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## New Jersey Supreme Court to Consider Controversial Family Cap Welfare Provision

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FEATURE: Family Cap Welfare Provision

# NEW JERSEY SUPREME COURT TO CONSIDER CONTROVERSIAL FAMILY CAP WELFARE PROVISION

By Jessica Hunter

The New Jersey Supreme Court is the first high state court in the nation to consider whether the family cap public assistance provision, known by opponents as the “Child Exclusion” law, violates state constitutional protections. The class action plaintiffs of *Sojourner A. v. New Jersey Dep’t. of Human Servs.*, along with the American Civil Liberties Union (ACLU) and National Organization of Women (NOW) Legal Defense and Education Fund and the private law firm of Gibbons Del Deo Dolan Griffinger & Vecchione, allege that the family cap provision denies public assistance recipients their fundamental right to reproductive autonomy and violates the equal protection clause by denying benefits to a class of children solely because of the timing of their birth. 803 A.2d 1165 (2002).

The family cap provision in New Jersey’s state welfare law denies the increase in additional cash benefits available to public assistance recipients for any children they bear while on state assistance. Its application has prompted unique coalitions among interest groups who do not traditionally work together, yet collectively protest that the family cap is unconstitutional and a seriously misguided public welfare policy. Moreover, while the controversy over the family cap provision draws those concerned with public policy, race and poverty, it is also uniquely a women’s issue due to the fact that women represent 90 percent of the custodial parents on welfare. *American Civil Liberties Union*, available at <http://www.aclu.org/reproductive/iverights>.

The 60-year-old federal entitlement

program, known as Aid to Families with Dependent Children (AFDC) established under Title IV-A of the Social Security Act, 42 U.S.C.A §§ 601-603 (1935), was replaced during the Clinton Administration with Temporary Assistance for Needy Families (TANF). Unlike the AFDC, which guaranteed income support to all individuals meeting nationally defined criteria, TANF as Title I of the Personal Responsibility and Work Reconciliation Act of 1996 (PRA) created fixed lump-sum payments to states, known as block grants. 42 U.S.C.A. § 601-

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608. These grants are meant to be administered, in the state’s broad discretion, to state public assistance programs. The welfare reform from AFDC to PRA was catalyzed by political pressure, which advocated that public assistance should no longer be viewed as an entitlement program, but rather, that it should stress personal responsibility and encourage individual employment.

The family cap provision, one of the many tools implemented to meet these reformative goals, is not a new creation under TANF. States could apply and did receive waivers from the federal requirement. However, after the passage of TANF in 1996, states are free to enact family caps at their own discretion, without federal

## FEATURE: Family Cap Welfare Provision

approval. To date, 23 states have implemented some form of the family cap provision as part of their public assistance program.

Generally, the family cap provides that no additional cash benefits are to be paid to a recipient household for children born while on public assistance. While women may receive in-kind benefits, such as vouchers for diapers, food stamps and additional Medicaid, they forfeit additional cash of about \$50 to \$60 a month, on average, if they have another child while on public assistance.

State lawmakers propose that TANF, and the family cap specifically, are meant to break the cycle of poverty by encouraging employment, individual responsibility and family stability. The broad purpose of the PRA is clear from its title;

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***...critics deride the common belief that women on public assistance have more children to get benefits and argue that a logical extension of such a theory would lead to the equally preposterous notion that middle-class women have children in order to attain federal tax deductions.***

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it is meant to serve these goals by promoting heterosexual marriage, ending non-marital childbearing and obliging single mothers receiving public assistance to work outside the home in the paid labor market.

State lawmakers contend that the family cap stresses the financial responsibility of giving birth and directs the recipient's focus on job and career training. They cite studies that have concluded that the family cap discourages out-

of-wedlock births, provides incentives to get off public assistance, causes postponement or avoidance of pregnancy and increases the likelihood of family planning and contraception. In support of the family cap, lawmakers cite an overall decline in birth rates of recipient mothers as proof that the family cap is meeting its goals. See Rutgers University Study, *A Report On the Impact of New Jersey's Family Development Program: Results from A Pre-Post Analysis of AFDC Case Heads from 1990-1996*. (reporting 14,057 fewer births to welfare mothers since the implementation of the family cap).

Critics of the family cap provision assert that it is premised on the faulty assumption that women in poverty irresponsibly reproduce and are motivated primarily by economic incentives. They accuse lawmakers of operating under the assumption that mothers receiving public assistance get pregnant in order to fatten their monthly welfare check. Among its critics, the family cap is viewed as a punitive rod rather than a carrot. The core of their complaint is that the purposes and justification for the family cap are wrapped up in stereotypical, mythical and false understandings of the welfare mothers.

Critics charge that one stereotype driving the legislative push for the family cap is the belief that mothers receiving public assistance have more children than mothers in the general population. However, they point to statistics that show that families receiving public assistance are no larger than those in the general population to prove that the legislative fear of public assistance recipients' "over-procreation" is unfounded. American Civil Liberties Union, available at <http://www.aclu.org/reproductiverights>. Some critics also assert that the aim of the family cap is more sinister than what states profess; they allege that the family cap is an attempt to keep the poor class' reproduction at an unnatural low. Moreover, critics deride the common belief that women on public assistance have more children

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NEWS

# CONSPIRACY DEFINITION AFFECTS WAR ON TERROR

By Heather Anne Egan

The United States Supreme Court found that members of a criminal conspiracy can be convicted regardless of whether the discovery of the plot by the police has made it impossible for the conspiracy to achieve its goal. *U.S. v. Recio*, 2003 U.S. LEXIS 901, 9-10.

“The Court has repeatedly said that the essence of a conspiracy is an agreement to commit an unlawful act,” Justice Stephen G. Breyer wrote for the court. He added, “the criminal agreement is a distinct evil, punishable whether or not the substantive crime ever takes place.” *Id.*

While the issue in *Recio* involves the war on drugs and specifically whether conspiracy law applies when federal authorities intercept a drug shipment but then send it forward in a sting operation, the effect of the ruling will have a large impact on the war against terrorism. Open Brief for U.S. 28.

By law, a conspiracy is a type of guilt by association. It allows the federal government to prosecute all of those who are involved in a drug gang or terrorist activity and to charge the minor players with a major crime. 21 U.S.C. §846.

Federal prosecutors and law enforcement officials say the same undercover tactics used in the war on drugs are necessary to arrest and prosecute international terrorists before they are able to carry out their plans. App. to Pet. for Cert. 9.

The September 2000 Ninth Circuit Court of

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Appeals decision reversed the convictions of Francisco Jimenez Recio and Adrian Lopez-Meza for conspiracy drug-trafficking. The court overturned the conspiracy convictions because it found that the conspiracy had effectively been terminated a day earlier when the federal agents arrested the first driver,

took temporary possession of the truck, and enacted a government sting operation. *U.S. v. Recio*, 258 F.3d 1069, 1071 (9th Cir. 2000). The Ninth Circuit reasoned that because the object of the conspiracy had already been frustrated by the time the men arrived, the conspiracy itself had terminated, and the convictions were invalid. *Recio*, 258 F.3d at 1071.

The Ninth Circuit was alone in their view that a conspiracy ends when either the conspirators abort their plans or the object of the conspiracy is defeated because undercover law enforcement agents are already on the case. Therefore, the Supreme Court’s ruling brings the law in the nine western states covered by the Ninth Circuit into line with that of the rest of the country.

The Ninth Circuit’s approach would potentially threaten “the use of properly run law enforcement sting operations,” including the use of undercover agents. *Recio*, 2003 U.S. LEXIS 901, 11. A conspiracy “poses a threat to the public over and above the threat of the commission of the relevant substantive crime,” Justice Breyer added,

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NEWS

# CALIFORNIA SCHOOL ADMINISTRATOR MAY BE PERSONALLY LIABLE FOR IDEA VIOLATION

By Amanda Strainis-Walker

Special education administrators will face personal liability for not complying with federal procedures, if a landmark decision from the Central District of California is allowed to stand. *Goleta Union Elementary School District v. Andrew Ordway*, CV99-07745 (C.D. Cal., verdict December 5, 2002).

When a Santa Barbara High School district administrator neglected to conduct an assessment of a student with disabilities before complying with his mother's request for a school transfer, she was found personally liable for monetary damages. The federal court found that the administrator failed to comply with the Individuals with Disabilities Education Act (IDEA) and was not entitled to qualified immunity because her actions exceeded objectively reasonable conduct. 20 U.S.C. §§ 1400-1487.

"Courts have been quite consistent in reading the IDEA, and when an administrator acts under color of law and the act is so egregious that severe harm is caused, there should be liability," said Brooke R. Whitted, an attorney who

practices special education law at Whitted & Cleary.

The school administrator was held personally liable after a hearing officer ruled that the agencies neglected to provide the student with a free appropriate public education, as required by the IDEA, by failing to properly assess the student before instigating a

sought.

The administrator later moved to be released from personal liability by claiming that she was entitled to Eleventh Amendment immunity as an employee of the school district and that the charge arose from her official capacity. Despite her claim, the court held that as a director of student services,

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***The school administrator was held personally liable after a hearing officer ruled that the agencies neglected to provide the student with a free appropriate public education, as required by the IDEA, by failing to properly assess the student before instigating a substantial change in the student's placement.***

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substantial change in the student's placement. The parent claimed that her child's educational needs were not met at the new school and she had to resort to private alternatives, costing an estimated \$3,000 to \$6,000 a month. The federal court reconfirmed the hearing officer's ruling, including the monetary award the parent

the administrator was charged with knowledge of IDEA requirements that prevent a student change of placement at the request of the student's parents, without first performing an assessment. Furthermore, the court found that IDEA regulations clearly state that an evaluation must

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NEWS

# CINCINNATI'S ADDITION OF SEXUAL ORIENTATION TO HATE CRIME SPARKS CONTROVERSY

By Molly Mack

**W**hen University of Wyoming college student Matthew Shepard was violently murdered because of his sexual orientation, a number of organizations and government officials began encouraging the addition of "sexual orientation" to hate crime laws in an attempt to curb hate crimes against homosexuals. On February 5, 2003, Cincinnati joined a

28003(a) (2003). However, under current federal law, the Justice Department has historically had marked difficulty prosecuting hate crimes because two very specific things must be shown; first, that the victim was enjoying a federally protected activity and second, the victim was a member of a protected class. 18 U.S.C. §245 (2003). Prevention of hate crimes is made difficult, if not

government agencies, would have included homosexuality in the protected class. The amendment would have also removed the six "federally protected activities" that a person must be participating in before being considered a victim of a hate crime, essentially making the prosecution of hate crimes easier. While the HCPA was not successful, its proposition severely impacted the creation

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*A change in Ohio's law is supported by the recent passage of a similar amendment to Cincinnati's municipal code which added "sexual orientation" as a protected class under the city's hate crime definition.*

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national trend by amending its hate crime legislation to protect, "gays, lesbians, bisexual, and transgender" citizens. Opponents of the amendment question the appropriateness of protecting sexual orientation and advocates are skeptical of the impact the amendment will have on the problem.

According to the Violent Crimes Enforcement Act, a hate crime is defined as "a crime in which the defendant...intentionally selects a victim... because of their actual or perceived race, color, national origin, ethnicity, gender, disability, or sexual orientation..." 28 U.S.C. §

impossible, because expressions of animosity toward individuals is protected by the First Amendment.

In 1999, to increase the federal government's authority to prosecute hate crimes, then-President Bill Clinton unsuccessfully urged the passage of the Hate Crime Prevention Act (HCPA). The HCPA would have amended the 1969 hate-crimes law that bans the use of force or threat against a person "because of his race, color, religion, or national origin," by adding gender, disability, and "sexual orientation." "Sexual orientation," defined differently by various organizations and

of individual state's own hate crimes.

For instance, Illinois' hate crime legislation includes criminal actions taken against a person by reason of an actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another. 720 ILCS 5/12-7.1 (2002). While the Federal hate crime legislation demands that victims are participating in federally protected activities, Illinois' act is slightly easier to prosecute under because it allows for an increased penalty

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NEWS

# ASBESTOS LITIGATION GROWING WITH MOUNTING NEGATIVE CONSEQUENCES

By Valerie Sarigumba

**A**s asbestos litigation hits an increasing number of companies, the costs to the companies, the victims, and the public are mounting with it. In a case illustrative of the expanding reach of asbestos litigation, the Supreme Court recently allowed for a broad area of asbestos claims.

On March 10, 2003 in a 5-4 decision, the Court held that under the Federal Employers' Liability Act (FELA), railroad workers who showed signs of asbestosis could receive damages for fear of developing cancer, even though no symptoms of cancer were evident. *Norfolk &*



claims for negligently inflicted emotional distress, claims for pain and suffering associated with, or 'parasitic' on, a physical injury are traditionally compensable . . . A plaintiff suffering from bodily harm

for national legislation." *Ayers*, 2003 WL 888363 at 17.

Dissenting, Justice Kennedy asserted: "As a consequence of the majority's decision, it is more likely that those with the worst injuries from exposure to asbestos will find they are without remedy because those with lesser, and even problematic, injuries will have exhausted the resources for payment. Today's decision is not employee-protecting; it is employee-threatening." *Ayers*, 2003 WL 888363 at 19.

Currently, there are over 600,000 asbestos claims pending in the courts. However, asbestos claims have not been limited to

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*Western Ry. Co. v. Ayers*, 2003 WL 888363 (2003). The plaintiffs were awarded \$5.8 million in damages, although the amount attributed to fear-of-cancer damages was not specified.

The majority opinion by Justice Ginsburg stated that, "Unlike stand-alone

need not allege physical manifestations of her mental anguish." *Ayers*, 2003 WL 888363 at 9. Notably, the majority concluded with, "The 'elephantine mass of asbestos cases' lodged in state and federal courts, we again recognize, 'defies customary judicial administration and calls

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NEWS

# SUPREME COURT TO EXAMINE THE CRIMINALIZATION OF CONSENSUAL SODOMY

By Kevin J. McCloskey

The United States Supreme Court granted certiorari in *Lawrence v. Texas* on December 2, 2002, a case which challenges the criminal sodomy laws of Texas which apply only to same-sex behavior. 123 S. Ct. 661 (2002). The petitioners are seeking to have the Court overrule their 1986 decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

The *Lawrence* case stems from a 1998 incident when police were called to the apartment of John Lawrence in Harris County, Texas. Police found nothing illegal besides Lawrence engaging in sexual activity with Tyron Garner. The two men were arrested according to the Texas law against homosexual sodomy and were eventually fined \$200.

The Lambda Legal Defense and Education Fund brought the case on behalf of Lawrence and Garner, and have raised both equal protection and right to privacy arguments to the Court.

Patricia Cain, the Aliber Family Chair in Law at the University of Iowa, explained the importance of this case stating, "*Lawrence* may be the only chance to

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***"Lawrence may be the only chance to overrule Bowers because most sodomy challenges in state courts, post-Bowers, have resulted in a striking of the sodomy statute under state constitutions. Thus, the federal constitutional question is never reached."***

***— Patricia Cain, Aliber Family Chair in Law, University of Iowa***

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overrule *Bowers* because most sodomy challenges in state courts, post-*Bowers*, have resulted in a striking of the sodomy statute under state constitutions. Thus, the federal constitutional question is never reached."

*Bowers* held that a Georgia sodomy statute did not violate the fundamental rights of homosexuals, and that the right of privacy did not protect individuals from criminal law in their own bedrooms. *Id.*

Relying on *Bowers* for the right to privacy issue raised in the case, the Texas Court of Appeals held that the sodomy statute, section 21.06 of the Texas Penal Code, did not infringe on the Constitution. It also held that the statute did not violate the equal protection clause. *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. Crim. App. 2001).

"Petitioners are attempting to force this country to condone homosexual relationships and to create a universal right, based on those relationships, which has never been recognized in the Constitutional history of the United States," wrote attorneys for the Pro Family Law Center, in an amicus curie brief urging the court to deny the appeal. Charles Lane, *Court to Hear Texas Case on Gay Rights*, WASH POST, Dec. 2, 2002, at A12.

Beyond the legal issue of the right to privacy and equal protection, the case is of the utmost importance to the homosexual community. Ruth Harlow, the legal director at Lambda Legal said, "Texas's law and others like it are widely used to justify discrimination against gay

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# REPRESENTATIVE CONYERS PROPOSES NATIONAL HEALTH INSURANCE ACT

By Amber Nesbitt

**C**ongressman John Conyers, Jr. of Michigan introduced the United States National Health Insurance Act (Act) to the 108<sup>th</sup> Congress on February 4, 2003. If passed, the Act would create a single payer health care system that is publicly financed, yet privately delivered. The goal of the Act is to ensure that all Americans have access to adequate health care in the future and to correct the "maldistribution of health personnel and facilities by establishing a system of prepaid personal health insurance." H.R. 15, 108th Cong. § 2b (2003).

Currently, over 42 million Americans are uninsured, and another 40 million are "under-insured." Professor Karen Harris, a

visiting Professor of Health Law at Loyola University's Health Law Institute notes, "It is undeniable that under the



current system millions of Americans are lacking adequate care. Moreover, since these individuals have no coverage they often delay seeking care and then are sicker when they finally do go

for services."

The many purposes of the Act include recognizing that national health is directly

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***– Professor Karen Harris, Visiting Professor of Health Law, Loyola University Chicago School of Law, Health Law Institute***

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linked to the prosperity of our country, revamping the outdated nature of the current system that unfairly disadvantages the impoverished, and establishing an entirely new health care system. Under the Act, all medically necessary services would be covered, including primary care, inpatient and outpatient care, emergency care, durable medical equipment, long term care, mental health services, dentistry, eye care, chiropractic, and substance abuse treatment. The bill would also allow patients to

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