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The ONLY GOOD POOR WOMAN: UNCONSTITUTIONAL CONDITIONS AND WELFARE

DOROTHY E. ROBERTS*

The goal of some welfare reform proposals is to discourage poor women from having children. The unconstitutional conditions doctrine provides a ready device for challenging these proposals in court. Such challenges, however, invoke a particular tension in the use of the unconstitutional conditions doctrine in the context of welfare—the tension between seeking to protect the private decisions of welfare recipients while at the same time seeking to obtain public assistance for exercising those decisions. This tension stems partly from the doctrine’s attempt to preserve poor people’s liberty within a constitutional framework designed to protect only property owners. 1

The Supreme Court has often resolved this tension by failing to find a constitutional violation when the government conditions welfare benefits on the waiver of privacy rights. 2 The unconstitutional conditions doctrine may nevertheless appear to be the indispensable cornerstone of claims that new welfare regulations violate recipients’ right to reproductive autonomy. 3 I argue

* Professor, Rutgers University School of Law-Newark. B.A., Yale University, 1977; J.D., Harvard Law School, 1980. This article benefitted from conversations with Marion Smiley and Lucie White; from comments of participants at the symposium on the doctrine of unconstitutional conditions at the University of Denver College of Law, the Class and Reproductive Control panel at the Crit Networks Conference on Class & Identity, and the symposium on Welfare As We’d Like It To Be at Princeton University; and from discussions with Lucie White’s Social Welfare Law class at Harvard Law School and the Harvard University Program in Ethics and the Professions seminar. I am grateful to the Program in Ethics and the Professions for its research support.

1. Thus, this tension does not arise in the Supreme Court’s application of the unconstitutional conditions doctrine in cases involving property rights, which may explain why property owners appear to prevail more often than welfare recipients. Compare, e.g., Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (extending the unconstitutional conditions doctrine to invalidate, under the Takings Clause, a city’s attempt to condition the grant of a discretionary building permit on the donation of property to the government) and Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the denial of unemployment benefits to persons who refuse to work on Saturdays for religious reasons violates the First Amendment) with Lyng v. International Union, UAW, 485 U.S. 360 (1988) (holding denial of food stamps to strikers does not violate the First Amendment) and Maher v. Roe, 432 U.S. 464 (1977) (upholding denial of medical benefits for abortion but not childbirth). See also Thomas W. Merrill, Dolan v. City of Tigard: Constitutional Rights as Public Goods, 72 DENVER U. L. REV. 859 (1995) (using a model of constitutional rights as public goods to explain the Court’s holding in Dolan). Merrill suggests that the Court rejected Medicaid recipients’ unconstitutional conditions claim in the abortion funding cases because “the judiciary views the right to abortion, which after all is grounded in the ‘right to privacy,’ as a uniquely private right whose primary significance is to the individual exercising that right.” Id. at 875.


3. See, e.g., Laurence C. Nolan, The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse, 3 AM. U. J. GENDER & L. 15 (1994); David S. Cole, Note, Norplant Bonuses and The Unconstitutional Conditions Doctrine, 71 TEX. L. REV. 187 (1992). In the face of conservative proposals to abandon the unconstitutional conditions doctrine in order to allow the state greater power to require citizens to trade their constitutional rights for
in this article that the unconstitutional conditions doctrine offers an impaired defense against welfare policies that regulate poor women’s reproduction. Although these policies reflect an unjust understanding of the reproductive liberties of women on welfare, the unconstitutional conditions doctrine cannot adequately explain why. We should replace it with a vision of welfare that more affirmatively reconciles the protection of poor women’s privacy with the demand for public support.

I. CONTRACEPTIVE WELFARE PROPOSALS

Welfare reform measures designed to discourage reproduction by recipients (I will call them contraceptive welfare proposals or laws) are based on the belief that welfare encourages poor women to bear children, combined with taxpayer resentment for having to pay to support them. As Representative Marge Roukema asked during the congressional debate on the Family Support Act, “how much longer do you think the two-worker couple will tolerate the welfare state and its cost to them in taxes to support that welfare mother? . . . The answer is that they should not have to.” Welfare mothers’ procreation is also considered morally irresponsible according to the premise that people should only have children they can afford to support. Welfare reform rhetoric describes childbearing by the poor as fueling a cycle of poverty by producing children who will inevitably depend on the government for sustenance. Sometimes reproduction by particular poor mothers, such as those who are unmarried or teenagers, is singled out as the target for deterrence.

public benefits, it is understandable that liberals and progressives would seek to shore up the doctrine. See, e.g., RICHARD EPSTEIN, BARGAINING WITH THE STATE (1993) (arguing that abolishing the unconstitutional conditions doctrine would promote economic efficiency).


8. The House Republicans’ Personal Responsibility Act, for example, contains measures designed to discourage unwed teenagers from becoming mothers. It prohibits mothers under the age of 18 from receiving AFDC benefits for children born out of wedlock, regardless of when aid is sought for the child, unless the mother marries the child’s father or someone who adopts the child. Personal Responsibility Act, H.R. 4, 104th Cong., 1st Sess., §§ 105 (1995) [hereinafter Personal Responsibility Act]. An amendment to the House bill would allow teenage mothers to receive Medicaid, food stamps, and vouchers to pay for items “suitable for the care of the child.” Mitreya Navarro, Threat of a Benefits Cutoff: Will It Deter Pregnancies?, N.Y. TIMES, Apr. 17, 1995.) The Act also denies aid for children whose paternity is not established and requires states to warn a pregnant, unmarried woman of her ineligibility for government aid unless she informs the state of the prospective father’s identity and cooperates in establishing the child’s paternity. Personal Responsibility Act, supra, §§ 101, 103. Although this provision is aimed at establishing paternity as early as possible, it might also provide an incentive to poor pregnant women to get an abortion. See SUE DAILY & CAROL JUZWICKIS, HOUSE VOICES ON EMERGENCY WELFARE COST: ABORTION FEES
This perception of procreation by the poor as costly and pathological was most notably promoted by Charles Murray, who, in 1984, argued that welfare induces poor women to have babies; in 1993, declared that "illegitimacy is the single most important social problem of our time;" and in 1994, claimed that the higher fertility rates of groups with lower average intelligence, who fall at the bottom of the economic ladder, help to perpetuate welfare dependency. While his views were once considered on the political fringe, Murray now "has a platform in respectable publications and is welcomed as a savant by Republicans in Congress." These themes run throughout the House Republicans' proposed Personal Responsibility Act. The bottom line of this thinking is that, since reproduction by the poor perpetuates poverty, policies designed to stem their reproduction are an efficient means of at once reducing poverty and cutting welfare costs.

The government can take several avenues to achieve the goal of reducing the number of children born to women on welfare. The most benign is to make contraceptives freely available to welfare recipients. Every state now makes Norplant available to poor women through Medicaid. This approach might be combined with the added incentive of offering a cash bonus to women on welfare for using Norplant. Several state legislatures have considered implementing such a bonus program. A third option is to deny additional benefits for children born to women who are already receiving public assistance. If the belief that welfare encourages childbirth were accurate, denying benefits would remove the incentive for women to become pregnant, or at least make childbearing more burdensome. Children born despite the elimination of incentives would be the unfortunate casualties of this deterrence rationale. Several states already have enacted so-called welfare "family caps," and others are considering such legislation.

Win Concession, Chi. Trib., Mar. 23, 1995, at 1 (discussing Roman Catholics' and anti-abortion Republicans' concern that the Act's provisions designed to reduce out-of-wedlock births will encourage pregnant women to obtain abortions); Robert Pear, Catholic Bishops Challenge Pieces of Welfare Bill, N.Y. Times, Mar. 19, 1995, at 1 (same).
13. The preamble of the Personal Responsibility Act states that the Act's purpose is to "restore the American family, reduce illegitimacy, control welfare spending and reduce welfare dependency." See Personal Responsibility Act, supra note 8.
15. See Rank, H.B. 7089, 74th Leg., 2d Sess. (1991) (providing women receiving AFDC a $500 cash bonus for inserting Norplant, as well as an additional $50 each year for continued use); La., H.B. 1584, 17th P. Sess. S 16 (1991) (providing women on welfare $100 per year for using Norplant); Tenn., H.B. 1350, 97th Leg., 2d Sess. (1992) (same).
A fourth possibility is to use more coercive means to ensure that women receiving government aid remain infertile. Mandating sterilization of women on welfare, a strategy used in many states during the first half of the twentieth century, now seems to be politically unacceptable. But the public might be willing to impose less permanent methods of regulating poor women’s fertility. Norplant serves this purpose adeptly because it acts on a long term basis and is reversible. At the same time, since removal requires a minor surgical procedure, it is possible for government authorities to monitor its use. Unlike most other contraceptives, Norplant’s effectiveness does not depend on a woman’s constant cooperation. At least two states have proposed legislation to mandate the use of Norplant as a condition of receiving welfare benefits. Denying benefits for children born to women on welfare has been condemned by many as cruel to the innocent children who are punished for their mothers’ behavior. A rule requiring Norplant as a condition of receiving welfare avoids this discomfort, since its objective is to prevent the birth of the children in the first place. (Of course, children whose mothers refuse to accept the condition will lose their benefits.) Americans are predisposed to be less concerned about protecting the reproductive decisions of poor women than the welfare of their children. As policymakers become increasingly hostile towards poor mothers on welfare, it is likely that these more coercive proposals will proliferate and may even prevail.

II. THE UNCONSTITUTIONAL CONDITIONS PROBLEM

It is clear at the outset that contraceptive welfare laws present an unconstitutional conditions problem. They raise the classic unconstitutional condi-

17. On the other hand, the popularity of tubal ligation and vasectomy as a method of family planning may have diminished the public’s concern about the brutality of coercing these procedures. PHILIP P. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 161 (1991). In 1980, the chairman of the Texas Board of Resources proposed sterilizing welfare recipients in the state. Official Urges Sterilization of Texas Welfare Recipients, N.Y. TIMES, Feb. 28, 1980; see also Jim Simon, Heavy Hand of Welfare Reform Legislators Planning to Get Tough, SEATTLE TIMES, Jan. 31, 1992, at B1 (discussing Washington state senator Scott Barrett’s proposal to offer $10,000 bonuses to welfare mothers who agree to sterilization after the birth of their first child).

tions question whether the government may condition the conferral of welfare benefits on the beneficiary's surrender of her constitutional right to reproductive autonomy and bodily integrity, although the government might choose not to provide welfare benefits altogether. The government is plainly doing indirectly what it could not do directly.

Few would dispute that it would be unconstitutional—at least under current conditions—for a state to pass a law requiring women to use contraceptives.21 The concept of decisional privacy, which seeks to protect intimate or personal affairs that are fundamental to an individual's identity and moral personhood from unjustified government intrusion, is firmly established.22 Freedom of personal choice in matters of marriage and family life has been at the forefront of the development of the right of privacy.23 Considerable support exists for the conclusion that the decision to procreate is part of the right of privacy.24 The decision to bear children is universally acknowledged in the privacy cases as being "at the very heart" of these constitutionally protected choices.25 The Court expressed the constitutional importance of the right to procreate in Skinner v. Oklahoma, declaring the right to bear children "one of the basic civil rights of man."26

The right of privacy, then, protects both the choice to bear children and the choice to refrain from bearing them. Unjustifiably burdening either choice violates a woman's personhood by denying her autonomy over the self-defining decision of whether she will bring another being into the world. Requiring women to use contraceptives is, in this sense, just as pernicious as forced maternity at the behest of the state. In addition, mandating such an invasive procedure as Norplant insertion would violate women's due process rights to bodily integrity and to refuse medical treatment.27 Since states could not constitutionally pass laws directly mandating that women use Norplant, the argu-

21. Nevertheless, Larry Alexander did dispute this assertion at the symposium, arguing that there is no absolute right to procreate. Although the Constitution does not protect the right to procreate absolutely, in that the right might be overcome by a compelling state interest, it does safeguard individuals' procreative decisions from government interference. Alexander proposed a limited right to procreate if one is financially able to support one's children. A hypothetical law directly limiting procreation on the basis of wealth illustrates that this conception of the right to procreate is too narrow. A criminal statute punishing individuals for having children without economic means to support them or a legislative scheme granting parenting licenses only to individuals who met financial standards would at least raise constitutional concern.


25. Carey v. Population Servs. Inst., 431 U.S. 678, 685 (1977); see also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").


27. See Cowan v. Dreesen, Minn. Dep't of Health, 457 U.S. 231 (1982). This essay focuses on reproductive liberty associated with the right of privacy. For an argument that programs relying welfare to Norplant use violate the First Amendment's Free Exercise Clause, see Coates, supra note 3, at 209-08.
ment goes, they cannot achieve this end indirectly by conditioning welfare payments on Norplant use.

This articulation of the unconstitutional conditions argument does not guarantee the invalidation of contraceptive welfare laws. The Supreme Court has avoided the unconstitutional conditions problem by distinguishing between direct state interference with a protected activity and the state's mere refusal to subsidize a protected activity. The former, the Court concedes, raises a constitutional issue because it involves state action, whereas it characterizes the latter as a constitutionally insignificant failure to act. Embedded in this distinction is the prevalent understanding of constitutional protections that extends only to the individual's negative right to be free from unjustified state intrusion and that measures state action from a baseline of the current arrangements of wealth and privilege.28 Under this reasoning, it is possible to characterize a condition on benefits as a constitutional nonsubsidy rather than an unconstitutional penalty.

The Court's most developed articulation of this doctrinal sleight of hand can be found in a series of cases concerning the government's obligation to subsidize the reproductive decisions of poor women. In these cases, the Court refused to require the state or federal government to pay for the cost of abortion services for poor women, even though the government pays for the expenses incident to childbirth.29 The abortion funding cases raise an unconstitutional conditions problem when the government's refusal to pay for abortions is viewed as a condition on the receipt of Medicaid funds—pregnant women may receive medical benefits as long as they do not use them to exercise their right to obtain an abortion. The Court nevertheless upheld this condition, reasoning,

[although government may not place obstacles in the path of a woman's choice, it need not remove those not of its own creation... 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.30

Can the government claim, as it did successfully in the abortion-funding cases, that by conditioning welfare payments on birth control it is not preventing welfare recipients from exercising their reproductive rights? The answer may depend on which type of contraceptive law is at issue. Unlike the laws in the abortion-funding cases, Norplant mandates impose more than the requirement that welfare funds be spent on the purpose for which they were intended—child care and not child bearing. They do not just fail to provide funds for an activity; rather, they require that welfare recipients undergo an affirmative—and invasive—procedure. Women who agree to the condition in order to receive AFDC payments do not have the option of exercising their constitu-

tional right to procreate through private means. The government’s condition of Norplant insertion completely forecloses their reproductive choice. Conversely, women who wish to exercise their right to procreate, and therefore refuse to use Norplant, must pay the high price of losing their benefits.31

In contrast, it would be more plausible for the state to claim that offering cash bonuses for Norplant use implements a legitimate decision to fund birth control and not childbirth. Recipients might counter that the unconstitutional conditions doctrine forbids bonus programs because they make indigent women pay more than wealthier women—the cost of forgoing the bonus—to exercise their right not to use Norplant.32 Still, it is hard to make a convincing argument that offering poor women free Norplant, as well as bonuses to use it, leaves them worse off than if the program did not exist at all. These women are not forced to choose between starvation and Norplant use, but only between accepting the bonus and its condition, or not. Norplant bonus programs arguably increase poor women’s reproductive options more than the laws denying abortion funding, which the Supreme Court upheld in Maher and McRae.

III. THE RESPONSE TO THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The concept of welfare entitlements, which welfare rights activists successfully advocated in the 1960s and 1970s, is quickly eroding.33 Conservative politicians and resentful taxpayers disclaim any obligation to support welfare recipients’ decision to have children. Legislators promote their contraceptive welfare proposals in terms of savings to hard working citizens. For example, the sponsor of the Kansas bill offering cash bonuses for Norplant use claimed that, “[b]y any set of objective criteria, the creation of the program has the potential to save the taxpayers millions of their hard-earned dollars.”34 The response to the unconstitutional conditions claim, then, is likely to be, “sure, poor women have a right to make reproductive decisions, but why should I have to pay for them?”35

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31. See Lynn A. Baker, The Price of Rights: Toward a Positive Theory of Unconstitutional Conditions, 75 CORNELL L. REV. 1185 (1990) (presenting a positive theory of unconstitutional conditions that “asks whether the effect of the challenged condition is to require persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a higher price to engage in that constitutionally protected activity than similarly situated persons earning a subsistence income”).

32. See Coale, supra note 3, at 214 (proposing a rule “limiting states to the power to selectively reimburse a percentage of the market price of Norplant”); see also John R. Hand, Note, Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion, 46 VAND. L. REV. 715, 719-20 (1993) (presenting an “ideal” unconstitutional conditions argument against Norplant bonuses, but predicting that it is likely to fail).


35. Roland Coaming, the author of the South Carolina bill mandating Norplant insertion, expressed this sentiment on national television: “They can have all the children they want. They just have to pay for them.” Prime time Live: End of Innocence (ABC television broadcast, Sept. 9, 1993), available in LEXIS, News Library, Script File. He argued that his bill, if enacted, would
As these comments reveal, many legislators and their constituents will have a hard time seeing contraceptive welfare laws as exacting from women on welfare a higher price for exercising their rights. In their mind the proposals do not charge poor women for having children; they simply decline to subsidize this activity. Thus, although some contraceptive welfare measures may in one sense affirmatively impose a deterrent "above and beyond those economic deterrents that are a natural concomitant of a market economy," their proponents see them as replacing the constraints on poor women's reproductive decisions that would exist but for the state's generosity. The unconstitutional conditions doctrine cannot adequately explain why the state should nevertheless support the private decisions of welfare recipients.

IV. WHAT'S WRONG WITH THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

A. The Doctrine's Functions

By asserting the unconstitutional conditions doctrine, claimants accept the premise that the government is under no obligation to subsidize poor women's reproductive decisions. They must renounce any claim to redistribution of resources necessary for reproductive liberty. The briefs of litigants who use the doctrine as a shield against government regulation begin with the partial surrender, "of course, we would never suggest that the government is affirmatively required to give us any support at all." This concession explains the need for the doctrine.

The unconstitutional conditions doctrine serves as a method for identifying "a characteristic technique by which the government appears not to, but in fact does burden... liberties." It is needed only to explain how a government condition on funding could possibly be unconstitutional when the government has no obligation to provide funding in the first place. If the government may constitutionally deny the grant altogether, why should recipients be heard to complain about a restriction? The doctrine reveals that, despite the logic of this question, the government nevertheless may be violating a constitutional right. Thus, under the prevalent understanding of privacy rights, the unconstitutional conditions doctrine appears to be an indispensable first step of arguments challenging the constitutionality of contraceptive welfare laws.39
The unconstitutional conditions doctrine functions like a pair of eyeglasses that enables us to see the infringement of liberty obscured by our faulty constitutional vision. Why do we need this corrective device in order to understand the harm of requiring poor women to use Norplant in order to survive? If the government were required to subsidize the activities at issue, and if reliance on public assistance therefore did not constitute a waiver of privacy, there would be no place for a special doctrine to prohibit government conditions that threaten these activities. It is our inability to defend poor women’s reproductive liberty in terms of traditional constitutional discourse that forces us to rely on this weak-kneed doctrine. Moreover, because the doctrine focuses on the violation of individual rights, rather than on the government’s conditional spending as a system of power, it often permits individuals to barter away their rights in exchange for benefits.

The unconstitutional conditions doctrine also functions like a bandage to patch up the gaping hole in our constitutional framework designed to protect the liberties of economically independent citizens. The unconstitutional conditions doctrine is conceived as a way of preserving, within the baseline of present economic inequality, “spheres of private ordering from government domination.” It maintains the boundary between the private realm and state power stemming from the government’s largesse. (This is part of the overall liberal project of preserving a sphere of individual privacy from government interference.) The unconstitutional conditions doctrine tries to fill the gap, created by the dependence of the poor, in the theory that “[a] right to private property, free from government interference, is . . . a necessary basis for a democracy.” It gives to propertyless citizens a dollop of the protection ordi-

40. See MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 185 (1995). Thomas Merrill notes that, according to this view of rights, “a doctrine that forbids individuals to sell their constitutional rights smacks of paternalism, and seems to deny the moral autonomy of the individual.” Merrill, supra note 1, at 869 (advocating a model of constitutional rights as public goods that rejects their conception as valuable entitlements belonging to individuals); see also Marion Smiley, Private Lives and Public Welfare: A Critical Reconstruction of the Concept of State Paternalism 8 (unpublished manuscript on file with author) (criticizing the definition of state paternalism as a violation of individual liberty).

41. Sullivan, supra note 38, at 1506; Kathleen M. Sullivan, Unconstitutional Conditions and the Distribution of Liberty, 26 SAN DIEGO L. REV. 327, 330 (1989); see also 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, 601 (1990) (“[T]he current constitutional mainstream sees the unconstitutional conditions doctrine as an effort to preserve legal requirements of governmental neutrality under different social and economic conditions.”). Another way of putting it is that the doctrine sets a limit on economic inequality by prohibiting the government’s power to impose a surcharge on the poor for exercising their constitutional rights. Professor Baker argues that the core of the doctrine’s consistency in the context of public assistance lies in “the Court’s tacit attempt to ensure a certain non-wealth-dependent equality of constitutional rights within the constraints of our market economy.” Baker, supra note 31, at 1188.

narily provided by ownership of private property so that they may, in a limited way, belong to the democratic polity. As Cass Sunstein explains,

the creation of property rights should be seen as an unconstitutional conditions doctrine writ very large. The idea is that government may not use its power over property to pressure rights in general; the existence of property rights generates a strong barrier against this form of pressure, just as the unconstitutional conditions doctrine provides a degree of insulation in narrower settings.43

Sunstein's comparison helpfully highlights the relationship between property, liberty, and unconstitutional conditions, but I would stress even more than Sunstein the inferiority of the unconstitutional conditions doctrine to property rights. The unconstitutional conditions doctrine tries to squeeze the propertyless into a constitutional framework designed to include only property owners.

In short, the unconstitutional conditions doctrine accepts the current unequal distribution of wealth, as well as the view of liberty as protection against state interference in that unequal arrangement.44 It attempts to minimize the harm to those who fall at the bottom (or completely out of bounds), without changing the basic order of things.

B. The Doctrine's Paradox

This view of unconstitutional conditions is paradoxical because it seeks to immunize a private sphere from state interference while at the same time requesting public assistance. It seeks to disconnect the demand for privacy from government intrusion and the demand for government intervention through financial support. It relies on the liberal resistance to government while hoping for the illiberal assistance of government. In order to determine the constitutionality of the condition, the doctrine requires us to close our eyes for a moment and pretend that poor women are not dependent on government assistance; then we may open our eyes the next moment and plead for government support for their decision to have children.45

43. Id. at 916.
44. Sunstein notes that his defense of property rights is not inconsistent with redistributive programs. See id. at 917 (proposing redistributive programs designed “to bring about at least rough equality of opportunity and, even more important, freedom from desperate conditions, or from circumstances that impede basic human functioning”); see also SUNSTEIN, supra note 28, at 138-40 (also proposing redistributive programs). The unconstitutional conditions doctrine, however, serves to avoid the need for such redistribution. For an argument that the Framers' view of property, upon which Sunstein relies, would justify a more expansive redistribution of wealth than Sunstein proposes, see William E. Forbath, Why Is This Rights Talk Different from All Other Rights Talk? Denouncing the Court and Reimagining the Constitution, 46 STAN. L. REV. 1771, 1788 (1994) (book review).
45. Marion Smiley notes a similar dilemma posed by the libertarian approach to state paternalism—the state's making of personal choices for individuals. Smiley argues that the concept of state paternalism as a violation of an individual's right to free choice in the private sphere forces us to choose between accepting state paternalism in the interests of providing welfare and letting individuals suffer in the interests of preserving their autonomy. See Smiley, supra note 40, at 5.
The unconstitutional conditions doctrine inevitably crumbles as a device for maintaining the boundaries between private and public spheres because it fails to justify the affirmative demand for public support for private decisions. This does not mean that making these private and public demands is necessarily inconsistent. My point is that the unconstitutional conditions doctrine does not help us to reconcile them. The growing conservative assault on welfare spending may finally compel us to abandon the unconstitutional conditions doctrine in this context and confront directly the social and political implications of citizens’ reliance on government welfare. Instead of seeking indeterminate answers through unconstitutional conditions analysis, we would inquire directly into the substantive constitutional values at issue—the boundaries of women’s right to reproductive autonomy and of poor citizens’ right to participate in the political community.

C. Dependence as a Waiver of Privacy

Because the unconstitutional conditions doctrine maintains the liberal boundary between public and private realms, it fails even to address most government interference in the private lives of welfare recipients. The sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance. An individual’s acceptance of government benefits is deemed to constitute a waiver of privacy. The Court has routinely allowed the state to regulate poor families by conditioning benefits on conformance to various mandates. Since families are not entitled to government support, the Court reasons, the government may force them to break up, rearrange, shrink and open up for inspection in order to qualify for benefits. Although the Court might find an egregious invasion of poor families’ privacy to be unconstitutional, most of the day-to-day decisions of family life remain vulnerable to state regulation. This use of the government’s spending power to supervise the everyday lives of poor families is not even analyzable as an unconstitutional conditions problem because the government has not interfered with any constitutionally protected activity by the recipients.

This loss of privacy often entails state intrusion in welfare recipients’ reproductive decisionmaking. From the inception of welfare programs in America, states conditioned payments on mothers’ compliance with standards of sexual and reproductive behavior. The Social Security Act, for example,

47. See FINEMAN, supra note 46, at 185.
49. For historical accounts of welfare policy’s regulation of women and their families, see
allowed states to condition eligibility for Aid to Dependent Children upon mothers’ sexual morality through suitable-home or “man-in-the-house” rules. More recently, women on welfare have been required, as a condition of receiving benefits, to undergo mandatory paternity proceedings that include state scrutiny of their intimate lives. Under the Family Support Act of 1988, the states are required to meet federal standards to establish the paternity of children born out of wedlock as a means of procuring child support from the absent fathers. The House Republicans’ Personal Responsibility Act contains more coercive measures: it denies AFDC benefits for a child whose paternity has not been established and directs states to warn unmarried pregnant women of their ineligibility for state aid unless they cooperate in establishing the child’s paternity.

In her recent book, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies, Martha Fineman argues that the law confers privacy only on the “traditional” family, composed of a husband, a wife, and their children. Privacy doctrine does not shield from state intrusion single mothers, including women who have children outside of marriage and divorced mothers:

If nonintervention is the norm, bureaucratic decisions are burdened, and the institution of family can be set up practically and theoretically as a construct to mediate against the power of the state. The private family enjoys the noninterventionist norm; the expectations and claims these favored units have vis-à-vis the larger society are unavailable to single mother families.

Fineman also notes that “private” traditional families receive huge public subsidies through government and other programs, such as tax breaks, government-backed mortgages, and employer-subsidized health and life insurance. Unlike “public” families, however, their reliance on government support does not entail a loss of privacy. Although Fineman is correct that the denial of

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51. Fineman, supra note 40, at 186; see Roe v. Norton, 422 U.S. 391 (1975) (approving requirement of welfare mothers’ assistance in paternity actions); Allen v. Eichler, No. 89A-FE-4, 1990 WL 58223 (Del. Super. Ct. 1990) (order denying benefits to a woman who refused to submit a calendar on which she had allegedly written the names of her sexual partners).


53. Personal Responsibility Act, supra note 8, §§ 101, 103.

54. Fineman, supra note 40, at 177-93.

55. Id. at 186; see also Robert A. Burt, The Constitution of the Family, 1979 SUP. CT. REV. 329, 339-40 (noting that the Court’s protection of parental decisionmaking depends on parents’ success “in bringing obedient social conformance from their children”); Martha Minow, The Free Exercise of Families, 1991 U. ILL. L. REV. 925, 944 (“The state can defend many burdens on individual choice in the name of a state interest in preserving or supporting the ‘traditional’ family.”).

56. Fineman, supra note 40, at 191; see also Gordon, supra note 49, at 1-13 (describing the stratification of the United States welfare system).
single mothers’ privacy is based on patriarchal definitions of family, it is also
ture that dependence on government aid provides an additional rationale, as
well as the opportunity, for state regulation. Wealth can help to buy the
presumption of privacy.

V. WHAT’S WRONG WITH GOVERNMENT RESTRICTIONS ON PROCREATION?

An alternative approach to government’s conditional spending focusses on
its systemic political impact instead of its infringement of individual women’s
(waivable) rights. We might examine how this use of government largesse
perpetuates unjust relationships of power in our society. Contraceptive welfare
laws degrade the dignity and equal status of poor citizens. This political di-

mension is revealed by comparing welfare proposals with eugenic policies that
proliferated in America during the first half of the twentieth century. Con­
trceptive welfare laws do not implement eugenic policy; they do not seek to
improve the nation’s stock through genetic selection. Nevertheless, we can
understand the injustice of conditioning welfare on relinquishing reproductive
autonomy by examining what these proposals share in common with eugenic
programs.

The salient feature of both eugenic sterilization laws and contraceptive
welfare proposals is their imposition of society’s restrictive norms of procre­
ation. Denying someone the right to bear children deprives her of a basic part
of her humanity; it constitutes a denial of her human dignity and equal status
in society. It is grounded on the premise that people who depart from social
norms do not deserve to procreate. Carrie Buck, the nineteen-year-old whose
involuntary sterilization was held constitutional by the United States Supreme
Court, was punished by sterilization not because of any mental disability,
but because of her deviance from society’s social and sexual norms. Indeed,
the state’s reasons for sterilizing Carrie Buck in 1924—because she was poor

57. I discuss elsewhere how racism interacts with patriarchy in limiting the privacy of poor,
single mothers. See Dorothy E. Roberts, Racism and Patriarchy in the Meaning of Motherhood, in
MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 224 (Martha
A. Fineman & Isabelle Karpin eds., 1995). I note that “the state has always considered Black
mothers, whether married or single, to need public supervision and not to be entitled to privacy.
Thus, the ‘public’ single mother has never had a Black counterpart in the ‘private’ family.” Id. at
248 n.6.

58. Kathleen Sullivan’s interpretation of the unconstitutional conditions doctrine as a tech­
ique for contesting the “systemic effect of conditions on distribution of rights in the polity as a
whole” offers another systemic approach to conditional government spending. She describes one
invidious effect as the creation of a constitutional caste as a result of discriminating among right­
holders on the basis of their relative dependency on a government benefit. See Sullivan, supra
note 38, at 1421, 1489-99.

59. See generally MARK H. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN
THOUGHT (1983); REILLY, supra note 17 (discussing involuntary sterilization).

60. Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color,


(“Her case never was about mental deficiency; it was always a matter of sexual morality and
social deviance... Two generations of bumsards are enough.”).
and had become pregnant out of wedlock—were precisely the same as the state’s reasons for enacting contraceptive welfare laws today.\(^{63}\)

Eugenicists framed their arguments not only in terms of improving the race, but also in terms of reducing the cost of subsidizing the unfit. In his celebrated study of a degenerate family, *The Jukes*, Richard L. Dugdale included detailed calculations of the amounts the Jukes had cost New York state by 1877. He estimated the family’s financial burden to society at over a million and a quarter dollars of loss in 75 years, caused by a single family 1,200 strong, without reckoning the cash paid for whiskey, or taking into account the entailments of pauperism and crime of the survivors in succeeding generations, and the incurable disease, idiocy, and insanity growing out of this debauchery, and reaching further than we can calculate.\(^{64}\)

Later, the country’s leading eugenicist, Charles Davenport, asserted, [i]t is a reproach to our intelligence that we as a people, proud in other respects of our control of nature, should have to support about half a million insane, feeble-minded, epileptic, blind and deaf, 80,000 prisoners and 100,000 paupers at a cost of over 100 million dollars per year.\(^{65}\)

Government control of reproduction in the name of science, social policy, or fiscal restraint masks racist and classist judgments about who deserves to bear children. The contraceptive welfare proposals implement a belief that poor people, especially Blacks, are less entitled to be parents. The debate about Norplant and welfare was initiated by an editorial in the *Philadelphia Inquirer* that proposed Norplant as a solution for the high poverty rate of Black children.\(^{66}\) After the public outcry, which led to a printed apology,\(^{67}\) few policymakers have explicitly directed their proposals at Black women.\(^{68}\) Yet welfare reform remains closely tied to racial politics. Although most families who receive AFDC are not Black, Black women disproportionately rely on this form of government aid to support their children.\(^{69}\)

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\(^{65}\) Charles B. Davenport, *Heredity in Relation to Eugenics* (1911).


\(^{68}\) David Duke is a notable exception. During his successful campaign for election to the Louisiana legislature, Duke, a former Grand Wizard of the Ku Klux Klan, ran on a platform of “concrete proposals to reduce the illegitimate birthrate and break the cycle of poverty that truly enslaves and harms the Black race.” William H. Tucker, *The Science and Politics of Racial Research* 294 (1994) (citation omitted). These programs included making welfare contingent on sterilization and offering cash bonuses to women on welfare who consented to the procedure. Duke was the sponsor of the Louisiana bill offering cash bonuses for Norplant insertion. Duke is also an outspoken proponent of eugenics. See Craig Fournier, Duke Says His Proud of Years as Klan Chief, DALLAS MORNING NEWS, June 17, 1992, at A1 (quoting Duke as saying in 1985 that the "'real answer to the world's problems' is 'promoting the best strains, the best individuals,'—ideas he defined as Nazism").

\(^{69}\) See COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, OVERVIEW
Moreover, the American public associates welfare given to single mothers with the image of the mythical Black "welfare queen" or teenager who deliberately becomes pregnant in order to increase the amount of her monthly check. It is fair to say, then, that welfare policies designed to discourage childbirth will disproportionately affect Black women and may be targeted at these very women.

During the eugenic movement's heyday in America, many poor women were judged mentally deficient and were briefly institutionalized in order to undergo sterilization. A 1928 Wisconsin study of women who were discharged after being sterilized in institutions for the feeble-minded found: "Many mentally deficient persons by consenting to the operation are permitted to return, under supervision, to society where they become self-supporting social units and acceptable citizens. Those inmates unwilling to consent to the operation remain segregated for social protection as well as individual welfare." These poor women's social acceptability was contingent on their consent to sterilization. Women who agreed to the procedure were rewarded with permission to enter society. Those who refused were punished with social segregation.

This restriction on "feeble-minded" women's ability to participate in society inflicts the same injury as the contraceptive welfare proposals. The harm of unconstitutional conditions is not to be found solely in the conditions they place on government benefits (seen as the violation of individual rights), but in the conditions they place on poor women's acceptability for citizenship. Poor women are entitled to the benefits of society only if they agree not to reproduce. According to these policies, an acceptable poor woman is one who consents to use birth control: the only good poor woman is an infertile poor woman.

VI. EXPLAINING PUBLIC RESPONSIBILITY FOR "PRIVATE" DECISIONS

If we reject the unconstitutional conditions doctrine in the context of welfare, we are left to make an affirmative claim to public assistance for "private" decisions. Such a claim is incomprehensible under current constitutional doctrine because of the barrier it has erected between public and private domains. In order to claim government assistance, then, we must challenge this wall of constitutional thinking.

Americans' resentment at paying for poor women's reproductive decisions stems from the particular unfairness associated with taxation for the purpose of providing public assistance to the poor, as well as with public support of pri-

71. Reilly, supra note 17, at 95-100.
72. Id. at 101-02 (emphasis added).
vate matters. The law circumscribes property rights in a number of ways, and the government confiscates citizens' property in the form of taxes for a variety of purposes. Tax money even goes to many redistributive programs, such as social security, farm subsidies, and corporate bailouts. Nevertheless, citizens reserve a special condemnation for welfare that redistributes income to the poor. Lee Anne Fennell locates this unique sense of offense to property rights in welfare's violation of norms connecting property to work:

This added element of distaste relates to the perceived unfairness of confiscating money—money by and large earned through work—for the purpose of providing an income to able-bodied, working-aged persons who have failed to earn their own living through work. It is a short step to the assertion that the more well-off are being forced to work for the benefit of others (and rather undeserving others, at that), at which point analogies to "forced labor" spring readily to mind.

This sentiment about welfare's unfairness has long been buttressed by the vilification of welfare recipients as undeserving and morally blameworthy.

Added to this source of unfairness is the view that public remedies should be reserved for publicly-caused problems; citizens must rely on private means to solve problems of their own making. If citizens request public assistance for private matters, according to this view, that assistance justifies state regulation of their private decisions. This is why receiving welfare is seen to deprive poor people of privacy. The critical foundation of this understanding of welfare is the premise that both the poor and the nonpoor are responsible for their economic positions, that both poverty and property are derived from individual merit.

Claims to public assistance for private decisions must refute this view of welfare's unfairness. They might be based on notions of reparations for past injustice or collective responsibility for current inequalities. To begin with, our current market system benefits decently employed or otherwise wealthy citizens at the expense of others who work for poverty wages or cannot find jobs. Free market capitalism, as well as American fiscal policy, guarantees that a portion of the population will be unemployed at any given time. As Christopher Jencks explained,

America's economic history since 1945 suggests that we need what Marx called a "reserve army of the unemployed." Without it, workers will push up their wages faster than their productivity, inflation will accelerate, and the Federal Reserve Board will throw the economy into a recession in order to restore price stability.

74. Id. (citing ROBERT NOQUICK, ANARCHY, STATE, AND UTOPIA 27 (1974)).
76. Id.; idem 200, at 126; see Starr, supra note 12, at 9 (noting that "[t]he anti-inflation policies pursued by the Federal Reserve and applauded by Gingrich and most other conser-
This flaw in market economics was exacerbated by the transformation of the American economy after World War II that diminished the demand for blue-collar and unskilled workers and particularly marginalized Black workers. Moreover, institutional barriers have prevented disempowered citizens from fully participating in the political process and the economy. As Loic Wacquant and William Julius Wilson conclude, "[t]he growth of welfare in the inner city is but a surface manifestation of deeper social-structural and economic changes, including deindustrialization, skyrocketing rates of joblessness, the increasing concentration of poverty, and racial polarization."79

Women are disadvantaged in the labor market by sex discrimination and by workplace rules that assume workers have no child care obligations. Black single mothers—who make up a disproportionate share of the AFDC rolls—are frustrated by all of these structural impediments. While other industrialized countries structure their markets and social programs to reduce poverty and wage inequality, American social policies and legal rules actively encourage these conditions.81

So far, these arguments refute the absolute rejection of public assistance for the poor as undeserved. But why should the state provide more than the minimal means of survival to needy citizens and why does the Constitution require this? It is beyond the scope of this essay on unconstitutional conditions to elaborate these redistributive constitutional arguments. I will suggest, however, two arguments elaborated by others that warrant further exploration and advocacy.

First, we might replace the concept of privacy as a purely negative right with the concept of liberty as human flourishing that affirmatively guarantees the needs of human personhood.82 Guided by a substantive vision of human flourishing, this interpretation of liberty guaranteed by the Due Process Clause requires the government to eliminate illegitimate social coercion based on race, gender, and class, as well as to provide the prerequisites for meaningful par...
participation in the national community. According to Robin West, "[t]he goal is an affirmatively autonomous existence: a meaningfully flourishing, independent, enriched individual life."\(^83\)

Second, claims to public assistance might also be based on the requirements of democracy. A truly democratic society has the obligation to provide its members with the prerequisites of political participation.\(^84\) William Forbath, for example, draws upon an ideal of equality embodied in the Civil War Amendments "in which racial and economic justice are entwined."\(^85\) The Reconstruction-era radicals' solution to the problem that poverty poses for democracy was not the unconstitutional conditions doctrine, but redistribution of wealth and resources. According to Forbath, "they thought, in Akhil Amar's apt phrase, that 'property is such a good thing . . . so constitutive, so essential for both individual and collective self-governance,' that 'every citizen should have some.'"\(^86\) Forbath finds historical support for a positive constitutional vision that offers more than state provision of the bare minimum necessary for subsistence. Instead of focusing on welfare entitlements, Forbath argues, every previous generation of reformers "sought more complex and autonomy-enhancing institutional reforms to secure the constitutional norms of decent livelihoods, independence, responsibility, and remunerative work."\(^87\)

CONCLUSION

The unconstitutional conditions doctrine maintains the liberal connection between property and privacy and the liberal separation between public intrusion and private decisions. A progressive vision of economic and political justice challenges both. This general vision leaves open a number of questions about the claim to government assistance. Should we see it as a right to government funding of particular activities, or to broad economic redistribution that ensures all citizens the property necessary for private autonomy and democratic participation? Should we prefer universal programs that might garner broad-based support and blur distinctions between the poor and nonpoor or means-tested and race-based programs strategically directed at dismantling institutional inequalities? Should we direct our efforts to the courts, legislatures, or both? Moreover, establishing a collective obligation to support the prerequisites for democracy or human flourishing will not necessarily deprive the government of any power to regulate these activities. But it will force the government to justify its regulation on more legitimate terms. There are numerous tasks to pursue in constructing a more dignified and egalitarian welfare system. The unconstitutional conditions doctrine, however, points us in the wrong direction.

\(^{83}\) West, supra note 82, at 707.
\(^{85}\) Forbath, supra note 44, at 1762.
\(^{86}\) Id. at 1745 (quoting Akhil R. Amar, Forty Acres and A Mule: A Republican Theory of Minimal Entitlements, 15 Harv. J.L. & pub. Pol'y 37 (1990)).
\(^{87}\) Id. at 1789.