan may offer more hope of success because recipients are given a direct incentive to act responsibly. If they agree to take either Norplant or Depo-Provera while they are receiving assistance—that is, they choose to act responsibly—then they will be rewarded. Additionally, the Norplant/Depo-Provera proposal fits within the same reasoning applied in the abortion funding and family cap cases—the encouragement of family responsibility by advocating the use of contraception does not prevent a recipient from having a child while on welfare. The recipient is not penalized;[178] they are left in the same place as they were before,

---

171. *Id.* at 212 n.48.

172. Duncan & Caspary, *supra* note 169, at 608.

173. *See* 42 U.S.C.A. § 604(a)(1) (West Supp. 2001).

174. *Id.* § 608(a) (West Supp. 2001) (including prohibiting states from using TANF funds to assist families without minor children, and to teen parents not attending school).

175. 42 U.S.C. § 608(a)(7) (Supp. V 1999). The 60-month period does not have to be consecutive; rather, a recipient is cut off from assistance once she has received assistance for a total of five years throughout her life. *Id.* Extensions of assistance may be granted, and this time limit does not apply to state-funded assistance. *Id.* §§ 608(a)(7)(C), (F).

176. Bender, *supra* note 161, at 384.

177. Friedman, *supra* note 52, at 642.

178. Some may argue that women choosing not to take Norplant or Depo-Provera are penalized because they lose an additional benefit. However, the apparent permissibility of family cap laws, which essentially deny recipients additional benefits for children born while their parents are on welfare, implies either that this is not a penalty or that penalties are permissible in some instances.

and their own financial problems remain the only thing impeding their ability to have children.

3. Other Public Assistance Cases Utilizing the Nonsubsidy/Penalty Distinction

The above review of the abortion funding cases and family cap laws reveals that it is conceivable that the Supreme Court would extend its rationale to support the implementation of Norplant/Depo-Provera welfare conditions as a nonpenalty. The Court's application of the nonsubsidy/penalty distinction, however, does not always yield findings of permissible government restrictions. Rather, in some instances, the Court has found that imposing a condition on the receipt of a benefit impermissibly penalizes an individual exercising a protected right.

During the middle of the twentieth century, the Unconstitutional Conditions Doctrine was extended to cover conditions involving individual rights. As mentioned above, the primary focus of these cases was to determine "whether conditions 'penalize' or 'deter' the exercise of constitutional rights."[179] The Court in three cases struck down regulations as impermissible, coercive penalties.[180] First, in 1958, the Court in *Speiser v. Randall*[181] held that offering World War II veterans a property tax exemption on the condition that they take a loyalty oath was an impermissible state requirement.[182] The Court viewed this condition as penalizing the veterans for their speech and emphasized that the potential deterrent effect on speech would be unacceptable.[183]

In 1963, the Court employed the same view against conditions imposing a restriction on an individual's protected right in *Sherbert v. Verner*.[184] In this case, the Court held that the withholding of unemployment compensation from a woman who lost her job because she refused to work on the Sabbath violated her First Amendment right.[185] Justice Brennan, writing the opinion of the Court, viewed this condition as coercive and accented that "the pressure upon [Mrs. Sherbert] to forego th[e] practice [of her religion] is unmistakable."[186] Moreover, the Court in 1969 in *Shapiro v. Thompson*[187] ruled that conditioning the receipt of welfare benefits on durational residency requirements required strict scrutiny.[188] In *Shapiro*, residents who had only lived in-state for less than one year were denied welfare benefits.[189] The

---

179. Sullivan, *supra* note 111, at 1433.

180. *See* Shapiro v. Thompson, 394 U.S. 618 (1969), *overruled in part by* Edelman v. Jordan, 414 U.S. 651 (1974) (overruling the Eleventh Amendment holding of *Shapiro*); *see also* Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

181. 357 U.S. 513 (1958).

182. *Id.* at 518-19.

183. *Id.*

184. 374 U.S. 398, 410 (1963).

185. *Id.*

186. Sullivan, *supra* note 111, at 1434 (quoting *Sherbert*, 374 U.S. at 404).

187. 394 U.S. 618 (1969).

188. *Id.* at 634.

189. *Id.* at 623-25.

Court found that this restriction penalized these residents by denying them their fundamental right to interstate travel.[190]

Although the above three cases suggest that benefits offered conditionally on the waiver of a protected right would not be permissible, subsequent case law involving conditions based on the waiver of an individual's right(s) have not yielded the same results. For instance, in 1983 the Court in *Regan v. Taxation With Representation*[191] "upheld [a] federal income tax [prohibiting] nonprofit organizations from using tax-deductible contributions for lobbying activities," which essentially meant that those organizations would have to abstain from certain activity in order to get a benefit.[192] Despite recognition that a direct ban of this activity would require strict scrutiny, the Court applied only rational basis review—referencing the conclusion in the abortion funding cases that a "decision not to subsidize the exercise of a fundamental right does not infringe the right."[193]

In 1988, the Court again followed the reasoning of *Regan* and the abortion funding cases, upholding the ban of federal food stamps for welfare recipients who had a household member on strike in *Lyng v. International Union, UAW*.[194] More specifically, the Court ignored the parallel to *Speiser* and differentiated *Lyng* from *Sherbert* on the ground that the right of religious belief is different than the rights of speech and association.[195] The Court instead emphasized the unlikely deterrent effect and that this restriction involved no "coercive governmental interference with specific individual rights."[196]

Many legal scholars have had problems reconciling the classification of *Sherbert* and *Shapiro* as impermissible penalties while, at the same time, concluding the abortion funding cases and family cap laws do not impose impermissible penalties.[197] However, the subsequent use of the nonsubsidy/penalty distinction in cases like

---

190. *Id.* at 634. The durational residency requirement was originally thought to violate equal protection since those living in-state for less than a year were treated differently than those living in-state for more than a year. *Id.* at 632-33. However, because "recent immigrants were not otherwise a suspect class, the penalty-on-interstate-travel reasoning explains the strict scrutiny applied in the case." Sullivan, *supra* note 111, at 1434 n.76 (citing *Shapiro*, 394 U.S. at 631).

191. 461 U.S. 540 (1983).

192. Sullivan, *supra* note 111, at 1441 (citing 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3), (4) (1982)).

193. *Regan*, 461 U.S. at 549.

194. 485 U.S. 360 (1988) (rejecting the claim that this restriction violated an individual's right to free speech and association under the Unconstitutional Conditions Doctrine). *But see* FCC v. League of Women Voters, 468 U.S. 364 (1984) (striking the regulation that denied federal funds for public broadcasting stations that engaged in editorializing as coercive). The Court in *League of Women Voters*, however, did distinguish this case from the prior conditions that had been upheld. The Court regarded this condition as a "ban" or "restriction," rather than a viable option. Sullivan, *supra* note 111, at 1442 (citing *League of Women Voters*, 468 U.S. at 391-94).

195. Sullivan, *supra* note 111, at 1438-39.

196. *Lyng*, 485 U.S. at 368-69.

197. *See, e.g.*, Sullivan, *supra* note 111, at 1439.

Regan and *Lyng* to uphold conditions involving individual rights signals a strong possibility that this same reasoning will be applied in cases involving the Norplant/Depo-Provera welfare condition.

Moreover, there are some obvious differences between the impermissible penalty cases and the permissible nonsubsidy cases. First, the nonsubsidy cases, unlike the penalty cases, have dealt with the similar subject matter of reproductive decisions. Second, the former cases involve a clear obstacle to the exercise of the recipient's fundamental right, which does not exist in the latter cases. For example, in *Sherbert*, the woman whose only available job requires working on the Sabbath can either break her religious beliefs and work, or she can keep her religious beliefs and be left with no means of income. Hence, the woman is left in a difficult position regardless of which option she takes.[198] The results in the abortion funding cases, however, do not alter the position the recipient was in prior to the optional condition.[199] Women who want an abortion are still able to have one; the government just will not pay for it. Similarly with the Norplant/Depo-Provera welfare condition, recipients may still have children while on welfare; the government just will not give the recipient any extra benefits if they do.

Even if women not opting to take Norplant or Depo-Provera are left in a worse position, the legality of the family cap laws indicates that this would not necessarily invalidate the condition. The family cap laws leave recipients who have children while on welfare in a worse position by eliminating the increase in benefits that welfare recipients traditionally were entitled to. Hence, technically the family cap law is an obstacle in a recipient's ability to have children while on welfare. The obstacle resulting from the family cap laws suggests that in at least some cases leaving a recipient in a so-called "worse position" is permissible. Moreover, one could argue that the denial of an extra benefit (the Norplant/Depo-Provera welfare condition) would not leave a recipient in a worse position than being denied an increase in welfare payments for additional children (the family cap law). Hence, if welfare conditions are analogized to the family cap laws, as they should be, then seemingly this alleged worse position would be found permissible, provided it is no worse than the family cap laws.

Furthermore, the penalty cases, including *Speiser*, *Sherbert*, and *Shapiro*, occurred in the 1960s when the penalty/nonsubsidy distinction was first being applied, while the nonsubsidy cases, including *Maher*, *Harris*, *Rust*, *Regan*, and *Lyng*, represent the Court's application throughout the 1970s to present day.[200] As noted earlier, the specific weight the Court has given to different factors in their analysis of conditional benefits is not clear. What is clear, however, is that the Court and Congress over the last four decades both appear to be more accepting of regulations containing

198. If she works on the Sabbath, she is compromising her religious beliefs. However, if she refrains from infringing on her religious beliefs, she will not be able to work and will not collect unemployment benefits.

199. No woman is denied the opportunity to have an abortion. Whether or not Medicaid offers assistance for childbirth does not worsen or further impair her financial situation, or hurt her ability to obtain an abortion.

200. The phrase "Court's application" refers to the recent trend of upholding conditions involving individual rights as a nonsubsidy, rather than as a coercive penalty.

conditional benefits and funding of reproductive matters. Moreover, in an analysis of the proposed welfare condition, great weight should be given to its similarity with the abortion funding cases and family cap laws. The next Subpart reviews the potential approval of the Norplant/Depo-Provera welfare condition and, more specifically, in what instances this condition may be legally valid.

B. Permissible Norplant/Depo-Provera Welfare Conditions

The idea that states may set up a welfare plan that directly encourages the use of birth control by female welfare participants is not a novel idea. Every state currently offers indigent women some financial assistance in obtaining Norplant.[201] Moreover, welfare legislation mandating the use of Norplant or offering recipients a cash incentive on the condition that they take Norplant has already been proposed in several states.[202] Mandating or conditioning the use of birth control has not yet been implemented into state welfare programs. However, even legal scholars who protest the constitutionality of these proposals recognize that the growing discontent with the welfare system may lead to additional proposals.[203] Moreover, the implementation of family cap laws and the move from AFDC to the new welfare reform under TANF signals that the country is experimenting with new, ambitious welfare programs. Finally, the advancement of Depo-Provera now heightens the attractiveness of a birth control incentive program by giving women the flexibility to choose between Norplant and Depo-Provera.

While proposals for mandating the use of the birth control may arise, the proposition and analysis in this Note have been limited to the constitutionality of a proposal that provides women with the *option* to take birth control in return for an *additional* benefit. The Norplant Depo-Provera welfare proposal does not require women to take birth control on the receipt of welfare funds in general; rather an extra benefit, in addition to a recipient's normal payments, is being offered as an incentive to encourage recipients to act responsibly by taking either Norplant or Depo-Provera. The bonus could take the form of increased welfare payments, exclusion from the family cap law, or an extension in the length of time an individual could receive assistance. Additionally, the ability to remove Norplant at any time and the temporary effectiveness of Depo-Provera allows women to opt for the bonus for the whole time they are on welfare, for only part of the time, or for none of the time.

---

201. Roberts, *supra* note 5, at 933.

202. Legislation mandating the use of Norplant for some women was proposed in Mississippi, and a cash bonus incentive program on the condition of Norplant being taken was proposed in Kansas and Louisiana. Coale, *supra* note 5, at 195-96. None of these programs, however, were passed. *Id.* at 196.

203. *See, e.g., id.* at 196.

1. The Objective

The purpose of the Norplant/Depo-Provera welfare condition would be to take the family cap laws not only a step further but to achieve the goals of the family cap laws in a more effective, direct manner. The specific objective of the Norplant/Depo-Provera welfare condition is for welfare recipients to act responsibly and refrain from having children while they are unable to support themselves without government assistance. The proposal is not singling out a class of people or suggesting that these recipients should not have children; rather, the proposal is merely encouraging those on welfare to make the responsible decision to wait to have children until they are financially self-supporting. In the end, the choice to procreate remains with the recipient at all times. If the recipient opts to take Norplant or Depo-Provera, the option to stop using the birth control and procreate is always available.[204]

2. The Bonus

The type of bonus offered to recipients on the condition that they take Norplant or Depo-Provera may affect the probability of whether the plan is found permissible. For instance, some opponents assert cash incentives would violate the Unconstitutional Conditions Doctrine as a coercive measure.[205] They contend recipients would feel compelled to opt for the bonus, rather than forego the monetary gain and fall into a lower economic rank.[206] While this argument on its face has some merit, in practice this argument does not necessarily result in conditions being found impermissible. The whole purpose of the family cap laws is to encourage women to stop having children while they are on welfare. The basic difference between the family cap laws and Norplant/Depo-Provera welfare condition is that the former is indirectly telling women to use contraception while the latter is directly providing women with the incentive to use contraception. Hence, since both plans have the same interest and essentially the same means for obtaining their goal, it seems very plausible that this more direct encouragement of taking contraception and being family-responsible would also be found acceptable.

However, even if cash incentives are found to be an impermissible burden, a state could still provide women with the incentive to take Norplant or Depo-Provera by assuring them that they would be exempted from the family cap law if they did

---

204. After the removal of the Norplant device, fertility will return at normal rate within months. *See supra* text accompanying note 64. Additionally, the effectiveness of Depo-Provera lasts three months. American Academy of Family Physicians, *supra* note 2. After the last injection of Depo-Provera, most women are able to procreate within a year. Pharmacia & Upjohn, *About Depo-Provera, available at* http://www.depo-provera.com/consumer/about_depo/faq.htm (last visited Oct. 1, 2001). Hence, women's ability to procreate after choosing to opt out of the conditional program may be delayed generally no more than one year.

205. *See, e.g.*, Coale, *supra* note 5, at 208-210.

206. *Id.*

become pregnant due to an error in the contraception.[207] In this situation, the woman may choose to protect herself from an unexpected pregnancy by opting to take Norplant or Depo-Provera. Alternatively, she may choose to take another form of birth control or none at all; however, the already existing family cap laws would apply if she had another child. This plan may prove to be successful against traditional arguments by opponents because a woman is not left in a worse position; if she decides not to opt for the exemption, then she is subject to the family cap laws as if there was no option at all. Additionally, this plan is particularly attractive because it encourages the use of birth control, but at the same time provides assistance to children born due to contraceptive error.

A final possible bonus might be to expand the current sixty-month time limit for welfare assistance under TANF. Although opponents still could argue that recipients not opting to take Norplant or Depo-Provera would be left in a worse financial situation because they will not have extended assistance, such an argument is far weaker in this situation. Even under the current welfare laws, states are given the ability to extend welfare assistance beyond the sixty-month time limit in certain situations. Hence, the extension of time would not be limited only to users of Norplant or Depo-Provera; rather, the Norplant/Depo-Provera users would be an exception to the sixty-month limit rule similar to the other exceptions available to this rule under TANF, including the hardship and minor child exceptions. [208]

CONCLUSION

This Note has attempted to address the most common constitutional challenges to the legal permissibility of the Norplant/Depo-Provera welfare condition and to present viable counterarguments that might be utilized to advocate its legal validity. In regard to the sterilization element of the plan, new birth control technology differs considerably from the traditional idea of sterilization and thus warrants a fresh analysis. Moreover, the analysis concerning procreation rights is inconsistent, producing various standards without expressing any clear understanding of what makes some privacy rights more basic than others. This analysis of reproductive rights has further failed to clearly assert when a government intrusion would be warranted.

While the incorporation of this new technology in welfare programs raises some interesting questions concerning traditionally protected rights, the main challenge to the Norplant/Depo-Provera welfare condition is the Unconstitutional Conditions Doctrine. The permissibility of this proposed welfare condition will most likely hinge on whether the rationale utilized in the abortion funding cases, family cap laws, and the other nonsubsidy cases discussed will be extended to include this welfare condition plan. If this rationale is extended, the government's interest in promoting family responsibility by directly encouraging the use of Norplant or Depo-Provera through a welfare condition could likewise be found constitutionally conceivable.

Accordingly, this Note has established that the Norplant/Depo-Provera welfare condition may be constitutionally permissible for the following reasons: (1)

---

207. This bonus type is directed toward states that have a family cap plan.

208. 42 U.S.C.A. §§ 608(a)(7)(B), (C) (West Supp. 2001).

sterilization through the use of Norplant or Depo-Provera is sufficiently different from the form of sterilization considered in *Skinner v. Oklahoma*, and thus this modern form of sterilization is not covered by the *Skinner* ruling; (2) the variability and inconsistency in the privacy/reproductive rights cases provide a clear possibility that a lesser standard, such as the undue burden standard adopted in *Planned Parenthood v. Casey*, could be applied to the Norplant/Depo-Provera welfare condition, and that this condition would be found constitutionally permissible; and (3) the practice of allowing reproductive regulation based on value judgments serves as a stepping stone for the Supreme Court to promote the Norplant/Depo-Provera welfare condition by advocating the need for family responsibility.