1998

Three Questions

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Recommended Citation

David Kennedy, *Three Questions*, 3 N.Y. City L. Rev. 9 (1998).
Available at: 10.31641/clr030103

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NEW YORK CITY LAW REVIEW

Edited by the students of the City University of New York School of Law

Volume Two

Summer 1998

Number Two

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DOES *GIDEON* STILL MAKE A DIFFERENCE?

Thomas F. Liotti†

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹

I. INTRODUCTION

March 18, 1998 marked thirty-five years since the United States Supreme Court decided *Gideon v. Wainwright*,² the landmark case affirming an indigent defendant's right to appointed counsel. Since *Gideon* was decided, crime has increased and our prisons seem to be growing faster than private enterprise. As a society, we seem to believe that it is far better to be punitive and to imprison offenders than it is to provide meaningful educational and economic opportunity, as well as true rehabilitation programs and alternative sentences. A significant portion of the population feels strongly that we should have a death penalty. A federal death penalty statute exists and recently New York State's governor and legislature have dehumanized our state by enacting one. Life and death hang in the balance. So does our dignity as a civilization.

While these severe penalties have been injected into our criminal justice system, we provide only the most cursory defense services to the poor. Public defender budgets are routinely slashed to the bare bone. Lawyers who serve the poor zealously strive to provide effective legal representation, yet they are overrun by the supe-

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¹ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

² 372 U.S. 335 (1963).

rior resources of law enforcement and the Government. The lack of funding for defense services for the poor makes a mockery of justice.

Counsel assigned to federal cases in New York receive \$75 per hour for in-court and out-of-court time,³ less arbitrary reductions made by judges who seem to retaliate against them for being strong advocates.⁴ A commission appointed by Chief Justice Rehnquist has recommended that judges be removed from the process of approving these fees.⁵ The federal judiciary has chosen to ignore these recommendations.⁶

In New York State courts, assigned lawyers work for the paltry sums of \$40 per hour for in-court time and \$25 per hour for out-of-court time.⁷ Only their dedication to equal justice and their commitment to the spirit of *Gideon* keeps them working. Pay vouchers are routinely delayed, arbitrarily reduced, or lost by mean-spirited judges. Many of these jurists were never defense lawyers or, if they were, it was a long time ago and their memories appear to have dimmed.

We must look beyond the sensational case and remember what is at stake for the indigent defendant. While we routinely under-represent the poor in criminal cases, the government brands them with the scarlet letter of criminal conviction. When a citizen who has no prior convictions pleads guilty to a felony, that person can no longer apply for many jobs or aspire to many careers,⁸ or ever vote in a general election.⁹ Without a substantial cadre of well trained and uninhibited defense lawyers, our adversarial system of justice simply breaks down. The end result is that society's most powerless citizens are methodically disenfranchised without any certainty that their convictions are just.

In spite of obstinate and uncomprehending opposition by the

³ SPANGENBERG GROUP, SURVEY OF INDIGENT DEFENSE PROVISIONS BY STATE (1992).

⁴ SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL (October 1997); see also Thomas F. Liotti & Harriet B. Rosen, *Review of the Report on the Criminal Justice Act*, N.Y. L.J., Outside Counsel Column, Nov. 17, 1992 at 1, 7; THE MOUTHPIECE (A publication of the New York State Association of Criminal Defense Lawyers), Nov./Dec. 1992 at 19.

⁵ JUDICIAL CONFERENCE OF THE UNITED STATES, CRIMINAL JUSTICE ACT REVIEW COMMITTEE: INTERIM REPORT, (1992), reprinted in 51 Crim. L. Rep. (BNA) 2335, 2337 (Aug. 19, 1992).

⁶ JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM, (1993), reprinted in 53 Crim. L. Rep. (BNA) 2003, 2010 (Apr. 14, 1993).

⁷ N.Y. COUNTY LAW § 722-b (McKinney 1991).

⁸ N.Y. CORRECT. LAW §§ 751-55 (McKinney 1981).

⁹ N.Y. ELEC. LAW § 5-106 (McKinney 1998).

state legislature, the New York State Defenders Association, Inc. helps criminal defense attorneys by providing research, briefs, transcripts, and strategic and tactical advice. Criminal defense lawyers all too often must wage a lonely fight for justice with nothing more than the fire in their bellies. On the thirty-fifth anniversary of *Gideon*, it's time to give more than just tacit support to that landmark decision. Lawyers must have the tools to fight—without them, all of us are in danger.

Part II of this article inquires into the spirit of *Gideon*. It discusses the history of court-appointed counsel to represent the indigent and the breakdown of that system around the turn of the century. Next, it analyzes federal and state cases that led up to *Gideon*. Finally, it describes New York State's statutory response to *Gideon*.

Parts III and IV address several causes of action that hopefully will spur litigation on behalf of indigent defendants. Part III describes United States Supreme Court treatment of indigent defendants and fundamental rights, with special emphasis on equal protection. Part IV addresses the quality of representation for indigent defendants in New York. Finally, Part V concludes with a general litigation strategy for the fight for equal justice for the poor.

II. THE SPIRIT OF *GIDEON*

A. *The History of Court Appointed Counsel*

Courts have looked to the historical obligations of the bar to justify their own power to appoint and the lawyer's duty to serve.¹⁰ Some commentators claimed to have discovered the roots of appointed counsel in Roman history.¹¹ However, other commentators question the support for this premise.¹² Historical English and American case law have been used to justify the appointment of attorneys to serve the indigent.¹³ The English tradition also supports the attorneys' obligation to accept court appointments.¹⁴

¹⁰ See, e.g., *Salas v. Cortez*, 593 P.2d 226, 229-30 (Cal. 1979), *cert. denied*, 444 U.S. 900 (1979).

¹¹ See John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 385 (1923).

¹² See David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 739-48 (1980).

¹³ See *Powell v. Alabama*, 287 U.S. 45, 72-73 (1932); see also *White v. Board of Commissioners*, 537 So. 2d 1376, 1379 (Fla. 1989); *State v. Remeta*, 547 So. 2d 181, 182 (Fla. Dist. Ct. App. 1989); *United States v. Dillon*, 346 F.2d 633, 636-37 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

¹⁴ See *Dillon*, 346 F.2d at 636.

Courts maintain that the history of appointment in England established the bar's duty to serve the indigent without payment.¹⁵ However, the English system does not establish this obligation.¹⁶

The early reported cases demonstrate a mixed response by the courts when faced with situations requiring appointment. In fact, a number of cases that date back to the sixteenth century show that defendants frequently had to beg the court for the assistance of counsel, and regularly did so to no avail.¹⁷ Yet, this was not always the case. The Ninth Circuit noted in *United States v. Dillon*¹⁸ that some English statutes and case law required certain attorneys to render unpaid services to the indigent as officers of the court.¹⁹ Although mandatory court appointment burdened some privileged members of the legal profession,²⁰ the claim that these special appointments require an obligation by all attorneys today is unfounded.

American courts have relied on the English tradition of court appointment to justify their own appointment of counsel with little or no compensation. Although authorities disagree about the extent of the right to counsel during the colonial period,²¹ the history of that period demonstrates a general departure from the English tradition of not appointing counsel. The colonial legislatures produced a variety of statutes creating a right to counsel.²²

The idea of appointed counsel was clearly on the minds of the members of the Constitutional Convention.²³ There, three differ-

¹⁵ *Id.*

¹⁶ See Shapiro, *supra* note 12, at 744-49.

¹⁷ *Id.* at 743. See also Lord Lovat's Case, 18 How. St. Tr. 529, 578-79 (1746) (blind, deaf invalid denied counsel); Scroop's Case, 5 How. St. Tr. 1034, 1043-46 (1660) (incarcerated defendant required to represent self); Howard's (Duke of Norfolk's) Case, 1 How. St. Tr. 957, 966-67 (1571) (defendant accused of high treason denied counsel).

¹⁸ 346 F.2d at 636.

¹⁹ But see Shapiro, *supra* note 12, at 743-49 (criticizing the court's selective use of case law to establish that counsel was always appointed for the indigent in England).

²⁰ See *id.* at 746. Historically, an officer of the court was the holder of public office, usually a sergeant-at-law. A sergeant-at-law was granted unusual privileges not given to other members of the bar and created a special strata within their own exclusive profession. This elite body alone bore the burden of mandatory service to the indigent. *Id.*

²¹ See Shapiro, *supra* note 12, at 750.

²² See Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1030 (1964) (noting that all states except Georgia and Rhode Island had adopted some right to counsel statute by 1789).

²³ See Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 1, 24-25 (1954).

ent versions of the Sixth Amendment were debated.²⁴ The final version of the Amendment, entitling indigent defendants representation by an attorney, was very similar to the original proposed language.²⁵ The first Congress passed an Act that required the appointment of counsel in capital cases.²⁶

B. State Court Reaction

Three early decisions held on constitutional grounds that an attorney could not be compelled to represent an indigent defendant without compensation. The Supreme Court of Indiana in *Webb v. Baird*,²⁷ was the first to dismiss the historical justifications for "gratuitous defense of a pauper."²⁸ The Indiana Court recognized the argument that an attorney has an "honorary" duty to aid the indigent.²⁹ However, the Court dismissed this claim as having no place under state law or the United States Constitution.³⁰ The Court considered all professions equal. Therefore, none could be subjected to the unique burden of providing services without compensation.³¹

In *Carpenter v. Dane County*,³² the Wisconsin Supreme Court repudiated court appointment without compensation on the same grounds as *Webb*.³³ The Iowa Supreme Court in *Hall v. Washington Co.*,³⁴ relied on the Fifth Amendment's takings clause to hold unconstitutional court appointment without compensation.³⁵ The Iowa Court ruled that the right to compensation was a fundamental right that would be violated by such an appointment.³⁶

By the close of the nineteenth century, the idea of compelled representation without pay was losing acceptance. Generally, states have rarely disciplined lawyers who refused to serve when ap-

²⁴ See Note, *supra* note 22, at 1031.

²⁵ See Rackow, *supra* note 23, at 24-25.

²⁶ See Rackow, *supra* note 23, at 25-26 n.98.

²⁷ 6 Ind. 13 (1854).

²⁸ *Id.* at 16-17.

²⁹ *Id.* at 16.

³⁰ *Id.* at 16-17.

³¹ *Id.*

³² 9 Wis. 249 (1859).

³³ *Id.* at 252.

³⁴ 2 Greene 473 (Iowa 1850).

³⁵ *Id.* at 478.

³⁶ *Id.* But see *Samuels v. County of Debuque*, 13 Iowa 536, 538 (1862) (holding that lawyers must provide representation for a prescribed statutory fee based on the theory that lawyers were officers of the court).

pointed without compensation.³⁷ Courts have held attorneys in contempt for refusal to proceed as appointed counsel, but they have been reluctant to exercise their judicial power to compel attorneys to serve the indigent.³⁸ Lawyers began to assert that uncompensated service constituted an excessive burden.

C. Challenges to Appointment Without Provisions for Compensation

Many courts accepted the argument that uncompensated service constituted an excessive burden and found challenges to mandatory court appointments both compelling and cognizable. For example, in *In re Nine Applications for Appointment of Counsel in Title VII Proceedings*,³⁹ the United States District Court for the Northern District of Alabama held the Title VII provision granting courts the discretion to compel representation without provision for payment unconstitutional, as it allowed for the creation of a form of involuntary servitude prohibited by the Thirteenth Amendment.⁴⁰ The court distinguished between the fundamental right to defend oneself against criminal charges and the right to initiate a civil lawsuit.⁴¹ The Fifth Circuit Court of Appeals later vacated the decision.⁴²

The *Nine Applications* holding was subsequently rejected by most circuit courts addressing the issue. To justify uncompensated service by appointed counsel, courts relied on the public service exception which is grounded in a line of cases permitting the state to call its citizens into temporary service.⁴³ The Supreme Court's holding in *Hurtado v. United States*,⁴⁴ practically assured the application of the public service exception to court appointment challenges by reinforcing the public service exception when applied to criminal justice proceedings.⁴⁵ The *Hurtado* Court held that the attorney's duty to represent the indigent was analogous to the pub-

³⁷ J.W. Thomey, Annotation, *Attorney's Refusal to Accept Appointment to Defend Indigent, or to Proceed in such Defense, as Contempt*, 36 A.L.R. 3d 1223-24 (1990).

³⁸ See *id.* at 1224.

³⁹ 475 F. Supp. 87 (N.D. Ala. 1979).

⁴⁰ *Id.* at 88.

⁴¹ *Id.* at 92.

⁴² See *White v. United States Pipe & Foundry Co.*, 646 F.2d 203 (5th Cir. 1981).

⁴³ See *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973); *Butler v. Perry*, 240 U.S. 328, 333 (1916).

⁴⁴ 410 U.S. 578 (1973).

⁴⁵ *Id.* at 588-89. However, the application of the public service exception has been limited. In *Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966), the Second Circuit Court of Appeals held that the government's power to compel public service is restricted by the requirement that the service bear a reasonable relation to the state's needs. *Id.* at 131-32.

lic's duty to provide evidence in criminal cases.⁴⁶

Utilization of the public service exception to court appointment prevents Thirteenth Amendment challenges because the voluntary nature of the service may be imputed from the attorney's oath taken upon entrance to the bar. Other fundamental policies form the foundation of court appointment rather than instances where the state temporarily requires the services of its citizens.⁴⁷

In *United States v. Dillon*,⁴⁸ the Ninth Circuit Court of Appeals rejected a deprivation of property challenge to uncompensated court appointment.⁴⁹ The *Dillon* court held that lawyers have a professional responsibility to render unpaid services.⁵⁰ To find a deprivation, due process analysis requires the court to determine that a taking of property has occurred.⁵¹ The court disposed of this question by holding that no taking of services occurs with court appointments because lawyers by implication consent to service upon entering the profession.⁵² The court reasoned that lawyers owed this duty as officers of the court.⁵³

The *Dillon* rationale has commanded a wide following in both state and federal courts.⁵⁴ However this rationale appears untenable in light of the Supreme Court's current test for examining takings. In *Penn Central Transportation Co. v. New York City*,⁵⁵ the Court noted that courts have held a taking exists when the state directs "acquisitions of resources to permit or facilitate uniquely public functions."⁵⁶ Court appointments facilitate a public function because appointment allows the state to fulfill the duty imposed upon it by *Gideon* and subsequent cases.

In *Goldblatt v. Town of Hempstead*,⁵⁷ the Supreme Court held that no compensation will be awarded unless there is a showing that the means are "unduly oppressive" to the petitioner.⁵⁸ Some

⁴⁶ 410 U.S. at 589.

⁴⁷ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

⁴⁸ 346 F.2d 633 (9th Cir. 1965).

⁴⁹ *Id.* at 635-36.

⁵⁰ *Id.*

⁵¹ *Id.* at 635.

⁵² *Id.* at 635-36.

⁵³ *Id.*

⁵⁴ See *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205 (5th Cir. 1981); *Tyler v. Lark*, 472 F.2d 1077, 1079 (8th Cir. 1973), *cert. denied*, 414 U.S. 864 (1973); *Dolan v. United States*, 351 F.2d 671, 672 (5th Cir. 1965); *Jackson v. State*, 413 P.2d 488, 490 (Alaska 1966).

⁵⁵ 438 U.S. 104 (1978).

⁵⁶ *Id.* at 128.

⁵⁷ 369 U.S. 590 (1962).

⁵⁸ *Id.* at 594-95 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

courts have used an analysis similar to the one used in *Goldblatt* to address takings challenges to court appointment.⁵⁹ Courts which implicitly follow *Goldblatt* have found that compensation systems violate the Fifth Amendment. Moreover, some decisions declare that uncompensated appointments are *ipso facto* violative of the Fifth Amendment.⁶⁰

D. Dominance of the States

The original Constitution ratified in 1789 contained few references to individual rights.⁶¹ Its major concern was the structure of the new federal government. However, the ratification debates revealed a popular demand for additional constitutional protections of individual and state's rights. The response to these pressures was the introduction and ratification of the first ten amendments, the Bill of Rights, in 1791.⁶²

There was little opportunity for the Supreme Court to interpret the Bill of Rights before the Civil War. The first century of constitutional decisions was marked by a concentration on structural issues; the respective roles of the national and federal governments as well as the tripartite separation of powers at the national level.⁶³ Moreover, Chief Justice Marshall would lay to rest any challenges to state supremacy in the landmark case of *Barron v. Mayor and City Council of Baltimore*.⁶⁴ Barron sued the City for ruining the use of his wharf in Baltimore harbor.⁶⁵ Justice Marshall, ordinarily not adverse to nationalistic interpretations, held that the Bill of

⁵⁹ See *People ex rel. Conn. v. Randolph*, 219 N.E.2d 337 (Ill. 1966) (holding trial court may reimburse court-appointed attorney beyond amount authorized by statute where attorney would otherwise "suffer an intolerable sacrifice and burden"). *Id.* at 340; *Kansas ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987) (holding a violation of the Fifth Amendment has occurred when an attorney is required to advance expense funds without full reimbursement or "is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice"). *Id.* at 842; *Daines v. Markoff*, 555 P.2d 490 (Nev. 1976).

⁶⁰ See *Bedford v. Salt Lake County*, 447 P.2d 193, 195 (Utah 1968); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972); *McNabb v. Osmundson*, 315 N.W.2d 9, 16 (Iowa 1982).

⁶¹ Stewart F. Hancock Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271, 278 (1993); see generally CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS & INTERPRETATION, SENATE DOCUMENT NO. 103-6 (1996) [hereinafter CONSTITUTION ANNOTATED].

⁶² U.S. CONST. amend. I-X.

⁶³ See generally CONSTITUTION ANNOTATED, *supra* note 61.

⁶⁴ 32 U.S. 243 (1833).

⁶⁵ *Id.* at 244.

Rights restricted only the federal government and did not limit state authority.⁶⁶ Marshall pointed to the fears about encroachments of the new national government expressed during the ratifying conventions.⁶⁷ Noting that the citizens had adopted not only the Federal Constitution but separate, and sometimes different, constitutions for the states, he saw the Bill of Rights as limiting only the government established by the Federal Constitution.⁶⁸

The result of the *Barron* holding was that neither the Supreme Court nor the lower federal courts were able to exercise meaningful control over the substance or procedures embodied in state law. Therefore, issues surrounding the appointment of counsel without provision for compensation were settled on the state level without consideration of the Sixth Amendment. The Constitution enabled the Supreme Court to provide federal protection of individuals and groups against governmental overreaching. This role would eventually expand with the passage of the Post-Civil War Amendments.

1. Enactment of the Civil War Amendments and Early Interpretations

After *Barron* the Constitution afforded individuals few safeguards against state action. The Civil War itself would radically alter that picture. From an historical perspective, the Civil War was about slavery and emancipation.⁶⁹ From a legal standpoint, the focus of the Civil War was federalism - a group of states asserting their prerogative over increasing federal interference into their way of life.⁷⁰ The Thirteenth, Fourteenth, and Fifteenth Amendments, passed in the wake of the Civil War, were a reaction to these causes of extreme divisiveness.

The *Slaughter House Cases*,⁷¹ the Supreme Court's first interpretation of the Civil War amendments, stated that the purpose of the amendments was to bar discrimination by the states against blacks,⁷² but the court rejected the opportunity to give the amendments reach beyond the issues that spawned them. The Court proved unwilling to conclude that the Fourteenth Amendment lim-

⁶⁶ *Id.* at 250-51.

⁶⁷ *Id.* at 250.

⁶⁸ *Id.* at 247-48.

⁶⁹ BRUCE CATTON, *THE CIVIL WAR* 10 (1960).

⁷⁰ *Id.* at 8-10.

⁷¹ 83 U.S. (16 Wall.) 36 (1873).

⁷² *Id.* at 71-72. See also David P. Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941*, 5 DUKE L.J. 800, 805 & n.90 (1987).

ited the states' powers.⁷³ In its interpretation, the majority relied on the historical background of the amendments and concluded that they were not to be read to "radically change the whole theory of the relations of the State and Federal Government to each other and both of these governments to the people."⁷⁴ Additionally, the court reasoned that they would not create a "perpetual censor upon all legislation of the States, on the civil rights of their own citizens."⁷⁵

The growth of industrialization and corporate power in the post-Civil War years led to popular demands and legislative responses. New regulatory laws clashed with the economic *laissez-faire* theories of Adam Smith and the Social Darwinism embraced by writers such as Herbert Spencer.⁷⁶ During those clashes, ideas such as survival of the fittest, the defense of economic inequalities, and governmental hands-off policies found their way into legal briefs and found responsive listeners on the bench.⁷⁷ Thus, the seeds of substantive due process began to surface in majority opinions.

The Supreme Court increasingly began to question state regulations⁷⁸ and eventually began to overturn them based on the Fourteenth Amendment's Due Process Clause.⁷⁹ The focus of the Court's scrutiny was economic regulation that conflicted with the Court's *laissez-faire* theory of minimal governmental interference with business. The most infamous of these economic regulation cases was *Lochner v. New York*.⁸⁰ At issue was a New York law which limited the hours a bakery employee could work.⁸¹ The Court struck down this law as an abridgment of liberty of contract and a violation of substantive due process.⁸² The *Lochner* era had begun.

⁷³ 83 U.S. at 78.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1389 (1990).

⁷⁷ *Id.* at 1389-90 (describing Justice Holmes chastisement of his fellow justices for reading Herbert Spencer's brand of utilitarian philosophy into the Constitution); see also H. SPENCER, *SOCIAL STATICS* 106 (1865).

⁷⁸ See *Munn v. Illinois*, 94 U.S. 113, 132-34 (1877) (deferring to the legislature's judgment on the issue but indicating a willingness to determine what regulations were "reasonable").

⁷⁹ See *Allgeyer v. Louisiana*, 165 U.S. 578, 591-92 (1897) (striking down a Louisiana statute which prohibited anyone from obtaining insurance on Louisiana property from any company not licensed in Louisiana).

⁸⁰ 198 U.S. 45 (1905).

⁸¹ *Id.* at 46.

⁸² *Id.*

Cases of the *Lochner* era had much in common. First, the Court was highly suspicious of legislative motives.⁸³ The Justices looked only at the legislature's actual motive, not a hypothetical one, and would often go so far as to substitute their own interpretation. For example, in *Lochner*, the Court rejected the proposition that the law at issue was intended to regulate health and safety.⁸⁴ Instead, the Court saw the law as a regulation of labor conditions which interfered with liberty of contract.⁸⁵ Second, the Court continually refused to defer to legislative findings of fact.⁸⁶ The Court concluded, "[i]t is not . . . possible to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman."⁸⁷

Lochner symbolizes the rise of substantive due process as a protection of economic and property rights.⁸⁸ For the next three decades the Court intensely scrutinized economic regulations and frequently struck them down. *Lochner* and the judicial philosophy behind it were subjected to intense criticism.

The election of Franklin Roosevelt and the promise of the New Deal programs convinced many of the need for aggressive legislation to ensure the nation's economic survival. Such large scale government intervention in economic affairs was clearly at odds with the *Lochner* freedom of contract philosophy. As a result, in the mid-1930s, judicial intervention in economic legislation began to gradually decline.⁸⁹ The use of substantive due process to give special protection to economic and property rights was discredited.⁹⁰

The economic regulation cases are useful to the understanding of *Gideon* because they focused on the judicial power used to protect individual liberties. These cases changed the relationship between federal judges and legislative bodies by changing their powers to determine the scope of "liberty." The new question that arose would be the pace and nature of this change.

⁸³ *Id.* at 62-63.

⁸⁴ *Id.* at 57.

⁸⁵ *Id.* at 61.

⁸⁶ *Id.* at 62.

⁸⁷ *Id.*

⁸⁸ *Id.* at 45.

⁸⁹ See William Michael Treanor, *Jam For Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 865 (1998).

⁹⁰ *Id.*

2. The Rise of Procedural Due Process and the Incorporation Debate

Change in court personnel, together with Roosevelt's court packing plan, contributed to a philosophical shift toward greater deference to legislation in economic affairs.⁹¹ Cases such as *Nebbia v. New York*,⁹² explicitly, and *West Coast Hotel Co. v. Parrish*,⁹³ implicitly, abandoned the *Lochner* philosophy. The battlefield having shifted, the new competing views became selective and total incorporation.

The selective incorporation approach denies that the entire Bill of Rights is made applicable to the states via the Fourteenth Amendment. Instead, only those aspects of liberty that are in some sense "fundamental" are protected by the Fourteenth Amendment against state interference. Justices Cardozo and Frankfurter were the two best-known proponents of the selective incorporation, fundamental rights approach. In *Palko v. Connecticut*,⁹⁴ Justice Cardozo articulated the selective incorporation test as being whether the Bill of Rights guarantee is "implicit in the concept of ordered liberty."⁹⁵ The proponents of selective incorporation also hold that the Bill of Rights does not set outside limits on the concept of liberty.⁹⁶

The contrary view, total incorporation, asserts that all of the guarantees specified in the Bill of Rights are made applicable to the states by the Fourteenth Amendment's Due Process Clause. The best known proponent of this view was Justice Black, whose position fell one vote short of becoming law in *Adamson v. Califor-*

⁹¹ WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940, 231-37 (1963).

⁹² 291 U.S. 502 (1934) (holding that the use of private property and the making of private contracts are free from governmental interference, but neither property rights nor contract rights are absolute: they are subject to public regulation when the public need requires. Regulation of this liberty is constitutional as long as it is not unreasonable, arbitrary and capricious, and the means selected are real and substantially related to the ends).

⁹³ 300 U.S. 379 (1937) (holding that property and contract rights are subject to regulation as long as the regulation is reasonable and the means selected are genuine and substantially related to the ends).

⁹⁴ 302 U.S. 319 (1937).

⁹⁵ *Id.* at 325.

⁹⁶ See, e.g., *In re Winship*, 397 U.S. 358, 359 (1970) (a selective incorporation decision holding that proof beyond a reasonable doubt is among the "essentials of due process and fair treatment" and therefore binding on state trials even though no specific Bill of Rights provision imposes such a requirement) (citing *In re Gault*, 387 U.S. 1, 13 (1967)).

nia.⁹⁷ In his dissent, Justice Black argued that the procedural guarantees applied to the federal government through the Fifth Amendment were automatically rendered applicable to the states via the Fourteenth Amendment.⁹⁸ Justice Black argued that this was the intent of the framers of the Fourteenth Amendment.⁹⁹ Moreover, in his view, the majority's fundamental rights approach allowed the Court "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."¹⁰⁰

Although the Supreme Court has continued to adhere, in theory at least, to the selective incorporation fundamental rights approach, the Warren Court sped up the process by which individual Bill of Rights guarantees were incorporated into the Fourteenth Amendment.¹⁰¹ Today, virtually the entire Bill of Rights has been incorporated into the Fourteenth Amendment, one guarantee at a time.¹⁰² In the process, the Bill of Rights in general, and the Due Process Clause in particular, has come to protect the values of a vulnerable citizenry from the overbearing reach of government officials.¹⁰³

3. The Constitutional Right of Indigent Defendants to Appointed Counsel

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense."¹⁰⁴ It was obvious from the outset that this provision guaranteed a right to representation by privately retained counsel. Whether the Sixth Amendment also included an obligation of the state to provide counsel for the indigent defendant was far less certain.¹⁰⁵

⁹⁷ 332 U.S. 46 (1947).

⁹⁸ *Id.* at 68-92 (Black, J., dissenting).

⁹⁹ *Id.* at 72, 74-75.

¹⁰⁰ *Id.* at 90.

¹⁰¹ See Rachel E. Fugate, Comment, *The Florida Constitution: Still Champion of Citizen's Rights?*, 25 FLA. ST. U. L. REV. 87, 91 (1997).

¹⁰² See *Adamson*, 332 U.S. at 91 n.32. Bill of Rights guarantees not incorporated into the Fourteenth Amendment are the Fifth Amendment's prohibition of criminal trials without grand jury indictment and the Seventh Amendment's right to a jury in civil cases.

¹⁰³ See *id.* at 91.

¹⁰⁴ U.S. CONST. amend. VI.

¹⁰⁵ See *Johnson v. Zerbst*, 304 U.S. 458 (1938) (requiring federal courts to provide indigent defendants with appointed counsel in criminal cases); *But cf. Betts v. Brady*, 316 U.S. 455 (1942) (holding that an indigent defendant in a non-capital case had to show that he had been prejudiced without a lawyer and that special circumstances

1. Right to Appointed Counsel in Felony Cases

*Powell v. Alabama*¹⁰⁶ was the first United States Supreme Court case to recognize a constitutional right to court appointed counsel.¹⁰⁷ In *Powell*, nine black youths had been charged with the rape of two white girls near Scottsboro, Alabama.¹⁰⁸ Amid a popular frenzy, the defendants who were under the constant guard of the state militia were rushed to trial.¹⁰⁹ Eight of the youths were convicted and the jury imposed the death sentence.¹¹⁰ The Supreme Court held that the defendants were denied effective appointment of counsel.¹¹¹

Powell was decided under the then prevailing "fundamental fairness" analysis of the Fourteenth Amendment Due Process Clause. According to the Court, the right to appointed counsel derived from the due process right to a fair hearing.¹¹² The indigent defendant was entitled to a fair hearing,¹¹³ just as the more affluent defendant who could afford to retain a lawyer. The *Powell* opinion stressed that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."¹¹⁴ Accordingly, the state had a due process obligation to provide the indigent defendant with a lawyer where the assistance of counsel was essential to achieve a fair hearing.¹¹⁵ However, the majority limited the holding of *Powell* to the specific facts before the court.¹¹⁶

Six years later, in *Johnson v. Zerbst*,¹¹⁷ the Supreme Court held that the right to appointed counsel was found in the Sixth Amendment.¹¹⁸ The Court discarded the fundamental fairness interpreta-

existed, such as defendant's ignorance, illiteracy, etc., to make the proceedings inherently unfair); *But see* Gideon v. Wainwright, 372 U.S. 335 (1963) (overturned *Betts* and held that court appointed counsel is a fundamental right stating, "[w]e think the Court in *Betts* was wrong . . . in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights"). *Id.* at 342.

¹⁰⁶ 287 U.S. 45 (1932).

¹⁰⁷ *Id.* at 71.

¹⁰⁸ *Id.* at 49.

¹⁰⁹ *Id.* at 51.

¹¹⁰ *Powell v. State*, 141 So. 201, 203 (Ala. 1932).

¹¹¹ *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

¹¹² *Id.* at 71.

¹¹³ *Id.* at 72-73.

¹¹⁴ *Id.* at 68-69.

¹¹⁵ *Id.* at 71.

¹¹⁶ *Id.*

¹¹⁷ 304 U.S. 458 (1938).

¹¹⁸ *Id.* at 462-63.

tion in favor of the selective incorporation analysis¹¹⁹ that made the Sixth Amendment directly applicable to the states.¹²⁰ Its interpretation of the Sixth Amendment rested heavily upon the analysis of the need for counsel first suggested by Justice Sutherland in his opinion for the Court in *Powell*.¹²¹ *Johnson* involved a federal prosecution in which two indigent defendants were charged with counterfeiting. The defendants argued that they had been refused appointed counsel because counterfeiting is not a capital offense.¹²²

Justice Black, writing for the majority, held that a trial without counsel violated the Sixth Amendment because the right to counsel applies to "all criminal prosecutions."¹²³ Relying heavily on the language in *Powell*, that the right to be heard would be of little value without assistance of counsel, Justice Black noted that the average defendant does not have the requisite skill to protect himself in a criminal trial.¹²⁴ Therefore, in federal court, a defendant could not be deprived of the right to assistance of counsel unless the defendant waived that right.¹²⁵

This right applied to all criminal defendants, including those who were unable to afford counsel.¹²⁶ The Court viewed the right to counsel as a constitutionally defined element of a criminal trial guaranteed by the Sixth Amendment.¹²⁷ Therefore, it was the trial court's affirmative obligation to see that the accused was given this right.¹²⁸ Furthermore, in the case of an indigent defendant, appointed counsel was required unless he knowingly and intelligently waived this right.¹²⁹

For another twenty-five years the Supreme Court refused to extend the *Johnson* holding to state courts. Even though the Court in *Johnson* held that the Sixth Amendment required appointed counsel in all federal felony cases, state courts were not compelled to employ more than the "fundamental fairness" test of the Fourteenth Amendment.¹³⁰ Accordingly, in *Betts v. Brady*,¹³¹ the Court

¹¹⁹ *Id.* at 467-68.

¹²⁰ *Id.* at 465-66.

¹²¹ *Id.* at 462-63.

¹²² *Id.* at 460.

¹²³ *Id.* at 463.

¹²⁴ *Id.*

¹²⁵ *Id.* at 468-69.

¹²⁶ *Id.* at 464.

¹²⁷ *Id.* at 467.

¹²⁸ *Id.* at 468.

¹²⁹ *Betts v. Brady*, 316 U.S. 455, 464-65 (1942).

¹³⁰ *Id.* at 466.

held that due process required the appointment of counsel only where special circumstances of the particular case demonstrated that the indigent defendant would need a lawyer to obtain a fair trial.¹³² Capital cases such as *Powell* presented an example of these special circumstances. However, the need for appointed counsel could also be shown in cases where the nature of the offense or the possible defenses raised complex legal questions¹³³ or the personal characteristics of the defendant, such as youthfulness or incapacity¹³⁴ raised the issue.

The Court in *Gideon v. Wainwright*,¹³⁵ rejected the special circumstances test of *Betts* and extended the right to appointed counsel in state cases to all indigent felony defendants.¹³⁶ The Court held that the Fourteenth Amendment incorporated the Sixth Amendment and made appointment of counsel applicable to the states in all criminal prosecutions.¹³⁷ *Gideon* established the requirement that a lawyer's assistance was necessary to guarantee a fair trial.¹³⁸ Therefore, if a defendant was unable to afford an attorney, the court had to appoint one for his defense.¹³⁹

In both *Johnson* and *Gideon* the Court viewed the Sixth Amendment as defining the basic elements of a fair trial and included the assistance of counsel among those elements.¹⁴⁰ In *Johnson*, Justice Black viewed the Sixth Amendment as imposing a single counsel requirement, designed to assure a fair trial.¹⁴¹ Following that premise, no Sixth Amendment distinction should exist between the indigent and affluent criminal defendant as to the basic right of representation by counsel.

2. Right to Appointed Counsel in Misdemeanor Cases

Until 1972 all of the appointed counsel cases decided by the Supreme Court had involved felony prosecutions.¹⁴² In *Argersinger*

¹³¹ 316 U.S. 455 (1942).

¹³² *Id.* at 462, 472-73.

¹³³ *See, e.g.,* *Rice v. Olson*, 324 U.S. 786, 789 (1945); *Powell v. Texas*, 392 U.S. 514 (1968).

¹³⁴ *See, e.g.,* *Smith v. O'Grady*, 312 U.S. 329 (1941); *House v. Mayo*, 324 U.S. 42, 45-46 (1945); *Canizo v. New York*, 327 U.S. 82, 83-84 (1946); *Foster v. Illinois*, 332 U.S. 134, 137-38 (1947).

¹³⁵ 372 U.S. 335 (1963).

¹³⁶ *Id.* at 339.

¹³⁷ *Id.* at 341-42.

¹³⁸ *Id.* at 344.

¹³⁹ *Id.*

¹⁴⁰ *See Johnson*, 304 U.S. at 468; *Gideon*, 372 U.S. at 344.

¹⁴¹ 304 U.S. at 467-68.

¹⁴² *See Argersinger v. Hamlin*, 407 U.S. 25 (1972).

v. Hamlin,¹⁴³ the Supreme Court held that the right to appointed counsel applied to petty offenses.¹⁴⁴ The Court noted that the problems associated with petty offenses might call for the appearance of counsel to assure a fair trial because the legal issues raised in misdemeanor trials were not less complex just because the jail sentence could not exceed six months.¹⁴⁵ Moreover, misdemeanors created a special need for counsel because the large number of such offenses often caused an "obsession for speedy dispositions, regardless of the fairness of the result."¹⁴⁶

The defendant in *Argersinger* had been sentenced to jail, but the Court declined to delineate the imposition of jail time as the standard for the requirement of appointed counsel.¹⁴⁷ However, the opinion laid the foundation for differentiating between cases involving sentences of imprisonment and those involving an imposition of a fine.¹⁴⁸ It did this by highlighting the special nature of punishment that led to the loss of liberty.¹⁴⁹ Moreover, the opinion cited the practicability of an actual imprisonment standard.¹⁵⁰ Therefore, *Argersinger* only required that counsel be appointed where there was an actual deprivation of personal liberty.¹⁵¹

In *Scott v. Illinois*,¹⁵² the Court refused to extend the Sixth Amendment right to counsel beyond the actual imprisonment standard suggested in *Argersinger*. In *Scott*, the petitioner was charged with shoplifting, which carried a penalty of a fine, imprisonment, or both.¹⁵³ The defendant was convicted and only a fine was imposed.¹⁵⁴ In a 5-4 decision, the Court concluded that the Federal Constitution did not require state courts to appoint counsel in this case.¹⁵⁵ The majority read *Argersinger* as resting on the conclusion that the loss of liberty due to incarceration was so harsh a penalty that due process required counsel to be appointed to protect the defendant's interests.¹⁵⁶ The mere possibility that im-

¹⁴³ 407 U.S. 25 (1972).

¹⁴⁴ *Id.* at 40.

¹⁴⁵ *Id.* at 33.

¹⁴⁶ *Id.* at 34.

¹⁴⁷ *Id.* at 39.

¹⁴⁸ *Id.* at 38-39.

¹⁴⁹ *Id.* at 37-40.

¹⁵⁰ *Id.* at 39. (quoting A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (Approved Draft 1968)).

¹⁵¹ 407 U.S. at 40.

¹⁵² 440 U.S. 367 (1979).

¹⁵³ *Id.* at 368.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 373-74.

¹⁵⁶ *Id.* at 372-73.

prisonment could be imposed did not invoke the right to counsel.¹⁵⁷

Justice Powell's concurring opinion in *Scott* stressed the majority's reliance on the fact that the actual imprisonment standard would provide clear guidance to lower courts.¹⁵⁸ He joined the majority reluctantly, preferring instead a flexible case-by-case adjudication of the need for appointed counsel in petty offense cases.¹⁵⁹ In *Argersinger* Justice Powell urged consideration of a series of factors in petty offense cases, including the complexity of the offense, the probable sentence, the competency of the individual to represent himself, and the "attitude of the community" toward the particular crime.¹⁶⁰ In light of the subsequent cases building upon *Argersinger*, it appears that the Court would not retreat from the requirement of counsel in actual imprisonment cases.¹⁶¹ The close division among the Court in *Scott* combined with Justice Powell's reluctant concurrence holds open the possibility that the Court might revisit the issue of appointment of counsel in a particularly compelling non-imprisonment misdemeanor case.¹⁶²

3. New York's Statutory Response to *Gideon*

Following the 1963 *Gideon* decision, states that had not previously made provisions to provide counsel for indigent defendants scrambled to enact legislation. New York followed suit in 1965 by amending Article 18 of the County Law, creating Article 18-B.¹⁶³

Article 18-B commands each county in New York State to supply representation to criminal defendants who are financially unable to obtain counsel.¹⁶⁴ This representation must take one of three forms: (1) representation by a public defender as provided for by Article 18-A,¹⁶⁵ (2) representation provided by a private legal aid bureau or society designated by the county,¹⁶⁶ (3) representa-

¹⁵⁷ *Id.* at 373.

¹⁵⁸ *Id.* at 374.

¹⁵⁹ *Id.* at 374-75; see also John E. Nowak, *Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 409 (1979).

¹⁶⁰ See 407 U.S. at 64 (1972).

¹⁶¹ See, e.g., *Baldasar v. Illinois*, 446 U.S. 222 (1980) (holding uncounseled conviction which resulted in fine could not be used as prior misdemeanor-theft conviction to support harsher sentence in future sentencing proceeding).

¹⁶² See Nowak, *supra* note 159, at 408-09.

¹⁶³ N.Y. COUNTY LAW § 722 (McKinney 1965) (current version at N.Y. COUNTY LAW § 722 (McKinney 1991)).

¹⁶⁴ See N.Y. COUNTY LAW § 722 (McKinney 1991).

¹⁶⁵ See *id.* § 722(1).

¹⁶⁶ See *id.* § 722(2).

tion by private counsel pursuant to a plan designed by the bar association of each county,¹⁶⁷ or (4) representation according to a plan containing a combination of the foregoing.¹⁶⁸ Article 18-B also provides compensation for investigative, expert, and other services necessary for an adequate defense.¹⁶⁹

Compensation for private attorneys was provided for under section 722-b.¹⁷⁰ As enacted in 1965, rates were fixed at fifteen dollars per hour for in-court time and ten dollars per hour for out-of-court time.¹⁷¹ Limits were placed on the total compensation an attorney could receive at five hundred dollars for cases involving felonies and three hundred dollars for cases involving misdemeanors with an option provided for compensation in excess of those limits if provided by the court.¹⁷² In 1966, section 722-b was amended to allow attorneys to receive payment during the course of representation.¹⁷³

Article 18-B was passed with much fanfare. Governor Nelson Rockefeller noted, "New York has always been a leader in the protection of the rights of its citizens and the passage of 18-B mark[ed] another great step in that direction."¹⁷⁴ In addition to the Governor, supporters included the Attorney General, deans of law schools, the State Administrator of the Judicial Conference, the Association of the Bar of the City of New York, the Chairman of the Commission to Revise the Penal Law and the Code of Criminal Procedure, many local bar associations, and the Joint Conference on Legal Education.¹⁷⁵ Opponents were concerned with 18-B's effect on home rule 19¹⁷⁶ and the costs placed on the counties,¹⁷⁷ relative to the differences in the cost of living in more populated

¹⁶⁷ See *id.* § 722(3).

¹⁶⁸ See *id.* § 722(4).

¹⁶⁹ See *id.* § 722-c.

¹⁷⁰ See *id.* § 722-b.

¹⁷¹ N.Y. COUNTY LAW § 722-b (McKinney 1965).

¹⁷² *Id.*

¹⁷³ N.Y. COUNTY LAW § 722-b (McKinney 1966) (current version at N.Y. COUNTY LAW § 722-b (McKinney 1991)).

¹⁷⁴ Memorandum filed with: Assembly Bill, Introductory Number 2233, Senate Print Number 5744 and Assembly Bill, Introductory Number 4786, Senate Print Number 7273.

¹⁷⁵ See Bill Jacket, L. 1965, c. 878.

¹⁷⁶ *Id.* Resolution of the Board of Supervisors of Montgomery County (June 8, 1965); Letter from F. Clark Hamlin, Clerk, Jefferson County Board of Supervisors, to Governor Nelson Rockefeller (May 28, 1965).

¹⁷⁷ See *id.* Letter from Irving Libenson, County Attorney, Westchester County, to Sol Neil Corbin, Counselor to the Governor (June 30, 1965).

areas as compared to those of rural areas.¹⁷⁸

Statutory fees for trial counsel have been increased only twice since 1965, to twenty-five dollars per hour for in-court time and fifteen dollars per hour for out-of-court time in 1977, and forty dollars per hour for in-court time and twenty-five dollars per hour for out-of-court time in 1985.¹⁷⁹ The equivalent increases in the caps have brought them to \$1,200 for cases involving felonies and \$800 for cases involving misdemeanors.¹⁸⁰ As time passed, it became more difficult to attract able attorneys to represent indigent defendants¹⁸¹ which led to the "abuse and neglect" of indigent cases.¹⁸² Moreover, the consistently higher rates paid in the federal court system acted to dissuade counsel from accepting state cases.¹⁸³ Proponents of the increases hoped that they would encourage a greater number of attorneys to participate in the program thereby reducing the individual caseload and providing higher quality legal representation to those clients served by the program.¹⁸⁴ The rates, which went into effect in 1986, have not been increased since.¹⁸⁵

III. HOW THE LAW TREATS THE POOR

The Supreme Court has recognized that the right to counsel is a fundamental right.¹⁸⁶ Counsel must not only be appointed for an indigent defendant, but must also be paid. If a state establishes a scheme to enact *Gideon* and affects another fundamental right, injustice may result. The injustice may not be just an inequitable distribution of social goods, but the imprisonment of people who do not possess that item by which other social goods are valued. Therefore, the concept of equal protection and the right to counsel for indigent defendants points to inequalities that may impinge directly on access to, or levels of, those rights.

¹⁷⁸ See *id.* Letter from Benjamin I. Taylor, President, Mammamroneck-Harrison Bar Association, to Sol Neil Corbin, Counselor to the Governor (Apr. 6, 1965).

¹⁷⁹ N.Y. COUNTY LAW § 722-b (McKinney 1991).

¹⁸⁰ *Id.*

¹⁸¹ See Bill Jacket L. 1985, c.315 (Memorandum in Support of Increase in Rates as per S.824/A.1216, Prepared by Joseph W. Bellacosa, Chief Administrator to the Courts).

¹⁸² See *id.* (Budget Report on Bill, Prepared by State Senators Dunne, Johnson and Goodhue).

¹⁸³ See Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice For All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 94-95 (1993).

¹⁸⁴ *Id.*

¹⁸⁵ N. Y. COUNTY LAW § 722-b (McKinney 1991).

¹⁸⁶ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

1. The Meaning of Indigency

Supreme Court opinions generally refer to the rights of an 'indigent defendant' without ever offering a specific definition of indigency. Federal and state appellate courts have established guidelines defining indigency,¹⁸⁷ although studies suggest that trial judges often will create their own standards.¹⁸⁸ Most if not all courts agree that indigency does not mean destitute. Generally, courts consider the full range of defense expenses in light of the defendant's current personal and financial situation.¹⁸⁹ Among the most common considerations are income from employment, real and personal property, number of dependents, outstanding debt, and seriousness of the charge.¹⁹⁰ The court will look to the defendant's current earnings and assets, as well as his potential to generate future income, but will disregard potential assistance from friends and relatives.¹⁹¹

2. Equal Protection and Poverty in Constitutional Law

Decisions addressing legislative classifications based on wealth began to attract the attention of the Supreme Court during the Warren Era. The Warren Court expressed the idea that society has a limited duty to lift some of the handicaps of poverty in some circumstances.¹⁹² Equal protection of the law provided the vehicle for the Warren Court to promote a constitutional vision of equal justice for rich and poor alike.¹⁹³ On the other hand, the Burger Court halted the expansion of the wealth classification doctrine

¹⁸⁷ See Wade R. Habeeb, Annotation, *Determination of Indigency of Accused Entitling Him to Appointment of Counsel*, 51 A.L.R. 3d 1108, 1111-14 (1973).

¹⁸⁸ See Steven Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601, 630 (1975); Ken Anderson, *Indigency: The Need for a Definition*, 5 TEX. S.U.L. REV. 45, 47 (1978).

¹⁸⁹ See, e.g., *Thiel v. Southern Pac. Co.*, 159 F.2d 61 (9th Cir. 1946) (estimated costs of appeal); see also *Morgan v. Rhay*, 470 P.2d 180 (Wash. 1970) (attorney fees in light of defendant's financial situation).

¹⁹⁰ *Williams v. Sup. Ct. of County of Stanislaus*, 38 Cal. Rptr. 291, 294 (Cal. Ct. App. 1964) (quoting Note, *Representation of Indigents in California*, 13 STAN. L. REV. 522 (1961)); see *Assad-Faltas v. Univ. South Carolina*, 971 F. Supp. 985 (D.S.C. 1997); see also *Fuller v. Oregon*, 417 U.S. 40, 45 (1974); *Bramlett v. Peterson*, 307 F. Supp. 1311 (D. Fla. 1969).

¹⁹¹ See *Barry v. Brower*, 864 F.2d 294, 299-300 (3rd Cir. 1988); see also *United States v. Viemont*, 91 F.3d 946, 952 (7th Cir. 1996).

¹⁹² See *Edwards v. California*, 314 U.S. 160, 174-75 (1941); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966); *McDonald v. Board of Education Commissioners of Chicago*, 394 U.S. 802, 807 (1969).

¹⁹³ See *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *McDonald v. Board of Education Commissioners of Chicago*, 394 U.S. 802, 807 (1969).

into other areas.¹⁹⁴ Significantly, the Burger Court abandoned the rhetoric of the Warren Court, sacrificing both the spirit and letter of the Warren Court's equal protection decisions.¹⁹⁵

A. *The Rise of Equal Access*

In *Griffin v. Illinois*,¹⁹⁶ the Supreme Court held that the state must provide the indigent criminal appellant with a free transcript of the trial when the bill of exceptions necessary for appellate review could not be prepared without it.¹⁹⁷ Earlier decisions held that a state was not required to provide appellate review of all criminal convictions.¹⁹⁸ However, the Court in *Griffin* reasoned that once the state establishes an appellate system, that system must treat rich and poor alike.¹⁹⁹ The majority viewed Illinois' justifications as irrational,²⁰⁰ since there was no relevant relationship between ability to pay and guilt or innocence.²⁰¹

In *Douglas v. California*,²⁰² the issue was whether a state had to appoint counsel for indigent defendants for their first appeal as of right.²⁰³ In the procedure at issue, the California appellate courts would determine whether the petitioner's claim had merit before appointing counsel.²⁰⁴ The Supreme Court reaffirmed *Griffin* holding, "[i]n either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"²⁰⁵ The Court in *Douglas* reasoned that California's right of appeal violated due process because indigent defendants were forced to make a preliminary showing of merit.²⁰⁶

Similarly, in *Anders v. California*,²⁰⁷ the Court sought to ensure that court-appointed counsel would passionately represent their

¹⁹⁴ See generally Peter Arenella, *Rethinking the Function of Criminal Procedure: The Warren and Burger Courts Competing Ideologies*, 72 GEO. L. J. 185 (1983).

¹⁹⁵ See *id.*

¹⁹⁶ 351 U.S. 12 (1956).

¹⁹⁷ *Id.* at 19.

¹⁹⁸ See *McKane v. Durston*, 153 U.S. 684, 687-88 (1894).

¹⁹⁹ 351 U.S. at 19.

²⁰⁰ *Id.* at 17-18.

²⁰¹ *Id.* at 19.

²⁰² 372 U.S. 353 (1963).

²⁰³ *Id.* at 355.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 355 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

²⁰⁶ 372 U.S. at 357.

²⁰⁷ 386 U.S. 738 (1967); see also *Jenkins v. Coombe*, 821 F.2d 158 (2d Cir. 1987) (holding that the state appellate court committed a constitutional error by entertaining a defendant's appeal without providing him with effective appellate counsel).

clients regardless of the merits of their claims.²⁰⁸ The issue in *Anders* was the constitutionality of California's withdrawal system, which permitted court-appointed attorneys to remove themselves from a case if they felt that the appeal was frivolous.²⁰⁹ The Supreme Court held that the process did not meet the constitutional requirements of due process and equal protection, thus requiring that counsel submit a brief suggesting *any* argument that might support the appeal.²¹⁰ The California court could then decide the appeal on the merits by the same standard used for a non-indigent appellee.²¹¹ This "assure[s] penniless defendants the same rights and opportunities on appeal—as nearly as practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."²¹²

These cases demonstrated the Court's commitment to equal justice for the poor. The Court's fundamental rationale was to create a protective rule to ensure equal treatment of indigent defendants.²¹³ The Supreme Court imposed rules in cases like *Anders* so that judges and lawyers may perceive an indigent's claim more critically.²¹⁴ These rules provide indigent defendants with the tools to draw attention to their claims. Moreover, they ensure that individuals are treated equally without regard for their ability to pay and are thus given an equal opportunity to preserve their liberty.

Further examples of these rules can be found where the Supreme Court dealt with rights they had already deemed fundamental. In *Gideon v. Wainwright*,²¹⁵ the Court adopted a rule requiring appointed counsel for every indigent criminal defendant accused of a felony.²¹⁶ Subsequently, in *Argersinger v. Hamlin*,²¹⁷ the Court extended *Gideon* to all prosecutions which resulted in imprisonment for any term.²¹⁸ This extension served as a hedge against the "obsession for speedy dispositions, regardless of the fairness of the result,"²¹⁹ caused by the larger number of misdemeanor cases.

Moreover, the Court did not limit this rationale solely to right

²⁰⁸ *Id.* at 744-45.

²⁰⁹ *Id.* at 739-40 & n.2.

²¹⁰ *Id.* at 744.

²¹¹ *Id.* at 744-45.

²¹² *Id.* at 745.

²¹³ *Id.*

²¹⁴ *Id.* at 744-45.

²¹⁵ 372 U.S. 335 (1963).

²¹⁶ *Id.* at 342-45.

²¹⁷ 407 U.S. 25 (1972).

²¹⁸ *Id.* at 37.

²¹⁹ *Id.* at 34.

to counsel cases. For example, *Harper v. Virginia Board of Elections*,²²⁰ involved a challenge to Virginia's poll tax.²²¹ Like the right of appeal from criminal convictions in *Griffin*, the franchise is not independently guaranteed by the Constitution. Nevertheless, the Court held that using wealth as a class to grant the vote to some while denying it to others was a violation of equal protection.²²² As in *Griffin*, the majority refused to legitimize the purported fiscal purposes served by the poll tax.²²³ Moreover, the Court expressed a willingness to mandate the fiscal amounts the state must spend on private services for private citizens.²²⁴ The court also suggested that when there is a fundamental interest at stake, the state has a duty to the indigent because the state bears a special responsibility for the infringement of that right.²²⁵

B. The Decline of Judicial Intervention on Behalf of the Poor

In the three decades since it was decided, *Griffin* spawned many cases reaffirming the state's duties to the indigent defendant, including *Douglas*. *Douglas* remained essentially untouched until it was overturned by the Supreme Court in *Ross v. Moffit*.²²⁶ *Ross* concerned the state's duty to appoint counsel for indigent state prisoners seeking discretionary review.²²⁷ The Court's holding, that states did not have this duty²²⁸ was no different from the holding in *Douglas*. However, the rationale used in *Ross* was radically different.

The explicit elimination of wealth as a suspect classification was noteworthy. The Court accomplished this by choosing not to impose the cost of counsel for discretionary review on the states.²²⁹ The way the Court defined the issue of wealth within the equal protection paradigm was more subtle, but in the end more devastating to the cause of the poor. In *Ross*, the Court viewed *Griffin* and its progeny as "stand[ing] for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."²³⁰ On the other hand, the Court in *Ross* viewed *Douglas* as "an examination of

²²⁰ 383 U.S. 663 (1966).

²²¹ *Id.* at 664.

²²² *Id.* at 670.

²²³ *Id.* at 668-69.

²²⁴ *Id.* at 668.

²²⁵ *Id.* at 670.

²²⁶ 417 U.S. 600 (1974).

²²⁷ *Id.* at 602-03.

²²⁸ *Id.* at 610, 617-18.

²²⁹ *Id.* at 612.

²³⁰ *Id.* at 607.

whether an indigent's access to the appellate system was adequate."²³¹ This subtle shift was a sign that the Court would no longer proactively seek to level the playing field between the rich and the poor.

Similarly, in *San Antonio Independent School District v. Rodriguez*,²³² the Supreme Court chose to re-characterize laws that classify people based on wealth. At issue in *Rodriguez* was Texas' system of financing its public schools.²³³ The state system guaranteed a minimal level of state financing and permitted the individual districts to raise additional revenues, usually through local property taxes.²³⁴ This led to a gross disparity in educational spending between affluent and poor districts based solely on the underlying property values.²³⁵ The Supreme Court chose to defer to the state's legislative judgments on raising money and how to educate children.²³⁶ More importantly, as further evidence of its retreat, the Court would rely on federalism²³⁷ to uphold a financing system that existed in many states.²³⁸ Ultimately it became apparent that the Court would not guarantee equal access to education but would only mandate that a threshold level be met, assuring at a minimum that each child had a chance to acquire the basic skills.²³⁹

Following *Ross* and *Rodriguez*, the Court would vacillate on its commitment to equal justice for the poor. In *Lassiter v. Department of Social Services*,²⁴⁰ a 5-4 majority held that the state is not required to pay for an attorney for an indigent woman whose child is being taken away, but that such determinations should be made at the trial court level on a case by case basis.²⁴¹ Justice Stewart's majority opinion concluded that an indigent is preemptively entitled to counsel only when faced with the risk of being deprived of physical liberty.²⁴² In the same year, the court decided *Little v. Streater*,²⁴³ in which the petitioner gave birth to a child out of wedlock and was

²³¹ *Id.*

²³² 411 U.S. 1 (1973).

²³³ *Id.* at 4-5.

²³⁴ *Id.* at 9-10.

²³⁵ *Id.* at 15-16.

²³⁶ *Id.* at 40-41.

²³⁷ *Id.* at 44.

²³⁸ *Id.* at 55.

²³⁹ *Id.* at 37.

²⁴⁰ 452 U.S. 18 (1981).

²⁴¹ *Id.* at 24-32.

²⁴² *Id.* at 25-26.

²⁴³ 452 U.S. 1 (1981).

forced by the Connecticut Department of Social Services to bring a paternity suit in order to qualify for welfare.²⁴⁴ The Supreme Court unanimously held that Connecticut's refusal to pay for the blood tests needed to bring a paternity suit was a violation of due process.²⁴⁵ The Court reasoned that the state played a "prominent role in the litigation"²⁴⁶ and was required to pay for the blood tests so that the petitioner would have a "meaningful opportunity to be heard."²⁴⁷

In *Plyer v. Doe*,²⁴⁸ the Court overturned a Texas law that denied public education to the children of illegal aliens.²⁴⁹ Writing for the majority, Justice Brennan acknowledged that states "have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."²⁵⁰ He reasoned that the Texas law did not "operate harmoniously" with federal immigration law²⁵¹ and that it served no state interest, but to the contrary, only promoted "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."²⁵²

One principle established in *Plyer* is that a state may not pursue policies which invariably create a permanent class of people who are economically depressed and politically disadvantaged, and indeed in some circumstances, the state may have a duty to spend public money to avert creation of a permanent caste of the underclass.²⁵³

C. *Equal Protection of the Laws and Article 18-B*

As some recent media trials demonstrate, even to those who are not familiar with the details of criminal defense work, the wealthy can buy justice in our country.²⁵⁴ The Supreme Court has

²⁴⁴ *Id.* at 15.

²⁴⁵ *Id.* at 16-17.

²⁴⁶ *Id.* at 6.

²⁴⁷ *Id.* at 5-6 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)).

²⁴⁸ 457 U.S. 202 (1982).

²⁴⁹ *Id.* at 228-30.

²⁵⁰ *Id.* at 225.

²⁵¹ *Id.* at 226.

²⁵² *Id.* at 230.

²⁵³ *Id.*

²⁵⁴ See generally Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47 (1997) (discussing the notion that justice before the law, particularly criminal law, should not depend on financial resources and that a "purchased" outcome in a criminal trial is not tolerable).

never required that the government neutralize the advantages of wealth. You get what you pay for.

It is indisputable that the abysmally low rate paid to private trial attorneys who represent the indigent in New York under section 722 of Article 18-B of the New York County Law²⁵⁵ places indigent criminal defendants at a substantial disadvantage. The relative amount of money that New York pays private attorneys has decreased since the passage of Article 18-B. A 1994 report adopted by the House of Delegates of the New York State Bar Association points out that despite the two increases in the rates paid to private attorneys, the consumer price index has increased five times since 1965, amounting to a 44 percent decrease in terms of purchasing power.²⁵⁶

The rates paid by New York State for non-capital cases are significantly disproportionate to the federal rates, the rates paid by other states, and the rates paid in New York for other types of legal representation.²⁵⁷ New York rates are among the lowest in the country despite its higher cost of doing business.²⁵⁸ Thirty-one states pay more for in-court time and thirty-two states pay more for out-of-court time.²⁵⁹ Only seven states pay less than New York for in-court time and only six for out-of-court time.²⁶⁰ It would be foolish to think that an indigent defendant charged with a crime in a New York state court is receiving the same quality of representation as an indigent defendant in a New York federal court.

The rates paid to private attorneys for other types of representation in New York indicate an implicit choice to provide a lower level of representation to poor criminal defendants. Partners assigned under Public Officers Law Section 17 to represent state employees receive \$100 per hour for in-court time and \$75 per hour for out-of-court work.²⁶¹ Associates with three years experience receive \$75 and \$50 respectively for the same work.²⁶² In 1992, New York City, which retains attorneys to represent the City and its

²⁵⁵ N.Y. COUNTY LAW § 722 (McKinney 1991).

²⁵⁶ See STATEMENT ON ASSIGNED COUNSEL FEES. Criminal Justice Section of the New York State Bar Association (Adopted at NYSBA Annual Meeting held in New York City on January 28, 1994).

²⁵⁷ See Schulhofer & Friedman, *supra* note 183, at 94.

²⁵⁸ See Schulhofer & Friedman, *supra* note 183, at 93.

²⁵⁹ See SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL (1997).

²⁶⁰ *Id.*

²⁶¹ See "LEGAL FEES" SCHEDULE, NEW YORK STATE DEPARTMENT OF AUDIT AND CONTROL, BUREAU OF CONTRACTS AND STATE EXPENDITURES.

²⁶² *Id.*

agencies, established maximum rates for partners of \$150 per hour and for associates of \$100 per hour.²⁶³ These higher rates suggest a disregard for the indigent criminal defendant's presumption of innocence.

Unfortunately, these incredibly low rates have caused experienced trial attorneys to shun 18-B cases. Veteran attorneys either leave the state 18-B panel or accept more federal cases, thereby depleting the state panel. The current system yields two other interesting results. First, the higher in-court rate causes attorneys to devote more time in court even though out of court preparation and investigation could result in speedier disposition of cases. Second, if caps are exceeded before the case goes to trial, the attorney could be faced with representing the client without a fee, which is impermissible.²⁶⁴

IV. INDIGENCY AND EFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court first recognized a constitutional right to effective assistance of counsel in *Powell v. Alabama*.²⁶⁵ In *Powell* the Court recognized that where due process requires the state to provide counsel for an indigent defendant, "that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."²⁶⁶ Ten years later, in *Glasser v. United States*,²⁶⁷ the Supreme Court held that there was a Sixth Amendment violation when a judge denied a defendant the "right to have the effective assistance of counsel."²⁶⁸ Later, in *Evitts v. Lucey*,²⁶⁹ the Supreme Court found that a defendant was entitled *a fortiori* to effective representation by retained counsel on a first appeal of right.²⁷⁰ The Court noted that "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."²⁷¹

The right to effective assistance of counsel extends to any proceeding where there is a constitutional right to counsel. In other

²⁶³ See Edward A. Adams, *Lawyers Cost City \$12 Million Last Year*, N.Y. L.J., Apr. 16, 1992, at 1.

²⁶⁴ See generally Schulhofer & Friedman, *supra* note 183.

²⁶⁵ 287 U.S. 45 (1932).

²⁶⁶ *Id.* at 71.

²⁶⁷ 315 U.S. 60 (1942).

²⁶⁸ *Id.* at 76.

²⁶⁹ 469 U.S. 387 (1985).

²⁷⁰ *Id.* at 402.

²⁷¹ *Id.* at 396.

words, the constitutional right to counsel that is grounded in either the Sixth Amendment, the Due Process Clause, or the Equal Protection Clause is the right to effective assistance of counsel. Where there is no such constitutional right, the same constitutional requirement of effective assistance of counsel does not apply.²⁷² In *Wainwright v. Torna*,²⁷³ the defendant claimed to have been denied effective assistance of counsel when his retained attorney failed to file a timely application for discretionary review.²⁷⁴ The Court noted that “[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel’s failure to file the application timely.”²⁷⁵

Over the years the courts have allowed appeals based on defense counsel failures in several areas. Some examples include the failure to investigate,²⁷⁶ to consult sufficiently with the defendant,²⁷⁷ to adequately represent client interests in plea bargaining,²⁷⁸ to move to suppress illegally obtained evidence,²⁷⁹ and to raise or properly present various available defenses.²⁸⁰

In *Strickland v. Washington*,²⁸¹ and *United States v. Cronin*,²⁸² which were announced the same day, the Supreme Court sought to provide a general framework for the analysis of ineffective assistance claims. Both opinions noted that the critical element of ineffective assistance claims is to evaluate the performance of counsel in light of the underlying purpose of the constitutional right to counsel.²⁸³ In *Strickland* the Court noted that the objective of the Sixth Amendment right to counsel was to provide the “basic elements of a fair trial.”²⁸⁴ Because the essential character of a fair trial is our adversarial system of litigation, effective assistance claims must be measured by reference to the proper functioning of

²⁷² See *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

²⁷³ 455 U.S. 586 (1982).

²⁷⁴ *Id.* at 586-87.

²⁷⁵ *Id.* at 587-88.

²⁷⁶ *In re Jones*, 917 P.2d 1175, 1179-82 (Cal. 1996).

²⁷⁷ *State v. Savage*, 577 A.2d 455, 466-69 (N.J. 1990).

²⁷⁸ *Mitchell v. State*, 762 S.W.2d 916, 922 (Tex. Ct. App. 1989) (citing *Diaz v. Martin*, 718 F.2d 1372, 1378 (5th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984)).

²⁷⁹ *State v. Fisher*, 874 P.2d 1381, 1384-85 (Wash. Ct. App. 1994).

²⁸⁰ *DeLuca v. Lord*, 858 F. Supp. 1330, 1346-52 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *and cert. denied* (1996).

²⁸¹ 466 U.S. 668 (1984).

²⁸² 466 U.S. 648 (1984).

²⁸³ *Strickland*, 466 U.S. at 685, 692; *Cronin*, 466 U.S. at 655-56.

²⁸⁴ *Strickland*, 466 U.S. at 685.

the adversarial process in a particular case.²⁸⁵ Therefore, the critical question is whether counsel's performance has been so lacking that the process "los[t] its character as a confrontation between adversaries,"²⁸⁶ leading to an "actual breakdown of the adversarial process."²⁸⁷

The concept of effective assistance of counsel stated in *Strickland* and *Cronic* allows a constitutional challenge only when a defendant can establish that counsel actually failed in some respect to discharge his duties and that the failure affected the adversarial process to an extent that undermines the confidence in the outcome of the proceeding.²⁸⁸ The Court in *Strickland* emphasized the importance of a fact-sensitive analysis of the nature and impact of the attorney's representation under the circumstances of the particular case.²⁸⁹ In *Cronic*, Justice Stevens recognized settings in which there could be *per se* violations of the right to effective counsel.²⁹⁰ First is the situation in which "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."²⁹¹ Second, Justice Stevens acknowledged that there were "occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."²⁹²

A. *Conflicts of Interest*

It has long been recognized that the constitutional right to effective assistance of counsel entitles a defendant to the undivided loyalty of his attorney.²⁹³ In *Strickland*, Justice O'Connor stated that capable representation "entails certain basic duties,"²⁹⁴ and among these duties is an obligation for lawyers to "avoid conflicts of interest."²⁹⁵ The defendant will not receive a fair trial when his counsel's decisions are affected by obligations to persons other than the defendant. Thus, a conflict of interest is present when defense

²⁸⁵ *Id.* at 690.

²⁸⁶ *Cronic*, 466 U.S. at 656-57.

²⁸⁷ *Id.* at 657.

²⁸⁸ *Id.* at 656; *Strickland*, 466 U.S. at 687.

²⁸⁹ 466 U.S. at 690.

²⁹⁰ 466 U.S. at 658-59.

²⁹¹ *Id.* at 659 n.25.

²⁹² *Id.* at 659-60.

²⁹³ *Strickland*, 466 U.S. at 688.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

counsel has personal interests that affect their professional judgment in representing the client.²⁹⁶

Courts have not found a constitutional bar against representation in potential conflict of interest settings.²⁹⁷ However, courts have been willing to view representation in those settings as suspect.²⁹⁸ They have also recognized that it is often impossible to reconstruct the precise impact of an attorney's loyalty because a conflict of interest arises from matters that are not reflected in an appellate record. The reviewing courts have expressed the difficulty in pinpointing acts or omissions at trial that are not readily apparent from the record.²⁹⁹ Ultimately, the only person who knows the true ramifications of a conflict is the defense attorney.

One response to this issue has been for courts to make a pre-trial inquiry into an attorney's possible conflicts. However, if the court itself is the source of the conflict, the inquiry is futile. Therefore, the defendant is forced to utilize post-conviction review. The prevailing standard for post-conviction review was established in *Cuyler v. Sullivan*.³⁰⁰ In *Cuyler* the Supreme Court stated that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."³⁰¹ This does not require the defendant to establish that he or she has been prejudiced by the attorney. Once a defendant "shows that a conflict of interest actually affected the adequacy of his representation" he or she is entitled to relief.³⁰² Thus, there is no need to establish that the Sixth Amendment violation might have adversely affected the outcome of the case. Once the defendant demonstrates both an actual conflict of interest (that the attorney was placed in a situation where conflicting loyalties pointed in opposite directions) and, as a result, the attorney proceeded to act against the defendant's interests, prejudice would be presumed and automatic reversal is required.

New York's scheme for compensating private attorneys creates conflicts of interest that may result in claims of ineffective assistance of counsel. Advocates cannot live in the vacuum of a single

²⁹⁶ See *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980).

²⁹⁷ See *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1987), *cert. denied*, 488 U.S. 934 (1988).

²⁹⁸ See *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

²⁹⁹ *Strickland*, 466 U.S. at 689.

³⁰⁰ 446 U.S. 335 (1980).

³⁰¹ *Id.* at 348.

³⁰² *Id.* at 349-50.

case. They must also consider office rent, support staff, and personal expenses as they allocate their time. The low fees paid to those who represent the indigent force them to choose not only how many of these cases they can take, but also the amount of time they devote to each case. The abysmally low rates create inherent conflicts of interest that undermine the quality of representation an attorney is able to provide.

The process of compensation under Article 18-B is equally flawed. Section 722 establishes caps on the total amount per case an attorney may receive.³⁰³ An attorney can exceed those caps only with the permission of the judge handling the case.³⁰⁴ Thus, the attorney is financially beholden to the judge hearing the case. The attorney's ability to choose how much time to devote to each case and meet expenses as the case progresses depends upon the judge handling the case. Therefore, attorneys may feel that they must tailor their representation strategies to the quirks of the judge in order to survive financially.

Attorneys who want to be appointed to future cases have to keep in mind that judges are charged with appointing counsel.³⁰⁵ It is my experience that many judges are former prosecutors who believe that defense attorneys who advocate zealously on behalf of their indigent clients are wasting the court's time and the people's money. Again, the inherent problem with a conflict of interest is that it is only the attorney, and perhaps the judge, who know how this affects the quality of legal representation in a particular case.

B. State Interference

Defendants are denied effective assistance of counsel when the state interferes with counsel's ability to make full use of trial procedures.³⁰⁶ In *Herring v. New York*,³⁰⁷ the Supreme Court noted that "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the tradi-

³⁰³ N.Y. COUNTY LAW § 722-b (McKinney 1991).

³⁰⁴ *Id.*; see also Schulhofer & Friedman, *supra* note 183, at 94.

³⁰⁵ N.Y. COUNTY LAW § 722(4) (McKinney 1991).

³⁰⁶ See *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (holding that denying counsel's input in deciding if and when a defendant will testify infringes on his or her constitutional rights); see also *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (holding that denying defendant's counsel the right to ask defendant questions when he took the stand denied him effective assistance of counsel).

³⁰⁷ 422 U.S. 853 (1975).

tions of the adversary fact finding process"³⁰⁸ The critical factor leading to the presumption of prejudice in state interference cases flows from the role played by the state in restricting an attorney's representation.³⁰⁹ The presumption of prejudice acts as a protective measure designed to discourage state action that may preclude effective representation.

New York's scheme for compensating private attorneys amounts to state interference. This scheme thrusts the state into the defense attorney's decision making process. Even if courts do not consider this scheme as establishing a conflict of interest, they cannot deny that these intrusions are the result of state action.

V. CONCLUSION

Article 18-B prohibits counsel from making full use of trial procedures by forcing the attorney to run a financial gauntlet throughout the entire course of a client's representation. This gauntlet consists of the caps on the total amount an attorney may receive and the manner in which it is dispensed.³¹⁰ These factors inhibit the attorney in making all of the decisions necessary to prepare and execute a zealous defense. Additionally, when judges make the appointments of 18-B attorneys, it is obvious that the state has injected itself into the indigent's defense. Therefore, the 18-B compensation scheme itself denies indigent defendants their right to effective assistance of counsel.

This article points to what New York attorneys for the indigent have known for some time: indigent criminal defendants are not receiving equal protection of the laws. Similarly situated defendants in New York and other state federal courts are receiving qualitatively better defense services. This unfair treatment of the indigent defendant leads to wrongful convictions that pack our prisons with wrongfully convicted defendants and robs the state of money that could be spent elsewhere to reduce crime.

The Bill of Rights and the Due Process Clause were designed to protect "a vulnerable citizenry from the overbearing concern for efficiency and efficacy" that frequently characterizes government officials.³¹¹ How much longer will we allow the state to perpetuate a society where some are more equal than others?

³⁰⁸ *Id.* at 857.

³⁰⁹ *Id.* at 857-59.

³¹⁰ N.Y. COUNTY LAW § 722-b (McKinney 1991).

³¹¹ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

THE RIGHT TO WORK AND EARN A LIVING WAGE: A PROPOSED CONSTITUTIONAL AMENDMENT

William P. Quigley†

I. INTRODUCTION

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. —*That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*¹

There is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are:

Equality of opportunity for youth and for others.

Jobs for those who can work.

Security for those who need it.

The ending of special privilege for the few.

The preservation of civil liberties for all.

The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.²

Every person should have the right to work and to receive a living wage for their work. It is time for a constitutional change. As the nation exhibits its legislative unwillingness to support non-working adults by forcing them off government assistance programs,³ they will meet millions who are already seeking work. Mil-

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¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

² 87 CONG. REC. 46 (1941) (remarks by President Franklin Delano Roosevelt in his State of the Union Address).

³ See, e.g., Barbarda Vobeja, *After 60 Years, a Basic Shift in Philosophy*, WASH. POST, Aug. 1, 1996, at A1.

lions more who are working do not earn enough to lift themselves and their children out of poverty.

Justice, supported by the Declaration of Independence and the history of this nation, demands change when current economic and legal arrangements hurt individuals, families, and communities. This article proposes an amendment to the United States Constitution to provide every citizen with the right to an opportunity for employment at a living wage. If this nation is serious about putting everyone to work, then it must guarantee everyone an opportunity to work at a living wage. If the United States House of Representatives can pass a proposed constitutional amendment banning flag-burning,⁴ an amendment ensuring the right to a job at a decent wage is possible.

It is in the nation's best interest to give everyone who wants to work the chance to be gainfully employed. This interest is served by allowing people to contribute to their own well-being, as well as to their family's and their community's. Likewise, it is in the common interest that people who work full-time should not remain poor. Workers who are compensated enough to support themselves and their families do not need to rely on support from others. The opportunity to work should be the right of every person. Work and poverty should not coexist.

Some who oppose full employment argue that it is inflationary and bad for the nation. These people would accept millions of non-working adults as the price the nation must pay to maintain low inflation. But is this true? Is the family helped by heads of households not being able to work if they are trying to work? Is the neighborhood helped by people not working? Is the city, or the state? Clearly not. So, if involuntary unemployment is bad for the family, the neighborhood, the city, and the state, how can it possibly be good for the nation? Others suggest that government has no business interfering with economic life. I would imagine that those who advance this suggestion have not had their own economic life assisted by government action.

American political history supports efforts to give everyone the opportunity to work and to make sure that those who work earn enough to avoid poverty. Historically, all levels of government have provided opportunities for work when the private sector was unable. This century has seen several legislative efforts to create a right to employment which, while unsuccessful so far, have enjoyed

⁴ Kenneth J. Cooper, *House Approves Amendment on Flag Desecration*, WASH. POST, June 29, 1995, at A7.

broad public support. Public support of such efforts is not surprising since this nation values work and opportunity.

The United States continually seeks ways to improve the constitutional rights to personal liberty and political participation for its citizens. Many of these important rights become diluted for the unemployed and those who are employed but still unable to support themselves and their families. It is time to recognize the need for an opportunity for all persons to support themselves. It is time to create a constitutional right to work for a living wage. The purposes of this proposed amendment are simple: (1) to create an opportunity to work for the involuntarily unemployed, and (2) to create an opportunity to earn a decent and livable wage for the employed. The proposed amendment reflects and reinforces this nation's commitment to work and opportunity. While the amendment has significant implications for this country's laws and economic policies, few would dispute the values it enshrines with constitutional protection.

This article outlines how such a guarantee of employment might work. It does not point out exactly how such an amendment could be implemented because the possibilities are literally limitless. For example, it could be implemented through: (1) the provision of tax incentives to private employers and employees which would support work creation and retention policies; (2) modifications of existing labor laws such as raising and indexing minimum wages; (3) the establishment of a Works Progress Administration ("WPA")-type employment corps for those who are not employed by the private sector, which could help clean, teach, and police the nation's communities; and (4) many combinations, as yet, unthought. The cost of such an effort would be much less than the cost the nation is already paying for unemployment and poverty-level wages. Such an amendment is consistent with the historical development of this country, and could propel the nation forward in supporting its citizens as they search for decent work at a decent wage.

II. THE PROPOSED AMENDMENT

The proposed amendment would contain the provision: *Every person shall have the right to work and to receive a living wage for their work.*

The amendment embodies two principles: a right to work, and a right for workers to receive a living wage. What these rights mean exactly will be decided by Congress, the Executive Branch,

and the Judiciary.⁵ However, a brief sketch of what these rights are intended to mean is in order.

The right to work would be a right of opportunity. "Every person shall have the right to work" simply means that there must be an opportunity to work for those who seek it. The proposed amendment does not force anyone to work, nor are the voluntarily unemployed affected. This is not mere sloganeering, but a real right to the opportunity to work. As a part of the Constitution, there would be a legally enforceable right to the opportunity for employment, and the involuntarily unemployed would be entitled to enforce this right.

The employed would be entitled, under this amendment, "to receive a living wage for their work." A living wage means compensation sufficient for workers to meet the needs and demands of everyday life, lived in a manner consistent with human dignity.⁶ The precise amount of money due workers will vary over time with national standards and expectations, but it is intended to cover the commonly accepted living expenses. Since it is a living wage, and because it is expected that many workers will be supporting families, the needs of those dependent on the worker must also be considered. A living wage certainly does not mean the statutory minimum wage,⁷ which is far below the wages needed for most workers and their dependents to live in dignity. The right to a living wage would become legally enforceable, with all the benefits that entails.

At the present, there is neither a guarantee of work nor living wages. The two principles of work and living wages must fit together. Without the guarantee of a living wage, work loses some of its appeal; without the real opportunity to work, the promise of good wages is empty. The guarantees of work and living wages energize and complement each other. They must remain linked to create a strong constitutional bond for the people of this nation.

The Constitution enshrines the highest goals of the United States. This nation values working and earning enough to secure a

⁵ U.S. CONST. art. I, §§ 1-8; art. II, §§ 1-2; art. III, §§ 1-2.

⁶ See Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 451 n.4 (1981) [hereinafter Klare, *Labor Law as Ideology*] ("[W]ork can and should provide dignity and meaning to life . . . it can and should be a mode of expression, development[,] and realization of the human self . . .").

⁷ The statutory minimum wage in the United States is currently \$5.15 per hour. Small Business Job Protection Act, 29 U.S.C. § 415(b)(2)(E) (1996).

dignified living.⁸ A constitutional amendment guaranteeing every person the right to work and to earn a living wage simply, yet forcefully, elevates accepted American principles to the status of constitutionally protected rights.

III. AMERICAN HISTORICAL PRECEDENT FOR THE RIGHT TO WORK AND EARN A LIVING WAGE

Three times during this century a guaranteed right to employment was seriously considered in the United States. First, in the early 1930s during the New Deal, President Franklin Delano Roosevelt lead the fight for decent work at decent wages through exhortation and legislation.⁹ After World War II, a comprehensive legislative guarantee of employment was considered by Congress.¹⁰ Third, in the mid-1970s, Congress and the nation again wrestled with a way to ensure everyone had the opportunity to work.¹¹ While none of these efforts culminated in an enforceable right to work, each moved the country closer to that goal and provided insight for those considering a constitutional amendment.

Even before the New Deal, Americans supported the obligation of public authorities to help the able-bodied jobless become employed.¹² Furnishing work opportunities for the unemployed was considered a part of the duty of local officials in England as early as the sixteenth century.¹³ Publicly funded work was used as a

⁸ See, e.g., Keith B. Leffler, *Minimum Wages, Welfare, and Wealth Transfers to the Poor*, 21 J.L. & ECON. 345 (1978).

⁹ See *infra* pp. 108-15.

¹⁰ See *infra* pp. 115-19.

¹¹ See *infra* pp. 120-23.

¹² For a more detailed overview of the history of the right to work, see William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1793-1804 (1994) (posing a social and economic citizenship based on roots ranging from postbellum Republicans' discussions of "wage slavery," Gilded Age reformers, the Populist tradition, the Progressive era, and the New Deal). See also THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 234 (1995).

¹³ WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 8-9 (5th ed. 1994). See also Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1994).

A statute enacted in 1530 . . . ordered that the disabled poor be licensed to beg within their own local area. Those begging outside the permitted area were to spend two days and nights in the stocks, and fed only bread and water. Moreover, anyone begging without a license was to be whipped and those "whole and mighty in body, able to labor" were to be "tied to the end of a cart naked, and be beaten with whips throughout the same town or other place till his body be bloody by reason of such whipping."

means of relief for the unemployed in the United States as early as 1857.¹⁴ In the nineteenth century, authorities in cities such as Baltimore, New York, Newark, and Philadelphia provided public jobs at a set minimum wage in response to widespread unemployment.¹⁵ These efforts continued into the twentieth century. Between 1914 and 1915, over fifty cities used public works such as laying water-mains, improving roads and parks, and repairing public buildings to help relieve unemployment.¹⁶

A. Franklin Delano Roosevelt and the New Deal

Government creation of public work programs cannot be understood without some knowledge of the Depression and its effect on unemployment. During the Depression, unemployment grew at a frightening rate. In the spring of 1929, there were 2.8 million unemployed men and women; by January 1930, there were over four million out of work; in September 1930, five million people were unemployed; eight million people were jobless by spring 1931; and unemployment peaked at thirteen to fifteen million people out of work in the spring of 1933.¹⁷

This sanguinary law was amended in 1535 to provide assistance to those who were truly needy, and to guide the others towards productive work. Under the amendment, sturdy beggars were made to work, and invalids were supported by alms collected by the churchwardens and two others of every parish. This was the first English law to legislate charitable sustenance of the poor.

After the accession to the throne of King Edward, the Henrician laws were replaced by more severe measures. The Edwardian statute provided that any loiterer or wanderer who would not work, or had run away from work, was to be branded with a "V" for vagabond. Furthermore, he was to be a slave for two years to whomever demanded him, was to be fed bread and water, and forced to do any task "how vile soever it be as he shall be put unto by beating, chaining, or otherwise." Moreover, if the enslaved beggar ran away, he was to be branded with an "S" upon the cheek and made a slave for life. If he ran away again, he was to be hanged.

Id. at 295-96 (citations omitted).

¹⁴ See LEAH HANNAH FEDER, *UNEMPLOYMENT RELIEF IN PERIODS OF DEPRESSION: A STUDY OF MEASURES ADOPTED IN CERTAIN AMERICAN CITIES, 1857 THROUGH 1922*, at 31 (1936).

¹⁵ SKOCPOL, *supra* note 12, at 234.

¹⁶ FEDER, *supra* note 14, at 288.

¹⁷ JOSEPHINE CHAPIN BROWN, *PUBLIC RELIEF: 1929-1939*, at 64-65 (1940). These unofficial employment estimates were gathered by several organizations since no official government estimates exist. *Id.* at 64. See also BONNIE FOX SCHWARTZ, *THE CIVIL WORKS ADMINISTRATION, 1933-1934* (1984).

More than 12.5 million Americans—ten percent of the population—were living on public aid. Four states alone, Pennsylvania, New York, Ohio, and Illinois, claimed a third of these persons, and an eighth re-

What did the unemployed want? Experiences of people involved in administering relief programs in the Depression confirmed that what the unemployed wanted was not a handout, but a job.¹⁸ But what did the unemployed receive? Not work, but relief, public assistance, and handouts. By 1933, relief from state and local governments was at unheard of levels: four million families (i.e., eighteen million people) were receiving some sort of public relief.¹⁹ "In some states [forty] percent of the population [was] on relief"²⁰ Incredibly, one out of every six families in the United States depended on assistance.²¹ At the time of the New Deal, everyone wanted more jobs. This notion remains true today. The discussion to resolve the crisis centered on how to get jobs to those who wanted them.

President Herbert Hoover chose to rely on the private market alone for job creation. For example, in 1930, he created a President's Emergency Committee for Employment (the "Emergency Committee").²² The Emergency Committee and the rest of the administration consistently maintained the position that massive unemployment was not a problem for the federal government, but an economic problem, and a local problem to be addressed by local resources, primarily private agencies.²³ The Hoover Administration joined with business interests in opposing any significant fed-

sided in five cities with a million or more inhabitants. The count included over 5.25 million children under sixteen years of age. One seventh of all youngsters from six to thirteen years old depended on relief, an experience comparable to school in its impact upon a future generation. And almost .25 million infants were starting life out on the dole.

Id. at 3.

¹⁸ JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY: 1900-1994*, at 53 (1994). "At least seventy-five percent of the people who came to us," [the head of a New York relief agency] told Mayor Fiorello La Guardia, 'wanted just one thing, and that was work; the last thing they wanted was a charity dole of any kind.'" *Id.*

¹⁹ BROWN, *supra* note 17, at 145.

²⁰ BROWN, *supra* note 17, at 145-46.

²¹ BROWN, *supra* note 17, at 146.

During the spring unemployment had reached its peak. Approximately 15 million people were out of work. The fiscal condition of states, counties[,] and municipalities was becoming more and more serious. In many places the economic machinery had already collapsed. Essential public services were being suspended. Thousands of families were losing their homes and their farms. There was no such thing as security, whether that meant the assurance of a job, a home, a farm, shares of stock, deposits in banks, or a life insurance policy.

BROWN, *supra* note 17, at 145.

²² BROWN, *supra* note 17, at 68.

²³ BROWN, *supra* note 17, at 68.

eral effort to combat the unemployment of the Depression on many, now-familiar fears: interference with the cycles of normal business; an unbalanced budget; higher taxes; large bureaucracy; and state's rights.²⁴

Franklin Delano Roosevelt, on the other hand, upon accepting the nomination of the Democratic Party for President, made his position on the economics issue clear: "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings."²⁵ Once in office, President Roosevelt's advisors began to consider ways the federal government could dramatically reduce unemployment, since the locally administered work relief programs which delivered public assistance were being overwhelmed by surging unemployment rates.²⁶

"[President] Roosevelt's understanding of New Deal constitutionalism embraced a right to decent, useful work."²⁷ President Roosevelt's New Deal went forward on two fronts: the creation of public programs providing jobs for the unemployed and the continual call for safeguarding the right to a job for all Americans.

While the most well-known of the New Deal public employment programs is the WPA, it was not the first effort of the Roosevelt Administration. The WPA actually arose out of the ashes of two programs enacted in 1933: the Civil Works Administration (the "CWA") and the Federal Emergency Relief Act ("FERA").²⁸ The CWA was created by President Roosevelt in November 1933 to provide jobs to the unemployed.²⁹ It employed four million people at good wages until it was terminated in March of 1934.³⁰ Though it had problems with criticism from the business community, in addition to problems in its administration and its politics, it was very popular with the unemployed who expressed a clear preference for work rather than relief.³¹ The CWA, more than any other New Deal effort, came closest to providing the unemployed

²⁴ BROWN, *supra* note 17, at 110-18.

²⁵ Franklin Delano Roosevelt, I Pledge You — I Pledge Myself to a New Deal for the American People, Address Before the Democratic National Convention (July 2, 1932), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 657 (1938).

²⁶ PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES 100-01 (1989).

²⁷ Forbath, *supra* note 12, at 1789.

²⁸ See SCHWARTZ, *supra* note 17, at 38. The WPA was created in 1935. It was always known as the WPA even though its name actually changed to the Works Project Administration. It became an independent agency in 1939. SCHWARTZ, *supra* note 17, at 38.

²⁹ SCHWARTZ, *supra* note 17, at 38.

³⁰ SCHWARTZ, *supra* note 17, at 213.

³¹ HARVEY, *supra* note 26, at 103-05. The CWA encountered harsh criticism in the

"real jobs for real wages."³²

After the 1934 elections, President Roosevelt, who always considered both FERA and CWA temporary, decided to "quit this business of relief" and dismantled the programs, shifting the government focus almost exclusively to public employment.³³ Anti-government forces are fond of quoting President Roosevelt's statement from his 1935 *State of the Union Address* that "[t]he Federal Government must and shall quit this business of relief."³⁴ However, they rarely go on to quote the rest of the speech in which he declared that government must provide unemployed people with jobs:

I am not willing that the vitality of our people be further sapped by the giving of cash, of market baskets, of a few hours of weekly work cutting grass, raking leaves, or picking up papers in the public parks. We must preserve not only the bodies of the unemployed from destitution but also their self-respect, their self-reliance, and courage and determination. . . . There are however an additional three and one-half million employable people who are on relief. . . . The Federal Government is the only governmental agency with sufficient power and credit to meet this situation. We have assumed this task and we shall not shrink from it in the future. It is a duty dictated by every intelligent consideration of national policy to ask you to make it possible for the United States to give employment to all of these three and one-half million employable people now on relief, pending their absorption in a rising tide of private employment.³⁵

As a result, a two-part strategy developed. First, the people who were unable to work were to seek assistance from the states.³⁶ Second, those who could work were to be assigned jobs through

South, where its nondiscriminatory hiring and wage policies interfered with the traditional race-based work patterns.

A du Pont vice president and family member wrote that, "Five negroes on my place in South Carolina refused work this spring, after I had taken care of them and given them house rent free and work for three years during bad times, saying they had easy jobs with the Government. . . ." A North Carolina landlord put it more bluntly: "You can't hire a nigger to do anything for you. . . . High wages is ruinin' 'em."

HARVEY, *supra* note 26, at 104.

³² HARVEY, *supra* note 26 at 99 (footnote omitted).

³³ SKOCPOL, *supra* note 12, at 170.

³⁴ 79 CONG. REC. 95 (1935) (remarks by President Roosevelt in his *State of the Union Address*).

³⁵ *Id.* at 95-96.

³⁶ MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 227 (1986).

the WPA.³⁷ Within a year, the WPA succeeded in employing more than three million people,³⁸ mainly those who were already on relief.³⁹ Despite its size, the WPA still reached only a fraction of the unemployed.⁴⁰ Wages earned by WPA workers were lower than private sector wages, but higher than the amount received on relief, although wages clearly were not as high as they had been in the CWA.⁴¹

While the WPA was criticized for its "make-work" philosophy, WPA workers did much to build and improve streets, storm sewers, grandstands, and landing fields.⁴² Other criticisms of the WPA included: its high cost; its infringement into private business and construction opportunities; and inherent uncorrectable flaws in any system of public employment.⁴³

As a result, public support for the work programs and the workers themselves began to erode.⁴⁴ While the WPA lasted until World War II, Congress cut its budget nearly in half in 1937, and again in 1939 when Congress ordered all WPA employees who had worked for the program more than eighteen months terminated.⁴⁵

³⁷ *Id.* at 227. The WPA was set up in 1935 with \$1.39 billion in funding, as part of the \$4.54 billion allocated for relief. PATTERSON, *supra* note 18, at 63. See KATZ, *supra* note 36, at 228-34.

³⁸ KATZ, *supra* note 36, at 228.

³⁹ PATTERSON, *supra* note 18, at 63-64 (the annual total of WPA jobs reached a high of 3.5 million people, approximately 30% of the 8 to 10.7 million unemployed).

⁴⁰ KATZ, *supra* note 36, at 229.

⁴¹ SCHWARTZ, *supra* note 17, at 254-56; see KATZ, *supra* note 36, at 229 (WPA wages, especially for semi-skilled workers, were often only 65 to 70% of workers' total needs; in the South, it was as low as 30 to 40% of workers' needs).

⁴² MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* 158-61 (1992). The WPA was known by its critics as "We Piddle Around" and "We Pay for All." *Id.* The author, a severe critic of most contemporary social assistance programs, looks comparatively fondly on the WPA, finding evidence that it was both "benefit and boondoggle" as he admires its attempts to "stress work and worthiness" over relief, and its conscious attempts to work within "American values toward work and dependency." *Id.* The WPA's "theater, arts, and writers' projects were bold ventures in government support of cultural activities." PATTERSON, *supra* note 18, at 63. See KATZ, *supra* note 36, at 230-34 (detailing the criticisms of the supporters and detractors of the work relief programs). The administrative problems of putting millions of people to work in a very short time with no prior programs to learn from was an incredible challenge. The goals of the programs were mixed, including immediately putting people to work, many of whom were unskilled, but also employing people for constructive public projects, which demanded planning and skilled workers. KATZ, *supra* note 36, at 230-31. Since all could not be helped, should the programs help those most desperate and least skilled, or those with skills who needed but a temporary job? KATZ, *supra* note 36, at 231-32. Wages had to be above relief levels but could not politically challenge private wage levels. KATZ, *supra* note 36, at 232-33.

⁴³ See PATTERSON, *supra* note 18, at 65-66.

⁴⁴ PATTERSON, *supra* note 18, at 45-55.

⁴⁵ KATZ, *supra* note 36, at 229; see PATTERSON, *supra* note 18, at 57.

A 1933 companion program, the CCC, put unemployed young people to work.⁴⁶ By 1939, 800,000 young Americans were working for the National Youth Administration (the "NYA") and the CCC, and another 2.3 million workers were employed through the WPA.⁴⁷ Eventually, the WPA folded into a new Federal Works Agency.⁴⁸ Congress terminated the CCC in 1942, and President Roosevelt called for the end of the WPA after the 1942 elections.⁴⁹

Though the public employment projects of the New Deal did not become permanent, they helped millions of people in one of the worst economic periods in American history. Subsequent efforts to guarantee employment through the legislature have never matched the success of the New Deal programs.⁵⁰ Likewise, the national government is popularly seen to be responsible for maintaining low rates of unemployment and, if necessary, becoming the employer of last resort.

In addition to the creation and administration of these programs, President Roosevelt and those who worked with the New Deal made significant contributions to the discussion over whether people should have a right to a job and a right to earn decent wages. For example, in 1934, President Roosevelt created the Committee on Economic Security ("CES") to develop a comprehensive workable social security program.⁵¹ CES quickly outlined a two-pronged social policy to combat the economic misfortunes:⁵² (1) income assistance for the needy who could not work; and (2) employment assurance for those who could.⁵³ The income assistance for the needy was formulated into programs. The economic assurance part of the equation was to provide work opportunities to make people self-supporting.⁵⁴ Unfortunately, only the income assistance programs were made operable.⁵⁵

Despite the novelty of the idea that the government become

⁴⁶ KATZ, *supra* note 36, at 224.

⁴⁷ SKOCPOL, *supra* note 12, at 169.

⁴⁸ SKOCPOL, *supra* note 12, at 172.

⁴⁹ SKOCPOL, *supra* note 12, at 175.

⁵⁰ SCHWARTZ, *supra* note 17, at 260-76 (providing a concise overview of legislative efforts to guarantee employment from the CWA to the Comprehensive Employment Training Act ("CETA")).

⁵¹ TRATTNER, *supra* note 13, at 289 (indicating that the committee consisted of four cabinet members and the head of FERA).

⁵² HARVEY, *supra* note 26, at 20 (labeling this a two-legged policy which ultimately lost one of its legs).

⁵³ HARVEY, *supra* note 26, at 20.

⁵⁴ HARVEY, *supra* note 26, at 20.

⁵⁵ HARVEY, *supra* note 26, at 20 ("Since then we have tried to walk on one leg only, to hobble along with half a social welfare system.").

the employer of last resort, a poll by *Fortune* magazine found overwhelming support for the principle that "government should see to it that every man who wants to work has a job."⁵⁶

President Roosevelt kept the idea of government guaranteed opportunity to work for fair wages on his agenda. In 1937, in an address to Congress, he said:

The time has arrived for us to take further action to extend the frontiers of social progress. . . . Our Nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.⁵⁷

As World War II approached, President Roosevelt and his advisors recognized that the declining unemployment rate of the mid-1930s, which was a result of the war production effort, might rise again after the war. Accordingly, in November 1940, President Roosevelt instructed the National Resources Planning Board ("NRPB") to formulate detailed plans for economic and social policies for the postwar period.⁵⁸ The NRPB issued several reports including one with 640 pages and 400,000 words, entitled *Security, Work, and Relief Policies*.⁵⁹ In this report, the NRPB proposed a "New Bill of Rights," which included:

1. The right to work, usefully and creatively through the productive years.
2. The right to fair pay, adequate to command the necessities and amenities of life in exchange for work, ideas, thrift and other socially valuable service.
3. The right to adequate food, clothing, shelter and medical care.
4. The right to security, with freedom from fear of old age, want, dependency, sickness, unemployment and accident.
5. The right to live in a system of free enterprise, free from compulsory labor, irresponsible private power, arbitrary public authority and unregulated monopolies.
6. The right to come and go, to speak or to be silent, free from the spyings of secret political police.
7. The right to equality before the law, with equal access to justice in fact.

⁵⁶ *The Fortune Survey*, FORTUNE, July 1935, at 67.

⁵⁷ 81 CONG. REC. 4960 (1937) (statement of President Franklin Delano Roosevelt asking for the enactment of the Fair Labor Standards Act).

⁵⁸ STEPHEN KEMP BAILEY, CONGRESS MAKES A LAW, THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 26 (1950).

⁵⁹ *Id.*; see SKOCPOL, *supra* note 12, at 173.

8. The right to education, for work, for citizenship and for personal growth and happiness.
9. The right to rest, recreation and adventure, the opportunity to enjoy and take part in an advancing civilization.⁶⁰

The NRPB also called for the assurance of economic security as a right of every American citizen. Thus, the federal government should provide jobs when private economy cannot.⁶¹ The NRPB spelled out this strategy for full employment in detail:

To guarantee the right to a job, activities in the provision of physical facilities and service activities should be supplemented by:

- (1) Formal acceptance by the Federal Government of responsibility for insuring jobs at decent pay to all those able to work regardless of whether or not they can pass a means test.
- (2) The preparation of plans and programs, in addition to those recommended . . . for all kinds of socially useful work other than construction, arranged according to the variety of abilities and location of persons seeking employment.
- (3) Expansion of the functions of the [U.S.] Employment Service, strengthening its personnel to the end that it may operate as the key mechanism in referring unemployed workers to jobs, whether public or private.
- (4) Establishment of a permanent "Work Administration" under an appropriate Federal agency to administer the provision of jobs of socially desirable work for the otherwise unemployed.⁶²

The NRPB proposed the establishment of a national employment service to gather information, administer all work and training programs, and unemployment compensation.⁶³ While no specific action was taken on this report, its suggestions lay the groundwork for the 1945 Full Employment Bill. Meanwhile, President Roosevelt continued to proclaim the need to guarantee economic opportunity and security for all people. In his January 1941 *State of the Union Address*, President Roosevelt announced that these principles were necessary to support the very bedrock of the American system:

⁶⁰ *The 'New Bill of Rights,'* N.Y. TIMES, Mar. 11, 1943, at 12.

⁶¹ SKOCPOL, *supra* note 12, at 174 (indicating that the NRPB, like previous New Dealers, "regarded public works and public employment as the solutions to the unemployment problem").

⁶² HARVEY, *supra* note 26, at 106.

⁶³ SKOCPOL, *supra* note 12, at 173-75.

There is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are: Equality of opportunity for youth and for others.

Jobs for those who can work.

Security for those who need it.

The ending of special privilege for the few.

The preservation of civil liberties for all.

The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.⁶⁴

He also pointed out the four freedoms he hoped would come about in the United States and world-wide: freedom of speech and expression; freedom of worship; freedom from want; and freedom from fear.⁶⁵

In his January 1944 *State of the Union Address*, President Roosevelt looked beyond the end of the World War II effort and enunciated the substance of the economic bill of rights:

It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known. We cannot be content, no matter how high the general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness.

⁶⁴ 87 CONG. REC. 46 (1941).

⁶⁵ *Id.* at 46-47.

In the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms. The first is freedom of speech and expression everywhere in the world. The second is freedom of every person to worship God in his own way everywhere in the world. The third is freedom from want, which, translated in world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not freemen." People who are hungry and out of a job are the stuff of which dictatorships are made.⁶⁶

President Roosevelt also proposed a "second Bill of Rights," where a new basis of security and prosperity could be established for all Americans.⁶⁷ This "second Bill of Rights" included: "[t]he right to a useful and remunerative job in the industries or shops or farms or mines of the Nation [and] the right to earn enough to provide adequate food and clothing and recreation. . . ."⁶⁸

During this period in American history, the federal government became the employer of last resort, and millions of people and their families survived massive unemployment. Economic independence, secured through the right to a decent job at decent pay, became more than just a slogan. It became part of the American dream.

B. *The Employment Act of 1946*

"Our American system owes no man a living but it does owe every man an opportunity to make a living. That is the proper interpretation of the 'right to work.'"⁶⁹

While the New Deal reforms made progress combating unemployment, as late as 1939, eight or nine million people remained

⁶⁶ 90 CONG. REC. 57 (1944) (remarks by President Roosevelt in his *State of the Union Address*).

⁶⁷ *Id.*

⁶⁸ *Id.* The complete "second Bill of Rights" proposed by President Roosevelt includes:

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every business man, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; [and]

The right to a good education.

Id.

⁶⁹ 91 CONG. REC. 381 (1945) (remarks of Senator James E. Murray (D-Mont.) introducing the proposed Full Employment Act of 1945).

jobless.⁷⁰ World War II solved the vast unemployment problem of the Depression.

With the nation concerned about joblessness rising again after World War II, full employment was the campaign cry of both Democrats and Republicans alike. During the 1944 National Convention, Republican presidential nominee Thomas E. Dewey strongly stated:

Government's first job in the peacetime years ahead will be to see that conditions exist which promote widespread job opportunities in private enterprise. . . . If at any time there are not sufficient jobs in private employment to go around, then Government [can and must create] job opportunities, because there must be jobs for all in this country of ours [I]f there is one thing we are all agreed upon, it is that in the coming peacetime years we in this country must have jobs and opportunity for all. That is everybody's business. Therefore it is the business of Government.⁷¹

By late 1944, a coalition of senators, interest groups, and various governmental agencies began drafting a full employment bill.⁷² The original draft of the bill (the "Murray Bill")⁷³ called for a specific right to full employment: "the Congress hereby declares that all Americans able to work and willing to work have the right to a useful and remunerative job in the industries, or shops, or offices, or farms, or mines of the nation."⁷⁴ After extensive discussions over what constituted full employment, how government economic analysis should be conducted, what political considerations were necessary for passage, and the role of Congress, a final draft emerged, with a little less than a full guarantee of a right to a job.⁷⁵

Section 2(b) of the Murray Bill stated:

All Americans able to work and seeking work have the right to useful, remunerative, regular, and full-time employment, and it is the policy of the United States to assure the existence at all times of sufficient employment opportunities to enable all

⁷⁰ BAILEY, *supra* note 58, at 8; see Helen Ginsburg, *Full Employment as a Policy Issue*, in *EMPLOYMENT AND LABOR RELATIONS POLICY* 15 (Charles Bulmer & John L. Carmichael, Jr. eds., 1980) (stating that unemployment was out of control after the Depression). Beginning at 3% in 1929, it soared to 25% in 1933, and averaged 19% from 1931 to 1940. *Id.*

⁷¹ *Gov. Dewey's Address in San Francisco Asking for Political Freedom With Security*, N.Y. TIMES, Sept. 22, 1944, at 12-13.

⁷² BAILEY, *supra* note 58, at 39-59.

⁷³ Full Employment Act of 1945, S. 380, 79th Cong. § 2(b) (1945).

⁷⁴ S. 380, 79th Cong. (1945).

⁷⁵ BAILEY, *supra* note 58, at 45-59.

Americans who have finished their schooling and do not have full-time housekeeping responsibilities freely to exercise this right.⁷⁶

The Murray Bill called for the President to propose an annual National Production and Employment Budget which would estimate the number of jobs needed during the coming year, and to also propose a plan to raise the economy to full-employment levels.⁷⁷ While the Murray Bill did not specifically guarantee a job to everyone who wanted one, its goal, was to assure that there were enough jobs for everyone.⁷⁸

Support for the Murray Bill came from groups such as the American Federation of Labor, the Congress of Industrial Organization, the American Veterans Committee, the Young Women's Christian Association, the National Council of Jewish Women, the National Catholic Welfare Conference, the National Association for the Advancement of Colored People, the National Lawyers Guild, the Union for Democratic Action, and the National Farmers Union.⁷⁹

⁷⁶ S. 380, 79th Cong. § 2(b) (1945); see BAILEY, *supra* note 58, at 243 (discussing text of bill).

⁷⁷ See HARVEY, *supra* note 26, at 107-08 (explaining the Murray Bill as a reflection of the growing ascendancy of more conservative Keynesian economists over the liberal New Deal strategies contained in the NRPB plan (i.e., "Postwar Keynesianism promised full employment without the need to tamper with the microeconomic structure of the economy.")). See HARVEY, *supra* note 26, at 108.

⁷⁸ 91 CONG. REC. 380-81 (1945). Senator Murray further commented that the bill recognizes that these Americans:

are entitled to opportunities for "useful, remunerative, regular, and full-time employment." The right does not mean guaranteeing John Jones a given job carrying a set salary and a definite social standing. It is not the aim of this bill to provide specific jobs for specific individuals. However, I believe nobody will deny that our economic system of free enterprise must offer opportunities for jobs for all who are able and want to work. Our American system owes no man a living but it does owe every man an opportunity to make a living. That is the proper interpretation of the "right to work."

Id. at 381.

⁷⁹ BAILEY, *supra* note 58, at 86-87. Unfortunately, the support of organized labor was initially less than totally enthusiastic due to concentration on other issues such as minimum wage, unemployment compensation, and the continuation of the Fair Employment Practices Commission. BAILEY, *supra* note 58, at 82, 92-96; see HARVEY, *supra* note 26, at 108-09. Furthermore, the rest of these groups had little political ability to organize the grass roots support the bill needed for passage.

No nation-wide polls were taken on S.380, but an extremely interesting local poll was taken of the 2d Congressional district in Illinois during July, 1945, seven months after the bill had been introduced. The question was asked, "Have you heard of any bill before Congress that will plan for enough jobs for everyone after the war?" The response, in percent, was as follows:

There was also considerable opposition. A coalition of conservative Democrats and Republicans, who feared increasing power in the executive branch already dominated by President Roosevelt, opposed the bill. They "warned demagogically of a vast state bureaucracy that would compel everyone to work and determine what jobs they could have."⁸⁰ Some employers feared that a high-employment economy would "raise labor costs and make it difficult to find workers for menial jobs, such as seasonal farm work."⁸¹ Organizations including the National Association of Manufacturers, Chambers of Commerce, and the American Farm Bureau Federation shared these fears.⁸² Opponents of the Murray Bill argued, among other things, that full employment: (1) cannot be guaranteed in a free society; (2) would kill private initiative; and (3) would lead to runaway inflation.⁸³ Moreover, opponents argued that government spending undermined business confidence.⁸⁴ Opponents were helped by the postwar economic and political climate. The anticipated postwar depression had not occurred, and anti-labor opposition was energized by a wave of postwar strikes.⁸⁵

By the time the Employment Act of 1946 (the "Employment Act") was enacted,⁸⁶ the short, direct promise of full employment was gone. In its place was the following:

The Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance

No, have not heard	69
Have heard, but have no idea what it is	19

BAILEY, *supra* note 58, at 180-81 (footnotes omitted).

The pollsters then asked a follow up question, loosely based on the bill.

What would you think of a bill like this?

First, the President would find out each year how many jobs there are going to be for the coming year. Then, if there are not enough jobs for everyone, Congress would give financial help to private business so that it could provide more jobs. Then, if there were still too few jobs, the government would give contracts to private business to build public works to help make up the balance of jobs needed.

BAILEY, *supra* note 58, at 181 (footnote omitted).

The response was 83% for, 12% against, 5% doubtful. BAILEY, *supra* note 58, at 181.

⁸⁰ ALAN BRINKLEY, *THE END OF REFORM, NEW DEAL LIBERALISM IN RECESSION AND WAR* 262 (1995).

⁸¹ *Id.*

⁸² *Id.* See also BAILEY, *supra* note 58, at 129-49.

⁸³ BAILEY, *supra* note 58, at 130-31.

⁸⁴ BAILEY, *supra* note 58, at 130.

⁸⁵ Ginsburg, *supra* note 70, at 17.

⁸⁶ Employment Act of 1946, Pub. L. No. 304 (1946).

and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power.⁸⁷

While the Employment Act did create the President's Council of Economic Advisers,⁸⁸ it made minimal progress toward the right to a decent job at a decent day's pay. The Employment Act endorsed maximum rather than "full" employment, and backed off from the promise of institutionalized planning.⁸⁹ What survived was a commitment to the more vague goal of "maximum employment."⁹⁰ This effort for full employment has been aptly called "the last great battle for the New Deal."⁹¹ A battle that began with lofty hopes, dilution by its supporters, and ultimate compromise in order to gain passage, suggested "the outlines of the post war liberal world."⁹²

The Employment Act did not go as far as its supporters hoped, but was nonetheless a milestone in American economic and political history. It was the first explicit national commitment to the promotion of maximum employment.⁹³

⁸⁷ *Id.* at § 2.

⁸⁸ *Id.* at § 4.

⁸⁹ *Id.* at § 2.

⁹⁰ *Id.* See, e.g., Ginsburg, *supra* note 70, at 17; SKOCPOL, *supra* note 12, at 231. See also HARVEY, *supra* note 26, at 109-10 (noting the comment of Senator Robert Taft (R-Ohio), a leader of the opposition to the Murray Bill, that Republicans need not fear voting for the bill because the bill was no more).

⁹¹ BRINKLEY, *supra* note 80, at 264.

⁹² BRINKLEY, *supra* note 80, at 264 (calling the ultimate law an "evisceration" of the commitment to full employment contained in the first bill). But see Leon H. Keyserling, *The New Deal and Its Current Significance In Re National Economic and Social Policy*, 59 WASH. L. REV. 795, 824-30 (1984). Keyserling, who chaired the Council of Economic Advisers from 1949-1953, said there were serious efforts to follow the Employment Act of 1946 and design policies to achieve full employment until a new Administration appointed a new Council of Economic Advisers whose prime, and almost exclusive, focus was switched to fighting inflation. *Id.* at 795, 824-25, 829-30.

⁹³ The Employment Act of 1946 is generally looked upon as a milestone in the economic history of the United States. See, e.g., Harvey L. Schantz & Richard H. Schmidt, *Politics and Policy: The Humphrey-Hawkins Story*, in EMPLOYMENT AND LABOR-RELATIONS POLICY 25, 26 (Charles Bulmer & John L. Carmichael, Jr. eds., 1980).

C. Full Employment and Balanced Growth Act of 1978

Between 1946 and the mid-1970s, legislation to combat unemployment focused on job training and, to a lesser degree, public employment programs.⁹⁴ Interest in full employment was revived in the 1970s by a broad coalition of civil rights,⁹⁵ women's, religious, labor, and senior citizens' organizations who sought full employment to "replace the policy of maintaining unemployment at politically tolerable levels. . . ."⁹⁶ Unemployment, nationally, averaged 4.7% from 1962 to 1973, 5.2% in June 1974, 6.6% in November 1974, and 8.2% in January 1975, while unemployment among African-American youths reached 41.1% in 1974.⁹⁷

The Full Employment and Balanced Growth Act ("FEBGA")⁹⁸ was conceived, at least by some of its drafters, as a sequel to or an amendment of the Employment Act.⁹⁹ The bill proposing the Act (the "Humphrey-Hawkins Bill") was formally introduced in June

⁹⁴ There were a number of job-training and employment service programs on the federal level. These programs, like the 1962 Manpower Development Training Act ("MDTA"), the 1973 CETA, and the 1982 Job Training Partnership Act ("JTPA"), unfortunately, evidenced little substantial impact on employment. Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in CONFRONTING POVERTY 168, 188-91 (Sheldon H. Danziger et al. eds., 1994).

The 1962 MDTA was designed to train and educate workers in order to gain private sector employment. From 1963 to 1968, MDTA reportedly enrolled nearly 700,000 persons in training; of these, about 450,000 people completed the training, and about 400,000 of those people secured employment within a year of training. Timothy A. Canova, *Monologue or Dialogue in Management Decisions: A Comparison of Mandatory Bargaining Duties in the United States and Sweden*, 12 COMP. LAB. L.J. 257, 263, 263 n.23 (1990-91).

CETA focused on the economically disadvantaged, the unemployed, and the underemployed. CETA provided job training, education, counseling, and public service jobs. CETA's impact on unemployment was slight but symbolic. "During its years of operation, CETA funding averaged between 0.3 and 0.4[%] of the [gross national product]; at its height, CETA served only about one-sixth of the six million officially jobless." *Id.* at 77.

Mere participation in CETA was not necessarily, of itself, a positive accomplishment. CETA participants thought little of the program and its impact on their lives. Mary K. Marvel, *The Social and Political Consequences of Manpower Training Programs: The Case of CETA*, in EMPLOYMENT AND LABOR-RELATIONS POLICY 41, 56-57 (Charles Bulmer & John L. Carmichael, Jr. eds., 1980).

⁹⁵ See, e.g., MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 163 (1967). Dr. King asked for a "contemporary social and economic Bill of Rights" that included "full employment." *Id.* at 199-200.

⁹⁶ Ginsburg, *supra* note 70, at 21.

⁹⁷ Schantz & Schmidt, *supra* note 93, at 26.

⁹⁸ Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (1978) (codified as amended at 15 U.S.C. §§ 3101-3152).

⁹⁹ Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 318 (1987). Keyserling is described as the "ghost writer" for many of the amendments to the Humphrey-Hawkins Act. *Id.* at 296.

1974 by Representative Augustus Hawkins (D-Cal.), who described the goal of full employment not as the number-driven goal of prior legislation, but as an enforceable right to work at fair pay. Representative Hawkins called it "an authentic full employment policy[,] reject[ing] the narrow, statistical idea of full employment measured in terms of some tolerable level of unemployment—the percentage game—and adopt[ing] the more human and socially meaningful concept of personal rights to an opportunity for useful employment at fair rates of compensation."¹⁰⁰

The Humphrey-Hawkins Bill was designed "to establish a national policy and nationwide machinery for guaranteeing to all adult Americans able and willing to work the availability of equal opportunities for useful and rewarding employment."¹⁰¹ Senator Hubert Humphrey (D-Minn.) noted that the goal of the Humphrey-Hawkins Bill was to reduce "unemployment to [three] percent of the adult labor force as promptly as possible, but within no more than [four] years after the date of enactment of this act."¹⁰² The key provision of the Humphrey-Hawkins Bill was Section 102, which amended section 2(b) of the Employment Act as follows: "[t]he Congress declares and establishes the right of all adult Americans able, willing, and seeking work to opportunities for useful paid employment at fair rates of compensation."¹⁰³ The federal government would, once again, become the employer of last resort.¹⁰⁴

Opponents of the Humphrey-Hawkins Bill stressed that full employment, or any reduction of unemployment to minimal levels, would have an inflationary impact on the economy.¹⁰⁵ Republicans publicly attacked the bill, saying it would cost thirty billion to sixty

¹⁰⁰ 120 CONG. REC. 21278 (1974). The Humphrey-Hawkins Bill was initially called the Equal Opportunity and Full Employment Bill. See statement of Rep. Augustus F. Hawkins describing the goal of the bill. *Id.* Senator Hubert Humphrey (D-Minn.) sponsored an identical bill in the Senate. 122 CONG. REC. 6610 (1976). The two versions became known as the Humphrey-Hawkins Bill.

¹⁰¹ 122 CONG. REC. 6610 (1976) (statement of Senator Hubert Humphrey).

¹⁰² *Id.* at 6611.

¹⁰³ *Id.* at 6616.

¹⁰⁴ Section 104 of the Humphrey-Hawkins Bill proposed to mandate "priority policies programs that comprise a full employment program." *Id.* Section 201 of the Humphrey-Hawkins Bill established "employment policies to create jobs in both the private and public sectors of the economy" *Id.* at 6617. Section 206(d) of the Humphrey-Hawkins Bill guaranteed that "[i]nsofar as adult Americans able, willing, and seeking work are not provided with job opportunities [under other provisions of this Act], such opportunities shall be provided by the President through reservoirs of federally operated public employment projects and private nonprofit employment projects approved by the Secretary of Labor." *Id.* at 6619.

¹⁰⁵ See Schantz & Schmidt, *supra* note 93, at 27-28.

billion dollars annually.¹⁰⁶ Even Carter Administration economic experts testified that four percent unemployment would most likely be inflationary.¹⁰⁷ After extensive changes by its sponsors to meet the objections of Humphrey-Hawkins opponents, FEBGA passed the House on March 16, 1978 and the Senate on October 13, 1978.¹⁰⁸ Within five years of enactment, FEBGA aimed to reduce the unemployment rate of individuals over twenty years of age to three percent, and four percent for those sixteen years of age and older.¹⁰⁹ Unfortunately, these goals were not binding.¹¹⁰ Congress declared FEBGA's goal as "the fulfillment of the right to full opportunities for useful paid employment at fair rates of compensation of all individuals able, willing, and seeking to work."¹¹¹ FEBGA section 4(b)(1) stated that the unemployment rate was to be reduced to four percent within five years.¹¹² Section 4(c)(1) sought full employment and a balanced budget "as soon as practicable."¹¹³ FEBGA also aimed to reduce inflation and increase real income.¹¹⁴

FEBGA's purpose was "to require the President to initiate, as the President deems appropriate, with recommendations to the Congress where necessary, supplementary programs and policies to the extent that the President finds such action necessary to help achieve these goals."¹¹⁵

Thus, gone was the individual's right to employment, and gone was the government as employer of last resort. Like its predecessors, FEBGA bolstered lofty goals, but lacked real authority or systemic change to achieve its goals.¹¹⁶ As two sympathetic commentators noted, "[p]assage of [FEBGA] . . . has not resolved, even

¹⁰⁶ Schantz & Schmidt, *supra* note 93, at 30.

¹⁰⁷ Schantz & Schmidt, *supra* note 93, at 29.

¹⁰⁸ The legislative history of Humphrey-Hawkins is summarized in Schantz & Schmidt, *supra* note 93, at 27-34.

¹⁰⁹ Full Employment and Balanced Growth Act of 1978, § 104, 15 U.S.C. § 1022(b)(1) (1994).

¹¹⁰ SKOCPOL, *supra* note 12, at 232.

¹¹¹ H.R. 15476, 94th Cong. § 102(b) (1978).

¹¹² *Id.* at § 4(b)(1).

¹¹³ *Id.* at § 4(c)(1).

¹¹⁴ *Id.* at § 2(c).

¹¹⁵ *Id.* at § 201.

¹¹⁶ In fact, almost immediately after FEBGA was passed by Congress, President James E. Carter announced a new anti-inflationary policy. He called for voluntary wage and price guidelines, cutbacks in federal hiring, and projected an increase in unemployment to 6.2%. See Schantz & Schmidt, *supra* note 93, at 36 (argument by Congressman Hawkins that FEBGA violated the intent of the Humphrey-Hawkins Act and would make it virtually impossible to reach the goals of the five year plan to reduce unemployment).

temporarily, differences over the direction of national economic policies. Although a major piece of goal-setting legislation has been placed on the statute books, the essential economic debate continues."¹¹⁷

FEBGA was the most recent legislative attempt to address the right to employment at decent wages.¹¹⁸ While its ultimate result was disappointing, its passage represents another step forward in the search for an enforceable right to work at a living wage.¹¹⁹

The search during this century for the right to work, for a living wage, and for full employment, is recognized as a vital part of the American political dynamic. The search will continue to clamor for action as long as Americans value work and opportunity.

Choosing to work for national employment assurance appears likely to remain a potentially popular political choice, although it remains to be seen if any political leadership will soon be forthcoming to devise both the policies and the suitably universalistic political alliances needed to work for this goal. Nevertheless, even if little happens soon, the goal of full employment assurance itself—so clearly articulated in 1935 by members of the [Committee on Economic Security]—seems unlikely to fade away. For employment assurance accords with longstanding American values, and it would address the distresses of many groups and regions in our presently unsettled national economy. Sooner or later, therefore, a politics of employment assurance—rather than one of welfare—will surely reappear on the American political scene.¹²⁰

IV. SUPPORT FOR A RIGHT TO WORK

Unless public policy ensures work for all, it is a cruel hoax to rely on the "discipline of the market" to inculcate the citizenly virtues of self-reliance and responsibility.¹²¹ Work can provide meaning and dignity to life.¹²² Some say "the history of the world is the

¹¹⁷ Schantz & Schmidt, *supra* note 93, at 36.

¹¹⁸ Ginsburg, *supra* note 70, at 21 (FEBGA "makes full employment a national policy and establishes the right of all Americans able willing and seeking to work opportunities for useful employment at fair wages.").

¹¹⁹ Ginsburg, *supra* note 70, at 21 (noting that for the first time, a process was established for formulating national economic policy openly and in a comprehensive, coordinated, and consistent manner).

¹²⁰ SKOCPOŁ, *supra* note 12, at 249.

¹²¹ Forbath, *supra* note 12, at 1789.

¹²² Klare, *Labor Law as Ideology*, *supra* note 6, at 451 n.4.

history of work."¹²³ The opportunity to work is precious and once lost, even for a day, it can never be reclaimed.¹²⁴ Work is essential to a person's self-definition. The community also defines a person's value by their employment or lack of employment.¹²⁵

Currently, there is only the right to look for work, and to engage in enormously unequal bargaining over the terms of work.¹²⁶ Refusal to work because a job is too dangerous or too low-paying is considered un-American and even immoral.¹²⁷ Economic justice is

¹²³ David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 119-20 (1988).

The history of the world is the history of work. It is a history first eloquently told in the Torah, as the Jews moved from the toil of slavery in Egypt to the dignity of meaningful work as free people in a free land. In the New Testament Jesus continued to dignify work. Unfortunately, for much of humanity the world of work historically has been debased and denied in alienation. This is the tragedy of labor; tragic because alienation is unfair, undeserved, and remarkably intractable.

Id.

¹²⁴ Otto Nathan, *Favorable Economic Implications of the Fair Labor Standards Act*, 5 LAW & CONTEMP. PROBS. 416, 417 (1939) ("Human labor is the most perishable commodity that exists; if it cannot be sold instantly, it will be lost forever.").

¹²⁵ PETER KELVIN AND JOANNA E. JARRETT, UNEMPLOYMENT: ITS SOCIAL PSYCHOLOGICAL EFFECTS 1 (1985). The authors point out that unemployment, among other deleterious effects, tends to ostracize those without work who feel stigmatized and who in turn withdraw from social activities. *Id.* at 53.

Unemployment brings a loosening and disintegration of a number of previously crucial fixed points in the individual's social environment. The most obvious of these are the loss of an active occupational role, and the fading of many job-related friendships; less tangibly, but none the less disturbingly, there is a general sense of loss of status; and beyond this, the individual may come to doubt whether he can still truly claim to belong to work-related organi[z]ations such as a particular trade union or professional association, which may once have been an important reference group.

Id. at 55. See also KATHRYN MARIE DUDLEY, THE END OF THE LINE: LOST JOBS, NEW LIVES IN POSTINDUSTRIAL AMERICA (1994) (describing the impact on the individual and community of the 1988 closing of the Chrysler plant in Kenosha, Wisconsin which cost the area 6,000 jobs).

¹²⁶ Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833, 845 (1983); *Coppage v. Kansas*, 236 U.S. 1, 11 (1911) (the Supreme Court stated that "in all respects employer and employee have equality of right" in that they are both free to enter or not enter into an employment contract). The Supreme Court would distinguish the coercion inherent in such an unequal relationship as public or private. "This approach makes critical a distinction between private and public power: public pressure on choice is coercion, private pressure is freedom." Lesnick, *supra*, at 845.

¹²⁷ Lesnick, *supra* note 126, at 850 ("The moral obligation to be employable implies that one unable to get the job he or she wants will take any job he or she can get. That is to say, one's willingness to take a job that is available is itself a moral test.").

The prevailing consciousness rests on a world-view that denies that work can be made to be life-affirming. The "Curse of Adam" is a metaphorical expression of this notion. It was not by being set to work that

built on opportunity, and the opportunity for every person to work must be included.¹²⁸ A right to an opportunity to work for a living wage would economically and socially enfranchise all citizens.¹²⁹

A. *Popular Opinion*

Popular opinion has continuously supported the right of every person to work, even if government has to provide a job for every person who wants to work. In 1935, *Fortune* magazine surveyed the American people and asked the following question: "Do you believe that the government should see to it that every man who wants to work has a job?"¹³⁰ The survey reported 76.8% answered "yes."¹³¹ The survey concluded that "public opinion overwhelmingly favors assumption by the government of a function that was never seriously contemplated prior to the New Deal. . . . [T]he country has definitely accepted the theory of state responsibility for an opportunity to earn a living."¹³²

Several surveys indicated that public support for the proposition that "[t]he government in Washington ought to see to it that everybody who wants to work can find a job," grew from fifty- six

Adam was cursed: "Cursed be the ground," Genesis says, "for your sake; in sorrow you shall eat of it; thorns and thistles shall it bring forth all your life." In other words, humankind will be cursed by scarcity and low productivity. Work will be just barely able to sustain life. That is the way it is, that is the way it is supposed to be; the only issue is how we deal with that reality.

Lesnick, *supra* note 126, at 851 (footnotes omitted).

¹²⁸ Keyserling, *supra* note 92, at 806.

The enlargement of economic justice has always been and still is one of the great purposes of the American society. Perfect justice is unattainable, and cannot even be defined. But rank injustice is easy to define and easy to observe, and it is all around us. Failing to give sufficient attention to economic justice is not only a social and moral error, it is an economic error as well. There is no way to avoid massive idleness of workers and other production resources so long as scores of millions of Americans are not brought up to much higher standards of living.

Keyserling, *supra* note 92, at 806. See Gregory, *supra* note 123, at 119.

¹²⁹ See, e.g., Lesnick, *supra* note 126, at 856.

Seeing the utility of work as not wholly external to the worker, and its meaning as more than a means toward self-sufficiency, would tend to legitimate the issue of work restructuring—the desire to make the workplace consonant with the values of a democratic social order and a fully enfranchised citizenry, and to make work consonant with the values of the individual worker.

Lesnick, *supra* note 126, at 856.

¹³⁰ FORTUNE, *supra* note 56, at 67.

¹³¹ FORTUNE, *supra* note 56, at 67.

¹³² FORTUNE, *supra* note 56, at 67.

percent in 1956 to seventy percent in 1976.¹³³ Later, the polls indicated overwhelming public support for a guarantee of work at a living wage.¹³⁴

In November 1987, a New York Times/CNN poll found seventy-one percent of the American public supported the proposition that "the Federal Government should see to it 'that everyone who wants a job has a job.'"¹³⁵ Public support for the opportunity to work is not surprising; Americans are committed to the ideals of work and opportunity.¹³⁶

B. Problems Finding Work

Unemployment is bad for those thrown out of work, who lose income and the nonpecuniary benefits of work. It is bad for society in general, because of the loss in production. It saps people's confidence in the economic system when, as often happens during a depression, idling plants and unemployed workers coexist.¹³⁷

Encouragement and support of work are currently being undercut by two forces: lack of opportunity to work due to unemployment or underemployment, and declining wages for those who do work. This section will focus only on unemployment.

There are millions of people who are unemployed, many ap-

¹³³ Robert Y. Shapiro et al., *Report: Employment and Social Welfare*, 51 PUB. OPINION Q. 268, 274 (1987) (supporting the proposition that the government should find employment for those who could not gradually rose from 1956 to 1976: 56% in 1956; 57% in 1958; 58% in 1960; 70% in 1976).

¹³⁴ In June 1968, the pollsters asked: "As you may know, there is talk about giving every family an income of at least \$3,200 a year, which would be the amount for a family of four. If the family earns less than this, the government would make up the difference. Would you favor or oppose such a plan?" 3 DR. GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION, 1935-1971*, at 2133. This was rejected by 58% and accepted by 36% in June 1968. *Id.* at 2133. In January 1969, 62% said no and 33% said yes. *Id.* at 2177. The second question was: "Another proposal is to guarantee enough work so that each family that has an employable wage earner would be guaranteed enough work each week to give him a wage of about \$60 a week or \$3,200 a year. Would you favor or oppose such a plan?" *Id.* at 2133. This was supported by a ratio of 78% to 18% in June 1968, and by 79% to 16% in January 1969. *Id.* at 2133, 2177.

¹³⁵ E.J. Dionne, Jr., *Poll Finds Reagan Support Down But Democrats Still Lacking Fire*, N.Y. TIMES, Dec. 1, 1987, at A1.

¹³⁶ JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 92-93 (1991) ("Both the dignity of work and the public obligation to work are almost universally preached. Seventy-five percent of the American public think that there is something wrong with not wanting to work. A good citizen is an earner, because independence is the indelibly necessary quality of genuine, democratic citizenship.").

¹³⁷ Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *DEMOCRACY AND THE WELFARE STATE* 53 (Amy Gutmann ed., 1988).

parently permanently.¹³⁸ For example, since the mid-1970s, over ten percent of African-American adults have been unemployed, about twice the rate of whites.¹³⁹ In the mid-1990s, the overall unemployment rate leveled off at 5.6%.¹⁴⁰

Unemployment has been a consistent problem in the United States. This nation has achieved an annual unemployment rate of two percent or less in only seven years of the past hundred.¹⁴¹ In contrast, Sweden's median unemployment rate between 1959 to 1986 was close to two percent, West Germany's median unemployment rate was 1.5%, and Japan's median unemployment rate was 1.6%.¹⁴² Despite this data, conventional wisdom continues to cling to the notion that there is plenty of work, if only the unemployed would get out and hustle to find it.¹⁴³ However, the facts are:

Lack of jobs has been endemic in peacetime during the past fifty years of American history. . . . [W]e need to face the fact that our economy and our institutions will not provide jobs for everyone who wants to work. They have never done so, and as currently structured, they never will. When it comes to unemployment, we are consistently the industrial economy with the worst record.¹⁴⁴

The widespread negative impact of unemployment on society exceeds the damage done to the unemployed individuals. For ex-

¹³⁸ Gregory, *supra* note 123, at 124 ("When the underemployed and those not statistically recognized are added, such as the disheartened who have abandoned the search for work, and the homeless, perhaps one-eighth of the work force is directly affected adversely by unemployment.").

¹³⁹ Blank, *supra* note 94, at 170.

¹⁴⁰ Stuart Silverstein, *Huge Layoffs May Now Be in Decline, but Worries Linger*, L.A. TIMES, Jan. 3, 1996, at A1.

¹⁴¹ HARVEY, *supra* note 26, at 14.

¹⁴² HARVEY, *supra* note 26, at 13, tbl. 1.1.

¹⁴³ KATZ, *supra* note 36, at 6 ("The availability of work for every able[-]bodied person who really wants a job is one of the enduring myths of American history.").

¹⁴⁴ LESTER C. THUROW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* 203 (1980).

Controlling inflation without idle capacity is essential since we now start from a position where there simply aren't enough jobs, good or bad, to go around. The problem is not just peculiar to this period of stagflation. . . . Review the evidence: a depression from 1929 to 1940, a war from 1941 to 1945, a recession in 1949, a war from 1950 to 1953, recessions in 1954, 1957-58, and 1960-61, a war from 1965 to 1973, a recession in 1969-70, a severe recession in 1974-75, and another recession probable in 1980. This is hardly an enviable economic performance. While monetary and fiscal policies could be used to stimulate the economy to the degree that it would provide good jobs for everyone able and willing to work, macroeconomic policies will not be used for this purpose.

ample, joblessness creates costs to implement unemployment programs; goods and services are lost, which could have been produced by the non-working; and the unemployed individual and family suffer a social cost.¹⁴⁵ Twenty years ago, it was estimated that every one percent rise in the jobless rate led to a sixteen billion dollar increase in the federal deficit.¹⁴⁶

Some suggest the economy could respond to globalization and growth in information technology by an increase in the number of people permanently without access to jobs.¹⁴⁷ Since this nation values work and opportunity, it is again time to consider creating a legally enforceable right to the opportunity to work. Valuing work and even demanding work is not enough. The opportunity to work must be provided. Otherwise, the commitments to work and opportunity ring hollow.

We consistently preach that work is the only "ethical" way to receive income. We cast aspersions on the "welfare" society. Therefore we have a moral responsibility to guarantee full employment. Not to do so is like locking the church doors and then saying people are not virtuous if they do not go to church.¹⁴⁸

V. SUPPORT FOR A RIGHT TO A LIVING WAGE

"Our Nation so richly endowed with natural resources and with a capable and industrious population[,] should be able to devise ways and means of insuring [sic] to all our able-bodied working men and women a fair day's pay for a fair day's work."¹⁴⁹

A full-time worker should not be left in poverty. A living wage should ensure that work pays off, otherwise some of the incentive to work is lost.¹⁵⁰ Yet, the term "working poor" exists.¹⁵¹ Over six

¹⁴⁵ HARVEY, *supra* note 26, at 51-53 (suggesting the costs for the income maintenance programs for the unemployed are \$1,000 per household per year; another \$1,600 per household annually in lost production; and an incalculable amount for the suffering resulting from lack of work).

¹⁴⁶ Ginsburg, *supra* note 70, at 20 (citing ALBERT H. CANTRIL & SUSAN DAVIS CANTRIL, U.S. DEP'T OF LABOR, UNEMPLOYMENT, GOVERNMENT AND THE AMERICAN PEOPLE 20 (1978)).

¹⁴⁷ HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTI-POVERTY POLICY* 133 (1995).

¹⁴⁸ THUROW, *supra* note 144, at 203-04.

¹⁴⁹ 81 CONG. REC. 4960 (1937) (statement by President Franklin Delano Roosevelt, in his message asking for the enactment of the Fair Labor Standards Act).

¹⁵⁰ Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 251-56 (1995). There is substantial evidence that adequately paying jobs would decrease reliance on public assistance. Rather than the current proposals to "push" people on public assistance into low wage jobs (where most are already working and

and one-half million workers in the labor force lived in families whose income fell below the poverty level.¹⁵² For about 3.4 million full-time wage and salary workers, the earnings were not enough to bring their families' incomes above the poverty level.¹⁵³

The average employee's hourly earnings declined over the past twenty years. Such a decline had not occurred in America since the Depression.¹⁵⁴ Also, less-skilled male workers experienced the sharpest decline in inflation-adjusted wages in the last twenty years.¹⁵⁵ In the 1990's, young men with high school degrees or less can expect to earn less than their fathers earned twenty years ago.¹⁵⁶ While women without high school degrees have not seen the same decline, they earn fifty-eight percent of the salaries of their counterparts.¹⁵⁷

The present minimum wage structure clearly does not provide a living wage.¹⁵⁸ By 1989, the value of the minimum wage had eroded significantly, falling over thirty percent from a 1979 real value (in 1992 dollars) of \$5.50.¹⁵⁹ Contrary to conventional wisdom, minimum wage jobs are held neither exclusively nor over-

not making it thus also living, in many cases illegally, on public assistance as well), living wages would "pull" recipients into the labor market. *Id.* at 254.

¹⁵¹ The working poor are defined as "persons who devoted more than half of the year to working or looking for work and who lived in families with incomes below the official poverty level." Bruce W. Klein & Philip L. Rones, *A Profile of the Working Poor*, 112 MONTHLY LAB. REV. 3, 6 Ex.1 (Oct. 1989) quoted in Jennifer M. Gardner & Diane E. Herz, *Working and Poor in 1990*, 115 MONTHLY LAB. REV. 20 (Dec. 1992). They identified three major labor market problems that help create the numbers of working poor: unemployment, involuntary part-time work, and low earnings. *Id.* at 3-5.

¹⁵² Jennifer M. Gardner & Diane E. Herz, *Working and Poor in 1990*, 115 MONTHLY LAB. REV. 20, 20 (Dec. 1992).

¹⁵³ *Id.* at 23.

¹⁵⁴ Paul Weiler & Guy Mundlak, *New Directions For the Law of the Workplace*, 102 YALE L.J. 1907, 1909 (1993).

¹⁵⁵ Blank, *supra* note 94, at 172-73. ("There is widespread agreement within the research community that inflation-adjusted wages have fallen among less-skilled male workers. Employed white men between the ages of eighteen and sixty five who had less than twelve years of education earned 15.8[%] less per week in 1989 than in 1979.")

¹⁵⁶ Blank, *supra* note 94, at 172-73.

This wage decline is not the result of the shift of low-skill jobs from the manufacturing sector to the service sector. Real wages have declined for both manufacturing jobs and service sector jobs, so that even less-skilled workers who find jobs in manufacturing industries in the 1990s face reduced wage opportunities.

Blank, *supra* note 94, at 173.

¹⁵⁷ Blank, *supra* note 94, at 173.

¹⁵⁸ See William P. Quigley, "A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum Wage, 27 ST. MARY'S L.J. 513 (1996).

¹⁵⁹ Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 23 (1994).

whelmingly by teenagers. In fact, over seventy percent of minimum wage workers are adults, many the sole wage earners of their families.¹⁶⁰ For example, millions of workers are still exempt from minimum wage protection under the Fair Labor Standards Act ("FLSA"). Of those people, it is estimated that more than one million earned less than the minimum wage in the last decade.¹⁶¹ Despite this, some still argue that minimum wage levels affect the poverty status of relatively few workers, and even fewer families.¹⁶²

The history of the FLSA supports the position that the ideal of the minimum wage *was* to be a living wage.¹⁶³ The Conference Committee Report indicated minimum wage protections were needed because of "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well-being"¹⁶⁴ Contemporary commentators recognized FLSA's aim to protect the living conditions of the lowest-wage workers.¹⁶⁵

¹⁶⁰ See 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 8-12 (May 1981) (profiling minimum wage workers in the 1980s). The report found them to be in all segments of the population, but disproportionately concentrated among those groups who are traditionally poor: 18% of all working women earned minimum wages or less versus 8% of all working men; 44% of those 16 to 19 earned minimum wages or less as did 38% of those over 65; while whites accounted for over three-quarters of those who earn minimum wages, 18% of all Black workers earned minimum wages or less while 11% of white workers did; surprisingly, 70% of all minimum wage workers were adults 20 or older and over 50% were 25 or older. *Id.*

¹⁶¹ See Earl F. Mellor & Steven E. Haugen, *Hourly Paid Workers: Who They Are and What They Earn*, 109 MONTHLY LAB. REV. 20, 23 (Feb. 1986) (stating that in 1984, 1.8 million people estimated to be employed in industries such as outside sales work, low-volume retail trade and service firms, and seasonal amusement establishments earned less than the minimum wage).

¹⁶² See, e.g., Gardner & Herz, *supra* note 152, at 20; LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 70 (1992) (acknowledging that 45% of minimum wage workers without other workers in the family were poor, making the "rhetoric of minimum wage" an increasingly irrelevant problem since only 710,000 people fit that category). See also Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation To Incomes and Poverty*, 110 MONTHLY LAB. REV. 27, 27-29 (June 1987) (arguing that about five million workers were paid at or below the minimum wage in 1985 and concluding that after teenagers, two-earner families, part-time workers, and the self-employed are deducted from the working poor that only 1.1 million of minimum wage workers were poor); Timothy J. Eifler, Comment, *The Earned Income Tax Credit as a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 737 (1994) (arguing that over 98% of workers who would benefit from minimum wage increases would not be poor, leaving "only 1.8% of full-time, year-round workers in occupations covered by the minimum wage [who] were poor").

¹⁶³ Quigley, *supra* note 158, at 529.

¹⁶⁴ H.R. REP. NO. 2738, at 28 (1938).

¹⁶⁵ See, e.g., Nathan, *supra* note 124, at 416.

The most favorable implication of the Fair Labor Standards Act is

There is disagreement concerning whether or not government should intervene to sustain adequate pay levels for low-wage workers. Some suggest that minimum wages reduce overall employment,¹⁶⁶ particularly for less-skilled workers,¹⁶⁷ and drive jobs away to other countries.¹⁶⁸

The value of the minimum wage continues to erode. The Congressional Research Service estimated that the minimum wage would had to have risen to \$6.75 an hour in 1996 to equal the purchasing power it had in 1978.¹⁶⁹ When compared with years past, the minimum wage is relatively low.¹⁷⁰ When adjusted for inflation it is even lower — lower than in the 1950s, 1960s, or 1970s.¹⁷¹ In order to set the minimum wage at the poverty threshold for a family of three, the minimum hourly wage needed to be raised to \$5.92 for 1994.¹⁷² Indexing it to a family of four would demand a minimum hourly wage of \$7.12.¹⁷³ To become a living wage, the minimum wage should be elevated to 1960-1970 levels, at least to coincide with the poverty threshold for a family of three,

the federal statutory recognition of the fact that the living conditions of those in the lowest income group should not be determined solely by the anonymous forces of the market mechanism. The Fair Labor Standards Act is a denial of the thesis that a competitive market without any regulatory interference will result in the greatest good for the greatest number of people. It postulates the necessity of considering human labor no longer as a "commodity" which is subject only to the iron laws of the market mechanism.

Nathan, *supra* note 124, at 416.

¹⁶⁶ Leffler, *supra* note 8, at 345 n.2 ("The real tragedy of minimum wage laws is that they are supported by well-meaning groups who want to reduce poverty. But the people who are hurt most by higher minimums are the most poverty stricken.").

¹⁶⁷ Minimum wage laws tend to cut off the bottom rungs of the economic ladder. The plain truth is there should be no minimum wage law, period, in this great land of free enterprise. Minimum wage laws keep people in poverty . . . by keeping workers from ever getting that foot on the bottom rung of the economic ladder.

Lefler, *supra* note 8, at 345 n.2. 135 CONG. REC. S5475 (daily ed. May 17, 1989) (statement of Senator Phil Gramm (R-Tex.) opposing the FLSA amendments).

¹⁶⁸ See Daryl Marc Shapiro, Comment, *Will an Increased Minimum Wage Help the Homeless?*, 45 U. MIAMI L. REV. 651, 698 (1991).

¹⁶⁹ 139 CONG. REC. S2779 (daily ed. Mar. 11, 1993) (statement of Senator Paul Wellstone (D-Minn.)).

¹⁷⁰ Blank, *supra* note 94, at 194.

¹⁷¹ Blank, *supra* note 94, at 194. See Smith & Vavrichuk, *supra* note 162, at 26; Shapiro, *supra* note 133, at 659 (graph 3).

¹⁷² See 59 Fed. Reg. 32,614-27 (1994) (calculating the poverty threshold for a family of three in 1994 as \$12,320). A minimum wage of \$5.92 per hour was computed by dividing the poverty threshold for a family of three by forty hours per week, fifty-two weeks per year.

¹⁷³ In 1994, the poverty threshold for a family of four was \$14,800. *Id.*

and indexed to prevent erosion from inflation.¹⁷⁴ The politics of indexing minimum wages in order to allow them to keep up with inflation are what most observers would expect: unions favor indexing and business opposes it. Congressional action fluctuates accordingly.¹⁷⁵

While progress on a living wage has been slow, the need remains critical. "The fact that 1.7 million prime-aged workers worked full-time, year-round in 1992, yet remained poor, begins to suggest the serious nature of the problem."¹⁷⁶ It is time to recognize the need for a living wage. It is also time to respond to the opponents of a living wage.

VI. WHY A CONSTITUTIONAL AMENDMENT?

A constitutional amendment is the most binding and direct way to ensure that all people have a right to work and earn a living wage. While it may be argued that the Constitution already contains support for the right to work and to earn a living wage, no court has yet said so. Scholars have argued, albeit unsuccessfully, that the Due Process Clause of the Fourteenth Amendment should establish a liberty interest in the right to work for a living wage.¹⁷⁷

¹⁷⁴ WALLACE E. HENDRICKS & LAWRENCE M. KAHN, *WAGE INDEXATION IN THE UNITED STATES: COLA OR UNCOLA* 15, 28, 65 (1985). Since World War I, federal agencies including the National War Labor Board and the Shipbuilding Labor Adjustment Board, and state minimum wage boards have relied on cost-of-living as one criterion for wage adjustments. *Id.* Indexing has also been used in many union contracts since 1910. *Id.* Since 1919, the United States Department of Labor Bureau of Labor Statistics has been publishing its cost-of-living index. The most commonly used inflation index, the cost-of-living allowance ("COLA"), triggers raises in union contracts, Social Security payments, and home mortgages in response to increases in the consumer price index ("CPI"). *Id.* See Edi Karni, *On Optimal Wage Indexation*, 91 J. OF POL. ECON. 282 (Feb.-Dec. 1983).

¹⁷⁵ 123 CONG. REC. 32,696 (1977) (indicating that Congress ordered indexing and its effects on the minimum wage analyzed as part of the 1977 amendments to the FLSA). See also REPORT OF THE MINIMUM WAGE STUDY COMMISSION, *supra* note 160, ch. 4 (containing the commission's findings and conclusions about indexing). Despite these findings and recommendations, indexing of minimum wages has not yet come into existence.

¹⁷⁶ Bernstein & Mishel, *supra* note 159, at 13.

¹⁷⁷ U.S. CONST. amend. XIV; Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065, 1065-66 (1977) ("I am convinced that, despite its difficulties, a doctrine will ultimately emerge that recognizes under the fifth and fourteenth amendments constitutional rights to decent levels of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, employment[,] and education.").

The fact that there is a need for a constitutional amendment to create a right to work and a right to work for a living wage would come as no surprise to Leo Charland of Muskegon Heights, Michigan. Charland worked for Norge in its Muskegon

Some have looked, with no success, for a constitutional right to a subsistence or minimum income.¹⁷⁸ Still others have looked, also unsuccessfully, for economic rights, like the right to a job, under the heading of fundamental values.¹⁷⁹

Thus, a constitutional amendment is in order.¹⁸⁰ Article V of

Heights plant for 30 years. In 1961, when he was 55, Norge decided to move out of Michigan to Fort Smith, Arkansas. Charland's job was gone and all he received was an offer of \$1,500 in termination pay. Norge's contract with the plant's union did not give the employees any rights to their jobs when the company moved to Arkansas. Charland could apply for a job as a new employee in Arkansas, but Norge had already indicated a preference for hiring local employees. Charland sued both Norge and his union asserting he had a property right to his job under the U.S. Constitution. Charland fought hard and even became ill while his case went through the courts. His wife was allowed to argue on his behalf in the district court and the court of appeals. While the appellate court sympathized with his predicament and his arguments, they concluded that "[w]hatever the future may bring, neither by statute nor by court decision has appellant's claimed property right been recognized to date in this country." *Charland v. Norge Div., Borg-Warner Corp.*, 407 F.2d 1062, 1065 (6th Cir. 1969), *cert. denied*, 395 U.S. 927.

¹⁷⁸ See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (indicating that chronic unemployment and poverty is tantamount to a denial of equal citizenship); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 573 (1978); Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986) (discussing the Declaration of Independence, the Preamble to the Constitution and the Ninth Amendment); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987) (discussing substantive due process and equal protection); and Kenneth L. Karst, *The Supreme Court, 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). But see RALPH K. WINTER, JR., *SUP. CT. REV.* 41 (1972).

¹⁷⁹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58-59 (1980).

Experience suggests that in fact there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn. People understandably think what is important to them is what is important, and people like us are no exception. Thus the list of values the court and the commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy, even the right not be locked in a stereotypically female sex role and supported by one's husband. But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: these are important, sure, but they aren't *fundamental*.

Id. (footnotes omitted).

¹⁸⁰ Questions about the process of amending the Constitution under Article V are the subject of many inquiries and are beyond the scope of this article. See generally Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); David Dow, *When Words*

the United States Constitution provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress¹⁸¹

Amending the Constitution is an arduous, time-consuming, and politically challenging task.¹⁸² Waiting for the Supreme Court to recognize a constitutional right to work will be fruitless. While there is international support for these basic human rights,¹⁸³ progress in the United States Supreme Court in the near future appears unlikely.¹⁸⁴

Absent a constitutional amendment providing a right to employment at a living wage, what can we realistically expect? Most people thinking about reversing trends in unemployment, under-

Mean What We Believe They Say: The Case of Article V, 76 IOWA L. REV. 1 (1990); and Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993).

¹⁸¹ U.S. CONST. art. V.

¹⁸² See generally Dow, *supra* note 180, at 41 (discussing the effort in the 1960s to overturn the one-man one-vote decisions of the Supreme Court and that after *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Simms*, 377 U.S. 533 (1964), thirty-two states, only two fewer than necessary under Article V, petitioned Congress to call a convention for the purpose of overruling the decisions); Judith L. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 OKLA. L. REV. 63 (1978); Ruth Bader Ginsburg, *Observations: Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979).

¹⁸³ See generally POPE JOHN PAUL II, ON HUMAN WORK (1981).

¹⁸⁴ Historically, constitutional and human rights have focused on civil and political rights, and not on economic and social rights, which have been the focus of socialist and developing countries.

What is at stake here is the different perceptions of human rights that seem to prevail in the North and the South. Westerners tend to afford special prominence to civil and political rights—at the expense of economic, social and cultural rights and of the right to development. Civil and political rights are the ones that were initially identified by Western political philosophers. They were the rights that were known when the United States was established and which found their way into the American Bill of Rights. Economic, social, and cultural rights, on the other hand, traditionally received special emphasis in socialist countries and—to add to Western skepticism—are often referred to as “red rights.”

Johan D. van der Vyver, *Kathleen E. Mahoney's & Paul Mahoney's Human Rights in the Twenty-First Century: A Global Challenge*, 8 EMORY INT'L L. REV. 787 (1993) (book review).

employment, and employment at declining wages, propose several strategies: improve education for children so present trends can be reversed; eliminate social programs for those who do not work; increase minimum wages and/or income support for those who work; train unemployed adults; offer incentives for private employers to hire the unemployed; enhance enforcement of civil rights laws in the area of housing and hiring; and increase public employment.¹⁸⁵ While these strategies have some merit, they are all, to some extent, already in place and, unfortunately, they have failed to make significant progress in combating the lack of work at decent wages.

What then is the prospect for a full-employment economy if these efforts have already been tried with only modest success? With a constitutional right to work at a living wage, the nation would have to seriously re-examine these past efforts. The nation would also be forced to evaluate whether some of these efforts need to be terminated, intensified, expanded, or blended in order to meet the shared national goal. Thus, if the right to work and to earn a living wage is worth the struggle, now is the time to start the process of amending the Constitution. There is no option but to give the right to an opportunity to work for a living wage constitutional protection.

VII. HOW WOULD/COULD A CONSTITUTIONAL AMENDMENT WORK?

How would a constitutional right to a job at a living wage be implemented? Would it demand that Congress create new corporations? Would judges mandamus the national economy? Would the President nationalize industries that lay off workers?

Fortunately, others have given consideration to similar rights. Professor Charles Black makes some observations about these issues in the context of his argument for a constitutional justice of livelihood:

I rather guess that my self-chosen task, for the rest of my years as a constitutionalist, is going to be arguing, in all weathers, the case for the proposition that a constitutional justice of livelihood should be recognized, and should be felt by the President and Congress as laying upon them serious constitutional duty. In the early phases of this work, I find I am most often asked the question, "How much?" or "Where will you draw the line?" I

¹⁸⁵ See Blank, *supra* note 94, at 200-04; GANS, *supra* note 147, at 135-47; WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 157 (1987).

think it well to try to suggest, at the beginning, that the establishment of a duty is one thing, while the specification of prudent quantities and means is another—though it must be remembered as well that the decently eligible range of means and measures is one thing when you are under no duty at all to act, and quite another when you are under a serious duty to act effectively.¹⁸⁶

The first step to a constitutional amendment is the establishment of the right itself. How would such a right be protected or implemented? The implementation of a right to work at a living wage would operate the same as with all other constitutional obligations: with considerable care, deference, and judgment.¹⁸⁷

As with all other constitutional obligations, where the initial steps are the responsibility of the legislative bodies, Congress is expected to craft appropriate implementation laws.¹⁸⁸ The executive branch, in turn, would be called upon to carry out these laws. The judiciary would fulfill its traditional role of evaluating the legisla-

¹⁸⁶ See Black, *supra* note 178, at 1113.

¹⁸⁷ See Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988) [hereinafter Karst, *Citizenship*] (addressing how all branches of the government might address a judicially-developed right to equal citizenship for the poor).

I do not claim that courts can abolish poverty by judicial decree, and I am not nominating King Canute for the Supreme Court. Beyond any judicial declaration will lie the crucial questions of remedy. Just as the remedies for segregated schools originated with desegregation plans filed by school boards, remedies that address the harms of ghetto unemployment and welfare dependency should find their initial definition in the proposals of elected officials.

Id. at 43.

The author recognizes the difficulty of these questions, but acknowledges that it is the burden and genius of government to address these and similar questions:

There is challenge in questions like these, but the challenge is no greater than those presented by other constitutional issues that have a more familiar ring. What kinds of police behavior amount to unreasonable searches and seizures? How much government regulation of the use of property is allowable before the regulation amounts to a "taking"? Constitutional questions normally turn on matters of degree; the challenge in all these questions is the challenge of judgment. No one thinks the courts alone are capable of solving the problem of marginalizing poverty. Yet they do have a role in keeping pressure on government to fulfill the responsibility we all share for affording every citizen the resources necessary to be a participating member of our society.

Id. at 45.

¹⁸⁸ *Id.* at 43 (arguing for a constitutional understanding of citizenship that would address various aspects of poverty and speaking to the question of judicial remedy in a manner that would also likely apply to a constitutional amendment such as the one advocated here: "Any such remedies will be partial. . . . So, no one should expect miracles from the judges who seek to protect equal citizenship against the worst ravages of material want. Modest beginnings hold the most promise.").

tion in purpose and practice, and ensuring its constitutionality.¹⁸⁹ While judicial interpretation and enforcement of a constitutional right to work for a living wage would be unprecedented in their particulars, the process engaged in by the judiciary would remain the same as for other constitutional rights. Legal scholars point out that enforcing social rights requires the same degree of judicial action as enforcing civil rights.¹⁹⁰

There are many practical questions about implementing legis-

¹⁸⁹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing that in an increasingly regulated society, the involvement of the court in public law litigation is both workable and inevitable). The role of the court is not so unusual, in fact there is quite a bit of precedent for this type of involvement. "In enacting fundamental social and economic legislation, Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. Whether this be legislative abdication or not, the result is to leave a wide measure of discretion to the judicial delegate." *Id.* at 1314.

¹⁹⁰ See, e.g., Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1210 (1992) (noting that many of the problems of interpreting and enforcing economic or social rights are the same as those involved in interpreting and enforcing the civil rights of the reconstruction era).

It has been contended that social rights are different. They often seem to require social provision; governments cannot simply stand aside, but must take positive steps to assure that rights to shelter, food[,] and work are honored. Yet, although courts are well positioned to protect civil rights, they are ill-suited to enforce social rights; courts cannot devise effective methods of ensuring that shelter, food[,] or jobs are available to citizens.

Id. at 1211 (citation omitted).

I believe the foregoing claims are wrong. First, civil rights are not in fact absolute in any interesting sense; that social rights cannot be absolute, therefore, does not distinguish them from civil rights. Second, enforcing both civil and social rights requires the same degree of judicial action, whether the action be a lot or a little.

Id. at 1211-12 (citation omitted).

Finally, consider the objection that "government in the large" may perhaps determine the distribution of food, jobs[,] and housing by structuring markets, but courts should not. Courts may be appropriate institutions to define civil rights, but they are inappropriate institutions to define social rights. Yet the distinction between civil and social rights is thinner than its proponents claim. Civil rights include the right to own property, to act freely subject to ordinary liability rules[,] and to enter into contracts. The manner in which those rights are defined determines how the interests protected by social rights are distributed.

For example, if a society defines the right to dispose of property to include a factory owner's power to shut down the plant whenever he or she wants, jobs may be more at risk than if the property right is defined so as to permit a shutdown only if certain conditions are met. There is nothing in the nature of the concept of property, or other civil rights, that forecloses the second definition of property. Yet, of course, the two definitions have quite different implications for the protection that society accords work. If we want to assure a certain distribution of jobs,

lation, but there are also innumerable combinations of ways to bring this about.¹⁹¹ The government would likely, again, become the employer of last resort. However, if other creative ways of ensuring an opportunity to work for a living wage arose, Congress would no doubt attempt to implement them. The United States has not yet perfected any other well-established constitutional rights, therefore full realization of this right will undoubtedly take time.

As least one economist says it can be done by creating "a socialized sector of the economy designed to give work opportunities to everyone who wants them but cannot find them elsewhere."¹⁹² Such a major restructuring would fundamentally alter the role of labor and economy. Under this view, "real economic competition would almost certainly increase."¹⁹³ The essential characteristics of a viable guarantee of employment include: decent, non-minimal wages; opportunity for promotion; availability of employment to those able and willing to work despite age, race, gender or education. While some of the jobs may be temporary, the guarantee of employment is permanent.¹⁹⁴

A New Deal-like Employment Assurance Policy ("EAP") for making a right to employment workable has been espoused by some.¹⁹⁵ The EAP would distinguish between those who are unable or not expected to work, and those who need public assistance because they have no work. The unemployed would be recipients of income assistance programs.¹⁹⁶ Those who could work would not receive income assistance, but would be entitled, by law, to a public sector job paying market wages.¹⁹⁷ Unskilled workers would

shelter[,] and food, we can reach that goal by a careful definition of property rights.

Id. at 1217 (citations omitted).

¹⁹¹ See, e.g., Richard J. Arneson, *Is Work Special? Justice and the Distribution of Employment*, 84 AM. POL. SCI. REV. 1127, 1144-45 (1990). The work provided should reflect the following principles: no make-work; stable employment, not temporary stop-gap; opportunities for promotion; low skill requirements; careful monitoring of equality; respectful supervision; on the job training; choices of entry level jobs; and wages and benefits that do not pull people out of decent private employment. *Id.* See Elster, *supra* note 137, at 53; HARVEY, *supra* note 26, at 115. See also WILSON, *supra* note 185, at 157 (proposing a full employment policy as a solution to present poverty and a substitution for traditional public assistance).

¹⁹² THUROW, *supra* note 144, at 206.

¹⁹³ THUROW, *supra* note 144, at 204.

¹⁹⁴ THUROW, *supra* note 144, at 200-07.

¹⁹⁵ See generally HARVEY, *supra* note 26.

¹⁹⁶ HARVEY, *supra* note 26, at 22.

¹⁹⁷ HARVEY, *supra* note 26, at 30 (explaining that since the minimum wage has deteriorated so much in recent decades, paying the minimum wage is not part of the

be offered special training with a job guarantee utilizing their skills upon completion of the training.¹⁹⁸ The entire process could be funded by an increase in Social Security taxes.¹⁹⁹ An increase of twelve percent would provide suitable funding and a feasible framework for the proposed EAP.²⁰⁰

Will such an amendment cause problems? Absolutely. Progress is problematic.²⁰¹ Traditional thought analyzes the implications of a right to a job by merely superimposing the right to work on the current situation and focuses on all the difficulties it can create.²⁰² Some have already concluded that a right to work, without a corresponding guarantee of a living wage, would create more harm than good. Particularly, this would disrupt current employer/employee, citizen/government, and business/government relationships.²⁰³

However, fair analysis must start with an acknowledgment that the current system does not work for millions of people. The analysis must then review the possible implications of a constitutional right to work in a society that would be directing a portion of its energy into creating employment rather than merely decrying the current victimization of millions. These rights, like the minimum wage, environmental protection, and the Federal Deposit Insur-

solution; rather, there should be a guarantee that at least poverty threshold wages would be paid).

¹⁹⁸ HARVEY, *supra* note 26, at 36.

¹⁹⁹ HARVEY, *supra* note 26, at 43-44 (explaining that this increase not only includes the cost of the EAP jobs program, but also is offset by the savings from eliminating income support programs for the currently unemployed).

²⁰⁰ HARVEY, *supra* note 26, at 50.

²⁰¹ There will be cries of "pain" of economic sorts. Creating such rights will make a "mess" of current economic relationships. These are familiar objections, heard in response to all efforts to improve society. See James Gaffney, *She Who Laughs Last: The Gender-Inclusive Language Debate*, AMERICA, Aug. 26-Sept. 2, 1995, at 8, 12 ("The moral aberrations of culture have never been corrected without pain and mess.").

²⁰² BAILEY, *supra* note 58, at 6 (quoting President Warren G. Harding, "There has been vast unemployment before and there will be again. There will be depression and inflation just as surely as the tides ebb and flow. I would have little enthusiasm for any proposed remedy which seeks either palliation or tonic from the Public Treasury." (citation omitted)).

²⁰³ See Elster, *supra* note 137, at 72-74. For those already employed in private industry, the effect would differ depending on whether the worker was a good or bad employee. The effect would create a workplace environment where the under-motivated and less-industrious would ease off, confident in their right to a government job, while good workers could demand better compensation as a condition of staying active. Further, whenever public workers received a raise, private workers would have to be better compensated as well. A right to work could not function in a capitalist economy because the end result of all these dynamics would be a constant enlargement of public employment and a constant diminishing of private employment concluding in the state employing all labor. Elster, *supra* note 137, at 72-73.

ance Corporation, would interfere with unfettered supply and demand. Would capitalism be able to adapt? Absolutely.

Human beings have created the current system, which works very well for some and not so well for others, and humans can modify it.²⁰⁴ The operation and inequity of the present system is a natural consequence of what has been created by America's choices.²⁰⁵ Legal realists argue that "the market itself, and therefore everything that flow[s] from market transactions, [is] structured by government."²⁰⁶ No one may argue that present governmental and legal actions do not already have impact on the creation, retention, elimination, and compensation of jobs. This proposed amendment would refocus the direction of those laws and policies toward creating jobs. Government policy already shapes employment in issues such as location, participation, and even the expansion and contraction of the total number of jobs.²⁰⁷

²⁰⁴ Indeed, as legal realists taught us long ago, the hand of government is present in any market. The law, by protecting some claims to property rights but not others, and by enforcing some contracts but not others, determines whether a market will exist. Since the New Deal era, the constitutional power of government to make those determinations has gone virtually unchallenged. It is at least half a century too late for anyone to say that law and government merely provide a neutral playing field on which "market forces" contend. Government in America has always influenced significantly the distribution of goods, and politics typically has been the province of the "haves."

Karst, *Citizenship*, *supra* note 187, at 22 (citation omitted).

²⁰⁵ Material and cultural poverty in American life is not like cancer or heart disease; still less is it like the winds and the tides. It is a result of our institutions, economic, social and—I am sorry to say—legal. There would be enough money in our society to provide for everyone's needs if we did not choose to spend it on other things. There would be enough to do in our society to keep everyone productively occupied if we did not choose to get it done in other ways. Poverty and unemployment are human artifacts as surely as highways and bridges—as surely as deforestation and acid rain. . . . [T]he same institutions that support our own prosperity are the ones that impoverish the poor among us. Whatever good there is in our laws and institutions—and there is a great deal—has a price, and the poor in our society are the ones who pay it.

Thomas L. Shaffer & Robert E. Rodes, Jr., *A Christian Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5, 15 (1988) (citation omitted).

²⁰⁶ Tushnet, *supra* note 190, at 1210 (citation omitted).

²⁰⁷ Edelman, *supra* note 178, at 45-46 (noting that specific governmental policies and decisions in issues ranging from urban renewal and highway construction to farm policy and public education directly influence where people work and the physical access people have to different kinds of jobs).

[G]overnment shapes the total number and quality of jobs available in the economy and the take-home pay of those who have work. Fiscal, monetary, and trade policies all affect the total number of jobs and the tax bites on those who do work. When the Federal Reserve decides on a

Many who claim that government has no business interfering in the marketplace in reality mean that they are satisfied with the present level of government interference. Those who benefit from government interference do not want to change its position in the marketplace to benefit others.²⁰⁸ Some suggest that politics and law are the subject of a public sphere of influence.²⁰⁹ It is further suggested that this influence is distinct from economics and business, which are in a private sphere.²¹⁰ This is little more than a

policy of high-interest rates to fight inflation, and there is no concomitant Congressional response to aid the people who lose their jobs as a consequence, the new recruits to the ranks of the poor are there because of government policy.

Edelman, *supra* note 178, at 46.

²⁰⁸ See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (concerning the need to subject the profit motive to the higher demands of wisdom and justice, by first recognizing the role that economic power already plays in political decision-making, and by recognizing the need for government action to temper economic interests).

Utterly unreal is all talk of men being robbed of their power of initiative because the state undertakes some service, e.g. to build a bridge across a river. Men are not deprived of opportunities for real self reliance by having their streets lighted at night, by filling up holes in the pavements, by removing other dangers to life and limb and by providing opportunities for education to all. The conditions of modern life are complex and distracting enough so that if we can ease the strain by simplifying some things through state action we are all gainers by it. Certain things have to be done in a community and the question whether they should be left to private enterprise dominated by the profit motive or to the government dominated by political considerations, is not a question of man versus the state, but simply a question of which organization and motive can best do the work. Both private and government enterprise are initiated and carried through by individual human beings.

Id. at 27.

²⁰⁹ See, e.g., Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1982).

²¹⁰ The essence of the public/private distinction is the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way. The core ideological function served by the public/private distinction is to deny that practices comprising the private sphere of life—the worlds of business, education and culture, the community, and the family—are inextricably linked to and at least partially constituted by politics and law. Denying the role of politics—the processes by which communities organize and institutionalize their self-directive capacities—in constituting the forms and structure of social life is a way of impeding access to an understanding of the role of human agency in constructing the world. The primary effect of the public/private distinction is thus to inhibit the perception that the institutions in which we live are the product of human design and can therefore be changed.

Id. (citations omitted).

wish to avoid changing the status quo and the interdependent relationship between public and private, law and economics, and politics and business.

Such criticisms have been leveled at every effort to make the economic system more human. It is not enough to say a proposal interferes with the market. The questions, rather, are whether interference is within the public interest and will it work? In order to consider how such an amendment might work, it is necessary to think about economics, justice, and law in new ways.²¹¹

Undoubtedly, some critics will say an effort to guarantee everyone the right to a job will reduce the number of jobs available. Historically, labor has been unpersuaded by the arguments of business leaders that other efforts, like increased minimum wage protections for low-wage workers, would hurt the cause of workers.²¹²

Ultimately, the effect of an amendment guaranteeing everyone a right to a job and a living wage will depend on how Congress chooses to legislate the implementation of these rights, and how the judiciary chooses to evaluate these rights and their implementation. Current legal and economic arrangements leave millions unemployed and millions more working, yet still poor. A constitutional amendment guaranteeing the right to an opportunity to work and to receive a living wage is worth undertaking the tedious and uncertain process of legislative, executive, and judicial implementation. Millions would certainly agree.

VIII. CONCLUSION

"If we continue to frame political debate about jobs, health care, and other aspects of equal citizenship only in terms of 'the budget' and 'sound policy,' it seems safe to expect the status quo will go largely undisturbed."²¹³ During the Depression, when unemployment nationwide was not as high as it is in today's inner cities, there was an effort to change the status quo and make government and economics more responsive to the needs of citizens. It was an effort of optimism and confidence that together, the citizens, the business community, and the government could change the present calamities and improve the daily lives of millions of

²¹¹ "The mission of all critical social thought is to free us from the illusion of the necessity of existing social arrangements." Klare, *supra* note 6, at 482.

²¹² See van der Vyver, *supra* note 184, at 326 (observing that in 1939, when labor rejected the concerns of business that minimum wage protection was not in workers' economic interests, "however horrible a situation might be brought about by interference with economic laws, the workers could hardly by any the worse off").

²¹³ Forbath, *supra* note 12, at 1805.

people who were suffering.²¹⁴ Similar efforts were launched in the mid-1940s and again in the mid-1970s.

Business interests will undoubtedly continue their historical opposition to the right to a job at a living wage. Those who would most benefit, the unemployed and low-wage workers, will remain relatively weak politically. However, there is still reason to hope for change, so long as America values work and opportunity. Contemporary America recognizes a duty to work, and recognizing the right to an opportunity to work for a living wage is not far removed.

The right to a job at a living wage has remained a popular concept to the general public for decades.²¹⁵ There is reason to believe that the spirit of the New Deal, which combined economic self-interest of the nation with the moral demands of full citizenship, will again call for the right to a job at a living wage.²¹⁶ Until then, "part of a theorist's job is to imagine the furthest possibilities lying fallow in the present and the past and the Constitution of a future that brings them to light."²¹⁷ This proposed constitutional

²¹⁴ In the darkest days of our worst domestic calamity, the greatest words of [President Roosevelt] were not that "the only thing we have to fear is fear itself." His greatest words were "[w]e are stricken by no plague of locusts." Even more so today, there is no plague of locusts. There is only the self-inflicted plague of underestimating our own capabilities to reduce social ills. While today's leadership has made a laudable attempt to win business confidence, this is not enough. Our leadership must also regain its confidence in itself, in the American economy, and in the about 113 million people in our civilian labor force.

Keyserling, *supra* note 92, at 800 (citations omitted).

²¹⁵ See, e.g., MICKEY KAUS, *THE END OF EQUALITY* 137 (1992).

A WPA-type jobs program would, quite literally, set the underclass and anyone else who needed a job to work rebuilding the public sphere rather than destroying it—planting trees, if you will, rather than lurking behind them. . . . With a neo-WPA maintaining highways, schools, playgrounds, and subways, with libraries open every evening and city streets cleaned twice a day, we would have a common life more people would find worth reclaiming.

Id.

²¹⁶ See, e.g., SHKLAR, *supra* note 136, at 63 ("Modern citizenship is not confined to political activities and concerns. Important as governing, voting, military service, and taxpaying are, they are not nearly as significant as the endeavors that constitute what Hegel called "civil society.") (citation omitted).

The right to earn should not be based on personal responses, such as loss of self-respect among the unemployed, but on loss of public respect, the reduction of standing and demotion to second-class citizenship, to which the public ethos, overtly and traditionally, condemns them. It is not a right to self-respect, but a right not to be deprived of one's standing as a citizen, that is at stake here.

SHKLAR, *supra* note 136, at 100-01.

²¹⁷ Forbath, *supra* note 12, at 1805.

amendment will finally guarantee the right to an opportunity for employment at a living wage.

GENDER INEQUALITY IN IN VITRO FERTILIZATION: CONTROLLING WOMEN'S REPRODUCTIVE AUTONOMY

Melissa E. Frasert

I. INTRODUCTION

This Note¹ attempts to add to those voices currently critiquing the new reproductive technologies by suggesting a two-step analysis which (1) analyzes how a specific reproductive technology can create inequitable power structures for women who turn to it, and (2) places that reproductive technology within a larger pattern of controlling all women's reproductive autonomy. While step one may be a familiar one to writers critiquing reproductive technologies, step two—taking the analysis, placing it as part of a larger pattern of control, and then reevaluating the analysis—may be a newer but necessary approach. Placing the reproductive technology within a larger pattern of control is necessary since simply critiquing the inequality within a reproductive technique cannot provide a full picture of the extent and type of control exhibited over women's reproductive autonomy. It also cannot provide the opportunity to investigate how the analysis itself changes once one steps back from the specific focus—a single reproductive technology—and views a larger entity—all women's reproductive autonomy.

This Note will apply this two-part analysis to the specific reproductive technology of in vitro fertilization (IVF). IVF is the process whereby a woman's egg is fertilized with sperm in a petri dish and then returned to the woman's uterus for development and delivery.² This Note argues that IVF has not received the close scrutiny necessary to prevent its potential misuse against the women turning to the technology. This Note will analyze the power structure within IVF by looking at the power relations between the women and the technology, the women and the doctors, and the phenomena of informed consent.

The question will then be asked: "Who is missing from IVF

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¹ The original version of this Note was written to satisfy the thesis requirement for the Master of Arts degree at The George Washington University, Washington, D.C.

² Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 307-08 (1993).

participation and why?" Research from a variety of areas suggests that IVF is employed by a relatively select subgroup of women in the United States (white, middle-/upper-class, heterosexual couples). While having a technology that is used only by selected women suggests inequality, questioning why this occurs will shed light on how reproductive technologies can be used to impact on all women's reproductive autonomy.

Part two of the analysis places the inequality within IVF into the larger pattern of societal control over women's reproductive autonomy. There are many ways this can be accomplished. This Note argues that control over women's reproductive autonomy is demonstrated by the selective valorization of some women's reproductivity and the selective devalorization of other women's reproductivity. By viewing IVF alongside such reproductive controls as forced sterilization, Norplant®³ use as a condition of probation, and fetal abuse laws, a larger pattern becomes clear which may not be seen when each phenomenon is viewed individually. Some women are being pushed toward reproduction as a result of the reproductive options available to them while other women are pushed away from reproduction as a result of the choices open to them.

Using an analysis which questions not only the inequality within the reproductive technology but also the inequality in the application of all reproductive technologies allows for the identification of larger patterns of control not visible through an individual analysis approach. It is only through this questioning of the development and use of reproductive technologies that women can gain control over the technologies and truly use them on their own terms and for the benefit of all women.

II. IVF: A MEDICAL TECHNIQUE

The first baby conceived through the use of IVF was born in England in 1978.⁴ The first baby born in the United States through the use of IVF came three years later in Virginia.⁵ These births, however, followed years of medical development, including a 1973 procedure in which an egg was fertilized in vitro, allowed to

³ The Norplant System® is marketed in the United States by Wyeth-Ayerst Laboratories, Inc. of Philadelphia, Pennsylvania. PHYSICIANS' DESK REFERENCE 3085 (1998) [hereinafter, Norplant].

⁴ George J. Annas & Sherman Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 202 (1983).

⁵ *Id.*

develop to the several-cell stage, and then transferred to a patient who underwent a hysterectomy two days later.⁶ By the mid-1980s, many no longer considered IVF an experimental procedure, and as of 1993 an estimated 700 IVF programs in over fifty-three countries were in operation.⁷

An IVF treatment, or cycle, can be divided into three phases: egg retrieval, fertilization and implantation, and storage.

A. Egg Retrieval

As part of the retrieval phase, clients are given a series of psychological and physical tests to screen and prepare for the procedure. Once screened, the woman is usually given drugs to produce superovulation (production of multiple eggs during one cycle).⁸ The procedure is monitored daily through blood hormonal assays and ultrasounds in order to track the quality and quantity of developing eggs.⁹ Once the maximum achievement point is reached, human chorionic gonadotropin (hCG) is given to the woman to achieve final maturation of the eggs.¹⁰

Thirty-four hours after the use of hCG, the eggs are gathered either through the use of a laparoscopy or a transvaginal ultrasound.¹¹ The 1992 IVF-ET Registry published by the Society for Assisted Reproductive Technologies (SART) reported that 85% of IVF stimulations (24,996 out of 29,404 cycles) lead to an egg retrieval.¹²

⁶ Melvin G. Dodson et al., *A Detailed Program Review of In Vitro Fertilization with a Discussion and Comparison of Alternative Approaches*, 162 SURGERY, GYNECOLOGY & OBSTETRICS 89, 90 (1986).

⁷ Marsden G. Wagner & Patricia Stephenson, *Infertility and In Vitro Fertilization: Is the Tail Wagging the Dog?*, in TOUGH CHOICES: IN VITRO FERTILIZATION AND THE REPRODUCTIVE TECHNOLOGIES 1, 2 (Patricia Stephenson & Marsden G. Wagner eds., 1993).

⁸ Alan O. Trounson & Carl Wood, *IVF and Related Technology: The Present and the Future*, 158 MED. J. OF AUSTL. 853, 854 (1993).

⁹ Jean Macchiaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 633 (1991).

¹⁰ *Id.*

¹¹ *Id.* at 633-34. With a laparoscopy, a needle is inserted through the woman's abdomen and gentle suction is used to retrieve the eggs. Feliciano, *supra* note 2, at 307. A transvaginal ultrasound locates structures by measuring reflections of high frequency waves, and does not require anesthesia. Feliciano, *supra* note 2, at 307; STEDMAN'S MEDICAL DICTIONARY 1883 (26th ed. 1995).

¹² *Assisted Reproductive Technology in the United States and Canada: 1992 Results Generated from The American Fertility Society / Society for Assisted Reproductive Technology Registry*, 62 FERTILITY & STERILITY 1121, 1123 tbl. 1 (1994) [hereinafter 1992 IVF-ET Registry Report]. An alternative to having the recipient produce her own eggs is to use one provided by a donor.

B. Fertilization and Implantation

Once eggs are obtained they are placed with sperm in a petri dish containing a special medium and allowed to fertilize and grow to the four-cell stage.¹³ At this point, the embryos are ready for transfer into the recipient's uterus.¹⁴ This is done with the use of a catheter inserted through the woman's cervix and into her uterus.¹⁵ The number of embryos transplanted is usually balanced with evidence that as the number of embryos transferred increases, so does the pregnancy rate.¹⁶

If transfer is successful, the embryos will attach to the uterine wall and continue as if a natural conception had occurred.¹⁷ Throughout the woman's first trimester, she is given estrogen and progesterone replacement therapy to help maintain the pregnancy.¹⁸ The woman, if given drugs to increase ovulation, is also given a series of drugs to return her cycle to normal.¹⁹

C. Storage

If superovulation has produced a high number of eggs for which implantation at one time is unwarranted or unwanted, a technique is used which allows doctors to freeze the "extra" embryos for later implantation.²⁰ Called cryopreservation, this technique has proven instrumental in the field. In cryopreservation, embryos are placed in vials containing a freezing medium and a

¹³ James M. Treppa, *In Vitro Fertilization Through Egg Donation: A Prospective View of Legal Issues*, 22 GOLDEN GATE U. L. REV. 777, 781 (1992).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The 1989 IVF-ET Registry reported that clinical pregnancy rates and corresponding live delivery rates among reporting fertility clinics were 15% and 13% respectively for transfers of less than three embryos, 21% and 16% respectively for transfer of three embryos, and 25% and 18% respectively for transfer of four or more embryos. *In Vitro Fertilization-Embryo Transfer (IVF-ET) in the United States: 1989 Results from the IVF-ET Registry*, 55 FERTILITY & STERILITY 14, 16 (1991) [hereinafter 1989 IVF-ET Registry Report]. The Society for Assisted Reproductive Technology (SART), part of The American Fertility Society (AFS) and Medical Research International (MRI), was established to "explore the epidemiology of the [assisted reproductive technologies]." *Id.* at 14.

¹⁷ Treppa, *supra* note 13, at 781.

¹⁸ Treppa, *supra* note 13, at 781 n.27 (citing Mark V. Sauer et al., *A Preliminary Report on Oocyte Donation Extending Reproductive Potential to Women over 40*, 323 NEW ENG. J. MED. 1157, 1158 (1990)).

¹⁹ Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733, 773 (1994).

²⁰ Eggen, *supra* note 9, at 638.

cryoprotective agent.²¹ The temperature of the vials are then lowered from 22° C (room temperature) to -80° C.²² The frozen vials are then placed in liquid nitrogen at a temperature of -196° C.²³ At this temperature, biological activity is not considered possible.²⁴ Embryos are typically frozen at the 2-, 4-, or 8-cell stage since earlier or later embryos are too difficult to freeze or do not develop normally once thawed.²⁵

Cryopreservation lowers the risk of multiple births by allowing only one or two embryos to be implanted at one time and the others preserved for later use.²⁶ Freezing the unused embryos also saves a woman from having to repeat the ovulation and egg collection process, thereby saving her body from additional drug therapy and controlling costs of the procedure with each implantation.²⁷ Cryopreservation is also useful in cases where there is some complication during the stimulation cycle or where patients will be undergoing medical therapy that will cause sterility (i.e., for leukemia or breast cancer).²⁸ Alternatively, cryopreservation might be used when a woman undergoes sterilization and wishes to store any eggs available at the time of surgery for possible later use.²⁹ Proponents note that once cryopreservation has been perfected, women will be able to store unfertilized eggs in much the same way men are currently able to freeze their sperm.³⁰

In 1989, the IVF-ET SART Registry reported the transfer of 2,124 cryopreserved embryos by 110 reporting clinics. Ten of these clinics accounted for 56% of the total clinical pregnancy rate (11%) and 54% of the overall live delivery rate (8%).³¹ In general, an 8-12% increase in IVF pregnancies occurs by using cryopreservation.³² This may be attributable to psychological and physical benefits cryopreservation offers women undergoing IVF.

²¹ Phyllis L. Bean, Comment, *Taking the Frozen Embryo to Court in Virginia: A Proposed Statute*, 13 GEO. MASON L. REV. 127, 130 (1990).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Colleen M. Browne & Brian J. Hynes, Note, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, 17 J. OF LEGIS. 97, 99 (1990).

²⁶ See Eggen, *supra* note 9, at 638.

²⁷ See Treppa, *supra* note 13, at 781.

²⁸ Trounson & Wood, *supra* note 8, at 855.

²⁹ Eggen, *supra* note 9, at 640 n.53.

³⁰ Katz, *supra* note 19, at 771.

³¹ 1989 IVF-ET Registry Report, *supra* note 16, at 20.

³² Treppa, *supra* note 13, at 781.

III. IVF AS A TOOL OF GENDER INEQUALITY

As noted earlier, this note argues IVF can create inequitable power structures for the women who turn to it. This can occur through the power dynamic involved in using IVF as well as through the selective control over who has access to the technology. This section discusses IVF's potential misuse by: 1) analyzing the power structure within IVF which minimizes women's control, and 2) discussing the select demographics of IVF users.

The power relationship within IVF takes various forms. The relationships between the women and the technology, the women as patients and their doctors, and the concept of informed consent, are all examples of how IVF creates inequitable power structures for women and will be discussed below.

A. *Women v. Technology*

Women using IVF turn to the technology because they are told the technology can overcome a defect of their own bodies—infertility. When they turn to IVF women place their control over their bodies into the hands of the technology. But is this necessary? Women's relationship with the technology, built on a belief that the technology can grant fertility, may be based on unreasonable definitions of infertility. If so, women may be turning to IVF too soon and in so doing unnecessarily cede power over their person to the technology.

The United States Office of Technology Assessment (OTA) defines infertility as the inability to conceive after one year of intercourse without contraception.³³ Critics such as Janice Raymond point out that this definition does not take into consideration couples who already have children who only recently became "infertile."³⁴ Noting that the time requirement of the OTA definition of infertility has decreased within the past decade to its current one year requirement, Raymond questions the appropriateness of such a time frame since older women and those previously on birth control can sometimes experience temporary infertility.³⁵ If women

³³ Wagner & Stephenson, *supra* note 7, at 3. Not all agencies, however, use such a lenient definition of infertility. The World Health Organization (WHO) requires a two year inability to conceive to meet the definition of infertility. Wagner & Stephenson, *supra* note 7, at 3.

³⁴ JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* 5 (1993).

³⁵ *Id.* at 3.

are turning to IVF too soon, they are exposing themselves to unnecessary physical, psychological, and financial burdens.

Critics such as Wagner and Stephenson argue that the one year period is misleading. They point to one study which suggested only 16% to 21% of couples originally meeting this one year definition of infertility remained infertile throughout their lives.³⁶ Further, they argue that the definition does not take into consideration the frequency of intercourse. One study reported that "16.7% of couples having intercourse less than once a week conceived within [six] months, but 83.3% of couples having intercourse four or more times a week conceived within that same period."³⁷

Ruth Hubbard has also suggested that this time requirement is inadequate.³⁸ She cites a 1983 study which found that over a two to seven year period, 41% of couples undergoing fertility treatments became pregnant, as did 35% of those couples who did not pursue the fertility treatments.³⁹ Indeed, Wagner and Stephenson suggest infertility "has become a kind of new morbidity—a medical reconstruction of a social problem, that is, involuntary childlessness."⁴⁰

IVF and infertility treatments have also been criticized as not being true aids to infertile women as the goal is not to correct infertility, but only to bypass it. One study comparing IVF pregnancy rates versus surgery procedures designed to repair the damaged reproductive systems, found a continuing pregnancy rate of 25% to 30% with microsurgery or laser surgery using a laparoscope to repair damaged fallopian tubes, a continuing pregnancy rate of 21% to 41% for procedures with carbon-dioxide lasers in "fertility-promoting procedures," and a 30% to 70% continuing pregnancy rate for a "laser applied through a laparoscope, either alone or in conjunction with danazol"⁴¹ This is compared to a continuing pregnancy rate with IVF of 10%, plus the need for repeat procedures with each pregnancy the woman desires.⁴² In response, groups such as the Feminist International Network of Resistance to Reproductive and Genetic Engineering (FINRRAGE), argue that

³⁶ Wagner & Stephenson, *supra* note 7, at 3.

³⁷ Wagner & Stephenson, *supra* note 7, at 6.

³⁸ RUTH HUBBARD, *THE POLITICS OF WOMEN'S BIOLOGY* 203 (1990).

³⁹ *Id.* at 203.

⁴⁰ Wagner & Stephenson, *supra* note 7, at 2.

⁴¹ H. David Banta, *Technology Assessment and Infertility Care*, in *TOUGH CHOICES: IN VITRO FERTILIZATION AND THE REPRODUCTIVE TECHNOLOGIES* 53, 58-59 (Patricia Stephenson & Marsden G. Wagner eds., 1993).

⁴² *Id.* at 59.

the focus should be shifted away from the reproductive technology and instead placed on identifying the causes of infertility and researching prevention.⁴³

If, as these critics suggest, current definitions of infertility lead to over diagnosis of infertility, women may be turning to IVF who do not need to and in so doing placing themselves in unnecessary danger. The safety of clinics, for example, has been questioned. An outbreak of hepatitis which affected 172 women, was reported in one IVF program in The Netherlands.⁴⁴ The culture medium used to grow fertilized embryos was contaminated with hepatitis B virus.⁴⁵ This type of physical danger is in addition to the ceding of control of one's body to the technology.

B. Patient v. Doctor Relationship

As women coming to IVF clinics usually are emotionally and physically drained and often see IVF as their last chance to have biological offspring,⁴⁶ the patient/doctor relationship in IVF is potentially problematic. This relationship can cause women to become subjugated to a technology "owned" by the doctor. This ownership of IVF technology has the potential to minimize women's roles as women, mothers, and individuals, and to make women mere vessels in the process of childbirth. Indeed in many cases, IVF doctors are perceived as giving life where the women have failed. This dynamic can place extreme guilt and anxiety on women who see their compliance with IVF protocols as the only way to become pregnant. One study of 200 pre-treatment couples noted that 49% of women believed infertility to be the most upsetting experience of their lives.⁴⁷ This is compared to only 15% of the men interviewed.⁴⁸

Women lose autonomy over their reproductive identity when

⁴³ Susan Behuniak-Long, *Radical Conceptions: Reproductive Technologies and Feminist Theories*, 10 WOMEN & POLITICS 39, 51-52 (1990).

⁴⁴ Pat Spallone, *Reproductive Health and Reproductive Technology*, in WOMEN AND HEALTH: FEMINIST PERSPECTIVES 49, 58 (Sue Wilkinson & Celia Kitzinger eds., 1994).

⁴⁵ *Id.*

⁴⁶ Dorothy Greenfeld & Florence Haseltine, *Candidate Selection and Psychosocial Considerations of In-Vitro Fertilization Procedures*, 29 CLINICAL OBSTETRICS & GYNECOLOGY 119, 119 (1986) (reporting couples coming to IVF programs have long histories of infertility treatment including drug therapy and surgery).

⁴⁷ *Id.* at 123. See also Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 215 (1995) [hereinafter Roberts, *Genetic Tie*] ("[P]eople often see the inability to produce one's own children as one of nature's most tragic curses.").

⁴⁸ Greenfeld & Haseltine, *supra* note 46, at 123.

they begin IVF programs. Ann Oakley described the phenomena in this manner:

For a complex of reasons, then, reproduction exposes the social fragility of women, not as the weaker but as the *second* sex, to use Simone de Beauvoir's term. Women's existence as childbearers is subject to a central paradox: although the *most* socially important activity, it is also rendered the *least* important, as cultural ideologies and practices enforce women's marginalization.⁴⁹

Also note the relationship between Leslie Brown, the mother of the world's first IVF baby, and her doctors, Drs. Steptoe and Edwards. Her doctors insisted Brown not tell anyone about the procedure and had her sign an agreement consenting to an abortion if the doctors thought it necessary.⁵⁰ "Presumably [the doctors] did not want to have the entire venture discredited by letting the first baby be born with a disability."⁵¹ Again, women's interests and reproductive autonomy are subjugated to the larger goals of creating a technology and in the doctors controlling it.

C. *Informed v. Uninformed Consent*

Critics of IVF have charged that due to a lack of enforcement of informed consent or even a specific definition of what constitutes informed consent, women turning to IVF are placed in the position of ceding their control to a technology which many argue is still, despite the medical community's assurances to the contrary, experimental.⁵² These critics charge that no clinical trials, cost analysis, analysis of social consequences, or ethical discussions have been performed, and that IVF should remain an experimental procedure and be ruled by the "safeguards covering research on human subjects."⁵³ Questions such as these concerning the experimental nature of IVF make informed consent questionable.

Wagner and Stephenson also express concern over the ways pregnancy success rates are reported.⁵⁴ For example, they noted that women experienced disappointment when they found out that the 20-25% pregnancy rate reported by one clinic was misleading.⁵⁵

⁴⁹ ANN OAKLEY, *ESSAYS ON WOMEN, MEDICINE AND HEALTH* 99 (1993) (footnote omitted). Oakley is referring to the work *The Second Sex* by Simone de Beauvoir. See generally SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Alfred A. Knopf, Inc. 1952) (1949).

⁵⁰ Hubbard, *supra* note 38, at 204.

⁵¹ Hubbard, *supra* note 38, at 204.

⁵² Wagner & Stephenson, *supra* note 7, at 1.

⁵³ Wagner & Stephenson, *supra* note 7, at 1.

⁵⁴ Wagner & Stephenson, *supra* note 7, at 17.

⁵⁵ Wagner & Stephenson, *supra* note 7, at 17.

In actuality, only 40% of women in that program reached the 20%-25% point.⁵⁶ Unfortunately this was information the women found out only *after* entering the program.⁵⁷ For women to make informed decisions about their participation in IVF programs, they need to have accurate and standardized information. However, the use of different pregnancy definitions can also mislead women.

Variations in reporting rates of pregnancy are attributed to different meanings given to pregnancy—clinical pregnancy versus pregnancy resulting in delivery. If a woman is pregnant for two days and then suffers a miscarriage, an IVF clinic may refer to this as a successful pregnancy and report it as such.⁵⁸ Women's goals are a "take-home" baby and not solely a pregnancy.⁵⁹ These rates are obviously very different. Compare the two compilations of the same facts presented below. The 1992 IVF-ET Registry reported that 29,404 IVF cycles were conducted in 1992 with the following break-down:

- 85% of cycles led to an egg retrieval (24,996)
- 87.5% of retrievals led to an embryo transfer (21,870)
- 24.1% of transfers led to a clinical pregnancy (5,279)
- 16.8% live delivery rate per retrieval (4,206)⁶⁰

Note these percentages are derived from the total number of cycles that led to an egg retrieval.

Now look at the information presented another way. Here, the total number of cycles becomes the reference point for each calculation, regardless of whether it led to an egg retrieval:

- 85% of all cycles led to an egg retrieval (24,996)
- 74.4% of all cycles led to an egg transfer (21,870)
- 18% of all cycles led to a clinical pregnancy (5,279)
- 14.3% of all cycles led to a live delivery (4,206)

The 14.3% live delivery rate may be of more value to women as it standardizes the reference point—cycles—as well as addresses women's association with each cycle with a birth. This is not to say that 14.3% (or one out of seven) of each woman's cycles will lead to a live birth. These figures do not include information on causes of infertility and, therefore, do not take into account women for whom IVF has a higher probability of success than those for whom

⁵⁶ Wagner & Stephenson, *supra* note 7, at 17.

⁵⁷ Wagner & Stephenson, *supra* note 7, at 17.

⁵⁸ Dr. Martha Field, *Reproductive Technologies and Surrogacy: Legal Issues*, 25 CREIGHTON L. REV. 1589, 1597 (1992).

⁵⁹ Wagner & Stephenson, *supra* note 7, at 8.

⁶⁰ 1992 IVF-ET Registry Report, *supra* note 12, at 1123 tbl. 1.

it does not.⁶¹ In part to remedy the discrepancy in expectations, Dr. Martha Field suggests women get counseling on the success rates, costs, psychological stress, and available alternatives before beginning an IVF program.⁶²

This lack of clear and accurate information hampers a woman's ability to give full and informed consent. But further, the severe emotional toll and anxiety women are under when they come to IVF clinics also impacts on a woman's ability to make informed decisions. Wagner and Stephenson indicated that it is necessary to investigate how IVF is marketed, how success rates are calculated, how they are communicated to patients, how hospitals sell the experimental procedures, and how physicians disclose the risks of IVF.⁶³

While this could be construed as a problem within the medical industry rather than one specific to women, two items are important to remember. First, in a society and industry which are defined by male standards, women are typically placed second. Second, those steps that have been taken to try and control the IVF industry have basically been geared to the needs of consumers, not women.

Informed consent is of imperative importance in a technology like IVF where women come to the technology desperate for a baby and often view IVF as their last chance.⁶⁴ Nancy Ehrenreich notes that "by ceding [the doctor] all control over her reproductive processes, [a woman] disempowers herself in a way likely to be deeply destructive of her sense of self."⁶⁵ These feelings were expressed by Mrs. J, a woman undergoing IVF treatments, in a 1986 publication of candidate selection:

It's like a steeplechase. One hurdle after another. First you worry that you won't be accepted in the program. After you are accepted, you worry about all that waiting and the enormous cost. Once you start the program, you worry that you might do something wrong or that you will not understand the instruction. Then you worry about getting the injections and the effects of the drugs that they give you. Then you worry that they will not get eggs. Or that the eggs won't fertilize. Finally, they do the implant and you are hit with what you feared all along—

⁶¹ 1992 IVF-ET Registry Report, *supra* note 12, at 1122-23.

⁶² Field, *supra* note 58, at 1597.

⁶³ Wagner & Stephenson, *supra* note 7, at 17.

⁶⁴ See Greenfeld & Haseltine, *supra* note 46, at 119 (suggesting long histories of surgery and drug therapy in couples entering IVF programs).

⁶⁵ Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 495 (1993).

that you won't get pregnant.⁶⁶

You might do something wrong and as a result *you* may not get pregnant. This relationship makes informed consent questionable.

Susan Bordo sums the effects of medical technologies on women's ability to choose by stating:

On the one hand, women now have a booming technology seemingly focused on fulfilling *their* desires: to conceive, to prevent miscarriage, to deliver a healthy baby at term. On the other hand, proponents and practitioners continually encourage women to treat their bodies as passive instruments of those goals, ready and willing, "if they want a child badly enough," to endure however complicated and invasive a regime of diagnostic testing, daily monitoring, injections, and operative procedures may be required.⁶⁷

One report noted that of ninety-one couples dropping out after one IVF attempt, fifty-five (60.4%) said anxiety was their reason for not continuing.⁶⁸

The anxiety to have a child and the concern that their actions might harm their chances, force women's identities to be sublimated to the technology, the doctor, and inaccurate definitions of informed consent. Women coming to IVF are placed in an interminable bind: they are told their bodies are incapable of producing offspring without aid (a misnomer as many couples are now undergoing IVF for male related infertility problems⁶⁹), that IVF is their last chance, and if no baby is produced it is due to a woman's non-compliance to a strict protocol (when in reality compliance does not guarantee a baby).

IV. THE DEMOGRAPHICS OF IVF USE

On one hand, we have a technology which says it offers women the possibility of having children they could not have before. On the other hand, we have the narrowing of the reproductive autonomy of the women turning to IVF. There is also another concern with IVF use—the demography of IVF users. Currently, a relatively select subgroup of United States society turns to IVF. Although the data on IVF users is sparse, available data suggest an unequal use of

⁶⁶ Greenfeld & Haseltine, *supra* note 46, at 123-24.

⁶⁷ SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 86 (1993).

⁶⁸ Greenfeld & Haseltine, *supra* note 46, at 124.

⁶⁹ Sharyn L. Roach Anleu, *Reproductive Autonomy and Reproductive Technology: Gender, Deviance and Infertility*, in *INTERSECTIONS: WOMEN ON LAW, MEDICINE AND TECHNOLOGY* 99, 105 (Kerry Petersen ed., 1997).

IVF by white, middle-/upper-class, married women. A brief discussion of the voices missing from IVF use and its ramifications are discussed below.

A. Poor Women

The cost of IVF has been estimated to be between \$67,000 and \$114,000.⁷⁰ This insures that most poor women cannot access fertility programs without outside help. But according to the Committee to Study Outreach for Prenatal Care, more than one-fourth of all "women of reproductive age . . . have no insurance to cover maternity care, and two-thirds of [this population of reproductive age] have no health insurance at all."⁷¹ For the uninsured, the costs of IVF can be prohibitive.⁷²

A "justification" for the exclusion of poor women from access to IVF services is based on a stereotypical association of poor women and children—that poor women have children to get more money from state assistance programs. Issues like sterilization and mandatory Norplant use are based on this perception⁷³—regardless of its validity. Society stereotypes poor women as having "too many children" which "we" have to support. With this mindset, it is unlikely that mechanisms will be established which would aid infertile poor women in accessing IVF,⁷⁴ and indeed as will be suggested

⁷⁰ Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 948 (1996) [hereinafter Roberts, *Race and the New Reproduction*].

⁷¹ Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femeness*, 7 BERKELEY WOMEN'S L.J. 1, 9 (1992).

⁷² *Id.*

⁷³ Note that this perception also has racial overtones. One report noted that the African-American poverty rate was 31%, despite the fact that African-Americans constituted only 12% of the United States population. Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain't Always Easy! An African American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191, 212 (1996).

⁷⁴ John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 989 (1986) ("At the present time the state has no legal obligation to provide infertility services to indigents . . ."). Roberts, *Genetic Tie*, *supra* note 47, at 245 n.140 ("Indeed, a major aim of current welfare reform proposals is to discourage women on welfare from having children.").

Note a report by Svensson and Stephenson which gave an example from one state to show how some women were discouraged from using IVF. Per-Gunnar Svensson & Patricia Stephenson, *Equity and Resource Distribution in Infertility Care*, in TOUCH CHOICES: IN VITRO FERTILIZATION AND THE REPRODUCTIVE TECHNOLOGIES 161, 163 (Patricia Stephenson & Marsden G. Wagner eds., 1993). Svensson and Stephenson reported that Oregon extended its eligibility for public health insurance funds to cover all people below the federal poverty level, although limits were placed on the medical services paid with public funding. *Id.* Medical procedures were ranked by a cost-utility procedure which rated each treatment by the benefit to the patient per unit of

later, it is often the case that poor women's reproductive autonomy is instead severely limited.

B. *Women of Color*

Various studies dating from as early as the 1900s suggest that the infertility rate for African-American women is much higher than that for white women. For example, Paula Giddings reports in her book, *When and Where I Enter*, two studies which suggest the African-American infertility rate was as high as fifty percent.⁷⁵ She also reports a 1942 doctoral dissertation from Columbia University which suggested a forty-one percent childlessness rate among African-American college women.⁷⁶ In 1996, Roberts reported the infertility rate for married African-American women was one and one half times higher than married white women.⁷⁷ But despite their high infertility rate, African-American women have not participated in reproductive services at the same rate as white women.⁷⁸

Dr. Cheryl J. Sanders, in her article on African-American women and reproductive technologies, suggests one general reason for African-American women's relative absence from reproductive technologies is a less exclusive definition of family.⁷⁹ Sanders notes the idea of one mother, one father, and genetic offspring, which has led to stigmatization when that ideal cannot be met, is not necessarily an accurate family structure for African-American families. "[T]he inclusion of infertile couples and individuals as valued members of the extended family, and especially as participants in rearing children, seems to have erased or minimized whatever stigma may have been attached to infertility by society."⁸⁰

cost. Of the 714 items on the priority list, IVF was ranked 701. *Id.* A clear disincentive for women on public health insurance to use IVF.

⁷⁵ Dr. Cheryl J. Sanders, *Surrogate Motherhood and Reproductive Technologies: An African American Perspective*, 25 CREIGHTON L. REV. 1707, 1715 (1992).

⁷⁶ PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 248, 379 n.30 (1984). Giddings suggests many factors were involved in this 41% rate including an unconscious revolt against being forced into the role of mothers. *Id.* at 248.

⁷⁷ Roberts, *Race and the New Reproduction*, *supra* note 70, at 939.

⁷⁸ Sanders, *supra* note 75, at 1715; see Roberts, *Genetic Tie*, *supra* note 47, at 244 ("The people in the United States most likely to be infertile are older, poorer, Black, and poorly educated. Most couples who use IVF services are white, highly educated, and affluent." (footnote omitted)).

⁷⁹ Sanders, *supra* note 75, at 1714-15; see Roberts, *Genetic Tie*, *supra* note 47, at 214 ("[B]lood ties are less significant to the definition of family in the Black community than they traditionally have been for white America.").

⁸⁰ Sanders, *supra* note 75, at 1714-15; see Roberts, *Genetic Tie*, *supra* note 47, at 231-32 (African-American culture is not dependent on the genetic ties).

Sanders suggests that more fluid definitions of family have given African-American families more alternatives in defining themselves to the extent that they are not "forced" by society to produce genetic offspring.⁸¹

While African-American women may have more choices in family structure, racial stereotypes may narrow the available opportunities of African-American women who may wish to choose IVF. As Sanders notes, the stereotypical image of the African-American woman is the "public enemy whose babies are a burden to society at large, unless, of course, she can produce sons who play football or basketball."⁸² Also, note a phone conversation Sanders reported between herself and a representative from the Surrogate Parenting Association in Louisville, Kentucky, which although specifically addressing surrogacy is applicable here: "When I asked why so few [African-Americans] participated in surrogacy arrangements, I was given several reasons: 1) [African-American] babies are easier to adopt; 2) the services are prohibitively expensive; and 3) [African-Americans] are not solely interested in biological offspring."⁸³ Sanders notes: "the experience of racism and racial discrimination breeds both skepticism and pessimism with regard to the question of whether white advances in technology and medicine are irrelevant or even inimical to the well-being of [African-Americans]."⁸⁴

C. Lesbian Women

In a 1984 report on the efficacy of single women and artificial insemination (AI), two doctors who ran an AI clinic stated they would only consider married heterosexual couples, and would not consider lesbian couples or single women for their programs.⁸⁵ Another doctor stated:

⁸¹ See generally Sanders, *supra* note 75, at 1714-15.

⁸² Sanders, *supra* note 75, at 1713.

⁸³ Sanders, *supra* note 75, at 1715.

⁸⁴ Sanders, *supra* note 75, at 1716. Roberts also reports that white women may be diagnosed with infertility, and thus pointed towards reproductive technologies, more often than African-American women.

[D]octors are more likely to diagnose white professional women with infertility problems such as endometriosis that can be treated with in vitro fertilization. In 1976, one doctor found that over 20[%] of his [African-American] patients who had been diagnosed as having pelvic inflammatory disease, often treated with sterilization, actually suffered from endometriosis.

Roberts, *Race and the New Reproduction*, *supra* note 70, at 940 (footnote omitted).

⁸⁵ Carson Strong & Jay S. Schinfeld, *The Single Woman and Artificial Insemination by Donor*, 29 J. REPROD. MED. 293, 294 (1984); see Roberts, *Genetic Tie*, *supra* note 47, at 241 n.125 (many IVF clinics accept only heterosexual married couples).

[T]he restriction of the service to 'married heterosexual unions' looks right. If, as we assume, the dominant and inescapable interest must be that of the child and his enjoying a normal upbringing—an interest, it may be added, which can be overlooked or subordinated to the couple's longing for parenthood—then deliberately to contrive its birth into a lesbian union or to a single woman would be to deny it justice.⁸⁶

One might assume lesbians also turn to IVF to meet their desire for children. Whether this is true or not, however, remains uncertain as there are no studies on the use, or attempted use, of IVF by lesbians.

"Officially" few IVF programs accept lesbians.⁸⁷ As Ann Oakley reports "[a]ccess to IVF is controlled by an outdated ideology which sees the heterosexual nuclear family as the only proper recipe for parenthood."⁸⁸ The same belief which tended to perpetuate opposition to lesbian custody⁸⁹ also pervades access by lesbians to IVF. The stereotypical beliefs maintain an exclusionary lock on access to IVF—at least officially.

V. A LARGER PATTERN OF REPRODUCTIVE CONTROL

If IVF is ever to be used for aiding women's search for reproductive autonomy, it is important to understand what drives women to turn to IVF, what expectations they have, and what are their outcomes. But one must be careful in treading this line. As Hilary Rose noted in speaking of the world's first test tube mother: "It is one thing to argue against a specific technological development which is against the interests of women . . . it is quite another to say to Lesley Brown (or any other infertile woman) that it was

⁸⁶ Strong & Schinfeld, *supra* note 85, at 294.

⁸⁷ Roberts, *Genetic Tie*, *supra* note 47, at 240-41 ("[F]ertility clinics routinely deny their services to single women, lesbians, women with genetic disorders, and women who are not considered good mothers."); see Roberts, *Race and the New Reproduction*, *supra* note 70, at 936 ("Most IVF clinics only accept heterosexual married couples as clients, and most physicians have been unwilling to assist in the insemination of single women." (citations omitted)).

⁸⁸ Oakley, *supra* note 49, at 178.

⁸⁹ Generally, homosexuality is not considered an acceptable factor in making custody decisions today. See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (it was impermissible for a court to rely on any real or imagined stigma associated with a mother being lesbian in custody decisions); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979) (mother's homosexuality was not a ground for change in custody); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987) (homosexual father could not be denied overnight visitation with his children as a result of his homosexuality); *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct. 1985) (mother's desire to share her lesbian relationship with her children was not a change in circumstance to warrant an alteration in custody agreement).

wrong for her to have Louise.'"⁹⁰ Ann Oakley asks, "[i]f we say that the industry of new procreative technologies should be halted, what do we say to women who want to become mothers, and who believe that investment in this industry is their only means of doing so?"⁹¹

It seems there is no way to halt reproductive technologies, nor does that seem an appropriate decision. As Oakley pointed out, it would not be equitable to protect women by punishing them. Doing so places the onus upon a woman by saying she must protect herself by refraining from using these medical advances. Instead, a better alternative would be to claim the technologies as women's own. One way of doing this is to place IVF within a larger pattern of controlling all women's reproductive autonomy. Only in this way can we really *see* what domination does to all women. Only in this way will medical, legal, and feminist theorists be able to realize the use of IVF to control reproductive autonomy is not an isolated issue, but rather part of a history and pattern of domination.

White women, women of color, poor women, lesbian women, *all* women, are being systematically denied reproductive autonomy.⁹² The forced sterilization of women, the use of Norplant to control poor women's reproduction, and the prosecution of mothers for fetal abuse, will be discussed in order to lay the groundwork for a discussion below to typify the larger pattern of controlling all women's reproductive autonomy.

A. *Forced Sterilization*

Believing that social problems resulted from social defects, the "socially undesirable" were sterilized as a means of race control.⁹³ The first compulsory sterilization bill to be proposed was intro-

⁹⁰ Oakley, *supra* note 49, at 180 (citation omitted).

⁹¹ Oakley, *supra* note 49, at 180 (citation omitted).

⁹² Women are being denied reproductive autonomy in many areas. *See, e.g.,* Lyng v. Castillo, 477 U.S. 635 (1986) (upholding provision of Food Stamp Act which gave lesser benefits to nuclear families than to unrelated persons or extended families comprising a single household); Harris v. McRae, 448 U.S. 297 (1980) (denying statutory and constitutional challenge to the Hyde Amendment which prohibited the use of federal funds for certain types of abortions); Califano v. Jobst, 434 U.S. 47 (1977) (upholding application of the Social Security Act which provided for termination of benefits paid to a disabled dependent child of a deceased wage earner upon the child's marriage to someone not receiving benefits); Maher v. Roe, 432 U.S. 464 (1977) (excluding elective abortions from state Medicaid funding did not unduly burden a women's right to an abortion).

⁹³ Steven S. Spitz, Note, *The Norplant Debate: Birth Control or Woman Control?*, 25 COLUM. HUM. RTS. L. REV. 131, 135 (1993).

duced but defeated in the Michigan legislature in 1897.⁹⁴ A second attempt, occurred in 1905 in Pennsylvania when the legislature passed "An Act for the Prevention of Idiocy."⁹⁵ The bill was vetoed by the Governor.⁹⁶ The first bill to be enacted, a 1907 Indiana bill, allowed for the sterilization of criminals, idiots, imbeciles, and rapists in state institutions upon the recommendation of a board of experts.⁹⁷

The eugenics movement in the United States quickly followed and reached its peak in the late 1920s.⁹⁸ By 1942, thirty-two states had passed compulsory sterilization bills.⁹⁹ It is estimated that over 60,000 individuals were forcibly sterilized to ostensibly eliminate social problems like "poverty, mental illness, mental retardation, disease, and criminality" ¹⁰⁰

In 1927, the Supreme Court addressed the issue of forced sterilization in the case *Buck v. Bell*.¹⁰¹ In this case, Carrie Buck brought a constitutional challenge to the Virginia sterilization statute.¹⁰² She was a resident of the State Colony for Epileptics and the Feeble Minded, and was chosen to be sterilized by the State Colony's superintendent because of believed "hereditary forms of insanity [or] imbecility" ¹⁰³ Buck was thought to be the offspring of a "feeble minded" woman and had herself recently given birth to a girl who was assumed to also be "feeble minded." ¹⁰⁴ Justice Holmes, writing for the majority and affirming the decision of the lower courts, stated: "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." ¹⁰⁵ It is interesting to note that Justice Holmes himself was an ardent eugenicist. In an article he wrote in 1915 for the *Illinois Law Review* he stated: "I believe that the wholesale social regeneration . . . cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand

⁹⁴ *Id.* at 135 n.25.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 135.

⁹⁹ *Id.* at 135 n.25.

¹⁰⁰ Katz, *supra* note 19, at 742.

¹⁰¹ 274 U.S. 200 (1927).

¹⁰² *Id.* at 201.

¹⁰³ *Id.* at 205-06.

¹⁰⁴ *Id.* at 205.

¹⁰⁵ *Id.* at 207 (citation omitted).

life and trying to build a race."¹⁰⁶

It was not until fifteen years later in *Skinner v. Oklahoma*,¹⁰⁷ a case dealing with the sterilization of a male "habitual criminal,"¹⁰⁸ that the Supreme Court held the right to procreation was a "basic civil rights of man."¹⁰⁹ According to the Supreme Court, "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."¹¹⁰ *Skinner* clearly states the right to procreate is a fundamental right. Nonetheless, forced sterilization is still employed.

One reason for this, despite *Skinner*, is because the Supreme Court decided *Skinner* on equal protection grounds rather than directly denouncing mandatory sterilization laws and overturning the *Buck* decision.¹¹¹ As a result, sterilization laws are still on many state books and "[u]nder either its police power or *parens patriae* authority, a state retains the power to determine who should reproduce."¹¹²

The use of sterilization laws today has broadened from "incompetents" to included racial, ethnic, and class stereotypes. Dorothy Roberts argues that "abusive sterilization" is a means to control African-American women's reproductive lives.¹¹³ She believes the stereotype of African-American women as sexually promiscuous has helped devalue their roles as mothers and created a push for stricter control over African-American women's reproductive options.¹¹⁴ Further, she argues the systematic denial of African-American women's reproductive autonomy harkens back to slavery, when slave owners controlled African-American women's reproduction and used it as a means of control.¹¹⁵ As evidence of the modern day control of African-American women's reproduc-

¹⁰⁶ Spitz, *supra* note 93, at 136 n.32 (quoting Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915)).

¹⁰⁷ 316 U.S. 535 (1942).

¹⁰⁸ *Id.* at 537.

¹⁰⁹ *Id.* at 541.

¹¹⁰ *Id.*

¹¹¹ Spitz, *supra* note 93, at 138-39.

¹¹² Spitz, *supra* note 93, at 139 n.46. Note, however, that despite the fact that states can still have sterilization laws, forced sterilization and consensual sterilization laws must now overcome constitutional challenges to be upheld. Julie Marcus, In re Romero: *Sterilization and Competency*, 68 DENV. U. L. REV. 105, 107 (1991).

¹¹³ Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1427 (1991) [hereinafter Roberts, *Punishing Drug Addicts*].

¹¹⁴ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1436-39.

¹¹⁵ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1439.

tion, she points to the rates of enforced sterilization for which African-American women are inordinately represented.¹¹⁶ A 1973 study reported that 43% of women sterilized under a federally funded program were African-American, though only 33% of the patients were African-American.¹¹⁷ A 1989 study reported that 9.7% of African-American women with college educations had been sterilized, in contrast to only 5.6% of white women with college educations.¹¹⁸ Further, 31.6% of African-American women without a high school diploma were sterilized, while only 14.5% of white women had been sterilized.¹¹⁹

Roberts suggests African-American women are under a particular bind as African-American women are five times more likely to be below the poverty line, and therefore in need of government supported medical programs, than white women.¹²⁰ This unequal balance exposes African-American women to greater governmental control and thereby exposes them to greater controls over their reproductive autonomy.¹²¹ For example, one study in North Carolina reported that between 1933 and 1973 over 7500 women were sterilized; of these women, about 5000 were African-American.¹²²

African-American women, however, are not the only ones to be over represented among those sterilized. Spanish-speaking women are twice as likely to be sterilized as English-speaking women.¹²³ Of all the races in the United States, African-American women and Hispanic women are the most likely to be sterilized.¹²⁴ Davis reports that by the 1970s, 35% of all women of childbearing age in Puerto Rico had been sterilized.¹²⁵ By 1976, 24% of all Native American women of child bearing age had been sterilized.¹²⁶ Further, it is reported in 1972 alone, between 100,000 and 200,000 sterilizations were performed by government funded programs.¹²⁷

¹¹⁶ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1442-43.

¹¹⁷ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1442 n.125 (citing Dick Grossboll, Note, *Sterilization Abuse: Current State of the Law and Remedies for Abuse*, 10 GOLDEN GATE U.L. REV. 1147, 1153 n.30 (1980)).

¹¹⁸ Roberts, *Race and the New Reproduction*, *supra* note 70, at 942.

¹¹⁹ Roberts, *Race and the New Reproduction*, *supra* note 70, at 942.

¹²⁰ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1432 n.60.

¹²¹ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1432.

¹²² Ehrenreich, *supra* note 65, at 515 n.73 (citing ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 202, 217 (1981)).

¹²³ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1442-43 n.125.

¹²⁴ Jeanne L. Vance, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 *HASTINGS CONST. L.Q.* 827, 833 (1994).

¹²⁵ Ehrenreich, *supra* note 65, at 515 n.73 (citing DAVIS, *supra* note 122, at 219).

¹²⁶ Ehrenreich, *supra* note 65, at 515 n.73 (citing DAVIS, *supra* note 122, at 218).

¹²⁷ Ehrenreich, *supra* note 65, at 515 n.73 (citing DAVIS, *supra* note 122, at 218).

Perhaps more alarming, a survey of facilities performing sterilizations in 1975 found that only 60% of the them were aware of government guidelines regulating sterilization and only 30% of facilities were trying to comply with these regulations.¹²⁸

Inconsistencies in the application of sterilization laws raise questions over the reasons for its use. In *Walker v. Pierce*,¹²⁹ a doctor required an African-American woman in labor to consent to sterilization before agreeing to assist her in delivering her fourth child.¹³⁰ Contrast this with the story told by Ruth Colker of a white law school classmate of hers who decided to be sterilized.¹³¹ The university doctor refused to allow the procedure unless the woman agreed to undergo several sessions with a psychiatrist, presumably as Colker says, to dissuade her from her decision.¹³²

Forced sterilization has been employed to selectively control women's reproductive autonomy. Specifically, forced sterilization seems to be employed most often to control the reproductive autonomy of African-American women, Latina women, and poor women. One technology pushes a subgroup of women toward fertility and another pushes a subgroup of women from fertility, though both demonstrate a loss of reproductive control. The recent trend by courts to use Norplant as a condition of parole also exemplifies this selective control.

B. *Norplant as a Probation Condition*

With its release to the United States market, Norplant birth control quickly became a tool for some courts to restrict women's reproductive ability. Norplant, believed to be 98.5% effective in preventing pregnancy over a five year period,¹³³ was approved by the Food and Drug Administration (FDA) on December 10, 1990 as an "acceptable means of birth control in the United States."¹³⁴

¹²⁸ Ehrenreich, *supra* note 65, at 515 n.73 (citing DAVIS, *supra* note 122, at 220).

¹²⁹ 560 F.2d 609 (4th Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978).

¹³⁰ Vance, *supra* note 124, at 833.

¹³¹ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1443 n.130 (citing Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1067 n.196 (1989)).

¹³² Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1443 n.130 (citing Colker, *supra* note 131, at 1067 n.196).

¹³³ Vance, *supra* note 124, at 828 n.5 (citing American Medical Association, *Requirements or Incentives by Government for the Use of Long-Acting Contraceptives*, 267 J. AM. MED. ASS'N 1818, 1818 (1992)).

¹³⁴ Spitz, *supra* note 93, at 132. Many people suggest the safety of Norplant was unknown as tests were still on-going or inconclusive. Specifically:

[a]n organization called Health Action International charges that the examiners [of tests involving Third World women as Norplant subjects]

However, like forced sterilization, Norplant has often been used disproportionately against African-American and poor women.

To use Norplant, six thin, flexible capsules containing a synthetic hormone, levonorgestrel, are inserted under the skin of the upper arm.¹³⁵ Norplant works by first suppressing ovulation with a continuous release of levonorgestrel, and second by keeping the cervical mucus thick and thereby preventing the sperm from reaching and fertilizing the egg.¹³⁶ Once inserted, Norplant can begin working within twenty-four hours if inserted within the first seven days of the woman's menstrual cycle.¹³⁷ To remove, another in-office surgical visit is required.¹³⁸ Norplant is not, however, without constraints. Norplant is not recommended for women with liver or heart disorders, blood clots, high blood pressure, breast nodules, fibrocystic disease of the breast or an abnormal breast x-ray, women with diabetes, high cholesterol or triglycerides, migraines, epilepsy, mental depression, or gallbladder or kidney diseases.¹³⁹ In women not constrained from using Norplant, side effects can include excessive or irregular vaginal bleeding, headaches, nervousness, nausea, dizziness, ovarian enlargement, dermatitis, acne, and change in appetite.¹⁴⁰

After its approval by the FDA, both state legislators and courts were quick to try to use Norplant as a means to control women's reproduction autonomy. In 1991, state legislators in Kansas attempted to pass legislation which would encourage low income women on welfare or Aid to Families with Dependent Children (AFDC)¹⁴¹ to use Norplant by offering bonuses and increases in

lost track of whole groups of women and that they gave Norplant to pregnant or lactating women. Women in Third World countries were often so frightened by the procedure for implantation that they refused to return to get the rods removed, even when they were experiencing prolonged bleeding.

Karin E. Wilinski, Note, *Involuntary Contraceptive Measures: Controlling Women at the Expense of Human Rights*, 10 B.U. INT'L L.J. 351, 357-58 (1992) (citations omitted).

¹³⁵ Spitz, *supra* note 93, at 132-33.

¹³⁶ Spitz, *supra* note 93, at 133.

¹³⁷ Spitz, *supra* note 93, at 133 n.11.

¹³⁸ Spitz, *supra* note 93, at 133.

¹³⁹ Spitz, *supra* note 93, at 134 n.17.

¹⁴⁰ Spitz, *supra* note 93, at 134 n.18.

¹⁴¹ AFDC was abolished in 1996 and replaced with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 which allowed block grants to go to states from which states can individually tailor their welfare plans. Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 734 (1998). Further, during its time AFDC itself was not without conflict. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587 (1987) (AFDC requirement that a family's eligibility for benefits take into account the income of all

yearly benefits.¹⁴² A 1991 report noted that 34.6% of AFDC recipients were African-American women.¹⁴³ Compared to the fact that African-American women made up only 6.35% of the United States population, one begins to see the misuse of technology to control African-American women's reproduction. The effect of state use of Norplant, like enforced sterilization, also tended to target predominately poor African-American women.

No Norplant bill has yet been made law; this is not, however, due to a lack of interest by state legislators. In Mississippi and Florida, state senators proposed making welfare conditional upon Norplant implantation.¹⁴⁴ In Washington and North Carolina, on the other hand, legislators proposed bills which would make Norplant implantation mandatory for mothers whose babies are born with fetal alcohol syndrome or drug addiction as determined at birth by the hospitals.¹⁴⁵ Other bills suggested increasing benefits for women who agreed to Norplant implantation. Among these states were Ohio (increased welfare benefits), Colorado (a credit to inmates for a vasectomy, tubal ligation, or Norplant implant), Connecticut (a \$700 bonus plus \$200/year thereafter for Norplant implant), and Florida (AFDC increase for Norplant or Depo Provera use).¹⁴⁶ Ex-Grand Wizard of the Klu Klux Klan and then Louisiana state representative David Duke, introduced a bill in Louisiana which in its original form offered incentives for mothers on welfare with more than one child to use Norplant.¹⁴⁷ Similarly, Medicaid plans also provided funding for the insertion of Nor-

family members living in the same house was reasonable); *Wyman v. James*, 400 U.S. 309 (1971) (state requirement of a home visit for recipients of AFDC served a valid purpose and did not violate recipients' privacy rights).

¹⁴² Spitz, *supra* note 93, at 141. Kansas also proposed legislation that would require woman able to conceive and convicted of a felony possession of drugs to choose between jail or Norplant use. Wilinski, *supra* note 134, at 361-62.

¹⁴³ Spitz, *supra* note 93, at 140 n.52 (citing Stephanie Denmark, *Birth-Control Tyranny*, N.Y. TIMES, Oct. 19, 1991, at A23).

¹⁴⁴ Vance, *supra* note 124, at 829.

¹⁴⁵ Vance, *supra* note 124, at 829. A problem in itself is that few rehabilitation programs will accept pregnant substance abusers. See Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1448; see also Wilinski, *supra* note 134, at 362 (Washington proposed a bill allowing for a petition to a court for insertion of Norplant for women who give birth to babies with fetal alcohol syndrome or drug addiction).

¹⁴⁶ Vance, *supra* note 124, at 829 n.12; see also Wilinski, *supra* note 134, at 362 (Florida's proposed bill would increase AFDC payments from \$258/month to \$400/month for Norplant use).

¹⁴⁷ Spitz, *supra* note 93, at 141, 143. Louisiana's proposed bill would pay \$100/year to poor women who choose Norplant. See Wilinski, *supra* note 134, at 362.

plant.¹⁴⁸ As of 1996, all fifty states provided funding for Norplant use through their Medicaid plans.¹⁴⁹

Critics have charged that both doctors and legislators have misused Norplant. Doctors have been criticized for enticing low-income and minority women into using Norplant without informing them of the cost of removal (\$150¹⁵⁰) or of potential side effects.¹⁵¹ Others have charged that the bills would effectively "rent a low-income women's womb for the duration of the implant" and that the bonus would act as an incentive for women to have it implanted.¹⁵² Proponents may argue that the bonuses for having Norplant implanted are too small to be a true incentive, but this may be inaccurate. Under the proposed Florida bill, for example, assistance to mothers on AFDC would increase from an average \$258/month to \$400/month upon proof the mother is using Norplant.¹⁵³ Increasing a mother's assistance by more than half is not a small incentive, but rather a bribe a low-income mother might be hard pressed to turn down in spite of any side effects from the implantation.

Courts have also attempted to use Norplant to control women's reproduction. The most notable case involved a judge conditioning parole on Norplant implantation. Darlene Johnson, a twenty-seven year old unwed mother of four, pregnant with her fifth child, had been arrested and pled guilty to violating California's penal code prohibiting corporal injury to a child.¹⁵⁴ The judge ordered her to attend counseling sessions and parenting classes, not punish her children by striking them, not smoke, and not use drugs during her pregnancy.¹⁵⁵ A month later, Johnson was sentenced to a year in jail and placed on three years probation.¹⁵⁶ In addition to the above probation conditions, Johnson was ordered to be implanted with Norplant after the delivery of her baby.¹⁵⁷ During the sentencing hearing, the judge inquired if Johnson was currently on welfare or planned to be on welfare, to

¹⁴⁸ Rachel Stephanie Arnow, *The Implantation of Rights: An Argument for Unconditionally Funded Norplant Removal*, 11 BERKELEY WOMEN'S L.J. 19, 19 (1996).

¹⁴⁹ *Id.* at 19.

¹⁵⁰ *Id.* at 21.

¹⁵¹ Vance, *supra* note 124, at 829.

¹⁵² Vance, *supra* note 124, at 830.

¹⁵³ Vance, *supra* note 124, at 831.

¹⁵⁴ Spitz, *supra* note 93, at 143, n.72 (citing Mark A. Stein, *Judge to Let Birth Control Order Stand*, L.A. TIMES, Jan. 11, 1991, at A3).

¹⁵⁵ Spitz, *supra* note 93, at 144.

¹⁵⁶ Spitz, *supra* note 93, at 144.

¹⁵⁷ Spitz, *supra* note 93, at 144.

which she answered yes.¹⁵⁸ Then, stating a concern for her children and her parenting ability, the judge asked if she would be willing to be implanted with a new birth control, similar to the pill, which lasted five years and had recently been approved by the FDA.¹⁵⁹ Johnson agreed without having been informed of the side effects for her particular conditions—high blood pressure, diabetes, and a heart murmur—which excluded her from its use.¹⁶⁰

Within the week, her attorney, who had not been at the probation hearing, asked the court to set aside the terms of the probation in view of Johnson's medical unsuitability for Norplant treatment, her constitutional right to privacy, and the statutory argument that Norplant was unrelated to her rehabilitation.¹⁶¹ The judge refused, stating that "[i]t is in the defendant's best interest and certainly in any unconceived child's interest that she not have any more children until she is mentally and emotionally prepared to do so."¹⁶²

The case was appealed but became a moot issue when Johnson violated the terms of her parole to not use drugs, and was sentenced to a prison term.¹⁶³ The appeals court subsequently refused to address the constitutionality of using Norplant as a condition of parole.¹⁶⁴

Johnson is not, however, the only woman for whom Norplant has been used as a condition of parole. In Nebraska, twenty-one year old Michelle Carlton agreed to use Norplant as part of her plea agreement.¹⁶⁵ In Texas, nineteen year old Ida Jean Tovar, an unmarried mother of three, agreed to the use of Norplant in her plea agreement.¹⁶⁶ Again in Texas, Cathy Lanel Knighten, a twenty-three year old poor woman charged with smothering her infant, agreed to a Norplant implantation as part of a plea agreement.¹⁶⁷

Like the forced sterilization of women, which has tended to result in the misuse and abuse of African-American, Latina, and

¹⁵⁸ Stein, *supra* note 154, at A3.

¹⁵⁹ Michael Lev, *Judge is Firm on Forced Contraception, but Welcomes an Appeal*, N.Y. TIMES, Jan. 11, 1991, at A17; Stein, *supra* note 154, at A3.

¹⁶⁰ Lev, *supra* note 159, at A17.

¹⁶¹ Spitz, *supra* note 93, at 146; Stein, *supra* note 154, at A3.

¹⁶² Lev, *supra* note 159, at A17; Spitz, *supra* note 93, at 146.

¹⁶³ Spitz, *supra* note 93, at 147 n.91.

¹⁶⁴ Spitz, *supra* note 93, at 147 n.91; *People v. Johnson*, No. F015316, 1992 WL 685375, at *1 (Cal. Ct. App. Apr. 13, 1992).

¹⁶⁵ Spitz, *supra* note 93, at 144 n.78.

¹⁶⁶ Spitz, *supra* note 93, at 144 n.78.

¹⁶⁷ Spitz, *supra* note 93, at 145 n.78.

poor women's reproductive autonomy, the use of Norplant has also been used to control the reproductive autonomy of women. Note Jeanne Vance's assessment of this situation:

[T]he public perception is that welfare mothers are unmarried and non-white. Therefore, the Norplant bills may draw support from prejudice and racial stereotyping. Certainly racism provides a partial motivation, even if only on a subconscious level, for some politicians and medical professionals who seek to prevent women of color from reproducing.¹⁶⁸

C. *Fetal Abuse Laws*

As of 1996, "two hundred women in thirty-five states had been charged with abusing an unborn child."¹⁶⁹ Fetal abuse laws have also been employed to selectively control women's reproductive autonomy. The use of fetal abuse laws—in addition to the fact that they place the interests of the embryo higher than that of the mother—has been shown to place a higher burden on African-American and poor women than on white or middle-class women.¹⁷⁰ One study noted that although there were equal rates of drug use among African-American and white women at one clinic, African-American women were nearly ten times more likely than white women to be reported to state agencies for drug abuse.¹⁷¹ This same study also noted that poor women were more likely than middle class women to be reported to the authorities.¹⁷² In Pinellas County, Florida, a study comparing the tests of pregnant women receiving care from either public or private clinics found that 60% of the 133 women reported to health authorities had incomes less than \$12,000, while only 8% of those reported had incomes of \$25,000 or more a year.¹⁷³ It has been suggested that one reason for this disparity is that doctors, in this case white and middle-/upper-class, identified more readily with someone from their own

¹⁶⁸ Vance, *supra* note 124, at 832-33 (citation omitted).

¹⁶⁹ Murphy, *supra* note 141, at 713. Prosecution for fetal abuse has usually taken two forms: prosecution under drug trafficking laws, or prosecution under criminal child abuse and neglect statutes. The successful prosecution under drug trafficking laws has been overturned on the grounds that these statutes prohibit trafficking to "born persons." Prosecution under criminal child abuse and neglect statutes has created litigation over whether a fetus is to be considered a child for the purposes of the statute. Murphy, *supra* note 141, at 713-14.

¹⁷⁰ Oberman, *supra* note 71, at 9 n.36.

¹⁷¹ Oberman, *supra* note 71, at 9 n.36 (citing Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990)).

¹⁷² Oberman, *supra* note 71, at 9 n.36 (citing Chasnoff, *supra* note 171, at 1205).

¹⁷³ Oberman, *supra* note 71, at 9 n.36 (citing Chasnoff, *supra* note 171, at 1205).

socio-economic background, and were thus less likely to report suspected abuse by white or middle-class women to authorities than for African-American or poor women.

Note the experience of twenty-three year old Jennifer Clarise Johnson, the first woman convicted of exposing her baby to drugs while pregnant,¹⁷⁴ as an example of this phenomenon. Johnson was prosecuted with two counts of delivering a controlled substance to a minor. The delivery supposedly occurred in the sixty seconds after birth and before the umbilical cord was cut.¹⁷⁵ The conviction was upheld by the appeals court, marking the first time a law prohibiting distribution of drugs to children under eighteen was successfully used as a fetal protection law and upheld by a state appeals court.¹⁷⁶

The Johnson case, however, is not an isolated incident. Hoffman reports that between 1987 and 1991 at least fifty "fetal abuse" cases were brought in nineteen states and the District of Columbia.¹⁷⁷ But as one study reported, of fifty-two defendants in fetal abuse law cases, thirty-five were African-American, two were Latina, and one was Native American. Only fourteen of the women were white.¹⁷⁸ Also note a 1990 *The New York Times* report stating that of sixty women charged with fetal abuse, 80% were minorities.¹⁷⁹ In Florida, as of 1991, ten of the eleven criminal cases for fetal abuse were brought against African-American women. Further, in South Carolina from 1989 to 1991, seventeen of the eighteen women charged with criminal neglect or distributing drugs to a minor were African-American.¹⁸⁰ These statistics suggest that fetal abuse laws are also being used to negatively control minority and poor women's reproductive autonomy.

¹⁷⁴ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1420.

¹⁷⁵ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1420. There are many examples of prosecution under fetal abuse laws. See generally Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1420 n.2.

¹⁷⁶ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1420 n.2 (citing Tamar Lewin, *Court in Florida Upholds Conviction for Drug Delivery by Umbilical Cord*, N.Y. TIMES, Apr. 20, 1991, at 6).

¹⁷⁷ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1421 n.5 (citing Jan Hoffman, *Pregnant Addicted—and Guilty?*, N.Y. TIMES MAGAZINE, Aug. 19, 1990, at 32, 35).

¹⁷⁸ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1421 n.6 (referring to a memorandum of the ACLU Reproductive Freedom Project).

¹⁷⁹ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1421 n.6 (citing Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13).

¹⁸⁰ Roberts, *Punishing Drug Addicts*, *supra* note 113, at 1421 n.6.

VI. FINDING REPRODUCTIVE AUTONOMY

There are many layers from which to analyze gender inequality within reproductive technologies. One is by viewing the bias within the technology itself. With IVF the inequality results from women being placed in competition with the technology, doctors, and views of informed consent. Inequality can also become apparent from viewing those who do not use IVF and how those women have their reproductive autonomy controlled outside IVF use. All women experience domination through the loss of their reproductive autonomy. From this common domination, it is possible to move the discussion to fighting and ending the domination rather than simply focusing on the differences within the experience of domination.

This Note has attempted to demonstrate that IVF has the potential to be used to control women's reproductive autonomy both as an individual technology and as part of a larger pattern of control. When one views IVF as part of a system of gender control, it becomes easy to see the systematic domination of women through restrictions on all women's reproductive autonomy whether it is in preventing or promoting their fertility.

Only by recognizing the limits that reproductive technologies place on women can women gain control over the technology and begin the quest to define their own reproductive autonomy.