

## **Paid Sterilizations for Poor Women: Coercing Them Out Of Poverty**

**By: Lynette Roberson**

### **Introduction**

Nadya Suleman, a 33-year-old woman, gave birth to octuplets in January 2009. Each infant survived the birth and continues to grow healthier (as of the time of publication). Suleman has received much media attention and public support for this medical miracle. However, the public soon discovered that the young mother was single, unemployed, living with her parents, had six other children under the age of eight, and received public assistance through food stamps and disability programs for herself and her three disabled children.<sup>1</sup> The public expressed outrage at the possibility of having to pay for Suleman's hospital bills and continue government aid for a family that she could not afford to support. "The outrage . . . is from regular people trying to raise their families in a poor economy," said California State Senator Sam Aanestad.<sup>2</sup> Seventy percent of people polled by *USA Today*, a national newspaper, were unsympathetic toward Suleman and her family.<sup>3</sup> The public has little tolerance for parents who procreate beyond their financial means.<sup>4</sup>

Louisiana Representative John LaBruzzo of Metairie is the former Vice-Chairman of the Louisiana House Health and Welfare

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<sup>1</sup> Public assistance is available to low-income families through a number of federal programs, paid by correlating state agencies. *See generally* U.S. FED. GOV'T, CATALOG OF FEDERAL DOMESTIC ASSISTANCE, [https://www.cfda.gov/downloads/CFDA\\_2008.pdf](https://www.cfda.gov/downloads/CFDA_2008.pdf) (last visited June 15, 2009). Suleman received benefits through the U.S. Department of Agriculture's Special Supplemental Nutrition Program for Women, Infants and Children ("WIC") and the Social Security Administration's disability benefits programs. *Taxpayers may be covering octuplet Mom's bills*, MSNBC.COM, Feb. 12, 2009, <http://www.msnbc.msn.com/id/29147091>. When this article refers to "welfare," it will refer to any form of public aid for needy families, including housing assistance through the Department of Housing and Urban Development ("HUD", commonly known as "Section 8" or public housing).

<sup>2</sup> Wendy Koch, *Octuplets' Mother Faces Public Backlash*, USATODAY, Feb. 18, 2009, [http://www.usatoday.com/news/nation/2009-02-18-octuplets\\_N.htm](http://www.usatoday.com/news/nation/2009-02-18-octuplets_N.htm).

<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

Committee. In September 2008, he suggested a plan to reduce the state's public assistance payments to poor residents. He projected that, one day, persons receiving state assistance would outnumber taxpayers. His suggested solution to the potential problem is that the state should offer poor people \$1,000 to undergo sterilization: tubal ligation for women and vasectomy for men.<sup>5</sup> Rep. LaBruzzo also proposed that college-educated, affluent couples receive tax incentives to have more children. His idea could be viewed as concern for the financial welfare of families receiving state assistance. "If [there are] fewer of them, we can do more for them."<sup>6</sup> Later, LaBruzzo adjusted his stance by offering temporary forms of birth control to poor women, again seemingly concerned that they may want to have more children when they are in a better financial position.<sup>7</sup> There are few additional details about LaBruzzo's plan; LaBruzzo explained that this idea had not been thoroughly researched before being made public by several media sources.<sup>8</sup> Shortly thereafter, he was removed from his leadership position in the state House of Representatives.<sup>9</sup>

Considering the above, why would it be unethical for a state legislature to prevent generational welfare for the sake of the state's finances? The problem is that the program resembles eugenic<sup>10</sup> sterilization programs previously used in the United States and other countries to reduce unwanted populations. These programs forced

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<sup>5</sup> A tubal ligation is the "interruption of the continuity of the oviducts by cutting, [cauterization or burning], or by a plastic or metal device to prevent future conception." STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000), <http://www.westlaw.com> (enter citation as "STEDMANS 228440"). Vasectomy, here, means an "excision of a segment of the *vas deferens* performed. . . to produce sterility." *Id.* at STEDMANS 432130.

<sup>6</sup> Mark Waller & Jan Moller, *LaBruzzo Welfare Views out of Sync: State's Welfare Rolls Shrinking for Years*, THE TIMES-PICAYUNE, Sept. 25, 2008, available at 2008 WLNR 18188250.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Robert Travis Scott, *LaBruzzo Stripped on House Health Committee: Sterilization Debate Seen as Impeding Leadership*, THE TIMES-PICAYUNE, Oct. 7. 2008, available at 2008 WLNR 19029497.

<sup>10</sup> "Eugenics" is derived from the Greek word *eugenēs*, meaning "wellborn." It is the "science that deals with the improvement (as by control of human mating) of hereditary qualities of a race or breed." MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/eugenics> (last visited June 15, 2009).

groups to undergo sterilization for their own good and for the good of the country, but were condemned and discontinued after widespread use by the Third Reich.<sup>11</sup> Although LaBruzzo's proposal entails voluntary acts, it still requires that the participants submit their fertility to the state's purposes and to surrender fundamental reproductive rights.<sup>12</sup> Most importantly, the state, in its authority, targets people who rely on it for basic needs and dangle cash in front of them in exchange for their rights. The imbalance of power and the dire need of the participants make this program coercive — not voluntary. If the state is truly concerned with supporting a financially healthy citizenry, policymakers would do better by considering and addressing the causes of generational poverty, rather than preying on vulnerable citizens and their fundamental rights. There is no evidence that sterilization reduces poverty.

Part I of this article will discuss the similarities between LaBruzzo's plan and its predecessors in federal law and Louisiana state law. Part II addresses the seemingly voluntary nature of the program and raises key challenges that the plan presents, including legal challenges under contract law, unexpected consequences, and outcomes of similar programs tried elsewhere. These challenges and criticisms of the plan are not limited to its application in Louisiana. Part III acknowledges the state's interests in controlling its budget and debunks claims that families are profiting from public assistance. Part IV offers appropriate alternatives that would more adequately address LaBruzzo's concerns. Part V concludes the article.

### **Part I: History of Compulsory Sterilization**

Sterilization programs in the United States were most prevalent around the beginning of the 20<sup>th</sup> century.<sup>13</sup> When immigrants began reproducing at a higher rate compared to educated,

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<sup>11</sup> ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/195069/eugenics> (main entry) (last visited on June 15, 2009).

<sup>12</sup> Reproductive choices have been held to fall within the fundamental, constitutional right of privacy. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

<sup>13</sup> SIMONE M. CARON, WHO CHOOSES?: AMERICAN REPRODUCTIVE HISTORY SINCE 1830 44 (2008).

middle- and upper-class white women on birth control, there was a panic.<sup>14</sup> Some theorists feared that the population growth among weaker, undesirable citizens would outpace that of educated people,<sup>15</sup> resulting in a Greek and Roman empire-like fall for American society.<sup>16</sup> Such theorists feared a drain on society as well, as evidenced by Richard Dugdale's 1877 study of the Juke family of Long Island, New York.<sup>17</sup> Dugdale found that the five to six generations of the Jukes included eighteen who had maintained brothels, more than 200 had been on public assistance, and over twenty-six had been convicted criminals.<sup>18</sup> Dugdale estimated that the Jukes had cost the public \$1.3 million in support.<sup>19</sup> The study proved the "propagation of undesirable traits and the drain of those traits on society."<sup>20</sup> This evidence was used by governments to force citizens with undesirable traits to be permanently sterilized through salpingectomy,<sup>21</sup> searing (or cauterization), or vasectomy.<sup>22</sup> Undesirable citizens included not only institutionalized disabled citizens, particularly the "feeble-minded" (those with mental disabilities)<sup>23</sup> and those suffering from epilepsy,<sup>24</sup> but also ethnic or religious minorities,<sup>25</sup> the poor, the uneducated, or criminals like the Jukes.<sup>26</sup> The programs were instituted for the good of those sterilized, relieving them of the burden of having children that were unwanted and disabled like their parents, and for the good of society, by keeping these defectives from burdening society and compromising desirable traits.<sup>27</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> LEON F. WHITNEY, THE CASE FOR STERILIZATION 105-09 (1934).

<sup>16</sup> CARON, *supra* note 13, at 48.

<sup>17</sup> Jennifer S. Geetter, *Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System*, 28 AM. J.L. & MED. 1, 9 (2002).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; CARON, *supra* note 13, at 50.

<sup>20</sup> Geetter, *supra* note 17.

<sup>21</sup> Salpingectomy is a procedure whereby one or both of the fallopian tubes are removed. STEDMAN'S MEDICAL DICTIONARY, *supra* note 5, at STEDMANS 362510.

<sup>22</sup> See WHITNEY, *supra* note 15, at 21-22, 28.

<sup>23</sup> *Id.* at 120.

<sup>24</sup> *Id.*

<sup>25</sup> These sentiments were more often directed toward German, Irish, and Italian immigrants who were dependent on public assistance, not toward black Americans. CARON, *supra* note 16, at 46-47.

<sup>26</sup> *Id.* at 44.

<sup>27</sup> See WHITNEY, *supra* note 15, at 165.

In 1913, Pope Pius XI publicly denounced these programs as denigrating to their victims. He noted the similar treatment of undesirables and criminals, both having the stigma of sterilization. However, the only crime committed by the undesirables was producing “defective children, even through use of all care and diligence.” These programs, the Pope added, rendered the people “unfit for natural functions” such as procreation and marriage. The Pope stated that the state, by forcing certain people to comply, was attempting to legislate and assert authority over that which it never owned — the procreative faculties of its people.<sup>28</sup>

The Supreme Court advocated the eugenic purpose of sterilization programs in the compulsory sterilization case, *Buck v. Bell*.<sup>29</sup> Carrie Buck was a ward of the state and had been abandoned by her mother as a baby.<sup>30</sup> Her mother, Emma Buck, was a prostitute who was eventually institutionalized for being mentally disabled and unable to care for herself and her other children.<sup>31</sup> Carrie was a product of several generations of “the shiftless, ignorant, worthless class of anti-social whites of the South.”<sup>32</sup> Carrie was institutionalized at the Virginia Colony for Epileptics and Feeble-Minded because she was not able to care for herself<sup>33</sup> and was labeled as mentally defective for purported “untruthfulness, immorality, and prostitution.”<sup>34</sup> As a young woman, Carrie was impregnated after being raped.<sup>35</sup> It was believed that both she and her progeny would become wards, and thus “menace[s],” to the state.<sup>36</sup> Consequently, under the laws of Virginia, Carrie was recommended for sterilization for her own good and the good of society.<sup>37</sup>

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<sup>28</sup> *Id.* at 191-92.

<sup>29</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>30</sup> THOMAS M. SHAPIRO, *POPULATION CONTROL POLITICS: WOMEN, STERILIZATION, AND REPRODUCTIVE CHOICE* 3-4 (1985).

<sup>31</sup> WHITNEY, *supra* note 15, at 158.

<sup>32</sup> *Id.*

<sup>33</sup> *Buck*, 274 U.S. at 205.

<sup>34</sup> WHITNEY, *supra* note 15, at 157.

<sup>35</sup> SHAPIRO, *supra* note 30.

<sup>36</sup> WHITNEY, *supra* note 15, at 168.

<sup>37</sup> *See Buck*, 274 U.S. at 206.

Under the Virginia Eugenical Sterilization Act of 1924, the superintendent of the colony where Carrie was an inmate filed a petition with the institution's Board of Directors, which ordered the sterilization.<sup>38</sup> The Act was based on a legislative finding that persons institutionalized for "insanity, idiocy, imbecility, epilepsy and crime" were likely to pass that trait to their children.<sup>39</sup> Such persons would be institutionalized for the duration of their reproductive years<sup>40</sup> preventing them from "propogat[ing] their kind"<sup>41</sup> and creating greater burdens on the state.<sup>42</sup> Permanent sterilization was touted as the ultimate rehabilitation therapy and the key to freedom for patients who would otherwise be institutionalized for decades.<sup>43</sup> After undergoing the procedure, the patient would be released from the institution still young enough to marry or to learn to support themselves.<sup>44</sup> Thus, the state would no longer have to support these "menace[s] to society"<sup>45</sup> and would avoid the threat of supporting their unwanted, "defective" children.<sup>46</sup>

Carrie, through a guardian,<sup>47</sup> appealed the Board's order to the county Circuit Court<sup>48</sup> and claimed that the Virginia Eugenical Sterilization Act of 1924 denied her due process and equal protection of the laws.<sup>49</sup> The Circuit Court and the State Supreme Court affirmed the decision of the State Eugenics Board.<sup>50</sup> The U.S. Supreme Court, in a short, eight-to-one majority opinion written by Justice Oliver Wendell Holmes, affirmed the holdings of the lower courts. Regarding due process rights, the Supreme Court held that the sterilization statute did not violate the constitutional due process

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<sup>38</sup> *Id.*

<sup>39</sup> Univ. of Va. Health Sys., Claude Moore Health Sciences Library, Virginia's Racial Integrity Act of 1924, <http://www.hsl.virginia.edu/historical/eugenics/exhibit2-9.cfm> (last visited June 15, 2009).

<sup>40</sup> WHITNEY, *supra* note 15, at 162.

<sup>41</sup> Univ. of Va. Health Sys., *supra* note 39.

<sup>42</sup> *Id.*

<sup>43</sup> WHITNEY, *supra* note 15, at 162-63.

<sup>44</sup> *Id.*

<sup>45</sup> Univ. of Va. Health Sys., *supra* note 39.

<sup>46</sup> WHITNEY, *supra* note 15, at 165.

<sup>47</sup> *Id.* at 200.

<sup>48</sup> *Id.* at 205-6.

<sup>49</sup> *Id.* at 205.

<sup>50</sup> *Buck*, 274 U.S. at 205.

rights of state wards by sterilizing them against their will, because the inmate could have her guardian (or one appointed by the Board) to advocate for her interests.<sup>51</sup> On the equal protection issue, the Court held that the Act presented no equal protection issue because it was narrowly tailored to apply to only a small group of people (those institutionalized) and the state properly sought to apply that law to everyone within that group.<sup>52</sup>

The most devastating legacy of *Buck v. Bell*, though, is the Court's fervent support of the compulsory sterilization programs in dicta. The Court argued that the states' authority to implement compulsory vaccination programs to prevent the spread of disease also gives them broad enough authority to compel sterilization to prevent the spread of heritable disabilities.<sup>53</sup> With regard to equal treatment under the law, the Court asserted that equality among citizens would be more nearly reached when the institutions found a way to return inmates to society and to free up space for others who needed to be treated.<sup>54</sup> The Court viewed sterilizations as a rehabilitative tool and called on some citizens to be unselfish, receive the cure, and return to society. It characterized submission to sterilization as patriotic:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . .

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<sup>51</sup> *Id.* at 206; WHITNEY, *supra* note 15, at 160.

<sup>52</sup> *See Buck*, 274 U.S. at 208.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Three generations of imbeciles are  
enough.<sup>55</sup>

This was a victory for eugenicists and established the constitutionality of American eugenics laws thereafter implemented.

Similar programs were instituted in Canada, Switzerland, Denmark, and England. Eugenics proponents in the United States often hailed the German compulsory programs administered by Adolf Hitler as more sophisticated in the way in which it dealt with Germany's "defectives."<sup>56</sup> However, by the 1930s and 1940s, after Nazi programs were used to exterminate entire races, eugenics programs carried a stigma that led one-time supporters to denounce them. The United States attempted to distance itself and its own similar programs from the Nazi regime.<sup>57</sup> Nazi leaders were tried and convicted at Nuremberg for implementing these programs.<sup>58</sup> State governments were subsequently encouraged to repeal their compulsory sterilization laws.<sup>59</sup> *Buck v. Bell* has not been used to support sterilizations since then, but it has not been overruled either. Nevertheless, courts have since recognized a liberty interest among mentally disabled citizens in avoiding sterilization.<sup>60</sup> Guardians of mentally disabled persons — not the governments — may petition courts to obtain sterilizations for their wards, if due process safeguards are maintained.<sup>61</sup>

#### Race and fighting the underclass: Klansman and Representative David Duke

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<sup>55</sup> *Id.* at 207.

<sup>56</sup> WHITNEY, *supra* note 15, at 135-36.

<sup>57</sup> ENCYCLOPÆDIA BRITANNICA ONLINE, *supra* at note 11.

<sup>58</sup> *Id.* at <http://www.britannica.com/EBchecked/topic/422668/Nurnberg-trials> (main entry).

<sup>59</sup> ENCYCLOPÆDIA BRITANNICA ONLINE, *supra* at note 11 (see "Antieugenics Sentiment" section).

<sup>60</sup> *E.g.*, Vaughn v. Ruoff, 253 F.3d 1124, 1128 (8th Cir. 2001); *see* Lake v. Arnold, 232 F.3d 360, 370-71 (3d Cir. 2000).

<sup>61</sup> *E.g.*, Mich. Prot. and Advocacy Serv. v. Kirkendall, 863 F. Supp. 482, 482 (E.D. Mich. 1994); *In re Estate of K.E.J.*, 887 N.E.2d 704, 719-20 (Ill. App. 1st Dist. 2008); *In re Guardianship of V.S.D.*, 660 N.E.2d 1064, 1067 (Ind. App. 1996); *In re Wirsing*, 573 N.W.2d 51, 55 (Mich. 1998).

After World War II, eugenics was treated with much suspicion. However, the desire to decrease defective, burdensome populations was reintroduced by another Louisiana lawmaker, but with new targets. LaBruzzo's plan resembles the paranoia of a swelling poor population by one of his predecessors from the same district, former Representative David Duke, a notorious Ku Klux Klan leader turned politician.<sup>62</sup> Nearly twenty years before LaBruzzo, Duke also feared a "rising welfare underclass" and "called for a slowdown in the . . . welfare birthrate."<sup>63</sup> "If [welfare recipients] have fewer children being born," he said, "we'll have more money available for the housing and training and education for these people."<sup>64</sup> In other words, controlling the fertility of welfare recipients would be for their own good and the good of the state. Duke also proposed providing low-interest loans to top college graduates as incentive for them to procreate, exactly like Nazi programs.<sup>65</sup>

Duke's idea sparked accusations of the attempted genocide of racial minorities because, unlike the disability-focused programs illustrated in *Buck v. Bell*, his proposal resembled the Nazi programs that targeted underclass races. Duke used the idea of controlling poor populations to gain supporters for his local, state, and presidential campaign.<sup>66</sup> He drew upon white constituent's belief that programs for the disadvantaged, in which he included affirmative action and welfare, were morally outrageous and an unfair burden to hard-working white people.<sup>67</sup> He then combined this popular opinion with his controversial, eugenic solutions. Those who strongly supported his first idea were willing to believe that his solutions were reasonable.

The basic details of LaBruzzo's plan are based on old eugenics plans. He seeks to separate people into categories of defectives (i.e., welfare recipients) and desirables (i.e., more affluent, college educated people). LaBruzzo's plan is grounded on a fear that defectives will outnumber desirables. His proposal would reduce the

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<sup>62</sup> THE EMERGENCE OF DAVID DUKE AND THE POLITICS OF RACE 117 (Douglas D. Rose ed. 1992). However, Duke claimed that he never specifically suggested sterilization as the solution to this problem.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 107.

<sup>66</sup> *See id.* at 214.

<sup>67</sup> THE EMERGENCE OF DAVID DUKE AND THE POLITICS OF RACE, *supra* at note 62.

fertility and growth of the defective population, while encouraging the growth of the desirable population. He proposes the same, invasive, permanent procedure of sterilization, administered by the government. LaBruzzo sees this solution as beneficial to welfare recipients and as helping to attain the greater good. From Duke's plan, LaBruzzo borrowed the idea of targeting welfare recipients as the defective underclass. Like Duke, he perpetuates the image of this group siphoning off state resources. LaBruzzo also warns of fiscal tragedy because of welfare recipients attempting to get rich from public assistance.

LaBruzzo claims that his idea is not racist because most welfare recipients are white.<sup>68</sup> However, given the history of this plan, the stigma associated with similar plans, and the injection of racial bias added by his predecessor, the plan may always be regarded as having a racial and eugenic animus. Since nearly twenty-five percent of African-Americans are impoverished,<sup>69</sup> while representing only thirteen percent of the population,<sup>70</sup> African-Americans stand to suffer a disproportionate impact from such a plan. Overall, LaBruzzo's plan is unoriginal and based on eugenic programs rejected by previous policymakers as unethical and potentially genocidal.

## **Part II: The Predatory Nature of the Proposal and the Challenges It Creates**

### A Predatory Benefit Program

The coercion problems with LaBruzzo's idea are illustrated through a non-profit program in California with a similar idea. Project Prevention, formerly "Children Requiring a Caring Kommunity" or C.R.A.C.K., pays women to be sterilized. It was founded by Barbara Harris, a former foster mother familiar with the pre-natal and post-

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<sup>68</sup> Waller and Moller, *supra* at note 6.

<sup>69</sup> U.S. CENSUS BUREAU, POVERTY STATUS OF THE POPULATION IN 2003 BY SEX AND AGE, FOR BLACK ALONE OR IN COMBINATION AND WHITE ALONE, NOT HISPANIC: MARCH 2004 (2006), <http://www.census.gov/population/socdemo/race/black/ppl-186/tab16ic.html>.

<sup>70</sup> U.S. CENSUS BUREAU, POPULATIONS BY SEX AND AGE, FOR BLACK ALONE OR IN COMBINATION AND WHITE ALONE, NOT HISPANIC: MARCH 2004 (2006), <http://www.census.gov/population/socdemo/race/black/ppl-186/tab1ic.html>. (NOTE: Racial demographics of public assistance recipients are not available through the state or federal WIC program or HUD program).

natal effects of drug use. Harris unsuccessfully advocated for prenatal drug use to be classified as child neglect. Her program pays drug addicted women two-hundred dollars upon proof of sterilization or long-term use of birth control, to prevent the number of drug addicted births. Though there are some claimed similarities between this program and eugenic programs,<sup>71</sup> the legal ingenuity of the program is that it is voluntary and offers an incentive. Project Prevention claims that it is overcoming all of the legal challenges to paid sterilizations.

Janet Simmonds, writing in *Hastings Women's Law Journal*, accuses C.R.A.C.K. of using coercion to buy women's reproductive capacities and has challenged this "voluntary" program on several issues.<sup>72</sup> First, there is a question about the legal capacity of these self-admitted drug addicts to enter into this type of agreement. It is questionable whether they are sober enough to give informed consent to the procedure. However, Simmonds points out that a woman would need to be sober to undergo surgery, so incapacity would not be a successful attack on the agreement.<sup>73</sup> She also compares buying the reproductive capacity of these women to agreements that are against public policy.<sup>74</sup> She likens the agreements to the illegal acts of selling children or organs, and notes the unequal bargaining power involved as well as the potential for exploitation.<sup>75</sup>

Finally, C.R.A.C.K. claims that offering two-hundred dollars in cash is not coercive enough to force these women to give up their reproductive rights. As Simmonds points out, however, drug addicts are in need of cash when seeking an instant high and no amount would be too small. She claims it would not be paternalistic to seek to protect these women from such incentives; the program is predatory.<sup>76</sup> Though the program is controversial, there have been no reported legal challenges to it.

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<sup>71</sup> See Janet Simmonds, *Coercion in California: Eugenics Reconstituted in Welfare Reform, the Contracting of Reproductive Capacity and Terms of Probation*, 17 *HASTINGS WOMEN'S L.J.* 269, 282-83 (2006).

<sup>72</sup> *Id.* at 282.

<sup>73</sup> *Id.* at 285-86.

<sup>74</sup> *Id.* at 286-87.

<sup>75</sup> *Id.* at 286.

<sup>76</sup> Simmonds, *supra* at note 71, at 283-84.

LaBruzzo would claim that when welfare recipients are neither mentally incompetent, nor intoxicated, nor otherwise lacking capacity to contract, they would not be impaired enough to make such agreements voidable. However, the agreement would nevertheless be predatory by targeting poor women in need of cash. It would also be against public policy because there is no authority for the sale of fundamental reproductive rights.

**a. LaBruzzo’s idea preys on poor women.**

One of the key features of LaBruzzo’s idea that makes it so controversial is the seeming voluntary nature of the proposed program. Coercion compels a person to an act or a choice.<sup>77</sup> Under contract law, coercion may occur in an agreement between parties when one party is more influential than the other and uses its influence to obtain agreement from the weaker party.<sup>78</sup> The state has the authority to set and change the terms by which it subsidizes recipient’s basic needs — its existing contract with the recipient — through regulation of the paying state agency. In addition, poor women would be susceptible to the cash incentive because of their dire circumstances. For them, having basic needs met might be as attractive as cash might be for a drug addict. LaBruzzo’s idea would pay \$1,000 — equal to several months of welfare payments — for a recipient to be sterilized. While there is no established market for buying a person’s fertility, the program lowballs<sup>79</sup> poor women in exchange for an invasive, permanent medical procedure and for their constitutional rights. For those women, no price will be too small, and the program takes advantage of their circumstances.

**b. Paying for sterilizations is against public policy**

States purchasing citizens’ fundamental rights seems fundamentally unfair and against public policy. The decision of whether or not to have children is a fundamental right protected against governmental intrusion by the Fourteenth Amendment of the

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<sup>77</sup> MERRIAM-WEBSTER ONLINE, *supra* note 10, at <http://www.merriam-webster.com/dictionary/coerce> (last visited June 15, 2009).

<sup>78</sup> RESTATEMENT (SECOND) OF CONTRACTS §177 (1981).

<sup>79</sup> To lowball someone means “to give a deceptively low price.” MERRIAM-WEBSTER ONLINE, *supra* note 10, at <http://www.merriam-webster.com/dictionary/lowball> (last visited June 15, 2009).

U.S. Constitution.<sup>80</sup> A state may regulate reproductive rights only where it has a compelling interest in doing so.<sup>81</sup> For example, courts find the protection of potential life to be a compelling state interest.<sup>82</sup> However, for LaBruzzo's proposed legislation, the state interest would be in preventing potential life. There is no precedent to support a state's interest in preventing life.<sup>83</sup> Also, unlike other constitutional rights such as the right to trial by jury<sup>84</sup> or the right against self incrimination,<sup>85</sup> which can be waived,<sup>86</sup> there is an absence of a recognized voluntary waiver of fundamental reproductive rights in jurisprudence. LaBruzzo's proposed law has no authority or precedent for encroaching on this fundamental reproductive right.

Internationally, coercive sterilizations are shunned as unsuccessful and inhumane. As the former Prime Minister of India, Indira Gandhi had financial and population concerns similar to LaBruzzo's in 1975 when she declared a state of emergency and offered incentives to citizens to become sterilized.<sup>87</sup> Government employees who were sterilized received raises and government loans were granted only to sterilized people.<sup>88</sup> Even communities earned

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<sup>80</sup> *Carey v. Population Servs., Int'l.*, 431 U.S. 678, 687 (1977); *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Ruby v. Massey*, 452 F. Supp. 361, 365-66 (D.C. Conn. 1978); *accord* *Driessen v. Freborg*, 431 F. Supp. 1191, 1195 (D.C.N.D. 1977).

<sup>81</sup> *Carey*, 431 U.S. at 686 (1977); *Roe*, 410 U.S. at 155-56; *Planned Parenthood of R.I. v. Bd. of Med. Review*, 598 F. Supp. 625 (D.R.I. 1984).

<sup>82</sup> *Roe*, 410 U.S. at 170; *Planned Parenthood of R.I.*, 598 F. Supp. at 637.

<sup>83</sup> The state may express interests in the financial health of the mother or of the unborn child, the financial health of the state, or the welfare of its citizens. However, sterilizing residents to achieve any of these interests will likely not be narrowly tailored enough to justify infringement on the right. *See Roe*, 410 U.S. 113.

<sup>84</sup> U.S. CONST. amends. V – VII.

<sup>85</sup> U.S. CONST. amend. V.

<sup>86</sup> Regarding the right to trial by jury, *see, e.g.* *Winter v. Minn. Mut. Life Ins. Co.*, 199 F.3d 399, 407-08 (7th Cir. 1999); *Gargiulo v. Delsole*, 769 F.2d 77, 79 (2d 1985); *Pradier v. Elespuru*, 641 F.2d 808, 809-10 (1981). Regarding the right against self-incrimination, *see, e.g.* *Colorado v. Spring*, 479 U.S. 564, 572 (1987); *Barker v. Wingo*, 407 U.S. 514, 529 (1972); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Escobedo v. State of Ill.*, 378 U.S. 478, 490 (1964).

<sup>87</sup> James G. Chadney, *Family Planning: India's Achilles' Heel?*, in *INDIA: THE YEARS OF INDIRA GANDHI* 84, 90 (Yogendra K. Malik & Dharendra K. Yajpevi eds. 1988).

<sup>88</sup> *Id.* at 91.

incentives; when a village reached a certain sterilization rate among its residents, the village received irrigation water at subsidized rates.<sup>89</sup> The program became more intense, with people being harassed or forced to comply. Even long after the sterilization program ended, citizens remained suspicious and resentful of their government and of family planning initiatives.<sup>90</sup>

The International Criminal Court (ICC), a treaty-based court for “serious crimes of international concern,”<sup>91</sup> defines “genocide,” in part, as “imposing measures intended to prevent births within [a] group.”<sup>92</sup> The ICC also outlaws sterilizations performed without the “genuine consent” of the patient and considers it a crime against humanity, along with rape or torture.<sup>93</sup> LaBruzzo, admittedly speaking extemporaneously, did not consider the grave implications of his idea.<sup>94</sup>

#### Legal, political, and social challenges

LaBruzzo’s idea creates a long list of legal, political, and social conundrums that this article does not purport to solve. For example, property rights over one’s own body may be illustrated by surrogacy, where a surrogate mother may be paid to carry a fetus until birth. The payment for sterilization could be analogized to surrogacy because a similar ability (pregnancy and gestation) is being contracted for. Public policy prevents surrogate mothers from accepting payment for the child. She can only accept payment for her expenses and care during the pregnancy. Similarly, there are medical costs for women undergoing sterilization. However, a surrogate mother grants only temporary use and possession of her body to the contractor for the

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<sup>89</sup> *Id.* at 92.

<sup>90</sup> *Id.* at 93-94.

<sup>91</sup> Int’l Crim.Ct., Rome Statute, art. 1 (1998), [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

<sup>92</sup> Int’l Crim. Ct., Elements of Crimes, art. 6(d) (2002), [http://www2.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www2.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>93</sup> *Id.* at art. 7(1)(g)-5.

<sup>94</sup> The United States rejected the Rome Statute. It is not a member of the International Criminal Court and would not be subject to prosecutions under the treaty. However, the Court’s definitions of genocide and crimes against humanity are useful in showing international sentiments toward sterilization programs.

birth of a child.<sup>95</sup> The sterilization conveyance would do the opposite; the sterilized woman would grant a permanent and exclusive use to another to prevent the birth of a child. There is no precedent for this type of agreement.

In Louisiana, where this issue has arisen, surrogacy is not analyzed under the principles of property law, but of obligations (contracts).<sup>96</sup> As in common law jurisdictions, surrogate mothers may not be paid for the children they bear but only for the expenses associated with the pregnancy, birth, or adoption of the child.<sup>97</sup> Again, there are similar medical expenses associated with sterilization. However, it is unclear whether the “cause” or reason for the obligation — to permanently prevent births — is valid. After all, in Louisiana, “absent unusual circumstances, a child is presumed to be a blessing.”<sup>98</sup> If the cause is valid, the transaction could not be considered a sale if the price paid is out of proportion with the value of the thing sold.<sup>99</sup> There is no precedent for determining whether \$1,000 is a fair price for being sterilized. Even in his own state, LaBruzzo’s plan would likely not be viable. The plan requires ill-fitted applications of property or obligations law.

It is not clear whether these payments might be covered by state spending laws. If so, the result would be absurd. For example, bidding laws require some states to seek bids for a project to ensure

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<sup>95</sup> This agreement is not against public policy, as long as the payment is for the woman’s expenses and not for the child.

<sup>96</sup> See LA. CIV. CODE ANN. art. 1968 (Westlaw 2008 Regular Session) (“The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.”).

<sup>97</sup> See LA. REV. STAT. ANN. § 14:286 (Westlaw through 2008 Regular Session); LA. CHILD. CODE ANN. art. 1223 (Westlaw through 2008 Regular Session).

<sup>98</sup> *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1162 (La. 1988); *In re Med. Review Panel on Behalf of Laurent*, 94-1661 (La. App. 1 Cir. 6/23/95); 657 So.2d 713, 722; *Kocke v. Bancroft Rehab. Living Ctr., Inc.*, 03-2351, 03-2391 (E.D. La. 7/26/04); 2004 WL 1615589, at \*3.

<sup>99</sup> LA. CIV. CODE ANN. art. 2464 (Westlaw through the 2008 Regular Session). The transaction could still be gratuitous contract, whereby the woman obligates herself to the State to be sterilized without any incentive in return. See LA. CIV. CODE ANN. art. 1910 (Westlaw through 2008 Regular Session). A purely gratuitous contract would mean that the woman would agree to undergo the surgery but the State would not pay cash, pay for the surgery, or pay for associated medical expenses. There would be no cause for this contract and it would be invalid.

the most competitive prices. When entering a contract for reproductive rights, would bidding laws still apply? If not, how would contracting agencies know what a fair price would be? As a practical matter, how would payments to the recipients occur? Current assistance is often dispersed by prepaid debit cards or pre-approved vouchers, but a paid sterilization program would likely require a payment be made after the procedure had been performed. Also, further inquiry should be done into whether the payments would be made under the current welfare benefits provider, the state Department of Health and Hospitals, or some other state agency. Finally, business contracts with state agencies often must be made public under state law. Would these recipients risk having their receipt of public funds, their personal information, and their participation in this program — otherwise private health information — made public? Would they be selling their expectations of privacy as well as reproductive rights? Evidenced by the absence of legal authorities to address these questions, legal concepts of contract, administrative, and constitutional law do not seem anticipate this type of agreement.

### **Part III: What About the State’s Budgetary Interests?**

States have the power to limit income payments to individuals. In *Dandridge v. Williams*,<sup>100</sup> the plaintiffs, recipients of Maryland Aid to Families with Dependent Children benefits, challenged the state’s authority to limit the amount of payments to the family. The plaintiffs claimed this maximum limit was discriminatory because of the size of their families and violative of the Equal Protection Clause<sup>101</sup> and the Social Security Act, which requires a state to provide aid to all eligible families with dependent children.<sup>102</sup> The plaintiffs claimed that the younger children in the families would be denied benefits. The U.S. Supreme Court found that the benefits per person in the family would be diminished and held that the state abdicated its duty to provide aid.<sup>103</sup> The court reasoned that state governments must choose “either to support some families adequately and others less

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<sup>100</sup> 397 U.S. 471 (1970)

<sup>101</sup> *Id.* at 474-75.

<sup>102</sup> *Id.* at 476.

<sup>103</sup> *Id.* at 477.

adequately, or not to give sufficient support to any family.”<sup>104</sup> It noted a possibility of larger families having greater resources if awarded aid according to their per capita needs, and that a strong state policy to support as many families as possible would not be prohibited.<sup>105</sup> States may attempt to provide lower amounts of benefits to provide for more families, even if some families experience insufficiencies.

*Dandridge* highlights an overlooked flaw in the call to reduce welfare rolls. The stereotype of opportunistic welfare families securing higher welfare payments by having children is not practical. The administration of President William Clinton reformed the welfare system to address budgetary concerns. The name of the program was changed from Aid to Families with Dependent Children to Temporary Assistance to Needy Families.<sup>106</sup> The systemic changes limited the lifetime duration of a family’s public assistance benefits to five years.<sup>107</sup> Families are required to work in order to receive the payments.<sup>108</sup> Thus, the claim of welfare recipients outpacing working people or taxpayers is misleading; at some point, welfare recipients (or former recipients) must become taxpayers. Also, as *Dandridge* illustrates, many state governments employ family caps, giving each family benefits according to their needs but capped at a maximum amount. For example, in *Dandridge*, a family of five would receive the maximum grant of only \$237.50 per month for the entire family.<sup>109</sup> Thus, the misconception of families getting rich from welfare payments is, as can be seen, unfounded.

Even if the aforementioned issues with a new sterilization program could be overcome, these policies would still meet unique challenges. There would be the budgetary concerns of how to disburse payments for sterilizations and out of which departments they would be paid. Qualifications for the program would also need to be determined. While LaBruzzo’s idea and this discussion have focused

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<sup>104</sup> *Id.* at 479.

<sup>105</sup> *Dandridge*, 397 U.S. at 480.

<sup>106</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §103(a)(1) (1996), amended sections 601 to 619 of Title 42 to grant “block grants to states for *temporary* assistance to needy families.” (emphasis added).

<sup>107</sup> 42 U.S.C. § 603(a)(7)(A) (Westlaw through June 2008 amendments).

<sup>108</sup> *Id.* at § 607 (Westlaw through Feb. 2009 amendments).

<sup>109</sup> *Dandridge*, Appellant’s Br. 14, 1969 WL 119895.

on families receiving welfare payments, there are likely other poor families — former recipients or not — whose children would be candidates for state assistance and, possibly, generational poverty. Economic forces may further augment the classification of families as poverty-stricken, compounding LaBruzzo’s budgetary concerns. The definition of program eligibility would be a conundrum. Finally, the U.S. Supreme Court, in regulating abortions, has acknowledged states’ interests in protecting prenatal life.<sup>110</sup> By contrast, state legislation allowing sterilization of certain undesirable members of society directly conflicts with this interest of protecting life.<sup>111</sup> It would be difficult to reconcile with political and religious conservatives interest in protecting prenatal life for the same reason.

#### **Part IV: Eradicate Poverty, Not the Poor**

Instead of trying to reduce the number of people living in poverty by terminating their ability to reproduce, policymakers should consider other factors that identify why low-income families suffer from systemic poverty. First, low-income households often have insufficient resources to meet their current consumption needs. For such families, saving for the future is not a realistic goal. These households typically have younger heads of household who are single parents, have less formal education, and are less likely to be employed. Together, these factors translate into a lack of access to savings tools, such as employer-subsidized pensions and financial education.<sup>112</sup> Other conditions that discourage wealth accumulation among the poor include increased taxes on wealth accumulation, as opposed to low-income households with little or no tax liability, and psychological and sociological factors which make large financial goals seem unattainable given the families’ environment.<sup>113</sup> The financial realities — not their unbridled fertility or laziness— may explain why it is difficult for them to escape poverty.<sup>114</sup>

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<sup>110</sup> *Roe*, 410 U.S. at 150.

<sup>111</sup> *Id.*; see also *Casey*, 505 U.S. at 860. It is arguable, however, that the state’s interest in prenatal life begins only at the point of viability.

<sup>112</sup> Stacie Carney & William G. Gale, *Asset Accumulation Among Low-Income Households*, in *ASSETS FOR THE POOR: THE BENEFITS OF SPREADING ASSET OWNERSHIP* 165, 167-68 (Thomas M. Shapiro and Edward N. Wolff eds. 2001).

<sup>113</sup> *Id.* at 168-69.

<sup>114</sup> Kathryn Edin, *More Than Money: The Role of Assets in the Survival Strategies and Material Well-Being of the Poor*, in *ASSETS FOR THE POOR: THE BENEFITS OF*

Additional factors also contribute to the inability of poor families to transition into better financial standing. For example, only about one-half of recipients of public assistance have a bank account of some kind.<sup>115</sup> For account holders, government caseworkers may use computerized databases to monitor their account balances and accordingly reduce their supplements.<sup>116</sup> This practice discourages families from depositing money into their savings accounts. Under some state assistance plans, families may be eligible to maintain an individual development account (savings account) without a reduction in their state payments. However, the individual development accounts may not allow families to withdraw money for emergencies. For some fathers, involvement in illegal trades (such as selling drugs) deters them from making investments; the acquisition of assets may alert authorities.<sup>117</sup> With fewer assets, poor families are less likely to receive credit lines from banks for investments.<sup>118</sup>

There are a number of programs that have aided poor families in the acquisition of assets. The Earned Income Tax Credit is also recognized as assisting poor families with debt repayment or home investments.<sup>119</sup> Private companies have adopted anti-poverty employee benefits, such as profit sharing.<sup>120</sup> Some policy makers will not favor adjusting the market to equalize economic disparities. However, more targeted approaches to address poverty and help the poor build assets will provide more long-term benefits for states.

## **Part V: Conclusion**

The sterilization of poor women is not a novel idea. However, any policymaker advocating this concept would be negating the heavily criticized history of these programs. The policymaker risks aligning state public assistance policies with those of convicted Nazi leaders. He also shows his ignorance of the causes of poverty, the

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SPREADING ASSET OWNERSHIP 206, 213 (Thomas M. Shapiro and Edward N. Wolff eds. 2001).

<sup>115</sup> Carney & Gale, *supra* at note 112, at 174.

<sup>116</sup> Edin, *supra* note 114, at 213.

<sup>117</sup> *Id.* at 214.

<sup>118</sup> *Id.* at 209.

<sup>119</sup> *Id.* at 211.

<sup>120</sup> *Id.* at 207.

impracticability of families pillaging state assistance programs, and the dire so-called choice given to women who are eligible to participate. To cause a few to extinguish their fertility for the good of the many is the essence of eugenics. Such a program should not be considered a creative solution to budgetary concerns, but a reversion to racial paranoia and genocide.