

# NOTE

## Womb for Rent: Norplant and the Undoing of Poor Women

By JEANNE L. VANCE\*

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\* Member, Third Year Class; B.A. 1991, Mills College. Thanks to Professor Mary Crossley for her assistance in developing both this Note and my interest in health law. My special love and thanks to Todd Brecher for his tireless editing of many drafts. This Note is dedicated to my sisters enduring the struggles of both parenting and living in poverty.

### Introduction

In 1990 the Food and Drug Administration approved Norplant, the first new contraceptive in over thirty years.<sup>1</sup> The Norplant Contraceptive System<sup>2</sup> is a long-term contraceptive device for women. The device is comprised of six capsules which are surgically implanted in a woman's arm and gradually release levonorgestrel<sup>3</sup> to provide contraception for three to five years.<sup>4</sup> Only a doctor can remove the capsules. Because it is convenient, effective,<sup>5</sup> and safe for many women, Norplant has been a financial success.<sup>6</sup>

Precisely these benefits have made it an attractive candidate for the implementation of sweeping social policy. Soon after it came on the market, there were proposals and even orders to compel the use of Norplant. Only a week after the approval of Norplant, a California trial court ordered a woman convicted of child abuse to be implanted with the drug as a condition of probation.<sup>7</sup> The judge in that case articulated his goal as preventing the defendant from having, and potentially abusing, any more children.<sup>8</sup> Subsequently, other judges compelled the use of Norplant for convicted female child abusers,<sup>9</sup> but the legality and constitutionality of such orders has yet to be decided on appeal.

1. G.R. Huggins & Anne C. Wentz, *Obstetrics and Gynecology*, 265 JAMA 3139, 3139 (1991).

2. Norplant is the trade name for levonorgestrel.

3. Levonorgestrel is a member of a class of steroid hormones known as progestins.

4. Board of Trustees, American Medical Association, *Requirements or Incentives by Government for the Use of Long-Acting Contraceptives*, 267 JAMA 1818, 1818 (1992).

5. Norplant is estimated to be at least 98.5% effective over five years. *Id.*

6. *Wyeth-Ayerst Premarin Monopoly Doubles Sales In Two Years to \$569 Mil. in 1991; Norplant Implant Contributes \$53 Mil. In First Year of Marketing*, F-D-C REP. (The Pink Sheet), Apr. 13, 1992, at 9-10.

7. Clerk's Transcript at 7, 44-45, *People v. Johnson*, No. F015316 (Tulare County Super. Ct. filed in Cal. App. Ct. (5th Dist.) Feb. 25, 1991). The judge ordered this procedure without her consent and despite the fact that the drug was contraindicated for a woman in her medical condition. *Id.*

The California Court of Appeal was relieved of having to decide the legality of the implantation order because Johnson violated another probationary term. The issue was declared moot. Order of Dismissal at 2, *People v. Johnson*, No. F015316 (Cal. Ct. App. (5th Dist.) entered Apr. 13, 1992).

8. Clerk's Transcript, *supra* note 7, at 44-45; see also William Grady & Erik Christianson, *Judge Says Birth Curb Order Holds*, CHI. TRIB., Apr. 30, 1993, § 2, at 1 (describing an Illinois judge's sentencing order for a convicted child abuser which included implantation with Norplant). The American Civil Liberties Union backed an Illinois bill which would prohibit judges from ordering birth control in sentencing. *Id.*

9. See, e.g., *Abusive Mother Accepts Contraceptive Implant*, CHI. TRIB., Feb. 10, 1993, § 1, at 3; *ACLU Will Challenge Norplant Sentence*, UPI, Feb. 11, 1993, available in LEXIS, Nexis Library, MAJPAP File.

Critics charge that doctors have misused the contraceptive. They allege that doctors have enticed low-income women to have Norplant implanted free of charge without informing them of removal costs, failed to inform women of potential adverse side effects, and advised poor and minority women against having Norplant removed once implanted.<sup>10</sup> An overriding concern of Norplant's critics is that doctors and politicians are targeting the contraceptive at low-income women.<sup>11</sup>

State legislators in Florida, Kansas, Louisiana, Tennessee, and Washington recently introduced legislation ("the Norplant bills") to provide "special assistance grants" to women on welfare who have Norplant implanted.<sup>12</sup> In both Mississippi and Florida, state senators are advocating conditioning the receipt of welfare by women on implantation of Norplant.<sup>13</sup> Bills pending in Washington and North Carolina would require Norplant implantation for mothers who have given birth to a baby suffering from fetal alcohol syndrome or drug addiction.<sup>14</sup>

After Norplant is surgically implanted, a woman using Norplant cannot control her use of the contraceptive (as she could with birth control pills, condoms, or other contraceptives) because of its continu-

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10. Sally Jacobs, *Norplant Draws Concerns Over Risks, Coercion*, BOSTON GLOBE, Dec. 21, 1992, at 1.

11. Laura M. Litvan, *Norplant Program Assailed; Poor Black Girls Seen As Targets*, WASH. TIMES, Dec. 4, 1992, at B1; Paul W. Valentine, *In Baltimore, a Tumultuous Hearing on Norplant*, WASH. POST, Feb. 10, 1993, at D5. See S. 1154, 1993 N.C. Sess. (requiring the Department of Human Resources to ensure that all AFDC-eligible women be encouraged to use Norplant); S. 5335, 1993 Wash. Sess. (same).

12. S. 1886, 1993 Fla. Sess.; H.R. 2089, 1991 Kan. Sess.; H.R. 1584, 1991 La. Sess. (original version); H.R. 1214, 1993 Tenn. Sess.; H.R. 1860, 1992 Tenn. Sess.; S. 5335, 1993 Wash. Sess., see also H.R. 342, 1993-94 Ohio Reg. Sess. (as introduced) (increasing on a percentage basis the benefits to welfare mothers for implantation with Norplant). None of these bills have become law.

More bills that would coerce Norplant use have already been introduced in 1994. See H.R. 1252, 1994 Colo. Sess (requiring the state to credit inmates earned time for choosing to undergo a vasectomy, tubal ligation, or implantation with Norplant); H.R. 5130, 1994 Conn. Feb. Sess. (directing a Norplant grant system which would pay an initial \$700 and \$200 each year thereafter for women on AFDC for Norplant implantation); H.R. 1450, 1994 Fla. Sess. (as introduced) (establishing a pilot program of Norplant special assistance grants for women on AFDC of an initial \$200 and \$400 per year thereafter); S. 2520, 1994 Fla. Sess. (as introduced) (allowing AFDC rate increased for Norplant implants or Depo-Provera injections). But see A. 3593, 1993-94 Cal. Sess. (as introduced) (forbidding the requirement that a person use contraceptives, including Norplant as a condition of receiving AFDC).

13. Jim Ash, Gannett News Service, Jan. 22, 1993, available in LEXIS, Nexis Library, MAJPAP File; *Don't Use Norplant Against Welfare Mothers*, USA TODAY, Feb. 16, 1993, at 10A; Barbara Kantrowitz & Pat Wingert, *The Norplant Debate*, NEWSWEEK, Feb. 15, 1993, at 36.

14. H.R. 1430, 1993 N.C. Sess.; S. 5249, 1993 Wash. Sess.

ous effect until removal by a doctor at a cost of \$150.<sup>15</sup> Because of this loss of individual control, the danger of coerced use is more significant with Norplant than with other forms of contraception.<sup>16</sup> The Norplant bills raise serious constitutional and ethical problems.<sup>17</sup> This Note discusses the social assumptions behind the proposals to coerce use of Norplant and how a constitutional challenge to such legislation should be approached.

Part I describes proposed legislation, the arguments of the Norplant bills' supporters and opponents, and the social assumptions underlying those arguments. It concludes that the bills would effectively rent a low-income woman's womb for the duration of the implant.<sup>18</sup>

Based on case law and the values underlying due process rights, Part II discusses how substantive due process challenges to coerced Norplant use should be decided. One such challenge to the Norplant bills would assert that they violate a woman's right to privacy. Part II traces the development of the right to privacy, including the recent case of *Planned Parenthood v. Casey*.<sup>19</sup> This Part also discusses the line of cases that articulates the dubious constitutionality of reducing constitutional rights as a condition of receiving welfare benefits. Finally, Part II addresses the question of what constitutional standard a court should apply to resolve a privacy challenge to a Norplant bill. This Note argues that the Norplant bills are unconstitutional.

Part III discusses an equal protection challenge to the proposed legislation based on gender, because only *women's* parenting rights can be coercively removed under the Norplant bills. This Part traces the development of equal protection doctrine and attempts to find consistency among the cases. Part III argues that the Supreme Court should take a closer look at what constitutes a gender classification, and account for social stereotypes in legislation that might be characterized as mere biological difference. This Part then analyzes the Norplant bills under equal protection doctrine and concludes that men and women are "similarly situated" in the area of reproductive control because reproductive coercion would be feasible against both sexes. The arguments that claim that men and women are not "similarly situated" for purposes of the Norplant bills are deeply riddled with

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15. Jacobs, *supra* note 10, at 1.

16. For example, a woman can simply stop taking birth control pills.

17. The information, arguments, and constitutional challenges discussed in this Note could apply equally to Depo Provera, a three-month contraceptive injected into women. Depo Provera was recently approved by the Food and Drug Administration for use in the United States. Stuart L. Nightingale, *Contraceptive Injection Approved*, 268 JAMA 3418, 3418 (1992); *FDA's October 1992—Prepared Report of NDA Approvals*, F-D-C REP. (The Pink Sheet), Jan. 4, 1993, at 21-25.

18. See *infra* text accompanying notes 20-53.

19. 112 S. Ct. 2791 (1992).

archaic stereotypes and are therefore an insufficient justification to withstand constitutional analysis.

Although no Norplant bills have become law, it is likely that some will in the near future due to the drastic money-saving measures state legislatures are contemplating in an attempt to balance shrinking state budgets. If the constitutional privacy and equal protection doctrines are to have meaning, these statutes must be struck down.

## I. Proposals to Pay Women on Welfare to Use Norplant

All states include Norplant in their Medicaid services or have created direct funding programs to afford access to the drug to poor women.<sup>20</sup> Because the cost of Norplant is already covered for low-income women, the purpose of the Norplant bills is not to defray the approximately \$500 to \$800 cost of implantation,<sup>21</sup> but to provide a financial incentive for women to be surgically implanted with the drug. Under the Kansas, Tennessee, and Washington bills, fertile women recipients of Aid to Families with Dependent Children (AFDC)<sup>22</sup> would have received a \$500 initial "special financial assistance grant" and \$50 per year thereafter as long as Norplant or another "functionally equivalent contraceptive" remained implanted and "continue[d] to be effective in preventing pregnancy."<sup>23</sup> The Louisiana bill would have paid an initial \$100 "grant" and \$100 per year thereafter.<sup>24</sup> The Florida bill, on the other hand, provides that an average AFDC family's grant be increased from \$258 per month to \$400 per month upon proof that the mother has been implanted with Norplant.<sup>25</sup> No Norplant bill has passed, but new bills are pending in Colorado, Connecticut and Florida.<sup>26</sup>

### A. Arguments For and Against the Norplant Bills

Proponents of the Norplant bills argue that "it's time we stopped worrying about the rights of the mother and started worrying about

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20. Julie Mertus & Simon Heller, *Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception*, 11 ST. LOUIS U. PUB. L. REV. 359, 361 (1992); *Birth Control Implant Gains Among Poor Under Medicaid*, N.Y. TIMES, Dec. 17, 1992, at A1.

21. Warren E. Leary, *U.S. Approves Injectable Drug as Birth Control*, N.Y. TIMES, Oct. 30, 1992, at A1. After an implantation paid for by Medicaid Ohio would provide a grant. H.R. 342, 1993-94 Ohio Reg. Sess. at 4-5.

22. 42 U.S.C. §§ 601-687 (1988).

23. H.R. 2089, 1991 Kan. Sess.; H.R. 1860, 1992 Tenn. Sess.; S. 5335, 1993 Wash. Sess. If Norplant contraception failed, presumably a woman would lose her yearly grant.

24. H.R. 1584, 1991 La. Sess. (original version).

25. S. 1886, 1993 Fla. Sess.; see also H.R. 1199, 59th Leg., 1993 Colo. Sess. (Apr. 23, 1993 version).

26. See H.R. 1252, *supra* note 12; H.R. 5130, *supra* note 12; H.R. 1450, *supra* note 12; S. 2520, *supra* note 12.

the rights of the children she's bringing into the world."<sup>27</sup> A proponent of the Louisiana bill stated that taxpayers are "sick and tired of working for other people. How long can we spend taxpayers' money on irresponsible people[?]"<sup>28</sup> Others favor coerced Norplant as one way to end the cycle of poverty.<sup>29</sup>

Opponents characterize the bills as forcing Norplant implantation upon women.<sup>30</sup> They object to these bills as contrary to the fundamental rights to refuse medical treatment and to have children.<sup>31</sup> Said one commentator while discussing the policy of personal autonomy inherent in these constitutional rights:

[T]he decision to undergo the surgical implantation of Norplant—like the decision to undergo any type of surgery or use any type of contraception—is a personal one that takes into account an individual woman's medical history, life circumstances, and personal needs. In line with professional ethics, it is imperative that women remain free to decide when to have Norplant inserted and then removed.<sup>32</sup>

According to the American Medical Association Board of Trustees, "[g]overnment benefits should not be made contingent on the acceptance of a health risk."<sup>33</sup> Others are concerned that offering financial incentives for Norplant use may make welfare more attractive for low-income women.<sup>34</sup>

## B. The Racial Premise of the Norplant Bills

The Norplant bills have inherent racial overtones. The public perception is that welfare mothers are unmarried and non-white.<sup>35</sup> Therefore, the Norplant bills may draw support from prejudice and

27. Matthew Rees, *Shot in the arm; The use and abuse of Norplant*, NEW REPUBLIC, Dec. 9, 1991, at 16 (quoting Kansas Representative Kerry Patrick, author of the Kansas bill H.R. 2089).

28. C.J. Fogel, *Duke Bill for Welfare Moms Clears Louisiana House Panel*, Gannett News Service, May 23, 1991, available in LEXIS, Nexis Library, MAJPAP File.

29. Walter A. Graham, *Norplant Can Aid Mothers*, USA TODAY, Feb. 16, 1993, at 10A.

30. Joyce Price, *Forced Norplant Use Assailed*, WASH. TIMES, Apr. 2, 1992, at A5 (describing the American Medical Association Board of Trustees' condemnation of the Norplant bills).

31. *Id.* The Supreme Court indicated that constitutional privacy rights may include the right to refuse medical treatment in *Cruzan v. Director*, 497 U.S. 261, 278 (1990). For a discussion of the right to bear children, see *infra* text accompanying notes 54-61.

32. Mertus & Heller, *supra* note 20, at 361.

33. Price, *supra* note 30, at A5.

34. Rees, *supra* note 27, at 16.

35. Joanna K. Weinberg, *The Dilemma of Welfare Reform: "Workfare" Programs and Poor Women*, 26 NEW ENG. L. REV. 415, 422 (1991). Discussing the emerging public policy trend of government to require recipients of AFDC to work as a condition of benefits, Professor Weinberg asserts:

racial stereotyping.<sup>36</sup> Certainly racism provides a partial motivation, even if only on a subconscious level, for some politicians and medical professionals who seek to prevent women of color from reproducing. For others, this motivation may not be so subtle. The author of the Louisiana bill, David Duke, is a former Grand Wizard of the Ku Klux Klan.<sup>37</sup> The problem of forced or coerced sterilization of women of color is not a new one. Some doctors encourage poor women in labor, especially those who do not speak English, to "consent" to sterilization.<sup>38</sup> For example, in *Walker v. Pierce*,<sup>39</sup> a physician required an African-American woman in labor, pregnant with her fourth child, to consent to sterilization before assisting her in labor. Of all races in the United States, studies show that Hispanic and African-American women are most likely to be sterilized.<sup>40</sup>

### C. The Norplant Bills Are More Than a Weak Incentive

Certain assumptions underlying the Norplant bills should be noted. The first has to do with the concept of choice. The "grants" that the bills provide effectively preclude poor women from deciding for themselves whether to have a child. Compare *United States v. Butler*,<sup>41</sup> where the Supreme Court acknowledged the coercive power of spending when it struck down the Agriculture Adjustment Act (AAA) on a spending power challenge. Under the AAA, the federal government paid farmers (on a "voluntary" basis) to reduce their crop acreage. The Court said:

The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of

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[H]istorically most women with children were not expected to work; the exceptions being slaves and indentured servants, and by extension, women of color. However, as perceptions about the composition of welfare recipients has shifted during the second half of the twentieth century, from widows to unmarried mothers, and from white to non-white, there has also been a shift in the public's mind away from the characterization of welfare recipients as "deserving."

*Id.* Therefore, argues Weinberg, legislators have imposed additional requirements and reduced benefits for recipients (as opposed to the more popularly funded program of Social Security, 42 U.S.C. §§ 301-433 (1988), which benefits seniors of all income levels). *Id.* (citations omitted).

36. See Litvan, *supra* note 11, at D5; Valentine, *supra* note 11, at B1.

37. For allegations that the Duke proposal was racially motivated see Fogel, *supra* note 28; Marlane Schwartz, *Duke Presses Louisiana Birth Control*, WASH. POST, May 29, 1991, at A14.

38. GEORGE J. ANNAS ET AL., *AMERICAN HEALTH LAW* 986 (1990).

39. 560 F.2d 609 (4th Cir. 1977).

40. ANNAS ET AL., *supra* note 38, at 986.

41. 297 U.S. 1 (1936). The Court rejected *Butler* without overruling it in *South Dakota v. Dole*, 483 U.S. 203 (1987), when it upheld the conditioning of federal highway funds on states' adoption of 21-year-old drinking age. The *Butler* Court's recognition of the coercive nature of monetarily-induced decisionmaking is still powerful by analogy.

benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. . . . This is coercion by economic pressure. The asserted power of choice is illusory.<sup>42</sup>

The AFDC mother, like the Depression-era farmer, may well face the choice between paying rent for her family or allowing implantation of Norplant. If she declines the drug, she loses out financially.

Some may argue that the \$50-\$100 per year "grant" for using Norplant is a pittance, too small to warrant a charge of coercion, but a comparison of the size of a typical AFDC payment is revealing. Tennessee and Kansas would pay the welfare mother \$500 up front and \$50 per year thereafter.<sup>43</sup> In 1989, the average monthly AFDC payment per recipient in Tennessee was \$61.49;<sup>44</sup> in Kansas it was \$118.42.<sup>45</sup> Louisiana would provide an initial \$100 "grant" and \$100 per year thereafter,<sup>46</sup> while the 1989 average monthly AFDC payment per recipient in that state was \$55.76.<sup>47</sup> Florida would nearly double the monthly AFDC grant for Norplant users.<sup>48</sup> When compared to general sustenance payments, the initial grants, and even the yearly supplements, are a significant amount of money to these women.

One could argue that AFDC itself operates as an incentive for recipients to have more children, and that Norplant grants would merely equalize the incentives. Although AFDC payments in most states do increase as the recipient has more children, this is not a terrific financial incentive; each additional child is a cost to the parent far beyond that made up by AFDC. Norplant grants, on the other hand, provide additional funding without a corresponding increase in expense.

This coercion has important social implications. The state's grant may force women to act against their best physical interests, as Norplant causes irregular menstruation, headaches, and breast discharge in some women.<sup>49</sup> Furthermore, the drug is contraindicated for women with thrombic disease, acute liver dysfunction, and breast can-

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42. *Id.* at 70-71 (dictum) (footnotes omitted).

43. *See supra* text accompanying note 23.

44. DEP'T OF HEALTH AND HUMAN SERVS., SOC. SECURITY BULL. (Annual Statistical Supplement) 306, Table 9.G2 (1991).

45. *Id.*

46. *See supra* text accompanying note 24.

47. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 44.

48. S. 1886, *supra* note 12.

49. Board of Trustees, *supra* note 4, at 1818.



cer.<sup>50</sup> Indeed, almost twenty percent of women who have chosen Norplant in test studies have it removed within one year.<sup>51</sup> Nonetheless, an indigent woman who does not want to have a child may forego some other form of birth control that is better suited for her physical, emotional, and sexual well-being, and subject herself to the potentially adverse effects of the drug.

Alternatively, a poor woman may want to have a child. Her choice, however, is reduced to a decision about her economic well-being, severely altering what would otherwise be a choice between different types of free medical care.<sup>52</sup> Many parents consider economics in deciding whether to have a planned pregnancy; low-income parents should not be insulated from this burden. But the difference between setting sustenance levels for those on public assistance<sup>53</sup> and economically coerced sterility is an important one.

The Norplant bills would offer a significant financial incentive to the poorest women in America. These women are most vulnerable to economic coercion because they are not only responsible for the care of themselves, but also the care of their children. The decision to undergo Norplant implantation and accept the grant cannot be characterized as voluntary. The coercive nature of this "choice" is troubling because it would cause some women to be implanted despite the fact that the drug is against their best physical interests.

## II. Substantive Due Process and the Norplant Bills

There are two lines of substantive due process "fundamental rights" cases courts may use to determine the constitutionality of Norplant statutes, if enacted. The first line develops the right of privacy in the area of procreation. The second describes the constitutional implications of the receipt of public benefits.

### A. The Right to Procreative Choice

#### 1. *Strict Scrutiny and the Right to Privacy*

The United States Supreme Court has a long history of protecting the right to privacy, including decisions relating to procreation, finding

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50. *Id.*; *Incorrect Statement*, 268 JAMA 2518, 2518, Nov. 11, 1992.

51. Mertus & Heller, *supra* note 20, at 367 (citing Bardin, *Norplant Contraceptive Implants*, 2 OB. & GYN. REP. 96, 98 & Table II (1990)).

52. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 10C-7.042(4)(i) (1993).

53. Increasing AFDC benefits for women who have more than one child is appropriate to equalize the tax benefits generally afforded custodial parents in which welfare mothers cannot partake, since public assistance is not taxable. *See* Rev. Rul. 57-102, 1957-1 C.B. 26. Custodial parents with taxable income may deduct \$2,000 per year (with adjustments) for each child, thereby reducing the parent's tax burden. I.R.C. §§ 151-152 (West Supp. 1993).

the right implicit in the protected "liberty" interest of the Due Process Clause of the Fourteenth Amendment.<sup>54</sup> Two decades before the Court articulated a general privacy right in *Griswold v. Connecticut*,<sup>55</sup> the Court in *Skinner v. Oklahoma*<sup>56</sup> unanimously declared that "[m]arriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."<sup>57</sup> *Skinner*, decided on equal protection grounds, demonstrates a historical commitment to the protection of reproductive rights.

In *Griswold*, the Court articulated a fundamental right of privacy, and declared a right of married couples to use contraception.<sup>58</sup> The Court relied on *Skinner* to support this right of procreative privacy.<sup>59</sup> The right to contraception was later extended to unmarried couples in *Eisenstadt v. Baird*,<sup>60</sup> where the Court further defined the right to privacy: "If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>61</sup>

Because these privacy rights are fundamental, the Court applies a strict scrutiny analysis to protect against arbitrary and invidious discriminations.<sup>62</sup> To sustain a statute under strict scrutiny, its proponents must demonstrate that a compelling governmental interest necessitates the regulation and that the statute sweeps no broader than necessary to support this interest.<sup>63</sup>

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54. U.S. CONST. amend. XIV; *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to interracial marriage); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried couples to contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion); *Cruzan v. Director*, 497 U.S. 261 (1990) (right to refuse medical treatment).

55. 381 U.S. 479 (1965) (plurality opinion).

56. 316 U.S. 535 (1942).

57. *Id.* at 541 (holding a statute which compels sterilization for grand larceny but not for embezzlement violates equal protection). The Court has not concluded that forced sterilization would be unconstitutional under all circumstances. *Id.*; see *Buck v. Bell*, 274 U.S. 200, 207 (1927) (holding that forced sterilization of a "feeble-minded" woman does not violate due process).

58. *Griswold*, 381 U.S. at 484.

59. *Id.* at 485; see also *Eisenstadt*, 405 U.S. 438 at 453-54 (also relying on *Skinner* to support a broad right of privacy).

60. 405 U.S. 438.

61. *Id.* at 453.

62. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

63. *Id.*; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977).

## 2. *The Casey Undue Burden Test*

After several decades of protecting specified privacy interests, the Supreme Court in *Roe v. Wade*<sup>64</sup> extended the Fourteenth Amendment's protections to include the right of a woman to terminate a pregnancy.<sup>65</sup> Since that decision, the nation has become polarized on this emotional issue, and the Supreme Court itself has fractured into different camps, thereby muddying the rule of *Roe* and the privacy right itself. In the most recent abortion decision, *Planned Parenthood v. Casey*,<sup>66</sup> the Court significantly altered *Roe*. In *Casey*, the Court reaffirmed the "central holding" of *Roe*, namely, the "recognition afforded by the Constitution to a woman's liberty."<sup>67</sup> The *Casey* Court quoted from *Carey v. Population Services International*<sup>68</sup> that a woman's liberty interest

includes "the interest in independence in making certain kinds of important decisions." While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, procreation, [and] contraception . . . ."<sup>69</sup>

While the *Casey* Court recognized this ongoing privacy "right," the plurality replaced the strict scrutiny test with an "undue burden" test, permitting only a right to an abortion free from any undue governmental burden before fetal viability.<sup>70</sup> Under this test, the plurality upheld several abortion restrictions, including a 24-hour waiting period, a requirement of "informed consent," parental consent for minors, and state reporting requirements of the names and addresses of the performing physician. The plurality struck down the spousal notification requirement as unduly burdensome.<sup>71</sup>

In upholding these restrictions, the current Supreme Court has expressed an unwillingness to consider the social reality that for certain women these restrictions may be excessive. Alternatively, they are unwilling to find excessive restrictions to be undue. By taking these stands, the Court ignores the realities of modern society. It overlooks the minor who is raped by her father, and who then needs to secure his permission to abort the fetus. It disregards the temptation by a girl to try a do-it-yourself abortion in an effort to not disap-

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64. 410 U.S. 113 (1973).

65. *Id.* at 153.

66. 112 S. Ct. 2791 (1992) (plurality opinion).

67. *Id.* at 2798.

68. 431 U.S. 678 (1977).

69. 112 S. Ct. at 2811 (1993) (quoting *Carey*, 431 U.S. at 684-85).

70. *Id.* at 2819-20.

71. *Id.* at 2822-23.

point her parents. It undervalues the onus of staying overnight and taking a second day off from work that a 24-hour waiting period imposes on a woman travelling long distances to secure an abortion (or having to confront the abortion-protestors a second time). The burdens of many of these restrictions are exacerbated by poverty. For reproductive restrictions to apply equally to *all* women, or at least not to fall most heavily on the poor, the Supreme Court must apply the "undue burden" standard in a manner that accounts for these social realities.

This undue burden test, however, only commanded a three-vote plurality.<sup>72</sup> The lack of clear consensus for the undue burden analysis in *Casey* complicates privacy law. Because abortion and procreative rights both fall within the constitutional rubric of "privacy," it is entirely possible that the *Casey* decision will implicate the other rights within the privacy classification, including the right to procreate and the right to obtain contraception. It is unclear how the plurality, or any of the other writing justices in *Casey*, intended to affect these other privacy rights. Because a privacy jurisprudence was well developed before *Roe*, its existence may not be dependent on *Roe*'s survival. Indeed, all of the writing justices seem to support the correctness of these earlier decisions.<sup>73</sup> Yet no Justice sets forth the standard to apply in subsequent privacy cases.

If the test for the remaining privacy rights has changed from strict scrutiny to the undue burden test after *Casey*, it appears that privacy is a severely limited right and no longer fundamental. The *Casey* Court seems to be either revoking the fundamental right status of privacy, removing abortion from the right, or severely altering the nature of substantive due process jurisprudence across the board. It is impossible to say, however, whether the plurality decision will ever be accepted by the majority of the Court. Indeed, more members of the present Court agree that *Roe* should be overturned<sup>74</sup> than agree with the undue burden test. Even if a majority does eventually support the undue burden test for abortion regulations, the Court may decide not to apply the test to other privacy rights. Indeed, the last privacy deci-

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72. This part of the judgment was joined by Justices O'Connor, Kennedy, and Souter. *Id.* at 2816. The remaining justices, none of whom adopted the undue burden test, concurred in part and dissented in part. *Id.* at 2838 (Stevens, J., concurring in part and dissenting in part); *id.* at 2843 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part, joined by White, J., Scalia, J., and Thomas, J.).

73. *See id.* at 2807 (plurality) ("We have no doubt as to the correctness of those decisions."); *see also id.* at 2840 (Stevens, J., concurring in part and dissenting in part) (citing these cases favorably); *id.* at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (same); *id.* at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (same).

74. *Id.* at 2855 (Rehnquist, C.J., dissenting).

sions to command a majority of the Court applied strict scrutiny.<sup>75</sup>

## B. Constitutional Welfare Law and Governmental Obstacles

When evaluating Norplant laws, courts may look to another line of cases which contemplate the interface between the receipt of government benefits and constitutional rights. Two questions will frame the examination: whether a regulation penalizes the exercise of a fundamental right and whether the government, while providing general medical services, can opt not to fund a medical procedure for the poor when the right to the procedure is constitutionally protected by the Equal Protection Clause.

### 1. Penalty vs. Non-penalty

In *Shapiro v. Thompson*,<sup>76</sup> the Court held unconstitutional a one-year residency requirement for welfare eligibility because it penalized the exercise of the constitutionally protected right to travel.<sup>77</sup> Similarly, in *Memorial Hospital v. Maricopa County*,<sup>78</sup> the Court struck down an Arizona statute requiring a year's residence in a county as a condition of receiving non-emergency hospitalization or medical care at the county's expense. The Court reasoned that the denial of a basic "necessity of life" such as medical care penalized indigent persons for exercising their right to travel.<sup>79</sup> *Memorial Hospital* interpreted *Shapiro* to require application of strict scrutiny to determine whether the non-citizens were afforded equal protection of laws that effected their fundamental rights.<sup>80</sup>

In *Dandridge v. Williams*,<sup>81</sup> on the other hand, the Court used the rational basis test<sup>82</sup> to hold that an upper cap on the size of AFDC grants (no matter how many children a woman had) did not deny equal protection.<sup>83</sup> Although the *Dandridge* Court could have discussed a procreative right violation, the Court avoided the issue since the case involved only "regulation in the social and economic field."<sup>84</sup>

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75. See *Zablocki v. Redhail*, 434 U.S. 374, 388-91 (1978); *Roe v. Wade*, 410 U.S. 113, 150-55 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

76. 394 U.S. 618 (1969).

77. *Id.* at 629-31.

78. 415 U.S. 250 (1974).

79. *Id.* at 258-59.

80. *Id.* at 258-70.

81. 397 U.S. 471 (1970).

82. A statutory classification fails the rational basis test "only when [it] rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). It is the most permissive standard of review in equal protection jurisprudence.

83. *Dandridge*, 397 U.S. at 483-87.

84. *Id.* at 484.

*Dandridge* is distinguishable from *Shapiro* and *Memorial Hospital*. In *Shapiro* and *Memorial Hospital* the government completely denied a benefit to persons who exercised their right to travel. Indigent persons were unable to obtain welfare or non-emergency medical care benefits at all. In *Dandridge*, however, the welfare recipients still received welfare, just a lesser amount per person than they would have received had they not exercised their fundamental right to procreate. This distinction justifies the different results in *Dandridge* compared to *Shapiro* and *Memorial Hospital*.

It is difficult to predict whether the Court would hold *Dandridge*, *Shapiro/Memorial Hospital*, or neither controlling when evaluating a Norplant bill. Under the Court's welfare jurisprudence, a penalizing statute cuts or denies a benefit upon the exercise of a constitutional right. A statute does not penalize a welfare recipient if it fails to increase benefits to offset increased financial obligations incurred through the exercise of constitutional rights.<sup>85</sup> In the typical Norplant bill, the state appears neither to totally deny a benefit, nor to refuse to increase a benefit. Instead, the state creates a new benefit which a woman can receive only if she gives up her right to procreate. An enacted Norplant bill would pay a welfare recipient *not* to exercise her right. While these three scenarios may have no effective difference to the welfare recipient, the Court distinguishes among them.

Despite the incentive characteristic of the Norplant bills, they should be properly recognized as creating a penalty against women who choose another form of contraception or childbirth over Norplant. Every woman on welfare capable of reproducing is entitled to the grant. Only if a woman exercises her right of privacy is she denied the special assistance grant. Certainly, this is characteristic of a penalty. If a challenger can persuade a court that the Norplant bills create a functional penalty for exercising a fundamental right, the court should apply a strict scrutiny analysis to invalidate the legislation.<sup>86</sup>

If the Supreme Court is to continue protecting constitutional rights of welfare recipients, these bills should be held unconstitutional. How can a constitution and a country assert that its citizens are vested with certain rights if the state can simply purchase them for a term and

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85. See *Maier v. Roe*, 432 U.S. 464, 474 (1977) (holding that withholding funding for first-trimester abortions while fully funding child-birth expenses under the Medicaid program did not "impinge" on a woman's right to an abortion); *Beal v. Doe*, 432 U.S. 438, 444-46 (1977) (holding that the Social Security Act permits a participating state to refuse non-therapeutic abortions under its Medicaid plan).

86. The level of scrutiny applied to the Norplant bills will almost certainly determine the outcome because almost no statutes pass strict scrutiny while almost all do pass the rational basis test. See Gerald Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

thereby avoid their meaningful exercise?<sup>87</sup> A contrary holding by the Court could have broad implications at direct odds with basic constitutional protections. Would it be permissible for a city to offer \$500 to homeless protestors to refrain from marching because it would save the costs of having to clean up and hire extra police? Would we tolerate an offer to pay \$500 to any criminal defendant who agrees to represent herself at trial because it would be cheaper than the cost of retaining an attorney? If these scenarios are impermissible, then so should be the Norplant bills. The primary difference between these examples and the Norplant bills is that those potentially affected by the bills are on welfare. The Court has never allowed the mere receipt of welfare to be a sufficient justification for the denial of constitutional rights.<sup>88</sup>

## 2. *Governmental Obstacles and the Abortion Funding Cases*

In the abortion-funding cases, the Court again addressed the question of whether the state can offer citizens a financial incentive not to exercise a fundamental right.<sup>89</sup> In these cases, the Court entertained challenges to the Hyde Amendment,<sup>90</sup> which denied use of federal Medicaid funds for most abortions.<sup>91</sup> In each case, the Court held that denial of federal funding did not "impinge" a fundamental right.<sup>92</sup>

The Court reasoned that the government placed no obstacle in the path of the woman seeking to exercise her right that was not al-

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87. Indeed, several courts and state legislatures have, on various grounds, disallowed private parties from contracting for these rights in surrogacy cases. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.859(1) (West 1992); *In re Baby M.*, 537 A.2d 1227 (N.J. 1988). *But see* *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (enforcing surrogacy contract). Certainly the interest against state action in this area would be more compelling.

88. *See, e.g.*, *Wyman v. James*, 400 U.S. 309 (1971) (holding that a home visit by a social worker upon a welfare recipient is not a search and seizure for purposes of the Fourth Amendment); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding AFDC payments to be a protected property interest under the Due Process Clause of the Fourteenth Amendment, which requires notice and a hearing prior to the cessation of benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding unconstitutional a one-year residency requirement for welfare eligibility as it penalizes the right to travel); *see also* *Parrish v. Civil Serv. Comm'n*, 425 P.2d 223, 230 (Cal. 1967) (citing *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966); *Brookhart v. Janis*, 384 U.S. 1, 4, 7 (1966); *People v. Stewart*, 400 P.2d 97 (Cal. 1965), *aff'd*, 384 U.S. 436 (1966)) ("Both this court and the Supreme Court of the United States have recently emphasized the heavy burden which the government bears when it seeks to rely upon a supposed waiver of constitutional rights [by the receipt of public benefits].").

89. *See* *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

90. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979); Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

91. For a description of the various provisions, *see Harris*, 448 U.S. at 302-03.

92. *Harris*, 448 U.S. at 312-13; *Maher*, 432 U.S. at 471-74; *Beal*, 432 U.S. at 445-47.

ready in existence had the state decided not to fund childbirth expenses.<sup>93</sup> "The regulation places no obstacles . . . in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."<sup>94</sup> In *Harris v. McRae*,<sup>95</sup> the Court also indicated that one's possession of a constitutional right does not mean that the government must fund its exercise.<sup>96</sup> The Court did say, however, that "government may not place obstacles in the path of a woman's exercise of her freedom of choice . . . ."<sup>97</sup>

The Norplant bills, by contrast, would directly construct an obstacle to a woman's exercise of her right to free reproductive choice. Rather than allowing a woman the freedom to choose among various forms of birth control, the state would coerce indigent women to be temporarily sterilized.<sup>98</sup> The difference between the Norplant bills and the Hyde Amendment at issue in the abortion-funding cases is one in kind rather than degree. In the Hyde Amendment, the federal government decided which types of free care to offer women. Under the Norplant schemes, the state funds options, but offers a staggering monetary bonus to women who submit to the preferred method. This distinction shows a court's option to hold the abortion funding cases irrelevant to a Norplant challenge. As discussed in the *Memorial Hospital* penalty analysis,<sup>99</sup> the government's outright purchase of a welfare recipient's constitutional rights should be sharply circumscribed.

### C. Norplant Legislation and the Right to Privacy

The Norplant bills implicate the Fourteenth Amendment's substantive due process rights announced in privacy cases developed from *Griswold* and its progeny.<sup>100</sup> A Norplant statute would create a significant obstacle to a welfare mother's free choice to decide whether to have another child or to choose a method of contraception.<sup>101</sup> The Norplant bills also share the penalizing features to welfare recipients for the exercise of constitutional rights familiar from *Memorial Hospital v. Maricopa County*.<sup>102</sup> Under these cases, a court should apply

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93. *Beal*, 432 U.S. at 474.

94. *Id.*

95. 448 U.S. 297 (1980).

96. *Id.*

97. *Id.*

98. *See infra* Part II.C.

99. *See supra* text accompanying notes 78-88.

100. *See supra* notes 55-63 and accompanying text.

101. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972).

102. 415 U.S. 250 (1974).



either a strict scrutiny or "undue burden" standard to the Norplant bills.

### 1. *Strict Scrutiny*

Under the strict scrutiny analysis called for in both privacy and welfare case law, a statute must be narrowly tailored to further a compelling state interest.<sup>103</sup>

#### a. State Interests Served by the Norplant Bills

One prominent state interest in the Norplant bills is to save the government money, as Norplant laws would result in fewer children on public assistance. In *Shapiro v. Thompson*,<sup>104</sup> the Court rejected governmental savings as a sufficient interest to warrant the denial of a constitutional right.<sup>105</sup>

Another interest a state has in the bills is to prevent children from being born into poverty.<sup>106</sup> This argument ignores, however, the underlying social problems of living in poverty (such as poor educational opportunities, homelessness, and joblessness which contribute to an inability to pull oneself out of poverty), and assumes that a life in poverty is inherently less valuable than life outside of poverty. Such short-sighted and classist views should not be the basis for the denial of constitutional rights. Recipients of AFDC are largely dependent on government to provide their basic necessities of life. The state should not be permitted to exploit this dependency to achieve its eugenic goals. Therefore, this interest should not be considered compelling.

A third state interest is to provide women on welfare the knowledge and financing necessary to make educated and informed decisions about their reproductive lives. This interest could be compelling if the government were assisting women to decide what is in each woman's own best interest based on her own physical, sexual, personal, and religious needs.

#### b. Narrow Tailoring

Even if the state could assert such a compelling interest, the Norplant bills fail the second prong of the strict scrutiny test—that the

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103. See *Roe v. Wade*, 410 U.S. 113, 150-55 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 631, 634, 637-38 (1969).

104. 394 U.S. 618 (1969).

105. *Id.* at 633 (Although a state can try to save money in its public assistance programs, "a State may not accomplish such a purpose by invidious distinctions between classes of its citizens."); see *Memorial Hosp.*, 415 U.S. at 263.

106. See Rees, *supra* note 27, at 16; *supra* text accompanying note 26.

regulation be narrowly tailored to further the interest.<sup>107</sup> The Norplant bills sweep far more broadly than necessary to afford women the means to make proper reproductive decisions. Every state currently provides the funding necessary for poor women to be inserted with the Norplant contraceptive.<sup>108</sup> This provides an ample opportunity for women who want to use Norplant as their birth control to do so free from coercion.

The state could argue that its interest in promoting birth control is well served by Norplant use because Norplant is an extremely effective method with little room for human error or negligence. Even if a woman wants to prevent conception, she is financially coerced into using Norplant over another type of birth control, even though another contraceptive may be a healthier alternative for her. Finally, a woman who seeks to have a child, or who does not want to use contraceptives for religious reasons, may face a significant impediment to any decision to not use Norplant. The state could better advance its interests in promoting responsible family planning by providing educational materials about *all* contraceptive choices and offering all methods, including Norplant, free of charge.

## 2. *The Undue Burden Test*

Even if *Casey's* undue burden test<sup>109</sup> were to prevail over strict scrutiny in all constitutional questions pertaining to reproductive freedom, the Norplant bills should fail that constitutional analysis as well. An impediment is an undue burden if it is a "substantial obstacle in the path of a woman's choice"<sup>110</sup> to bear a child. Under this approach, a court may assert that the Norplant bills do not force sterilization on welfare recipients because these women voluntarily consent in exchange for a cash grant. One might argue that paternalistic notions of poor women's inability to make decisions colored by economics should not control our constitutional jurisprudence. But we have outlawed surrogacy,<sup>111</sup> prostitution,<sup>112</sup> and the sale of organs<sup>113</sup> because there are certain situations in which the state simply will not force a person to choose between body and money. In each of these cases, the injection of money into the equation makes the incentive a burden which we have considered undue. To allow coercive manipulation of the rights readily enjoyed by monied members of society is to create the invidious classifications specifically forbidden in *Memorial*

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107. See, e.g., *Roe*, 410 U.S. 113, 155.

108. See *supra* text accompanying note 20.

109. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2819 (1992) (plurality opinion).

110. *Id.* at 2820.

111. See *supra* note 87.

112. 63A AM. JUR. 2D *Prostitution* § 1 (1984).

113. 42 U.S.C. § 274e (1988).

*Hospital and Shapiro.* The Norplant bills offer food to the hungry if they avoid asserting a fundamental right. Other than an outright ban, it is hard to imagine a larger obstacle to free choice.

### III. Equal Protection and Gender Concerns

Welfare recipients may challenge the Norplant bills on equal protection grounds as an impermissible gender classification in two ways. First, men on AFDC<sup>114</sup> or other forms of welfare could challenge the bills on the grounds that they are similarly situated to women on AFDC, but are treated unequally because they cannot receive a Norplant grant. Second, women could challenge the Norplant bills on equal protection grounds since "men face no similar threat of reproductive control."<sup>115</sup> The Supreme Court has forbidden gender classifications which uphold archaic stereotypes.<sup>116</sup> In other cases the Supreme Court has found no gender discrimination because men and women were not similarly situated.<sup>117</sup>

#### A. Development of the Equal Protection Doctrine as Applied to Gender Classifications

Gender classifications must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced [are] treated alike."<sup>118</sup> The Supreme Court has developed the principle that gender classifications are impermissible when based on archaic stereotypes about traditional sex roles, but may be acceptable in affirmative action programs to help women overcome

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114. In 1990, 360,495 male adults received AFDC. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS (FY 1990), *microformed on* CIS No. 92-4584-7 (Congressional Info. Serv.). There is no long-lasting contraception for men except permanent sterilization, and vasectomies would not qualify men for the grants. Marilyn Gardner, *Birth Control By Law*, THE CHRISTIAN SCI. MONITOR, Jan. 15, 1991, at 15. But see H.R. 342, 1993-94 Ohio Reg. Sess.; and S. 407, 1993 Tenn. Sess., which would provide cash incentives for vasectomies.

115. See Gardner, *supra* note 114, at 15. For discussion of the male implant in development, see Tim Frient, *Pills With Pioneering Potential*, USA TODAY, Aug. 29, 1990, at D1; *Test of Male Contraceptive Shows Promise*, L.A. TIMES, Oct. 18, 1990, at P2. Discrimination based on the capacity to become pregnant is a gender classification. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 197-200 (1991).

116. See *J.E.B. v. Alabama ex rel. T.B.*, No. 92-1239, 1994 U.S. LEXIS 3121, at \*6-\*7 (U.S. April 19, 1994); *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Craig v. Boren*, 429 U.S. 190, 204 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

117. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 469, 473 (1981) (plurality opinion).

118. *Reed*, 404 U.S. at 75 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

past economic discrimination.<sup>119</sup>

Laws implicating gender classifications and challenged under the Equal Protection Clause are subject to “intermediate” scrutiny.<sup>120</sup> “To withstand constitutional challenge . . . classifications by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives.”<sup>121</sup> Applying this standard in *Reed v Reed*,<sup>122</sup> the Supreme Court unanimously agreed that men should not receive preference over women in estate administrator appointments.<sup>123</sup> Professor Wendy Williams asserts that cases like *Reed* are “easy” cases because the classifications in the statutes are based on clearly outmoded thinking about women’s roles, and are easily invalidated because they reflect “archaic stereotypes.”<sup>124</sup>

This clear rule prohibiting gender classifications resting on archaic stereotypes has broken down, however, when the Court has confronted gender classifications arguably based on the biological differences between men and women.<sup>125</sup> The Court has allowed such classifications in *Geduldig v. Aiello*,<sup>126</sup> *Michael M. v. Superior Court*,<sup>127</sup> and *Rostker v. Goldberg*.<sup>128</sup> Because perceived “physical” differences may in fact be socially constructed stereotypes, the Court has failed to apply the ban against “archaic stereotypes” in a rational and consistent manner.<sup>129</sup> As Professor Laurence Tribe noted:

Differences that are obviously attributable to social conventions that the judges themselves have come to perceive as arbitrary and outmoded—and therefore as mere cultural artifacts sup-

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119. See *J.E.B.*, 1994 U.S. LEXIS 3121, at \*6-\*7 (prohibiting peremptory challenges in jury selection solely on basis of gender); *Califano*, 430 U.S. at 317 (upholding computation of Social Security income based on fewer, higher-earning years for women than men); *Craig*, 429 U.S. at 204 (striking down different legal drinking ages for men and women as invidious classifications); *Reed*, 404 U.S. at 76 (striking down law favoring men as estate administrators).

120. See *Califano*, 430 U.S. at 316-17; *Craig*, 429 U.S. at 197.

121. *Craig*, 429 U.S. at 197 (emphasis added); see *J.E.B.*, 1994 U.S. LEXIS 3121, at \*17; *Califano*, 430 U.S. at 316-17. One criticism of this approach is that courts are incorrectly concerned with the intent of the state action rather than the effect on the members of the regulated social group. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 353 (1992).

122. 404 U.S. 71 (1971).

123. *Id.*

124. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 179-80 n.35 (1982).

125. *Id.*

126. 417 U.S. 484 (1974).

127. 450 U.S. 464 (1981) (plurality opinion).

128. 453 U.S. 57 (1981).

129. See Siegel, *supra* note 121, at 268-72. Critics argue that the failure to examine the problem of regulating women’s reproduction in social rather than physical terms means the equal protection doctrine is inadequate to provide sexual equality. *Id.* at 272; Williams, *supra* note 124, at 182 n.50, 193.

porting only contingent statistical correlations—are insufficient to justify explicit legal differentiation between the sexes. But when a gender classification is so woven into the entire social understanding of women that it reflects what the judiciary itself still perceives as a genuine gender difference, the plot begins to thicken.<sup>130</sup>

Professor Williams calls these physiology-based decisions the “hard” cases in which the Court has upheld gender classifications which “concern themselves with other, perhaps more basic sex-role arrangements.”<sup>131</sup>

In these “hard” cases, the Court has fallen back on stereotypical notions of the differences between men and women. Williams argues that the Court’s unwillingness to see biological difference as socially constructed has prevented it from realizing the similarities between pregnancy and other disabilities which affect both sexes, or which affect only men.<sup>132</sup> By conducting a “similarly situated” inquiry, the Court has dismissed the classification as *not based on gender*, thereby seemingly making *any* classification based on pregnancy permissible for purposes of the Equal Protection Clause.

Williams argues that the tests the Court has articulated in the “easy” and “hard” cases are different even though the classifications at issue are not. “The analytical key to [the hard] cases lies in [Justice] Rehnquist’s use of the ‘similarly situated’ inquiry as an alternative to Justice Brennan’s more finely tuned standard, first enunciated in *Craig v Boren*<sup>133</sup> . . . , requiring that sex classifications ‘bear a substantial relationship to an important governmental purpose.’”<sup>134</sup> The two standards could be interpreted consistently, but,

in the hands of Justice Rehnquist—and [Justice] Stewart—the “similarly situated” inquiry is in fact a less rigorous inquiry than the *Craig* standard would require. In addition, it changes the nature of the standard in important ways.

The “similarly situated” inquiry is less rigorous because its adherents do not in fact require that the perceived differences between the sexes bear a close connection to the purposes of the legislation.<sup>135</sup>

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130. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-28, at 1571 (2d ed. 1988); see also Siegel, *supra* note 121, at 358 (“Motherhood is the role upon which this society has traditionally predicated gross stereotyped distinctions between the sexes.”).

131. Williams, *supra* note 124, at 180.

132. For the purpose of a statutes regulating job benefits, argues Williams, pregnancy should be treated like any other disability which causes a person to be unable to work for a period of time. *Id.* at 193-96.

133. 429 U.S. 190 (1976).

134. Williams, *supra* note 124, at 182 n.50.

135. *Id.*

Justice Rehnquist's standard, therefore, "preserve[s] sex-based statutes providing they are part of an interlocking statutory scheme founded on gender differentiations. Thus, sex-based statutes, standing alone, might succumb to challenge, whereas statutes that are one brick in a sex-based edifice might be upheld."<sup>136</sup>

Other feminist and constitutional scholars have criticized the Supreme Court's gender jurisprudence in the area of pregnancy. "To ignore woman's unique role in human reproduction is to allow women to lay claim to equality only insofar as they are like men."<sup>137</sup> The "similarly situated" inquiry does not allow for a fair recognition of these differences in the quest for equality. For example, in *Geduldig v. Aiello*,<sup>138</sup> the Court addressed an equal protection challenge to the California disability insurance scheme. The scheme provided compensation for most disabilities which caused employees to miss work, but excluded coverage of a normal pregnancy. The Court held that the state could permissibly cover some disabilities while not covering pregnancy.<sup>139</sup> In the Court's view, the state accomplished these policies on an "objective and wholly noninvidious basis . . . . There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."<sup>140</sup>

In a footnote, Justice Stewart argued for the Court that *Geduldig* was distinguishable from *Reed* and other equal protection cases holding gender classifications invalid:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is [an impermissible] sex-based classification . . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on a reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential

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136. *Id.*

137. TRIBE, *supra* note 130, § 16-29, at 1583; cf. Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 513-57, 565-72 (1983) (arguing against an "equal treatment" approach to sexual equality).

138. 417 U.S. 484 (1974).

139. *Id.* at 494-95.

140. *Id.* at 496-97 (footnotes omitted).

recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.<sup>141</sup>

Although Congress statutorily overruled *Geduldig* in the Pregnancy Discrimination Act of 1978,<sup>142</sup> the case is useful in analyzing the Court's gender discrimination jurisprudence.<sup>143</sup> The California statute impermissibly reinforced the archaic stereotype of woman as homemaker by "exemplif[ying] the social judgment that pregnancy is incommensurate with employment, graphically illustrating the use of public power to transform the physiological act of gestation into a condition of economic dependency."<sup>144</sup>

Another case that shows the Court's unwillingness to invalidate some classifications based on archaic stereotypes is *Michael M. v. Superior Court*.<sup>145</sup> In *Michael M.*, the plurality held that a statutory rape law under which only men could be convicted did not violate the Equal Protection Clause.<sup>146</sup> As a threshold question, the Court asked whether men and women were "similarly situated" in regard to the subject matter of the legislation.<sup>147</sup> The Court answered in the negative; "a legislature may provide for the *special problems of women*."<sup>148</sup> In *Michael M.*, the Court accepted as legitimate the state interest in preventing illegitimate teenage pregnancies<sup>149</sup> and accepted the gender classification as a differentiation between men and women that "realistically reflects the fact that the sexes are not similarly situated in certain circumstances."<sup>150</sup> To justify the classification, the Court indicated that

[b]ecause virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment.<sup>151</sup>

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141. *Id.* at 496-97 n.20.

142. 42 U.S.C. § 2000e(k) (1988) (distinctions on the basis of pregnancy are distinctions on the basis of sex for purposes of federal civil rights law.)

143. Of *Geduldig*, Professor Tribe said, "[T]he choice of men and *their* needs as a touchstone for equal protection analysis is neither natural nor necessary." TRIBE, *supra* note 130, §16-29, at 1583.

144. Siegel, *supra* note 121, at 268.

145. 450 U.S. 464 (1981) (plurality opinion).

146. *Id.* at 468-76.

147. *Id.* at 469.

148. *Id.* (emphasis added; citations omitted).

149. *Id.* at 470.

150. *Id.* at 469 (citations omitted).

151. *Id.* at 473.

The Court did not use the intermediate scrutiny standard in *Michael M.* because the classification, according to the Court, was not truly gender-based. The Court, however, failed to recognize that its conceptions of teenage women were deeply riddled with archaic stereotypes. It specifically rejected arguments that the statute impermissibly sought to protect only the chastity of women,<sup>152</sup> although Justice Brennan argued in his dissent that this was in fact the law's original goal.<sup>153</sup> Professor Williams argues that *Michael M.* reflects social conceptions of male as aggressive offender and female as passive victim—conceptions which might not pass the muster of intermediate scrutiny.<sup>154</sup>

Yet a third case shows the Court's unwillingness to look beyond its members' own deeply held ideas of gender roles in adjudicating challenges to gender classifications. In *Rostker v. Goldberg*,<sup>155</sup> the Military Selective Service Act, which authorized the president to require selective service registration of men, but not of women, was challenged under the Fifth Amendment.<sup>156</sup> The Court, as it did in *Michael M.*, applied a lower standard of review after conducting a "similarly situated" inquiry.<sup>157</sup> The Court indicated that men and women are not similarly situated in the military context because women are restricted from participation in combat.<sup>158</sup> Therefore, the equal protection challenge failed because military custom has been to exclude women.<sup>159</sup>

In upholding the classification and refusing to apply intermediate scrutiny, the Court reinforced the archaic stereotype that women are somehow less than full citizens because they are less capable of national service. It also promoted the stereotype that women are weaker than men (and therefore, wisely excused from combat duty), allowing this perceived weakness to justify a gender based classification.<sup>160</sup>

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152. *Id.* at 472 n.7.

153. *Id.* at 494-96 & nn. 9-10 (Brennan, J., dissenting).

154. Williams, *supra* note 124, at 187. Even if there is some biological link between sex and sexual propensities, the socialization process has exacerbated it to the extent that its use as a basis for legal classification is unjustified. *Id.* at 179-90.

155. 453 U.S. 57 (1981).

156. The Fifth Amendment's Due Process Clause prohibits the federal government from engaging in unjustifiable discrimination. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

157. *Rostker*, 453 U.S. at 78.

158. *Id.* at 67. The Court did not entertain an equal protection challenge to this underlying practice of excluding women from military combat.

159. *Id.*

160. "It is [ ] true that while males as a class tend to have an advantage in strength and speed over females as a class, the range of differences among individuals in both sexes is greater than the average differences between the sexes." *Hoover v. Meiklejohn*, 430 F. Supp. 164, 166 (D. Colo. 1977).



## B. Equal Protection and the Norplant Bills

Would a case involving a Norplant bill be an “easy” case or a “hard” one? Would the Court perceive the gender classifications as based on physiological or social differences? The Norplant bills involve pregnancy, an issue on which even feminist scholars cannot agree whether women should be treated differently from men.<sup>161</sup> Under equal protection cases such as *Geduldig* and *Michael M.*, one must ask, are men and women similarly situated? If they are, the classification is truly sex-based, thereby warranting intermediate scrutiny. If they are not, the Court would not view the classification as sex-based, thereby giving the statutes legitimacy.<sup>162</sup>

The bills would tie the administration of Norplant to the receipt of AFDC. Both men and women receive AFDC<sup>163</sup> and both sexes are capable of reproducing. But AFDC is not a benefit for those who are capable of bearing a child. The receipt of AFDC is totally independent of the pregnancy and birth itself—it is a benefit for poor children and their parents. Men and women are equally capable of raising children after they are born.<sup>164</sup> Thus, in the context of AFDC, men and

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161. See Williams, *supra* note 124 (supporting an “equal treatment” approach to equality whereby men and women should be treated the same for all purposes, where differences, if any, between the sexes, should be analogized to characteristics of the other sex and treated the same); Krieger & Cooney, *supra* note 137 (arguing for a “positive action” approach to equality whereby positive steps (not given to men) should be taken by employers and society so that bearing and rearing children does not hinder women in society, particularly the workforce); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1 (1985) (arguing for an “episodic analysis” approach to achieve equality in the area of pregnancy whereby women would be afforded special treatment only during the time when she is physically incapacitated because of the pregnancy and labor).

162. For a critique of the equal protection doctrine in its ability to achieve sexual equality see LOIS G. FORER, *UNEQUAL PROTECTION—WOMEN, CHILDREN, AND THE ELDERLY IN COURT* 39 (1991) (“The assumption that the same treatment accorded to biologically . . . different individuals will result at all times in legal equality is preposterously illogical. All too often it yields manifestly unjust decisions. To acknowledge human differences in order to accord equal protection does not imply inferiority.”). As Professor Tribe notes:

[A]n approach to the equal protection clause that is dominated by formal comparisons between classes of people thought to be similarly situated is inadequate to the task of ferreting out inequality when a court confronts laws dealing with reproductive biology, since such laws, by definition, identify ways in which men and women are definitely *not* similarly situated.

TRIBE, *supra* note 130, § 16-29, at 1582.

163. See *supra* note 114.

164. This same point applies in evaluating an equal protection challenge to a court ordered Norplant implantation as a condition of probation. “A reviewing court would be unable to skirt an equal protection challenge by characterizing the Norplant condition as a pregnancy-based classification; the defendants in the Norplant cases were ordered to use the device not because they had the potential of becoming pregnant, but because they had the potential of becoming parents. Male child abusers share this same potential.” Melissa Burke, Note, *The Constitutionality of the Use of the Norplant Contraceptive Device as a*

women are similarly situated.

The state might argue that men and women are not similarly situated for the purposes of the Norplant bills because there currently exists no long-lasting contraceptive for men. This lack of male contraception, however, does not exist in a vacuum. It reflects a societal bias that women are responsible for birth control. This is symbolized by the hesitancy of stores to sell male contraception and of consumers to buy it.<sup>165</sup> It is likely that pharmaceutical companies have been encouraged by these market forces to develop female contraceptives such as Norplant at a faster rate than male contraceptives. To enforce a Norplant bill without a parallel incentive for men to use contraception reinforces the stereotype that it is the woman's responsibility to avoid pregnancy. For a more just determination of sex roles, one must recognize that men and women are equally responsible for the use of contraception when the goal is to avoid procreation. They are, therefore, "similarly situated." To reason otherwise would use an archaic stereotype to justify a gender classification.

The state might argue that women are biologically more fit to be child-rearers, or, less controversially, that it is rational to give the benefit only to women because, as a statistical matter, the majority of child-rearers are women. As in *Michael M.*, the state might argue on this basis that men and women are not similarly situated. The first assertion, however, confuses a physical difference with one that is socially constructed, an archaic stereotype. The latter proposition also rests on a historical assumption which arose through past and present sexual role-typing and workplace discrimination. This justification just as surely rests on and promotes archaic and overbroad generalizations.

In *Califano v. Webster*,<sup>166</sup> the Court disapproved of "casual assumptions that women are 'the weaker sex' or are more likely to be child-rearers or dependents."<sup>167</sup> Instead, "[t]he law must be prepared to act to make those stereotypes *less* accurate reflectors of our world, by affirmatively combating the inequities that result when we all too casually allow biological differences to justify the imposition of legal

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*Condition of Probation*, 20 HASTINGS CONST. L.Q. 207, 241 (1992) (concluding that such orders should be struck down under the Fourteenth Amendment).

165. See Cynthia W. Cooke, *Shielding Greed*, THE NATION, Mar. 29, 1986, at 464, 466-67 (book review) (alleging that those who evaluate contraceptives overplay dangerous side effects to men but underplay dangerous effects to women); *Feminine Hygiene Heads for Big Growth; Sales Statistics*, PROGRESSIVE GROCER, Aug. 1986, at 56 (alleging that supermarkets have been resistant to selling male contraception as opposed to female contraception).

166. 430 U.S. 313 (1977).

167. *Id.*

disabilities on women.”<sup>168</sup> Furthermore, in *Craig v. Boren*,<sup>169</sup> “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’ were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.”<sup>170</sup>

The state might further assert that the classification is not based on archaic stereotypes because it is not *forcing* women to bear children, reinforcing their roles within the home, but is *preventing* their fate as domesticians. But this argument fails to tailor its inquiry to the purpose of the bills. A chief premise of the Norplant bills is that many women on welfare irresponsibly burden our system by bearing children they cannot support. AFDC, however, is a benefit for *parents* with children—men receive it for the same reasons that women do. To uphold its ban against archaic stereotypes, the Court must conduct its inquiry with the purpose of the statute in mind.

Under the *Craig* standard, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>171</sup> The state could assert the same interests discussed in the right to privacy/strict scrutiny argument: saving money, protecting potential children from being born into poverty, and providing poor women the financing necessary to make educated and informed decisions about their reproductive lives.<sup>172</sup> The analysis for assessing the value of these interests under an equal protection argument would be identical to the privacy discussion.<sup>173</sup>

The Norplant bills do not further the only interest strong enough to justify the discrimination inherent in the bills: providing poor women the financing necessary for true reproductive choice. The financial incentive, in fact, serves as a barrier to freedom of choice by offering an incentive favoring Norplant over other methods of contraception.

Even if a court determined that any of these interests were sufficiently important, the Norplant bills would still fail constitutional scrutiny for failure to fulfill the requirement that the justification bear a substantial relation to the achievement of the government objective. Although one might argue that because women are statistically more likely to rear children, *Craig* negates this justification as a sufficient basis for a finding that the means specified are substantially related to

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168. TRIBE, *supra* note 130, § 16-29, at 1577.

169. 429 U.S. 190 (1976).

170. *Id.* at 198-99.

171. *Id.* at 197.

172. *See supra* Part II.C.1.a.

173. *See supra* Part II.C.1.

supporting that interest.<sup>174</sup> In striking down a statute which set different ages at which men and women could purchase beer, the Court said, “[S]ocial science studies that have uncovered quantifiable differences in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would be perceived as invidious.”<sup>175</sup> Because the reason for a woman’s increased likelihood of rearing her children has to do with social rather than biological differences, reinforcing this stereotype of a woman’s place in the home would run contrary to the equal protection cases purporting to promote gender equality.

### Conclusion

As state legislatures are forced to make the difficult budget cuts called for in recent times, it is likely that welfare will be a consistent target of these cuts. A long-lasting and effective contraceptive like Norplant presents tempting opportunities for politicians to exercise fiscal and social control, and it is likely that temporary sterilization statutes will pass and be challenged. Because the Norplant grants would effectively deprive poor women of reproductive freedom by coercively renting their wombs, and because the Court has a long history of protecting a woman’s procreative and contraceptive choice, the Court should subject the Norplant bills to a strict scrutiny analysis. This historical protection is extremely important in light of the most recent abortion decisions, particularly *Casey*, which serve as a source of confusion in the area of privacy law. The Norplant bills impinge upon a woman’s constitutional rights by penalizing the exercise of her right to have children or to choose her contraceptive method. She cannot receive “special assistance grants” unless she consents to Norplant implantation.

These bills should fail a strict scrutiny or even the lesser undue burden test. The bills should also fail a proper equal protection challenge based on gender because reproductive control is only brought to bear against women. The reasons for greater opportunity to control women rather than men have to do more with societal bias than lack of scientific ability. Men would face no similar invasion of their reproductive freedom, nor would they be able to partake in any monetary

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174. *Craig*, 429 U.S. at 202; see *J.E.B.*, 1994 U.S. LEXIS 3121, at \*21 n.11.

175. *Id.* at 208. “Thus, if statistics were to govern the permissibility of state alcohol regulation without regard to the Equal Protection Clause as a limiting principle, it might follow that States could freely favor Jews and Italian Catholics at the expense of all other Americans, since available studies regularly demonstrate that the former two groups exhibit the lowest rates of problem drinking.” *Id.* at 208 n.22; see *J.E.B.* 1994 U.S. LEXIS 3121, at \*21 n.11.

benefit of the grant programs. Women and men do not receive equal protection of the laws within such a scheme.

Because the poor and women are underrepresented in the judiciary, courts must discern social realities imposed by the legislation on poor women—realities which might not otherwise be self-evident. The state, which acts as protector of many civil rights, has no place in purchasing a person's right to exercise them. Moreover, the law and courts should not be used as a sword for the oppression of women. Any statute or regulation offering financial incentives to women on welfare to be implanted with Norplant should have no place in our law.



*The editors and members of  
Volume 21 dedicate this issue to  
Professor William B. Lockhart*

