

FAMILY CAPS IN WELFARE REFORM: THEIR COERCIVE EFFECTS AND DAMAGING CONSEQUENCES

REBEKAH J. SMITH*

INTRODUCTION

“Welfare reform” is a political force that has held American family policy in its grip for the past decade. A particularly problematic component of such reform efforts is the policy of establishing “family caps” or “child exclusions.” Family caps end the traditional system of welfare benefits that increase with family size and instead freeze the amount of a family’s welfare grant at a level correlated to the number of children in the family at the time that the family began receiving assistance. Since 1992, twenty-four states have implemented variations of such policies.

Part I of this Article reviews the relatively recent emergence of family caps and places them in the context of the last decade’s rush for reform.

Part II explores how the code language of caps relates to the goal of deterring poor women from having children, premised on condemnation of presumed immoral behavior. It also highlights social science data that contradicts the assumptions upon which caps are based, including the ideas that welfare recipients have larger-than-average families, do not want to work, and are motivated to have children by a desire to obtain welfare benefits. This Part also considers the way in which the sexist, racist, and classist history of welfare law has contributed to the popularity of family cap provisions.

Part III of the Article examines the varied components of family cap policies in different states and considers the surprising lack of coordination between state cap policies and family planning services.

Part IV compiles all available data on the impacts of caps on children, poverty, and rates of childbirth and explores how individuals receive social messages about family caps. Although data on the increase in child poverty from caps is remarkably scant, it is clear that caps affect increas-

* Ms. Smith is the author of several articles exploring the social policies promoted by laws that particularly affect women, including rape shield laws and welfare programs supporting higher education. She would like to thank the Skadden Fellowship Foundation for their support of this Article; Christine Hastedt, Stephanie Stern, and Jennifer Wriggins for their insightful reviews of this Article, and Patrick Mellor for his steadfast encouragement.

ing numbers of children and result in a diminution of their parents' ability to meet their basic needs. Moreover, although social science data overwhelmingly dispels the myth that women get pregnant in order to obtain welfare benefits, recent reporting from at least one state reveals that the particular policy of caps may be contributing to increased abortion rates. It may be that while a woman does not choose pregnancy in order to obtain welfare benefits, when faced with the prospect of a complete lack of aid for a newborn infant, she chooses abortion as the state-sanctioned course.

Part V of the Article assesses various efforts to overturn caps through federal and state court cases, legislative initiatives, and administrative efforts. Although constitutional challenges based on violations of due process and privacy rights have been largely unsuccessful in state and federal courts, this Article asserts that these failures result from courts' adoption of the faulty assumptions on which caps are based. The Article also reports that despite fruitless efforts to federally repeal caps, advocates at the state level have been successful in overturning family caps by highlighting evidence of their harmful effects.

Part VI argues that family cap policies have insidious effects on children and families while simultaneously sending the message that low-income women should not have children. Family cap policies thereby unfairly and unconstitutionally coerce poor women, particularly poor black women, into having abortions. As such, they should be abolished.

I. A BRIEF HISTORY OF FAMILY CAPS

Twenty-four states have adopted family cap or child exclusion policies, although only twenty-two states currently have such a policy in effect.¹ Of those twenty-two states, eighteen implement a full child exclusion (wherein the newborn is completely excluded from benefits), two utilize a partial child exclusion (where the birth of a new child brings a reduced increase in the family grant), and two operate a flat grant (where all families receive the same amount regardless of size).²

Under the former federal Aid to Families with Dependent Children (AFDC) program, states were required to obtain waivers from the federal government to implement policies such as family caps because they vio-

¹ Jodie Levin-Epstein, *Lifting the Lid Off the Family Cap: States Revisit Problematic Policy for Welfare Mothers*, in CLASP POLICY BRIEF: CHILDBEARING AND REPRODUCTION HEALTH SERIES BRIEF NO. 1, at 3 (2003) [hereinafter Levin-Epstein, *Lifting the Lid*].

² SHELLEY STARK & JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POLICY, EXCLUDED CHILDREN: FAMILY CAP IN A NEW ERA 18 n.2 (1999), available at http://www.clasp.org/publications/excluded_children.pdf. The term "child exclusion" is a more accurate appellation for these policies because they permanently exclude a child born into a family receiving welfare from benefits. The term "family cap" is more appropriate for policies that provide flat funding to families after they reach a certain size. Nevertheless, because these policies, and much of the literature about them, refer to child exclusion provisions as "caps," I use that term in this Article.

lated the Social Security Act by incorporating eligibility criteria based on behavior.³ Twenty states obtained AFDC waivers for a family cap from the federal Department of Health and Human Services (HHS). Four of those states did not enact a cap until after AFDC's elimination, and one, Kansas, ultimately chose not to implement a cap at all.⁴

State caps on benefits began to appear in the mid-1990s, just prior to the passage of federal welfare reform legislation. President Bill Clinton's promise to "end welfare as a way of life"⁵ demonstrates that the political climate was ripe for such changes, which began with New Jersey's adoption of a cap in 1993. With the introduction of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, creating Temporary Assistance for Needy Families (TANF) and abolishing AFDC, the federal government ended the entitlement to welfare benefits that existed for decades and left states free to enact caps without obtaining a waiver.⁶

As federal welfare reform was being debated in 1995, family caps were thrown into the mix at the national level. Although the initial welfare reform legislation passed by the House of Representatives required every state to adopt a family cap policy,⁷ this mandatory cap provision did not pass in the Senate.⁸ As the result of a compromise, the House and Senate conference report required states to impose a family cap unless they affirmatively opted out.⁹ President Clinton vetoed that bill, but both the House and Senate adopted mandatory family caps in their subsequent 1996 efforts to pass welfare reform legislation. The provision was ultimately struck from the bill, however, because of a procedural violation.¹⁰ The final version of TANF, signed into law by President Clinton in August 1996, did not require states to implement caps, but instead, by remaining silent, allowed

³Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 721 (1992) [hereinafter Williams, *The Ideology of Division*] (referencing 42 U.S.C. § 602(a)(10)(A) (2000); 42 U.S.C. § 1315 (repealed 1996)).

⁴The twenty states were: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Kansas, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, New Jersey, North Carolina, South Carolina, Tennessee, Virginia, and Wisconsin. STARK & LEVIN-EPSTEIN, *supra* note 2, at 18 n.2 (citing OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., SETTING THE BASELINE: A REPORT ON STATE WELFARE WAIVERS (1997)).

⁵President William Jefferson Clinton, Address Before a Joint Session of the Congress on the State of the Union (Feb. 17, 1993).

⁶Cheryl Sullivan, *Welfare in America: What is Being Reformed?*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 633, 636 (1997).

⁷Melynda G. Broomfield, Note, *Controlling the Reproductive Rights of Impoverished Women: Is This the Way to "Reform" Welfare?*, 16 B.C. THIRD WORLD L.J. 217, 228 (1996).

⁸Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 160 (1996) [hereinafter Appleton, *When Welfare Reforms Promote Abortion*] (citing H.R. 4, 104th Cong. § 101 (as passed by Senate, Sept. 19, 1995); H.R. 4, 104th Cong. § 101 (as passed by House, Mar. 4, 1995)).

⁹*Id.* (citing 141 CONG. REC. H15, 323, 402 (daily ed. Dec. 21, 1995)).

¹⁰*Id.* at 159 (explaining that a Senate rule barred provisions unrelated to deficit reduction).

states to continue utilizing existing family cap policies or enact new caps without federal oversight.¹¹

Since TANF was enacted, nine states (including four states that obtained waivers under AFDC but did not implement them until after TANF was introduced) have adopted family cap policies. The most recent state cap policy is Minnesota's, adopted in 2003.¹² Two states have begun to turn the tide by discontinuing or overturning caps. Maryland, which capped children but provided funds to designated nonprofit, third party payees to buy goods on behalf of children, discontinued its program in October 2002. Illinois began to phase out its cap in August 2003.¹³

II. FOUNDATIONS FOR FAMILY CAPS

A. *The Rhetoric of "Irresponsible Reproduction"*

The purpose of [a cap] is to deter poor women from having children. It is just plain and simple. No one tried to hide it; this is how it was promoted. Women on welfare are having too many children, taxpayers shouldn't have to pay for it, and we're just going to stop them by denying them the benefits that they would have gotten before.¹⁴

The obvious purpose of a family cap is to discourage low-income women receiving welfare from having children, premised on the principle that society deems it undesirable for such women to bear children. States often subtly disguise their purpose with language promoting individual responsibility and the concomitant strengthening of families through the discouragement of the birth of additional children.¹⁵ Notwithstanding these

¹¹ Because TANF replaced AFDC, states that had previously received waivers for caps were no longer obligated to conform to AFDC waiver guidelines, which required an evaluation of a cap's impact. As a result, most states chose to discontinue their waivers after TANF passed, thus freeing them of AFDC's mandatory monitoring and reporting obligations. Those states included: Arkansas, California, Georgia, Maryland, Massachusetts, Mississippi, New Jersey, and Wisconsin. Nevertheless, five states took the option of continuing caps as proposed in their AFDC waivers and maintaining federal funds for implementation and evaluation. STARK & LEVIN-EPSTEIN, *supra* note 2, at 6. Under 42 U.S.C. §§ 615, 1315 (2000), states that continue to operate AFDC waivers under TANF maintain federal funds for implementation and evaluation have reported results as well as others who did not continue waivers.

¹² In addition to the states that were granted AFDC waivers, Idaho, North Dakota, Oklahoma, and Wyoming enacted caps independently under TANF. STARK & LEVIN-EPSTEIN, *supra* note 2, at 18 n.2.

¹³ See *infra* discussion Part V.2.C.

¹⁴ Martha Davis et al., Panel Discussion, *Four Cornerstones to Ending Women's Poverty*, 7 GEO. J. ON POVERTY L. & POL'Y 199, 214 (2000) (remarks of panelist Dorothy Roberts).

¹⁵ Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 313 (1997).

rationalizations, caps are a form of regulation directed primarily at presumably immoral women—those who would become pregnant for the purpose of increasing their welfare checks.¹⁶ Underlying cap policies is the assumption that welfare recipients, “lacking a sense of responsibility and a stable family structure, require punitive restrictions to curtail their propensity to have numerous children for the purpose of getting welfare benefits.”¹⁷

This rhetoric of “irresponsible reproduction” has long accompanied welfare’s “reform.” In this campaign, reproductive behaviors considered irresponsible are used to prove the “moral decline, social breakdown, and pathology” of welfare recipients.¹⁸ Illegitimacy and single parent families are deemed examples of “irresponsible reproduction.”¹⁹ Families forged outside the bounds of traditional marriage are portrayed as the root of various societal problems; many welfare reforms “reflect a belief that social problems such as crime and poverty flow from motherhood outside marriage, and particularly from the motherhood of particular women.”²⁰ In an especially stunning example, the Governor of Mississippi suggested that caps would reduce births among teenaged mothers, getting “right to the root cause of crime in Mississippi.”²¹

This line of reasoning, which assumes that all women have access to safe and effective family planning methods, targets the reproductive behavior of all women. Women who practice “responsible” reproduction do so within traditional marriage; these mothers are presumed “self-sufficient” and thus able to meet their “private” responsibility to materially support their children.²² Unmarried mothers who shift the financial costs of raising their children to taxpayers, on the other hand, practice “irresponsible” reproduction.²³

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Linda C. McClain, “Irresponsible” *Reproduction*, 47 HASTINGS L.J. 339, 340 (1996).

¹⁹ *Id.*

²⁰ Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 475 (1995); see also McClain, *supra* note 18, at 340, 345 (arguing that the stereotype of “responsible reproduction” takes place within traditional relationships).

²¹ Thomas L. Gais & Cathy M. Johnson, *Welfare Reform, Management Systems, and Their Implications for Children*, 60 OHIO ST. L.J. 1327, 1337 (1999) (quoting THE NELSON A. ROCKEFELLER INST. OF GOV’T, MISSISSIPPI FIELD RESEARCH REPORT 3 (1998)). Focusing on “personal responsibility in the diagnosis of social ills” allows policymakers to ignore “issues of collective responsibility.” McClain, *supra* note 18, at 342.

²² McClain, *supra* note 18, at 345.

²³ *Id.*; see also Carole M. Hirsch, Note, *When the War on Poverty Became the War on Poor, Pregnant Women: Political Rhetoric, The Unconstitutional Conditions Doctrine, and the Family Cap Restriction*, 8 WM. & MARY J. WOMEN & L. 335, 337 (2002) (noting that “[t]he common opinion of women on welfare, furthered by many political leaders, is they ought to work rather than collect assistance services, and they should not be allowed to have more children if they cannot support them financially”).

More specifically, this rhetoric vilifies mothers if they cannot provide sufficient financial support for their children.²⁴ This view depicts the choice to accept welfare funds as encompassing a moral judgment that it is acceptable to deflect the costs of having children onto society, rather than a matter of necessity for an individual family.²⁵ In conjunction, “reform” proponents argue that current welfare policies discourage accountability on the part of recipients and allow them to procreate without consequence.²⁶

B. *Faulty Assumptions Behind Caps*

The rhetoric of the current “welfare reform” debate goes something like this: [AFDC] recipients are themselves responsible for their poverty because they have not “pulled themselves up by their bootstraps”; they are dysfunctional mothers incapable of fitting into mainstream society, and they are economically and emotionally atrophied because of their “dependence” on welfare. Proponents of “welfare reform” further argue that by withholding AFDC benefits, the government can transform present recipients into productive members of society, thereby solving the intractable problems of poverty. Consistent with this rhetoric, the current “welfare reform” proposals condition AFDC eligibility on conformity with putative moral norms of society.²⁷

Family caps, as a component of “welfare reform,” are premised on these faulty assumptions grounded in harmful stereotypes.

1. *“Welfare Mothers Intentionally Get Pregnant in Order To Get an Increased Benefit”*

At the forefront is the misconception that most women receiving welfare bear additional children primarily to obtain an increase in welfare benefits, which some suggest allow them to “live the good life.” Caps “are founded on the conviction that welfare itself encourages poor women to have additional children.”²⁸ They perpetuate the stereotyping of welfare mothers as “‘thoughtless child-making people,’ who constantly get pregnant in order to collect more money from the government rather than work.”²⁹ In fact, conception by welfare mothers is “labeled as undesirable, irresponsible behavior on the premise that people should not have addi-

²⁴ See McClain, *supra* note 18, at 352–53.

²⁵ See *id.* at 353.

²⁶ See *id.*

²⁷ Williams, *The Ideology of Division*, *supra* note 3, at 719–20 (footnotes omitted).

²⁸ Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 242 (2000).

²⁹ Laura M. Friedman, Comment, *Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637, 657 (1995).

tional children if they cannot afford to support them without governmental aid.”³⁰

Caps promote a public accounting of welfare mothers, who “must be made to fully experience the financial consequences of their actions.”³¹ Through caps, the government postures as the enforcer of penalties; delinquent recipients who bear additional children must be disciplined.³²

Social science research, however, consistently concludes that women on welfare do not have additional children for the purpose of obtaining an increase in benefits.³³ Family caps, although based on the assumption that benefit levels impact the child-bearing decisions of welfare recipients, were supported by scant data in state AFDC waiver applications: “Despite the political attractiveness of caps, there is little empirical support for expecting them to do much beyond reducing costs. By far the dominant conclusion of the literature on welfare effects on fertility is that such influences, though present, are small and uncertain.”³⁴ In fact, none of the state AFDC waiver requests seeking to impose caps included data on the incidence of conception among welfare recipients.³⁵ Nevertheless, widespread public opinion was that welfare benefits in general encouraged women to have children, with 62% of respondents to a 1994 poll agreeing that women had children for the purpose of receiving additional benefits and more than half of respondents approving of family caps.³⁶

Another 1994 study determined that neither the baseline welfare benefit level nor the incremental benefit for additional children influenced the decisions of young mothers up to age twenty-four whether to have a second child.³⁷ Mothers who received AFDC for their first child were no more likely to have subsequent children than mothers who did not.³⁸ This study suggested that while the imposition of caps might carry a symbolic message,

³⁰ Brito, *supra* note 28, at 242.

³¹ *Id.*

³² See McClain, *supra* note 18, at 378.

³³ See, e.g., NOW LEGAL DEF. & EDUC. FUND, BACKGROUND ON CHILD EXCLUSION PROPOSALS § III.A (2000), available at <http://www.legalmomentum.org/issues/wel/childep.shtml>; Kaufman, *supra* note 15, at 311 (citing William J. Wilson & Kathryn M. Neckerman, *Poverty and Family Structure*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 248 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986)); Williams, *The Ideology of Division*, *supra* note 3, at 739.

³⁴ Michael Wiseman, *Welfare's Children* 3 (Univ. of Wis.-Madison, Inst. for Research on Poverty & Nat'l Opinion Research Ctr., Discussion Paper No. 1212-00, 2000), <http://www.irp.wisc.edu/publications/dps/pdfs/dp121200.pdf>.

³⁵ See *id.* at 5.

³⁶ THE HENRY J. KAISER FAMILY FOUND., WELFARE POLICY AND REPRODUCTIVE HEALTH: “CAPPING A FAMILY'S BENEFITS” 3 (2003) [hereinafter WELFARE POLICY AND REPRODUCTIVE HEALTH].

³⁷ GREGORY ACS, THE URBAN INST., THE IMPACT OF AFDC ON YOUNG WOMEN'S CHILD-BEARING DECISIONS 17–18 (1994).

³⁸ *Id.* at 18.

it was unlikely to have a substantial effect on women's childbearing decisions.³⁹

A 1996 literature review concluded that the results of twenty-three studies were mixed "but generally show[ed] no direct relationship between AFDC benefit levels (or differentials) and family size."⁴⁰ A 1998 evaluation of the data reported "there is considerable uncertainty" surrounding the results of the research "because a significant minority of the studies finds no effect at all, because the magnitudes of the estimated effects vary widely, and because there are puzzling and unexplained differences across the studies by race and methodological approach."⁴¹ A 2001 Urban Institute report, documenting attitudes toward welfare rules and non-marital childbearing among both TANF recipients and non-recipients, discovered that women recently receiving welfare were much less likely to agree with the statement that welfare encourages young women to have children.⁴²

Moreover, in reality, the median benefit increase for a new child—seventy-one dollars per month⁴³—is barely enough to cover the monthly costs of diapers, formula, and clothing. As one welfare director stated: "anyone who thinks that a woman goes through nine months of pregnancy, the pain of childbirth and 18 years of rearing a child for \$45 more a month . . . has got to be a man."⁴⁴

Furthermore, the vast majority of welfare recipients are living in abject poverty. The reality is that the median benefit level for a family of three with no other income was \$379 per month in 2001,⁴⁵ bringing the family up to only 31% of the federal poverty guidelines.⁴⁶ Even reaching

³⁹ *Id.*

⁴⁰ MICHAEL J. CAMASSO ET AL., A FINAL REPORT ON THE IMPACT OF NEW JERSEY'S FAMILY DEVELOPMENT PROGRAM 127–28 (1998). While another review of forty-five previously conducted studies found that although welfare benefit levels appeared to possess incentive effects on the fertility and marriage choices of recipients, disparities in the research results weakened this conclusion. Wiseman, *supra* note 34, at 3 (citing Robert Moffitt, *The Effect of Welfare on Marriage and Fertility*, in WELFARE, THE FAMILY AND REPRODUCTIVE BEHAVIOR 50, 75 (Robert Moffitt ed., 1998)).

⁴¹ Moffitt, *supra* note 40, at 50.

⁴² See RICHARD WERTHEIMER ET AL., THE URBAN INST., WELFARE RECIPIENTS' ATTITUDES TOWARDS WELFARE, NONMARITAL CHILDBEARING, AND WORK: IMPLICATIONS FOR REFORM? 2 (2001), available at http://urbaninstitute.org/UploadedPDF/anf_b37.pdf.

⁴³ Traci Mach, *Measuring the Impact of Family Caps on Childbearing Decisions* 3 (Univ. at Albany–State Univ. of N.Y., Discussion Paper No. 00-04, 2001). In 2003, the increase ranged from \$20 a month in Wyoming to \$131 in California. Levin-Epstein, *supra* note 1, at 1 n.2.

⁴⁴ Lucy A. Williams, Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2026 n.81 (1994).

⁴⁵ NISHA PATEL ET AL., CTR. FOR LAW & SOC. POLICY, MAKING ENDS MEET: SIX PROGRAMS THAT HELP WORKING FAMILIES AND EMPLOYERS 12 (2002), available at http://www.clasp.org/publications/making_ends_meet.pdf.

⁴⁶ The federal poverty level for a family of three at that time was \$14,630. Annual Update of the HHS Poverty Guidelines, 66 Fed. Reg. 33, 10695–97 (Feb. 16, 2001). By 2004, it had increased to \$15,670. Annual Update of the HHS Poverty Guidelines, 69 Fed. Reg. 30, 7335–38 (Feb. 13, 2004).

100% of the federal poverty guidelines would be insufficient to live comfortably and safely. Research suggests that it requires an income double to that set by the federal poverty guidelines, which are calculated based on the cost of food needs as a percentage of a family's budget, to obtain all basic necessities including housing and health care.⁴⁷ In addition, the real value of benefits is decreasing rapidly; from 1970 to 1995 the value of welfare benefits decreased by 45%.⁴⁸

These low levels of assistance often leave families struggling to make ends meet, forcing them to forgo necessities. For example, a 2001 study of Maine TANF families found that 55% received utility shut-off notices and 26% ran out of fuel in the previous year.⁴⁹ Over one-third of families went without transportation for more than a month and 43% utilized a food pantry.⁵⁰

2. "Welfare Families Are Larger than Non-Welfare Families"

It is also widely believed that welfare families contain unusually large numbers of children.⁵¹ In reality, the size of welfare families began to decrease well before the imposition of caps. In 1969, 32.5% of AFDC families had four or more children.⁵² By 1990, 72.5% had only one or two children and almost 90% had three or fewer children.⁵³ In fact, welfare family size rates are now equivalent to rates found in the general U.S. population.⁵⁴ Moreover, the longer a mother remains on welfare, the lower the likelihood that she will have another child, even in states without caps.⁵⁵ This reality suggests "states are not trying to keep the family size of welfare recipients 'within reason,' but instead are trying to keep these numbers to an unnaturally low number, expecting them to have smaller families than their non-recipient counterparts."⁵⁶

⁴⁷ NANCY K. CANTHEN & HSIEN-HEN LU, NAT'L CTR. FOR CHILDREN IN POVERTY, EMPLOYMENT ALONE IS NOT ENOUGH FOR AMERICA'S LOW-INCOME CHILDREN AND FAMILIES 2 (2003) (Research Brief No. 1 in the series *Living at the Edge*), <http://www.nccp.org/media/lat03a-text.pdf>.

⁴⁸ Broomfield, *supra* note 7, at 224 (citing Nancy Hobbs, *Putting Welfare in Working Order, Advocates Fear It's Open Season on Less Fortunate; The Needy at the Center of Attention*, SALT LAKE TRIB., Jan. 29, 1995, at B1).

⁴⁹ LISA POHLMANN, ME. CTR. FOR ECON. POLICY, WELFARE REFORM: LESSONS FROM MAINE 25 (2002), <http://www.mecep.org/report-welfare/>.

⁵⁰ *Id.*

⁵¹ Brito, *supra* note 28, at 242.

⁵² Williams, *The Ideology of Division*, *supra* note 3, at 738.

⁵³ *Id.* at 737.

⁵⁴ *Id.* at 737-38.

⁵⁵ NOW LEGAL DEF. & EDUC. FUND, *supra* note 33, § III.A; Friedman, *supra* note 29, at 658.

⁵⁶ Hirsch, *supra* note 23, at 337, 349.

3. “Welfare Parents Should Play by the Same Rules as Taxpayers”

Family cap proponents also argue that low-income families should “play by the same rules” and adhere to the same value systems as working families.⁵⁷ They contend that middle-class families must decide whether they can afford to have another child knowing that they are not guaranteed a pay increase with each new birth.⁵⁸ As a New Jersey legislator pronounced:

What this [cap] does is give welfare recipients a choice. They either can have additional children and work to pay the added costs, or they can decide not to have any more children. It’s their call and a decision that puts them in the same position as anyone else in mainstream America who must choose among options.⁵⁹

Thus, caps purport to encourage “mutual responsibility” between welfare recipients and the state by forcing welfare mothers to make the same difficult choices that non-welfare mothers have to make. Yet the financial incentives for middle-class taxpayers to have children are much more substantial than for women receiving welfare benefits; benefits for the middle class include federal and state tax exemptions as well as federal child care credits. In addition, non-welfare working families reap such subsidies as government-backed mortgages and employer-subsidized health and life insurance.⁶⁰ Together, these benefits are generally much larger than the direct benefits conferred on welfare recipients.⁶¹ Nevertheless, this reality is hidden behind the portrait of a budget-draining welfare recipient.⁶² Moreover, policy makers do not presume that middle-class taxpayers make procreative decisions based on tax benefits; on the contrary, it is presumed that middle-class parents are “intelligent enough to refrain from having children when they cannot support them and that poor women should do likewise.”⁶³

⁵⁷ McClain, *supra* note 18, at 354.

⁵⁸ *Id.*

⁵⁹ Friedman, *supra* note 29, at 656 n.107 (quoting Wayne King, *Senate Sends Florio Welfare Bill That Limits Benefits for Mothers*, N.Y. TIMES, Jan. 14, 1992, at A1 (quoting New Jersey Assemblyman Wayne Bryant)).

⁶⁰ Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 942 (1995) [hereinafter Roberts, *The Only Good Poor Woman*] (citing MARTHA A. FINEMAN, *THE NEUTURED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 191 (1995)).

⁶¹ See Broomfield, *supra* note 7, at 226–27.

⁶² See NOW LEGAL DEF. & EDUC. FUND, *supra* note 33, at 4; Hirsch, *supra* note 23, at 348–49.

⁶³ Williams, *The Ideology of Division*, *supra* note 3, at 737.

4. “Welfare Promotes Intergenerational Dependence”

Another fallacy upon which caps are based is the notion that welfare creates intergenerational dependence.⁶⁴ Cap proponents “claim that the state must target the reproductive choices made by welfare recipients in order to break the cycle of welfare dependency. If not, the children born to families on welfare will also come to depend on public assistance when they are adults.”⁶⁵ Caps imply that welfare dependency is a pathological phenomenon: “welfare dependents are responsible for their predicament and pass their plight along to their children.”⁶⁶

In reality, however, most welfare recipients receive benefits for less than two years.⁶⁷ Only 25% of beneficiaries are actually long-term recipients.⁶⁸ Often recipients rely on benefits during a time of transition—for example, following a divorce.⁶⁹ Typical short-term recipients, often ignored by the media and policy makers, are “heroic poor women and children who are living their lives under impossible conditions, and who are going to school, not having multiple children and not using drugs or abusing their children.”⁷⁰

5. “Welfare Recipients Do Not Want To Work”

Yet another faulty assumption of cap proponents is that welfare mothers do not work at all while non-welfare mothers work full-time. One theory supporting caps, termed the “environmental theory,” proposes that employment outside the home by a welfare parent will make life more structured and orderly for children in the home. This theory assumes that a working parent is a better parent because they are more in control and independent and that their children will be well taken care of in a safe and nurturing child care environment during working hours.⁷¹ Yet states collect very little data about children’s environments and the impact of welfare reform, much less family caps, on those environments; therefore, this theory remains largely untested, especially in the context of the informal or low-cost

⁶⁴ See Friedman, *supra* note 29, at 657; see also Roberts, *The Only Good Poor Woman*, *supra* note 60, at 932 (discussing welfare reform rhetoric that argues reproduction by the poor creates a “cycle of poverty”).

⁶⁵ Brito, *supra* note 28, at 342.

⁶⁶ Shannon DeRouselle, *Welfare Reform and the Administration of Children’s Services: Subjecting Children and Families to Poverty and Punishing Them For It*, 25 N.Y.U. REV. L. & SOC. CHANGE 403, 431 (1999).

⁶⁷ Friedman, *supra* note 29, at 658 (citing Richard Lacayo, *Unraveling the Safety Net*, TIME, Jan. 10, 1994, at 25).

⁶⁸ *Id.* (citing DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 148 (1988)).

⁶⁹ *Id.*

⁷⁰ Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1191 (1995).

⁷¹ Gais & Johnson, *supra* note 21, at 1353.

daycare that most low-income families are likely to access.⁷² Moreover, family caps appear to conflict with other proposals for national policies aimed at encouraging parents to stay at home with their kids, premised on the contrary assumption that children are better off when one parent does not work outside the home.⁷³

Furthermore, among non-welfare, married mothers, only one-quarter work full time.⁷⁴ On the other hand, approximately half of welfare mothers work in addition to receiving benefits, but do not earn enough to make them ineligible for welfare much less lift them out of poverty.⁷⁵ Historically, “set[ting] the poor to work” is a frequently suggested solution to poverty, despite “overwhelming evidence that work policies and programs generally fail . . . to improve the economic self-sufficiency of the poor.”⁷⁶ Research reveals that “[t]he evidence is consistent that the welfare poor share the work ethic and that most seize opportunities to improve themselves and leave welfare when they can.”⁷⁷ Moreover, for those welfare recipients who do not work, barriers often prevent them from doing so. A recent national study by the General Accounting Office (GAO) reported that 44% of TANF recipients suffer from a mental or physical impairment.⁷⁸ Another survey found that 17% of TANF recipients faced three or more significant obstacles to employment and 27% faced two.⁷⁹

⁷² See *id.*; see also Katherine Hunt Federle, *The Consequences of Welfare Reform for Children*, 60 OHIO ST. L.J. 1505, 1511 (1999) (discussing the shortage of data on the experiences of children after welfare reform).

⁷³ McClain, *supra* note 18, at 355.

⁷⁴ Friedman, *supra* note 29, at 642 (citing ELLWOOD, *supra* note 68, at 132–33); see also Ariel Halpern, *Poverty Among Children Born Outside of Marriage: Preliminary Findings from the National Survey of America's Families* 13 (The Urban Inst., Assessing the New Federalism, Discussion Paper No. 99-16, 1999) (discussing the factors that influence the likelihood that a child lives in poverty), available at http://www.urban.org/UploadedPDF/409295_discussion99-16.pdf.

⁷⁵ KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 42–45 (1997).

⁷⁶ JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 150 (1995).

⁷⁷ *Id.*

⁷⁸ U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: MORE COORDINATED FEDERAL EFFORT COULD HELP STATES AND LOCALITIES MOVE TANF RECIPIENTS WITH IMPAIRMENTS TOWARD EMPLOYMENT 3 (2001). Also prevalent are substance abuse problems, domestic violence, and low levels of literacy, all of which create obstacles to stable employment. *Hearing on Implementation of Welfare Reform Work Requirements and Time Limits Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 107th Cong. 54 (2002) (statement of Mark. H. Greenberg, Senior Staff Attorney, Center for Law and Social Policy).

⁷⁹ Pamela J. Loprest & Sheila R. Zedlewski, *Current and Former Welfare Recipients: How Do They Differ?* 9 (The Urban Inst., Assessing the New Federalism, Discussion Paper No. 99-17, 1999), available at <http://www.urban.org/UploadedPDF/discussion99-17.pdf>. In Maine, for example, over half of TANF families face a health problem that limits the kind or amount of work that a parent can perform. POHLMANN, *supra* note 49, at 30.

6. "Welfare Programs Are Very Costly"

A final incorrect assumption is that welfare spending accounts for a large proportion of state and federal government costs. States spend a minute portion of their total budgets on welfare (an average of 3.4% in 1993)⁸⁰ and the federal government expends only 1% of total federal spending on welfare programs.⁸¹ The average Social Security recipient collects five to six times more of other people's tax remittances than the average AFDC recipient.⁸²

C. Sexist, Racist, and Classist History of Welfare and Family Caps

These conceptions of welfare recipients come together in the inflammatory stereotype of the black "welfare queen": "the lazy, black welfare mother who 'breeds children at the expense of the taxpayers in order to increase the amount of her welfare check.'"⁸³ Many feminist commentators have linked caps to this country's long history of repression of the reproductive autonomy of poor black women; historically, "the powerful have repeatedly marshaled state power to use the bodies of poor women to further their own economic and symbolic ends."⁸⁴ In our times, "[poor women's] bodies have become a field on which deep male insecurities about the erosion of their historic monopoly on economic and sexual power are acted out symbolically."⁸⁵ As recently as the welfare reform discussion of the mid-1990s, this approach to coercive reproductive policy extended so far as to call for the sterilization of women on welfare as a condition of receiving benefits.⁸⁶

The historical path of the federal welfare program bears out these accusations of discrimination. AFDC, originally enacted in 1935 as Aid to Dependent Children (ADC), was predicated on the assumption that black

⁸⁰ Broomfield, *supra* note 7, at 225 (citing Marc Stuart Gerber, *Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited*, 81 GEO. L.J. 2141, 2173 n.6 (1993)). Further, states often make cuts in welfare programs when budgets are tight. As documented in June 2003, more than thirty-five states had recently made cuts in welfare reform programs due to state budget crises. SHARON PARROTT & NINA WU, CTR. ON BUDGET & POLICY PRIORITIES, STATES ARE CUTTING TANF AND CHILD CARE PROGRAMS 1 (2003), available at <http://www.cbpp.org/6-3-03tanf.pdf>.

⁸¹ PARROTT & WU, *supra* note 80, at 1 (2003).

⁸² *Perceptions of Welfare: An Interview with Linda Gordon* (Cleveland Public Radio broadcast Mar. 1, 1999), available at <http://www.wcpn.org/specials/welfare/030199gordon.html>. Of all federal spending on citizens, only 23% is allocated to low-income people while the remaining 77% goes to those with more means. *Id.*

⁸³ Kaufman, *supra* note 15, at 301 (quoting Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and Right to Privacy*, 104 HARV. L. REV. 1419, 1443 (1991)).

⁸⁴ Lucie White, *Institutional Barriers to Women in the Workplace: Searching for the Logic Behind Welfare Reform*, 6 UCLA WOMEN'S L.J. 427, 433-34 (1996).

⁸⁵ *Id.* at 434.

⁸⁶ Martha Davis et al., *supra* note 14, at 212 (remarks of panelist Dorothy Roberts).

families would be excluded.⁸⁷ Initially an attempt to nationalize “Mother’s Pensions,” state programs that assisted children living with usually white widowed women, ADC was intended to help single women raise their children at home by alleviating the need for them to undertake paid employment. Thus, ADC was ““designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society.””⁸⁸ The intent to exclude blacks was evident; one administrator reported that his community saw “no reason why the employable Negro mother should not continue her usually sketchy seasonal labor or indefinite domestic service rather than receive a public assistance grant.”⁸⁹

After World War II, the ADC population changed dramatically, with a greatly increased number of divorced or never-married women receiving assistance. The percentage of black mothers receiving assistance increased. White widowed women were redirected to the Old Age Insurance Program, leaving ADC as a last resort for divorced, deserted, or never married mothers.⁹⁰ This era saw the image of “the deserving poor” twisted into “the undeserving poor.”⁹¹

In the 1960s, the number of recipients, especially black mothers, rose due to social movements such as the “War on Poverty” and the civil rights movement. Recipients of AFDC, the new format of ADC, continued to be treated less favorably than other Social Security Act program recipients.⁹² In a marked shift, states began to require AFDC mothers to obtain paid work outside the home and to attempt to reduce the number of children born to unwed recipients.⁹³ The Family Support Act of 1988 completed the shift of focus within welfare programs from income maintenance, so mothers could care for their children full-time, to preparation for employment outside the home with attendant full-time child care.⁹⁴ Under the Family Sup-

⁸⁷ Williams, *The Ideology of Division*, *supra* note 3, at 723. ADC was intended to be a temporary program to last only until dependents could be covered under another section of the Social Security Act dealing with male workers’ old age insurance. *Id.*

⁸⁸ *Id.* at 723 n.32 (quoting *Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways and Means*, 74th Cong. (1935)).

⁸⁹ *Id.* at 724 (quoting WINIFRED BELL, *AID TO DEPENDENT CHILDREN 9–13* (1965) and Mary S. Larrabee, *Unmarried Parenthood Under the Social Security Act*, in *PROCEEDINGS OF THE NAT’L CONFERENCE OF SOCIAL WORK* (1939)).

⁹⁰ Kaufman, *supra* note 15, at 306–07. Former federal welfare rules allowed states to condition eligibility upon the sexual morality of recipients by enforcing “suitable-home” or “man-in-the-house” rules. Williams, *The Ideology of Division*, *supra* note 3, at 723. In Alabama, for example, mothers who cohabitated with a single or married able-bodied man were ineligible. *Id.* at 723 n.34.

⁹¹ Kaufman, *supra* note 15, at 307 (quoting MICHAEL KATZ, *THE UNDESERVING POOR: FROM THE WAR ON THE POOR TO THE WAR ON WELFARE 68–69* (1989)).

⁹² *Id.*

⁹³ *Id.* at 307–08.

⁹⁴ Sullivan, *supra* note 6, at 634.

port Act, families were required to participate in work or training, while the state provided assistance with needs such as child care and transportation.

Many scholars believe that the introduction of family caps in the 1990s arose from this tradition of discrimination. They describe caps as “an attempt to restrict recipients’ access to benefits and punish and stigmatize what is widely, if inaccurately, perceived to be a largely black population of welfare mothers.”⁹⁵ Although falling short of extremist calls for sterilization, caps are harmful attempts to control the reproductive activity of low-income women based on a series of incorrect assumptions and faulty stereotypes.

III. THE IMPLEMENTATION OF FAMILY CAPS

A. Differences Among State Operation of Caps

Although the mission of caps, which is to prevent low-income women from having children, is consistent across states, there are many differences in the detailed operation of state caps. As a general rule, states with caps exclude children from benefits if they are born more than ten months after the family’s initial receipt of TANF benefits. Although some states have shorter “grace periods,” most states continue to provide assistance to children conceived prior to the family’s receipt of benefits.⁹⁶ Nebraska’s grace period, for example, is limited to three months from the date a family is found eligible for TANF.⁹⁷ In Arkansas, families receive no “grace period”; grants exclude any child born after a family receives TANF funds, no matter how many months prior to the application the child was conceived.⁹⁸ Thus, families in those states are punished even though conception occurred before they applied for help and often before they were aware of the family cap.

Most states completely eliminate the benefit increase that a family would traditionally receive for an additional child, while a few partially reduce the increase.⁹⁹ In Connecticut, for example, families receive about

⁹⁵ Kaufman, *supra* note 15, at 312.

⁹⁶ Some states begin the ten-month grace period with the date a family applies for TANF rather than when the family actually begins to receive benefits. See, for example, the laws of Mississippi, MISS. CODE ANN. § 43-17-5(1) (2004), and Georgia, GA. COMP. R. & REGS. 290-2-28-.15 (1997).

⁹⁷ NEB. REV. STAT. § 43-504(2) (2005).

⁹⁸ 016-20-002 ARK. CODE. R. § 2150.1 (Weil 2000).

⁹⁹ Welfare rules generally require parents to turn over child support rights to the state in exchange for welfare benefits. Although under AFDC rules, states were required to “pass through” to a family the first fifty dollars of child support collected, TANF completely eliminated the pass through requirement, thus allowing states to keep all the child support collected for a welfare family. *Child Support: Distribution Bills Introduced in Congress*, CLASP UPDATE (Ctr. for Law & Soc. Policy, Wash. D.C.), June 2001, at 3, available at http://www.clasp.org/publications/June_2001.pdf. Only nineteen of all fifty states pass

half of the normal increase for an additional child.¹⁰⁰ Florida also provides half of the usual increase for the birth of the first additional child but completely eliminates the increase for any further children.¹⁰¹ Idaho and Wisconsin both provide flat grants, giving all families the same benefit amount regardless of family size.¹⁰² A few states furnish capped families with vouchers for supplies as a substitute for cash benefits.¹⁰³

States also employ a variety of exceptions to caps.¹⁰⁴ Many states will suspend the cap on a child for a family who is reapplying to TANF after a specified period of time.¹⁰⁵ Most states exempt the firstborn children of minor parents.¹⁰⁶ Indiana exempts children born with a "substantial" disability;¹⁰⁷ Mississippi excludes children whose parents die or are incarcerated;¹⁰⁸ and Massachusetts allows parents of capped children to apply for an "exceptional circumstances" waiver.¹⁰⁹

Nineteen states exempt children born as the result of rape, assault, or incest.¹¹⁰ Most states with such an exception require verification of the rape

through a portion of the child support to the family, while retaining the rest to reimburse themselves for any TANF payment made to the family. U.S. GEN. ACCOUNTING OFFICE, MORE RESEARCH NEEDED ON TANF FAMILY CAPS AND OTHER POLICIES FOR REDUCING OUT-OF-WEDLOCK BIRTHS 12 (2001) [hereinafter MORE RESEARCH NEEDED]. State and federal governments retain 55% of child support collected on behalf of current TANF families, in the amount of \$919 million annually. Vicky Turetsky, Ctr. for Law & Soc. Policy, Slide Presentation for the 2nd National Symposium of Children, Courts, and the Federal Child Support Enforcement Program: Child Support Trends (May 2003), http://www.clasp.org/publications/cstrends_0503.ppt. Another \$1.21 billion is retained from collections made on behalf of former TANF families each year. *Id.* Only four states pass through more of the child support for a capped child than they do for a non-capped child, despite the fact that they are not providing TANF benefits to the capped child. MORE RESEARCH NEEDED, *supra*, at 99. In California and Virginia, 100% of child support paid for a capped child goes to the child's family. CAL. WELF. & INST. CODE § 11450.04(e) (West 1994); VA. CODE ANN. § 63.2-604 (West 2004). Research shows that child support receipt can augment the resources of a single-parent family significantly enough to improve children's well-being. Halpern, *supra* note 74, at 5.

¹⁰⁰ CONN. GEN. STAT. ANN. § 17b-112(d)(2) (West 1996).

¹⁰¹ FLA. STAT. ANN. § 414.115 (West 2005).

¹⁰² STARK & LEVIN-EPSTEIN, *supra* note 2, at 5. In Wisconsin, the amount of the flat grant is determined by the work category to which a recipient is assigned based on ability to work. MORE RESEARCH NEEDED, *supra* note 99, at 8 n.15.

¹⁰³ See, for example, Illinois, 305 ILL. COMP. STAT. 5/4-2 (2003), Indiana, IND. CODE § 12-14-2-5.3(c) (2001), Oklahoma, OKLA. STAT. tit. 56, § 230.58 (2000), South Carolina, S.C. CODE ANN. REGS. 114-1140B(2) (2004).

¹⁰⁴ Several states allow families with capped children to retain more of their earnings than uncapped families before their benefits are reduced. See, for example, Arizona, ARIZ. REV. STAT. ANN. § 46-292(C) (2005), Massachusetts, 106 MASS. CODE REGS. 203.300 (2005), New Jersey, N.J. REV. STAT. §§ 44:10-49, 44:10-61(a) (1997).

¹⁰⁵ See, for example, Illinois, 305 ILL. COMP. STAT. 5/4-2 (2003) (family must leave TANF for three months before reapplication), California, CAL. WELF. & INST. CODE § 11450.04(d)(1) (West 1994) (family must leave TANF for twenty-four months).

¹⁰⁶ STARK & LEVIN-EPSTEIN, *supra* note 2, at 3.

¹⁰⁷ 470 IND. ADMIN. CODE 14-2-2 (2001).

¹⁰⁸ STARK & LEVIN-EPSTEIN, *supra* note 2, at 4.

¹⁰⁹ 106 MASS. CODE REGS. 203.300 (2005).

¹¹⁰ MORE RESEARCH NEEDED, *supra* note 99, at 7. See, for example, Arizona, ARIZ. REV. STAT. ANN. § 46-292(H)(1) (2005), California, CAL. WELF. & INST. CODE § 11450.04(d)(1)

or incest from medical or law enforcement personnel.¹¹¹ Florida will not grant the exception unless the rape was reported to police within thirty days; California requires that a rape be reported within three months of the child's birth.¹¹² If no official verification is available, Arizona will accept an applicant's statement and Massachusetts will accept the sworn statement of an individual with knowledge of the rape.¹¹³

California employs a unique exemption for children born as a result of the failure of certain specified contraceptives: Norplant, intrauterine devices, and sterilization.¹¹⁴ Massachusetts exempts children born to victims of domestic violence who were conceived due to abuse or fear of abuse.¹¹⁵

B. Coordination with Family Planning Services

Despite the fact that family caps are intended to reduce births to low-income women, they are often implemented without consideration of family planning services. In fact, family planning services are often difficult to access for low-income women and federal funding is scant. The former AFDC system required states to offer family planning services to all welfare recipients and to promptly provide such services to those who sought them, although acceptance of services was not a prerequisite to eligibility.¹¹⁶ TANF, on the other hand, does not require states to provide family planning services with TANF dollars, even in states that employ caps.¹¹⁷ In one study of all fifty states, only six reported utilizing TANF dollars to provide actual contraceptive services, generally to low-income women who are ineligible for Medicaid.¹¹⁸

Efforts of the few states with caps that have sought to improve access to family planning services usually take the form of limited outreach and education rather than actual services.¹¹⁹ Arizona, for example, requires

(West 1994), Florida, FLA. STAT. ANN. § 414.115 (West 2005), Georgia, GA. COMP. R. & REGS. 290-2-28-.15 (1997), Massachusetts, 106 MASS. CODE REGS. 203.300 (2005).

¹¹¹ Fourteen states require verification. MORE RESEARCH NEEDED, *supra* note 99, at 11 fig.2. See, for example, Arizona, ARIZ. REV. STAT. ANN. § 46-292(H)(1) (2005), Georgia, GA. COMP. R. & REGS. 290-2-28-.15 (1997), Indiana, 470 IND. ADMIN. CODE 14-2-2 (2001), Massachusetts, 106 MASS. CODE REGS. 203.300 (2005).

¹¹² FLA. STAT. ANN. § 414.115 (West 2005); CAL. WELF. & INST. CODE § 11450.04(b)(1) (West 1994).

¹¹³ See ARIZ. REV. STAT. ANN. § 46-292(H)(1) (2005); 106 MASS. CODE REGS. 203.300 (2005).

¹¹⁴ CAL. WELF. & INST. CODE § 11450.04(b)(3) (West 1994).

¹¹⁵ STARK & LEVIN-EPSTEIN, *supra* note 2, at 4.

¹¹⁶ 42 U.S.C. § 602(a)(15) (repealed 1996).

¹¹⁷ JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POLICY, TWO SIDES OF THE SAME COIN OR A TOSS OF THE COIN?: FAMILY PLANNING SERVICES AND FAMILY CAP IMPLEMENTATION 2 (1999) [hereinafter LEVIN-EPSTEIN, TWO SIDES], http://www.clasp.org/publications/two_sides_of_the_same_coin.pdf.

¹¹⁸ THE HENRY J. KAISER FAMILY FOUND., WELFARE, WOMEN, AND HEALTH: THE ROLE OF TEMPORARY ASSISTANCE FOR NEEDY FAMILIES 7 (2003).

¹¹⁹ STARK & LEVIN-EPSTEIN, *supra* note 2, at 11. One fourteen-state study found that only five states—California, Delaware, Georgia, Massachusetts, and Wisconsin—reported an effort

its Department of Human Services to inform all recipient parents, verbally and in writing, of family planning services available to them.¹²⁰ In Georgia, which in 1993 became one of the first states to enact a cap, the initial cap policy included mandatory family planning instruction for some capped families. In 1995, the legislature increased funding for family planning services by one million dollars in response to statewide waiting lists. The legislator who led this fight, irked by a separate one million dollar allocation to evaluate the family cap while family planning services were cut, was concerned that the state was not “living up to the terms of our waiver to make family planning accessible.”¹²¹

Nevertheless, even well-intentioned attempts to improve access to family planning services can become unfairly coercive if acceptance of services is mandatory. In 1997, Georgia began to require TANF recipients to take part in personal responsibility plans, which could require family planning education for any member of the recipient household. A family member’s failure to participate in family planning services could result in a reduction or cessation of benefits for the entire family.¹²² State welfare administrators insisted that although improved access to family planning was their goal, the referral process was never intended to punish recipients who did not seek a referral.¹²³ Nonetheless, the personal responsibility plans warn recipients of benefit reductions if all plan elements are not met: one local office reported verifying recipients’ attendance at family planning coun-

to improve access to family planning services to capped families. *Id.* California’s Department of Social Services mailed fliers to all AFDC recipients in 1996 explaining the cap as well as how to access family planning services, and also undertook a campaign to increase awareness of the state’s family planning services. *Id.* Delaware required that recipients visit a family planning provider and obtain information about services; although use of contraceptives was not required, one survey respondent reported that her welfare caseworker required proof of her Depo-Provera shot. DAVID J. FEIN & JENNIFER A. KARWEIT, ABT ASSOCS., THE ABC EVALUATION: THE EARLY ECONOMIC IMPACTS OF DELAWARE’S A BETTER CHANCE WELFARE REFORM PROGRAM 34 (1997). Six states with caps—Arizona, Indiana, Mississippi, Nebraska, New Jersey, and Virginia—explicitly reported that they had not undertaken any special family planning initiatives in conjunction with a cap. STARK & LEVIN-EPSTEIN, *supra* note 2, at 11.

¹²⁰ ARIZ. REV. STAT. ANN. § 46-292(L)(2) (2005). Even when Arkansas mandated the provision of family planning information, a survey found that only three-quarters of welfare workers explained the offer of family planning services to recipients subject to the cap. CAROLYN TURTURRO ET AL., SCH. OF SOC. WORK, THE UNIV. OF ARK. LITTLE ROCK, ARKANSAS WELFARE WAIVER DEMONSTRATION PROJECT FINAL REPORT 22 (1997). And only 70% of workers gave families a brochure on family planning intended for recipients at the initial application stage. *Id.*

¹²¹ LEVIN-EPSTEIN, TWO SIDES, *supra* note 117, at 4–5 (referencing State Representative Georganna Sinkfield). The original cap in Georgia applied only to families who had been receiving benefits for twenty-four months because legislators were trying to target what they perceived to be the largest AFDC families. *Id.* at 4.

¹²² *Id.* at 3–4.

¹²³ *Id.* at 7 (referencing statements of Nell Gamble of the Division of Child and Family Services).

seling and one caseworker admitted making family planning counseling mandatory.¹²⁴

Moreover, several states have adopted a companion policy called “Norplant bonuses,” in which a state covers not only the cost of implanting Norplant, a contraceptive capsule surgically inserted into a woman’s arm, but also offers welfare recipients a cash bonus of up to \$500 for undergoing the procedure.¹²⁵ Several states provide Norplant bonuses to welfare recipients,¹²⁶ and at least two states—Mississippi and South Carolina—have considered mandatory Norplant inserts for women receiving welfare.¹²⁷

IV. EVIDENCE OF HARMFUL EFFECTS OF CAPS

I shudder to think and hold my breath on the issue of learning something from the imposition of the family cap; I fear that we will continue to promote family cap on the backs of children because of political agendas. My prayer is that the policy will not worsen family well-being.

—Representative Georganna Sinkfield,
Georgia House of Representatives¹²⁸

Many child advocates and policy makers fear the still largely unrealized impacts of family caps on children and low-income families. States that obtained AFDC waivers to implement caps would have been required to document the effects of caps had AFDC not been abolished. Some states have continued these studies even though they were free to continue caps without evaluation after AFDC became TANF. Other states have initiated cap evaluations independently after implementing caps with other TANF reforms. This Article considers all the data available on caps’ effects on child welfare, family poverty, and childbearing decisions. The result is a portrait of caps that reveals substantial harm to poor women and children through impacts both unintended and unfortunate.

In 2001, the GAO published a report compiling all the information known about caps’ impacts at that time.¹²⁹ The GAO report concluded that, due to the limited amount of research and the deficiencies in that research, more studies were needed to determine the true impact of caps. Although it identified a handful of cap studies, the report found that the impact of several major changes in welfare policies at roughly the same time as

¹²⁴ *Id.* at 10, 12.

¹²⁵ Broomfield, *supra* note 7, at 234.

¹²⁶ *Id.*

¹²⁷ Roberts, *The Only Good Poor Woman*, *supra* note 60, at 934 n.18.

¹²⁸ LEVIN-EPSTEIN, *TWO SIDES*, *supra* note 117, at 8.

¹²⁹ The GAO report, compiling data found in existing studies, was requested by United States Representatives Donald Payne (D-N.J.), Charles Rangel (D-N.Y.), and Christopher Smith (R-N.J.). *MORE RESEARCH NEEDED*, *supra* note 99, at 1.

the implementation of the caps made it difficult to disaggregate the impact of caps. Other reports note broader social trends complicating research results such as the already declining birth rate among AFDC recipients, the increasing age of welfare recipients, and a universal increase in the use of birth control.¹³⁰ As a result, the GAO survey was unable to draw conclusions about whether caps reduced the incidence of out-of-wedlock births, affected the number of abortions obtained by welfare recipients, or changed the size of TANF caseloads.¹³¹ Nevertheless, individual state studies bring to light some disturbing data and suggest disquieting trends.

A. Number of Capped Families

By 1999, states with caps contained about half of the national TANF caseload and roughly half of all poor families with children.¹³² The GAO report estimated that in an average month in 2000, approximately 108,000 families were subject to the cap in twenty reporting states, representing about 9% of all TANF families in those states.¹³³ In New Jersey alone, state records show that between 1993 and 1998, 28,000 newborns were denied welfare benefits due to that state's cap.¹³⁴ The percentage of families capped in each state varied tremendously. The smallest percentages of capped families were found in South Carolina and Tennessee, where caps impacted 1% or fewer of TANF families, while the highest percentage, nearly 20%, occurred in Illinois.¹³⁵ Some contend that the 108,000 figure greatly underestimates the number of families subjected to the cap.¹³⁶ Significantly, California, the country's most populous state, had recently implemented its cap at the time that it reported its data.¹³⁷ Further, state studies showing that Arizona capped 660 families in a single month and that New Jersey excluded 7265 families in one month suggest that the national number is likely higher than 108,000.¹³⁸ Finally, the 108,000 figure signifies a one-month calculation only.¹³⁹ Over the course of a year,

¹³⁰ WELFARE POLICY AND REPRODUCTIVE HEALTH, *supra* note 36, at 2.

¹³¹ MORE RESEARCH NEEDED, *supra* note 99, at 20.

¹³² Wiseman, *supra* note 34, at 1.

¹³³ MORE RESEARCH NEEDED, *supra* note 99, at 13.

¹³⁴ CTR. FOR LAW & SOC. POLICY, CAPS ON KIDS: FAMILY CAPS IN THE NEW WELFARE ERA 3 (1999) [hereinafter CAPS ON KIDS], available at http://www.clasp.org/publications/caps_on_kids.pdf.

¹³⁵ MORE RESEARCH NEEDED, *supra* note 99, at 14.

¹³⁶ *Family Cap: GAO Finds Many Families Affected; Calls for More Study*, CLASP UPDATE (Ctr. for Law & Soc. Policy, Wash., D.C.), Nov. 2001, at 10 [hereinafter *Family Cap*], available at <http://www.clasp.org/publications/nov.pdf>.

¹³⁷ *Id.* A post-hoc evaluation of the impact that a cap would have had on California's caseload had it been put into place earlier concluded that roughly 30% of children under age nine who were receiving AFDC in 1996 were conceived while their parents were receiving assistance and thus would have been capped. Wiseman, *supra* note 34, at 38–39.

¹³⁸ *Family Cap*, *supra* note 136, at 10.

¹³⁹ *Id.* at 9. As for whether caps decrease TANF caseloads, their impact will likely be

the total number of families impacted would be much larger than the average monthly number of capped families because many new families come onto TANF while others leave.¹⁴⁰

The precise financial toll of caps on families was not ascertainable due to overlapping benefit impacts from earnings and child support. Nevertheless, the GAO report estimated that capped families, assuming a two-person family having one additional child, received 20% less than they otherwise would have, an average reduction in the family's grant of \$100 per month. The average decrease in a family's benefit ranged from \$20 in Wyoming to \$121 in California.¹⁴¹

Surprisingly, however, there has been little study of caps' repercussions on children, financial or otherwise.¹⁴² No state or national studies reported to date measured the impact of caps on children's physical or mental health or development,¹⁴³ and the GAO report noted that no study attempts to quantify the increased poverty capped children likely suffer.¹⁴⁴ General research on the impact of familial poverty, however, links such poverty to "poor health, developmental, and social outcomes"¹⁴⁵ and establishes that poor children are more likely to be exposed to risk factors that inhibit normal brain function and development.¹⁴⁶ Poor children are also twice as likely to suffer lead poisoning and to be kept back in school.¹⁴⁷ More than half of all poor children in the United States face serious deprivations each year (such as hunger, lack of utilities, or substandard housing).¹⁴⁸

slight since even when children are capped, the rest of the family continues to remain eligible for TANF. The effect of caps in reducing caseloads will be far greater in future years when families with younger capped children may become completely ineligible because their oldest uncapped children turn eighteen. A 1999 report from the federal Council of Economic Advisors reported that caps were not responsible for decreasing state TANF caseloads. EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL OF ECON. ADVISORS, THE EFFECTS OF WELFARE POLICY AND THE ECONOMIC EXPANSION ON WELFARE CASELOADS: AN UPDATE 18 (1999).

¹⁴⁰ For example, in Arizona, only 660 families were capped in a given month, but nearly three times that many (1800) were capped over the course of a year. *Family Cap*, *supra* note 136, at 10.

¹⁴¹ MORE RESEARCH NEEDED, *supra* note 99, at 17. Food stamp allotments generally increase with the birth of a capped child. *Id.*

¹⁴² Ironically, researchers who conducted a study of caps' impacts on birth rates in New Jersey, discussed in detail *infra*, diverted federal funds originally designated to study the impact of the cap on children in order to include a second methodology in their study on birth and abortion rates due to concerns about the experimental data voiced by the federal government. JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POLICY, OPEN QUESTIONS: NEW JERSEY'S FAMILY CAP EVALUATION 3 (1999) [hereinafter LEVIN-EPSTEIN, OPEN QUESTIONS], available at http://www.clasp.org/publications/open_questions.pdf.

¹⁴³ STARK & LEVIN-EPSTEIN, *supra* note 2, at 15.

¹⁴⁴ MORE RESEARCH NEEDED, *supra* note 99, at 22.

¹⁴⁵ WELFARE POLICY AND REPRODUCTIVE HEALTH, *supra* note 36, at 3.

¹⁴⁶ CAPS ON KIDS, *supra* note 134, at 4; WELFARE POLICY AND REPRODUCTIVE HEALTH, *supra* note 36, at 3.

¹⁴⁷ Children's Defense Fund, Basic Facts of Poverty, <http://www.childrensdefense.org/familyincome/childpoverty/basicfacts.aspx> (last visited Oct. 12, 2005).

¹⁴⁸ *Id.*

Subjective reactions indicate that caps are indeed hurting children. The most extensive state cap evaluation, performed in New Jersey, revealed that over half of the welfare recipients responding felt it was likely that the cap hurt poor children.¹⁴⁹ Although unable to quantify the extent of poverty increases, a report in Arizona concluded that caps placed families in more precarious financial positions.¹⁵⁰ Even though no study specifically attempts to define the impact of caps on the number of families living in poverty or the depth of such poverty, caps likely lead to the denial of the basic needs for children, such as the denial of necessities like diapers and food, and result in poor outcomes often linked to poverty.¹⁵¹

B. Family Planning Attitudes and Concomitant Birth and Abortion Rates

One of the most perplexing questions that cap evaluations must consider is whether caps attain their goal of reducing birth rates among welfare recipients.¹⁵² Demographic changes over the past ten to fifteen years make it difficult to differentiate the effect of caps from the results of other policy and societal changes, including welfare reforms. Non-marital birth rates in the general population increased steadily for most of the last half of the 20th century;¹⁵³ the rate of out-of-wedlock births increased nearly ten-fold from 3.8% in 1940 to 32.6% in 1994.¹⁵⁴ Between 1960 and 1995, the percentage of children living with only one parent more than doubled, from 12% to 27%.¹⁵⁵

More recently, many of these trends have stabilized or reversed direction. The most recent birth rate data indicates that the overall birth rate is at “the lowest level since national data became available,” and the rate of out-of-wedlock births remains approximately at one-third of all births.¹⁵⁶ In the late 1990s, the percentage of children living in two-parent

¹⁴⁹ CAMASSO ET AL., *supra* note 40, at 77. Begun in 1990 and completed in 1996, the New Jersey survey divided AFDC recipients into a control group of current recipients and applicants subject to traditional AFDC rules and benefits, and an experimental group of recipients and applicants, subject to a variety of welfare reform provisions, including a family cap. *Id.* at 3–5.

¹⁵⁰ GREGORY MILLS ET AL., ABT ASSOCS., EVALUATION OF THE ARIZONA EMPOWER WELFARE REFORM DEMONSTRATION executive summary at 8 (2001), available at http://www.abtassociates.com/reports/ES-2001367766680_93366.pdf. The report also concluded that families who were leaving welfare were not necessarily able to replace their benefits with earnings or other income. *Id.*

¹⁵¹ See Friedman, *supra* note 29, at 662.

¹⁵² In New Jersey, the press dubbed this the “\$64.00 Question” since a recipient would have received a \$64 increase in benefits for the birth of a third, fourth, or fifth child prior to the cap’s imposition. CAMASSO ET AL., *supra* note 40, at 128.

¹⁵³ SHAWN FREMSTAD & WENDELL PRIMUS, CTR. ON BUDGET & POLICY PRIORITIES, STRENGTHENING FAMILIES: IDEAS FOR TANF REAUTHORIZATION 3 (2002), available at <http://www.cbpp.org/1-22-02tanf.pdf>.

¹⁵⁴ MORE RESEARCH NEEDED, *supra* note 99, at 5.

¹⁵⁵ FREMSTAD & PRIMUS, *supra* note 153, at 3.

¹⁵⁶ Brady E. Hamilton et al., *Births: Preliminary Data for 2002*, NAT’L VITAL STAT.

families increased and the percentage of single parent homes fell; among lower-income children, the percentage living with single mothers declined between 1995 and 2000 from 36.6% to 32.7%.¹⁵⁷ It is unlikely that these trends can be attributed to caps or other welfare reforms, however, because these changes began before most major reforms were implemented.¹⁵⁸

Several cap studies grapple with the question of whether benefit levels and caps influence family planning and childbearing behavior. Researchers agree that quantifying the impact of a family cap on complex questions of family planning is very difficult “[b]ecause no single methodology can adequately address the multitude of issues inherent in measuring the impact of the family cap.”¹⁵⁹ By analyzing statistical trends to confirm experimental data, as researchers in New Jersey did, trends in the research can be elucidated.¹⁶⁰

1. Surveys of Recipient Attitudes Toward Caps

Initially, it appears that many welfare recipients are unaware of the cap and thus their proactive behavior is largely unaffected. A 2001 Arizona survey found that in each local office, between 29% and 37% of TANF recipients subject to the cap were unaware of the cap policy.¹⁶¹ A lack of understanding about the cap also existed in Delaware, where only 63% of recipients subject to the cap were aware of it and nearly 25% of all recipients subject to the cap believed that it applied to Medicaid as well as TANF.¹⁶² Moreover, the Arizona survey revealed that the cap, as well as time limits, did not impact attitudes or behaviors regarding pregnancy or attempts to become self-sufficient for most recipients.¹⁶³

In New Jersey, although the cap was the most widely recognized component of welfare program changes, its impact on benefits was widely misunderstood by recipients.¹⁶⁴ While nearly 95% of recipients understood that they would not receive any additional cash benefits for the new child, only 39% of those subject to the cap knew that a newborn would continue to be eligible for Medicaid and only 27% realized that food stamps would

REP., June 25, 2003, at 1, 3, available at http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_11.pdf.

¹⁵⁷ FREMSTAD & PRIMUS, *supra* note 153, at 3–4.

¹⁵⁸ *See id.* at 3.

¹⁵⁹ LEVIN-EPSTEIN, OPEN QUESTIONS, *supra* note 142, at 2.

¹⁶⁰ *See* CAMASSO ET AL., *supra* note 40, at 32.

¹⁶¹ MILLS ET AL., *supra* note 150, executive summary at 4. The report in Arizona was created by compiling administrative data, survey data, site visits, and random focus groups. *Id.* executive summary at 2.

¹⁶² FEIN & KARWEIT, *supra* note 119, at 15–16. The Delaware study reviewed program impacts on family outcomes by delineating control and experimental groups and utilizing both state records and follow-up surveys. *Id.* at 8–11.

¹⁶³ MILLS ET AL., *supra* note 150, executive summary at 7.

¹⁶⁴ CAMASSO ET AL., *supra* note 40, at 75.

likely be available.¹⁶⁵ Over one-third of respondents believed that they would receive no additional benefits of any kind for the child.¹⁶⁶

Over 50% of recipients responding to the survey felt that the cap was an attempt to influence the fertility choices of minority women and 36.5% felt that it interfered with women's reproductive rights.¹⁶⁷ Yet over 50% said that receiving an increase in benefits for the baby would not impact their choice of whether to have a child, while 39% felt that the lack of a benefit increase for the baby's needs influenced their decisions whether to avoid or delay pregnancy.¹⁶⁸

In an Arkansas study, 94% of fertile control group members, governed by traditional AFDC program rules, and 82% of experimental group mothers, subject to a cap, reported that the amount of benefits available to them would have no impact at all on their decision whether to have another child. Less than 4% of control group members and fewer than 7% of experimental group members reported that the amount of benefits would impact their decision "some" or "a lot."¹⁶⁹ Nearly 80% of fertile mothers reported no change in birth control methods resulting from the cap.¹⁷⁰

Research in several other states indicates that welfare caseworkers also believe that caps have little impact on recipients' family planning decisions. In Arizona, many caseworkers believed that few if any recipients have another child in order to increase their grant allocations.¹⁷¹ In Delaware, most caseworkers felt that the cap was unlikely to influence recipients' childbearing decisions.¹⁷² In Indiana, welfare caseworkers did not believe that the cap was effective at deterring additional childbearing.¹⁷³

Thus, the correlation between procreative behavior modification and economic incentives continues to be far from certain in the case of caps: "[d]ecisions about childbearing, marriage and living arrangements are very complex," and although they are affected by financial incentives, there

¹⁶⁵ *Id.* at 74–75.

¹⁶⁶ *Id.* at 75.

¹⁶⁷ *Id.* at 77.

¹⁶⁸ *Id.* at 77, 83. The experimental group responses showed a more negative perception of caps than the control group, and ongoing recipients were also more likely to have a negative perception of caps. *Id.* at 78.

¹⁶⁹ TURTURRO ET AL., *supra* note 120, at 39–40. The Arkansas study, running from July 1994 until the implementation of TANF in June 1997, evaluated the impact of Arkansas's experimental family cap. The study followed two groups, one experimental (subject to caps and increased family planning measures) and the other control (subjected to the rules of AFDC in the state's approved AFDC plan). *Id.* at 1. Criticisms of the Arkansas research include the use of a small sample size and the failure to draw a distinction between new and ongoing cases. CAMASSO ET AL., *supra* note 40, at 129. The GAO report also noted the likelihood of "contamination" among survey respondents in Arkansas due to recipients' confusion about whether they were in the control or the experimental group. MORE RESEARCH NEEDED, *supra* note 99, at 33 app. II.

¹⁷⁰ STARK & LEVIN-EPSTEIN, *supra* note 2, at 10.

¹⁷¹ CAPS ON KIDS, *supra* note 134, at 3; WELFARE POLICY AND REPRODUCTIVE HEALTH, *supra* note 36, at 3 (citing MILLS ET AL., *supra* note 150).

¹⁷² WELFARE POLICY AND REPRODUCTIVE HEALTH, *supra* note 36, at 3–4.

¹⁷³ *Id.*

are many other factors.¹⁷⁴ As the administrator of New Jersey's cap commented: "[t]o think that a woman decides to have a child or not have a child solely because of the small amount of money involved trivializes a very complex issue."¹⁷⁵

2. Birth Rates Found in Cap Studies

The next question, therefore, is whether caps alter objectively measured birth rates. In the New Jersey study, data revealed differences in birth rates between families subject to the cap and those who were not. Among ongoing recipients, the experimental group, subject to the cap, had a birth rate 9% lower than that of the control group.¹⁷⁶ A larger discrepancy existed among new recipients, while the experimental group had a 12% lower birth rate than the control group.¹⁷⁷ In Arkansas, however, researchers found no statistically significant difference between the birth rates of the capped and non-capped groups.¹⁷⁸ Nor did the research in Arizona find any significant changes in birth rates in families subject to the cap.¹⁷⁹

Five other studies that were not state-specific reached varying conclusions: two found that family caps decreased birth rates while three found no decrease. A study conducted in 1999 by researchers reviewing data from the Census Bureau and other sources found that family caps negatively correlate with non-marital birth rates.¹⁸⁰ A 2001 study of Current Population Survey data for pre-cap and post-cap periods compared birth

¹⁷⁴ Friedman, *supra* note 29, at 656 n.109.

¹⁷⁵ LEVIN-EPSTEIN, OPEN QUESTIONS, *supra* note 142, at 2 (quoting Press Release, N.J. Dep't of Human Servs., Office of Pub. Info. (Nov. 2, 1998)).

¹⁷⁶ CAMASSO ET AL., *supra* note 40, at 149. The New Jersey study's determination of birth rates has been the subject of criticism because the administrative sources of birth data used were likely to underestimate birth rates. LEVIN-EPSTEIN, OPEN QUESTIONS, *supra* note 142, at 3. Researchers utilized TANF administrative data rather than Medicaid data to determine birth rates because of concern that Medicaid data may not have recorded all births after managed care was introduced. Nevertheless, administrative data was also subject to flaws because experimental group recipients who believed that the cap applied to them may not have reported new births. Even when reported, caseworkers may not have recorded births because the cap made the birth moot in terms of the family's TANF benefit level. *Id.* In addition, birth rates had started to decline before the imposition of the family cap, a fact not taken into account by the New Jersey study. Further, the study did not factor in that the welfare caseload has been aging, with fewer younger women entering the caseload and remaining recipients tending to be older. *Id.* The GAO report also noted the potential problem caused by recipients not understanding whether they were in the control or the experimental group. MORE RESEARCH NEEDED, *supra* note 99, at 33 app. II.

¹⁷⁷ CAMASSO ET AL., *supra* note 40, at 196.

¹⁷⁸ TURTURRO ET AL., *supra* note 120, at 96.

¹⁷⁹ MILLS ET AL., *supra* note 150, at 3.

¹⁸⁰ Ann Horvath & H. Elizabeth Peters, Cornell Univ., Welfare Waivers and Non-Marital Childbearing 23 (Sept. 1999), http://www.jcpr.org/wpfiles/Horvath_WP.PDF?CFID=721331&CFTOKEN=26940488. The Horvath-Peters study has been criticized for methodological limitations and inconsistent findings. Ted Joyce et al., *Family Caps Provisions and Changes in Births and Adoptions* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 10214, 2004).

rates in states with and without caps and concluded that living in a state that has a cap while receiving benefits reduced birth rates among welfare recipients by nearly one-fifth.¹⁸¹ When the pool of recipients studied was limited to those with incomes below the poverty line, birth rates decreased by one-third.¹⁸² The study found that the birth rate among recipients in states with caps was lower (46 per 1000) than among recipients in states without caps (79 per 1000).¹⁸³ Three other studies, however, found no correlation between family caps and decreased birth rates.¹⁸⁴ The most recent comparison of birth records from states with and without family caps determined that birth rates fell among mothers who were most affected by a family cap.¹⁸⁵

Thus, until recently, social science research concluded that an increase in welfare benefits had neither subjective nor objective impact on procreative decisions. More recent studies of the particular effects of family caps show no subjective impact on recipients' childbearing attitudes, but some data suggest that birth rates are decreasing among affected mothers. If the birth rate for families under caps is indeed decreasing, the vital question then becomes whether the reduction is due to increased abortion rates or increased contraception usage.

C. *Abortion Rates Found in Cap Studies*

A 2002 national study by researchers at the Guttmacher Institute reported that, among women who gave birth in seventeen states, between one-third and one-half of all births were unintended.¹⁸⁶ Previously collected data reported similar results, indicating that over 50% of all pregnancies in the

¹⁸¹ Mach, *supra* note 43, at 2. Criticisms of this study included a lack of adequate control variables, use of Current Population Survey data that may have utilized small state samples, and possible selection bias. MORE RESEARCH NEEDED, *supra* note 99, at 34 app. II; see Joyce et al., *supra* note 180, at 479.

¹⁸² Mach, *supra* note 43, at 2.

¹⁸³ *Id.* at 11. Women who gave birth were more likely to be young, married, and receiving welfare and food stamps. They were less likely to have been working and living in states with caps. *Id.* at 12. There was also a smaller difference among non-recipients of 54 per 1000 in capped states and 48 per 1000 in non-capped states and a finding, inconsistent with other research, that birthrates among welfare recipients (77 per 1000) were much higher than among other recipients (54 per 1000). *Id.* at 11–12.

¹⁸⁴ See Wendy Tanisha Dyer & Robert W. Fairlie, *Do Family Caps Reduce Out-of-Wedlock Births? Evidence from Arkansas, Georgia, Indiana, New Jersey and Virginia*, 23 POPULATION RES. & POL'Y REV. 441, 469 (2003); Phillip B. Levine, *The Impact of Social Policy and Economic Activity Throughout the Fertility Decision Tree* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 9021, 2002), <http://www.nber.org/papers/w9021>.

¹⁸⁵ Joyce et al., *supra* note 180, at 503. Because a decreased birthrate was also found among welfare recipients in states without family caps, researchers could not conclude whether the decrease was due to family caps or to welfare reform generally. *Id.*

¹⁸⁶ Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, PERSP. ON SEXUAL & REPROD. HEALTH, Sept./Oct. 2002, at 233.

United States each year (a total of 3.4 million) are unintended and that failed contraceptives account for 43% of those unintended pregnancies.¹⁸⁷

The overall abortion rate in 2000 in the United States fell to 21 per 1000 women, a decline of 11% from 1994.¹⁸⁸ This decrease was not, however, consistent across income groupings. In fact, the abortion rate among poor women increased substantially over the same period, while a marked decrease was observed among higher-income women. Increasingly, women obtaining abortions were never-married, low-income, non-white or Hispanic, and usually the parent of at least one child.¹⁸⁹

In comparable 1994 and 2000 studies, researchers also found that low-income women experienced high abortion rates. Among poor women, defined as those with incomes below 200% of the poverty line, abortion rates increased between 1994 and 2000 by 25%.¹⁹⁰ Poor women constituted 30% of all women of reproductive age in the United States, yet they obtained 57% of the abortions in 2000.¹⁹¹

The higher abortion rates among low-income women correlate to relatively high pregnancy rates: among the poorest category of women, 133 per 1000 became pregnant. In comparison, women with the highest incomes experienced a pregnancy rate of half that of the poorest women: 66 per 1000.¹⁹²

Among state cap studies, only the New Jersey study evaluated abortion rates among welfare recipients, concluding that in some circumstances abortion rates increased among the group subjected to caps.¹⁹³ New welfare recipients in the experimental group accessed abortions at a 14% higher rate than those in the control group.¹⁹⁴ In ongoing cases, however, there was no statistically significant difference in abortion rates between the control and experimental groups.¹⁹⁵ Among respondents, 6% of respondents terminated a pregnancy because of the cap and nearly 14% responded that it would be acceptable to terminate a pregnancy prohibited by a cap (even though, technically, a birth is never a rule violation).¹⁹⁶

Although utilization of family planning services increased among experimental group members, abortion was a more common short-term response to the cap than was improved family planning and increased con-

¹⁸⁷ Friedman, *supra* note 29, at 659 n.126 (citing RACHEL B. GOLD, ABORTIONS AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? 11 (1990)).

¹⁸⁸ Jones et al., *supra* note 186, at 229.

¹⁸⁹ *Id.* at 232–33.

¹⁹⁰ *Id.* at 228. The abortion rate among poor teenagers also increased substantially over this period. *Id.* at 232.

¹⁹¹ *Id.* at 231.

¹⁹² *Id.*

¹⁹³ Little empirical research prior to the cap studies discussed here has attempted to determine the link between welfare benefits and abortion rates. CAMASSO ET AL., *supra* note 40, at v.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 160.

¹⁹⁶ *Id.* at 84, 88.

traceptive use.¹⁹⁷ Further, continuing recipients in the experimental group utilized family planning services about 10% more often than those in the control group and underwent 28% more sterilizations.¹⁹⁸ Among new cases, the experimental group used contraception 21% more often than the control group.¹⁹⁹ Almost one-quarter of all respondents reported using contraceptives for the first time and others reported changing to a more reliable method or using contraceptives more routinely.²⁰⁰ Between October 1992 and December 1996, the cap potentially averted approximately 14,000 births while leading to roughly 1400 abortions that otherwise would not have occurred.²⁰¹

Among studies of data from multiple states, only the Joyce study reviewed abortion data. Researchers found an increase in abortion rates after 1996.²⁰² This increase, although small, contradicted a generally downward trend in abortion rates among women in the same socioeconomic classifications.²⁰³

The interaction of Medicaid policies with family caps may in fact exacerbate the increase in abortions. As of 2000, the midpoint of the Guttmacher Institute study, nineteen states used Medicaid funds to cover medically necessary abortions.²⁰⁴ Although most states with caps did not appear to consider their Medicaid abortion funding policies when debating state caps, the original cap legislation in Maryland, which did not pass, linked the cap to the end of the ban on state-funded abortion.²⁰⁵

The Guttmacher Institute report suggested that poor women in 2000 might have found it harder to obtain and use effective contraceptive methods as well as to care for and support a child when they became pregnant.²⁰⁶

¹⁹⁷ *Id.* at ix.

¹⁹⁸ *Id.* at v.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 84. The conclusions of the New Jersey study were supported by a companion analysis of the entire AFDC caseload from 1990 to 1996, studying pre-program trends in birth and abortion rates, which confirmed that abortion and family planning utilizations increased as a result of welfare reforms. *Id.* at ix.

²⁰¹ Levin-Epstein, *Lifting the Lid*, *supra* note 1, at 2.

²⁰² Joyce et al., *supra* note 180, at 492.

²⁰³ *Id.*

²⁰⁴ Fourteen states chose to cover medically necessary abortions: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, and West Virginia. Jones et al., *supra* note 186, at 231. Five additional states—Alaska, Arizona, Idaho, Illinois, and Indiana—were required by court order to cover medically necessary abortions, although in practice almost no Medicaid funds were used for abortions. *Id.*

²⁰⁵ Friedman, *supra* note 29, at 641 n.27. Nationally, approximately one-quarter of the abortions obtained in 2000 were covered by Medicaid. Jones et al., *supra* note 186, at 231. The abortion rate among women with Medicaid coverage (57 per 1000) was three times greater than among women not covered by Medicaid. *Id.* Between 1994 and 2000, the abortion rate among women covered by Medicaid increased while the rate among those not covered decreased. *Id.* Two-thirds of Medicaid recipients who obtained an abortion in 2000 lived in states where Medicaid covered abortions. *Id.*

²⁰⁶ Jones et al., *supra* note 186, at 233.

Requiring employment for welfare benefits and the unintended decrease in Medicaid coverage that resulted from welfare reform were also cited as possible causes.²⁰⁷ The report additionally noted that increased funding for free or low-cost family planning services did not accompany the decline in the number of women receiving Medicaid coverage or the increase in women without any health insurance coverage.²⁰⁸

The result is that poor women access abortion services at a higher rate than higher-income women. In New Jersey it appears that caps contributed to these increased abortion rates. In states with caps, and, ironically, with Medicaid policies covering abortions, recipients confronted with these social policy messages may perceive abortion to be the most socially desirable option. For these women, the state strongly encourages them to choose an abortion when faced with an unplanned pregnancy. Research confirms that two-thirds of women in the general population who have abortions do so because they cannot afford to have a child.²⁰⁹ Thus, although the data has not historically demonstrated a relationship between welfare benefit levels and birth rates, when faced with the birth of a child for whom no assistance will be available for basic necessities, a woman may choose abortion as the state-sanctioned remedy.

D. Racial Implications of Fertility and Abortion Data

The racial implications of caps has not gone unnoticed by policy makers; one TANF reauthorization bill included a finding that “[s]tates in which African Americans make up a higher proportion of recipients are statistically more likely to adopt family cap policies.”²¹⁰ Subsequent analysis of the New Jersey data by one of the principal investigators in the original study demonstrated that the cap’s influence on fertility behavior was also particularly conditioned upon race.²¹¹ For example, black women who were new cases in the experimental group were 21% less likely to carry a pregnancy to term, while whites and Hispanics experienced no difference.²¹²

This analysis also revealed higher abortion rates among blacks and Hispanics than among whites. Among the entire experimental group, a 12% increase in abortion rates was observed, although the impact was mainly confined to new cases.²¹³ Yet when respondents were separated by race,

²⁰⁷ *Id.* at 233–34.

²⁰⁸ *Id.* at 234.

²⁰⁹ Friedman, *supra* note 29, at 660 (citing GOLD, *supra* note 187, at 11).

²¹⁰ H.R. 3113, 107th Cong. § 3(10) (2001).

²¹¹ Radha Jagannathan & Michael J. Camasso, *Family Cap and Nonmarital Fertility: The Racial Conditioning of Policy Effects*, J. MARRIAGE & FAM., Feb. 2003, at 52.

²¹² *Id.* at 52, 66. For black women, particularly those who were new recipients, the cap had a larger impact on birth rates when recipients lived in predominantly white communities. *Id.* at 64, 69.

²¹³ *Id.* at 65.

black women in the experimental group experienced a 32% increase in abortion rates compared to those in the control group; Hispanics a 50% increase; and whites no increase.²¹⁴

The Guttmacher Institute research is consistent with the race-based findings in the New Jersey data. The Guttmacher Institute study found the lowest abortion rates among white women (1.3%) and the highest among black women (4.9%).²¹⁵ White women had a correspondingly lower pregnancy rate than other racial groups, with only 18% of conceptions ending in abortion.²¹⁶ Among blacks, who had a higher pregnancy rate, 43% of conceptions ended in abortion.²¹⁷ Hispanics terminated pregnancies 25% of the time.²¹⁸ Although welfare status was not recorded, black and Hispanic women are much more likely than whites to be low-income and their income levels thus potentially contributed to their higher abortion rates.²¹⁹

V. ATTEMPTS TO OVERTURN FAMILY CAPS

There have been numerous attempts to abolish family caps in state and federal courts and legislatures. Unfortunately, only efforts in individual state legislatures have thus far been successful.

A. Court Challenges

Efforts to overturn family caps through court challenges have been unproductive. The Supreme Court upheld a program like a family cap more than thirty years ago in *Dandridge v. Williams*, rejecting an equal protection challenge by welfare recipients to the maximum grant provision in Maryland's AFDC program.²²⁰ Echoing contemporary arguments, Maryland justified the maximum grant policy as supportive of its legitimate state interests in "encouraging gainful employment, in maintaining an equitable balance in economic status as between welfare families and those supported by a wage-earner, in providing incentives for family planning, and in allocating available public funds in such a way as fully to meet the needs of the largest possible number of families."²²¹ The Court held that the policy did not violate the Equal Protection Clause because it was rationally related to the state's interests "in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor."²²²

²¹⁴ *Id.*

²¹⁵ Jones et al., *supra* note 186, at 231.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 232; see Jagannathan & Camasso, *supra* note 211, at 53.

²²⁰ 397 U.S. 471 (1970).

²²¹ 397 U.S. 471, 483–84 (1970).

²²² *Id.* at 486.

As suggested in the dissent of Justice Thurgood Marshall, welfare programs could be used toward the purpose of “violently furthering caste-linked agendas of social control.”²²³ Justice Marshall’s dissent prophesied “the danger that the state could use welfare programs to ‘wield its economic whip’ over disfranchised groups, forcing them to dance in response to the dominant group’s fantasies and phobias about its own Soul.”²²⁴

I. Equal Protection and Due Process Challenges

There have been several unsuccessful challenges to family caps in state and federal courts alleging constitutional violations.²²⁵

a. C.K. v. New Jersey Department of Human Services

Plaintiffs alleged violations of AFDC recipients’ federal equal protection and due process rights in the only federal case challenging a family cap, *C.K. v. New Jersey Department of Human Services*.²²⁶ The plaintiffs, on behalf of a class, contended that the cap was “irrational and illegitimate because it penalize[d] children for the behavior of their parents.”²²⁷ They suggested that the cap should be subject to strict scrutiny, because its purpose was the illegitimate goal of deterring welfare recipients from having children, thus infringing on the fundamental right to make private procreative choices through overly broad and intrusive means.²²⁸

²²³ White, *supra* note 84, at 434.

²²⁴ *Id.* (quoting *Dandridge*, 397 U.S. at 525 (Marshall, J., dissenting)).

²²⁵ In at least two instances, challenges to particular applications of a cap have proven more successful. In 2000, a group of capped children in Indiana won a challenge to the state’s administrative policy of retaining child support collected on their behalf. *Williams v. Humphrey*, 125 F. Supp. 2d 881, 883 (S.D. Ind. 2000). *But see Williams v. Martin*, 283 F. Supp. 2d 1286, 1296 (N.D. Ga. 2003) (upholding Georgia policy of assigning child support payments of capped children on the basis that involvement in the TANF program, and its accompanying assignment of child support payments, was voluntary). The court in *Williams v. Humphrey* held that the state was taking the children’s private property without just compensation. 125 F. Supp. 2d at 883. Although the state argued that the TANF families were not ignoring the capped children’s needs but were instead sharing their TANF grants with them, the district court deemed the taking unconstitutional and issued a permanent injunction against the enforcement of the policy. *Id.* at 890. The court concluded that “[i]n effect, Indiana is simply taking the excluded child’s property for the public purpose of helping to finance a public assistance program.” *Id.* at 888.

In 2003, the Supreme Court of Nebraska agreed with a group of plaintiff children who argued that the Nebraska cap should not have been applied to them because their parents were disabled. *Mason v. State*, 672 N.W.2d 28, 154–55 (Neb. 2003). The Court held that the parents did not meet the statutory definition of “participants” in Nebraska’s welfare reform program and thus the state legislature did not intend to include them under the cap. *Id.* at 36 (citing NEB. REV. STAT. § 68-1724(2)(b) (1996)).

²²⁶ 92 F.3d 171 (3d Cir. 1996).

²²⁷ *C.K. v. N.J. Dep’t of Health & Human Servs.*, 92 F.3d 171, 194 (3d Cir. 1996).

²²⁸ *Id.*

The state, in its waiver request to the federal government, contended that the cap did not coerce parents but merely offered them a choice in deciding whether to have another child:

This may appear harsh, but it is based on the same principle that applies to everyone else in our society. If a person is working and has a baby, that person's salary is not automatically increased. Yet, that is essentially what we are required to do under [current] federal AFDC regulations. We believe that if a person is given a choice, that person will do what is best for the family which, in this case, is work. We can best help others by empowering them to help themselves.²²⁹

The district court found this state goal to be legitimate:

Placing welfare households on a par with working families is a reasonable and appropriate goal of welfare reform The Family Cap, by maintaining the level of AFDC benefits despite the arrival of an additional child, puts the welfare household in the same situation as that of a working family, which does not automatically receive a wage increase every time it produces another child. This in turn reflects the reasoned legislative determination that a ceiling on benefits provides an incentive for parents to leave the welfare rolls for the work force, as any "advantage" of welfare in the form of the per child benefit increase is no longer available. . . . In addition, it cannot be gainsaid that the Family Cap sends a message that recipients should consider the static level of their welfare benefits before having another child, a message that may reasonably have an ameliorative effect on the rate of out-of-wedlock births that only foster the familial instability and crushing cycle of poverty currently plaguing the welfare class.²³⁰

²²⁹ C.K. v. Shalala, 883 F. Supp. 991, 1005 (D.N.J. 1995). The district court attempted to distinguish the New Jersey cap from other "behavior-modification" statutes invalidated by the Supreme Court by stating:

The legislation here does not direct the onus of parental conduct against the child, nor does it completely deprive children of benefits which they might otherwise receive but for the conduct of their parents. Rather, New Jersey's cap merely imposes a ceiling on the benefits accorded an AFDC household while permitting any additional child to share in that "capped" family income.

Id. at 1013.

²³⁰ *Id.* at 1013-14.

The Court of Appeals for the Third Circuit, in upholding the district court's grant of summary judgment, disposed of the plaintiffs' constitutional arguments in three paragraphs while giving more attention to plaintiffs' statutory arguments. In its more lengthy treatment of plaintiffs' complaints about the process by which the Secretary of HHS granted New Jersey's waiver, the court rejected the argument that HHS violated the Administrative Procedures Act (APA) by failing to explain in the record how the waiver complied with APA requirements or how it addressed the statutory and constitutional issues raised by commentators. As established by Third Circuit case law interpreting the APA, the only question to be asked by the court, answered in this case affirmatively, was whether the Secretary had a rational basis for determining that the waiver would promote AFDC objectives.²³¹

The appellate court also agreed with the district court that New Jersey's family cap policy should not be subject to strict scrutiny because the state had not unduly burdened procreative choices. The cap, the court declared, "in no way conditions receipt of benefits upon plaintiff's reproductive choices."²³²

The Third Circuit also endorsed the district court's summary of the three legitimate governmental interests advanced by the cap: giving welfare recipients the same incentive structure as "working people," enhancing the role of individual responsibility, and strengthening and stabilizing families. The court concluded that with regard to the plaintiffs' constitutional claims,

[w]e have nothing to add to the district court's opinion on this point except to observe that it would be remarkable to hold that a state's failure to subsidize a reproductive choice burdens that choice. In short, there are no constitutional implications when the state does not pay a benefit to parents who have a child that it would not pay to parents who did not have a child. Rather than burdening the procreative choice of the plaintiff class, [the cap] is neutral with respect to that choice.²³³

²³¹ C.K. v. N.J. Dep't of Health & Human Servs., 92 F.3d at 188. The court found that the state's failure to include exceptions, such as for rape or failed contraception, was within its discretion and that even though the Secretary had required Connecticut to include certain exceptions in a subsequent waiver approval, the federal government could legitimately allow states to implement waivers in a piecemeal fashion. *Id.* at 187-88.

²³² *Id.* at 194 (quoting *Shalala*, 883 F.Supp. at 1014).

²³³ *Id.* at 195.

b. *N.B. v. Sybinski*

Next, a mother whose pregnancy was caused by failed contraception, for which the Indiana cap policy had no exception, lost a constitutional challenge to that state's cap. In 2000, affirming the state district court's grant of summary judgment to Indiana, the Indiana Court of Appeals denied the plaintiff's claims in *N.B. v. Sybinski* that the cap violated her rights to equal protection and family association, the latter residing in her right to substantive due process.²³⁴

The plaintiff argued that the cap was unconstitutional under the Equal Protection Clause because it discriminated against children living with their parents by allowing children not living with their biological parents to receive benefits. In addition, the plaintiff contended that this infringement of her fundamental right to family association warranted strict scrutiny.²³⁵

The court, however, declined to apply strict scrutiny. Instead, it compared the case to *Bowen v. Gilliard*, in which the Supreme Court held that a law counting child support as income for AFDC purposes was not directly intended to change familial living arrangements and was not responsible for any resulting changes.²³⁶ The court held that "Indiana has done nothing to bar a TANF recipient from keeping a capped child in the home; rather, the State has merely chosen not to subsidize the parents' fundamental right by removing the automatic benefit increase."²³⁷ Acknowledging that the cap could indeed "have some incidental effect on family structure," the court held that its impact was not significant enough to warrant a heightened level of review. The court concluded that "[t]he fact that some families may choose to remove a capped child from their home in order to avoid the effects of the family cap does not give the rule coercive effect."²³⁸ Because the court held that the cap did not burden a fundamental right, it applied the rational basis test.

The state argued that the cap satisfied the rational basis test because it maintained a legitimate interest in "altering the cycle of welfare dependency" and that the cap "encourages self-sufficiency and personal responsibility, maintains parity between welfare recipients and the working poor, and provides incentives for family planning."²³⁹ The court agreed that the cap policy was rationally related to the state's "legitimate interest in encouraging welfare recipients to act responsibly in child bearing" and therefore did not violate plaintiff's equal protection rights even if it reduced birth rates among welfare recipients.²⁴⁰

²³⁴ 724 N.E.2d 1103, 1105 (Ind. Ct. App. 2000).

²³⁵ *Id.* at 1108.

²³⁶ 483 U.S. 587, 601–02 (1987).

²³⁷ *N.B.*, 724 N.E.2d at 1109.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ The court acknowledged:

Finally, the court rejected the plaintiff's argument that the cap violated substantive due process rights by "'punish[ing] children by increasing their poverty without any rational justification for that punishment that would relate to a legitimate government interest.'"²⁴¹ In support of this contention, the plaintiff argued that depriving the capped child of benefits did not rationally relate to the goal of reducing birth rates among welfare recipients because the child had no control over the behavior of its parents.²⁴² Again, applying a rational basis review, the court concluded that substantive due process did not confer on the plaintiff an entitlement to the funds necessary to take advantage of freedoms of choice and association. Adopting the reasoning of *C.K.*, the court held that the cap "does not completely deprive children of benefits," since they are likely to share in the family's limited grant.²⁴³ Reiterating the state's legitimate interest in reforming welfare, the court upheld the cap as rationally related to that interest.²⁴⁴

c. *Sojourner A. v. New Jersey Department of Human Services*

Most recently, the New Jersey Supreme Court denied a challenge to that state's cap based on alleged violations of state constitutional privacy and equal protection rights in *Sojourner A. v. New Jersey Department of Human Services*.²⁴⁵

A class of plaintiffs²⁴⁶ argued that the family cap had been enacted for the purpose of influencing poor women not to become pregnant. They ar-

Although the parties dispute whether the purpose of the family cap is to reduce the birth rates of welfare recipients, the differing opinions that arise as a result of the State's hypothesis that the family cap will reduce fertility does not preclude a grant of summary judgment. The State has a legitimate interest in encouraging welfare recipients to act responsibly in child bearing. The State does not deprive the class of the right to have children; rather, it merely chooses not to subsidize the increased costs of an additional child. While the family cap provision may lower childbirth rates among TANF recipients, we find no basis for the class's claim that such an effect is the only interest of the State.

Id. at 1110.

²⁴¹ *Id.* at 1112.

²⁴² *Id.*

²⁴³ *Id.* at 1113.

²⁴⁴ *Id.* The court invoked the Supreme Court statement that "'so long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight jacket.'" *Id.* at 1110 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546–57 (1972)). Justice Marshall, in his dissent in *Dandridge*, alluded to this supra-deferential standard for state welfare programs, suggesting that had *Dandridge* involved a business regulation, the defects in the program would likely have made it unsustainable. *Dandridge v. Williams*, 397 U.S. 471, 529 (1970) (Marshall, J., dissenting).

²⁴⁵ 828 A.2d 306, 337 (N.J. 2003).

²⁴⁶ At least 20,000 children and thousands of their mothers were represented. Press Release, NOW Legal Def. & Educ. Fund, *Sojourner A. v. N.J. Dep't of Human Servs.* (Sept. 4, 1997), <http://www.legalmomentum.org/news/pr/Archive/090497j1.shtml>. Among the moth-

gued that it coerced reproductive choices in contravention of rights to privacy and equal protection.²⁴⁷ Utilizing the study of New Jersey's cap, the plaintiffs maintained that the cap impacted reproductive choices and, furthermore, did not meet the goals outlined in the state's waiver application to the federal government: breaking the cycle of poverty, enhancing the role of individual responsibility, and strengthening and reuniting families.²⁴⁸ The plaintiffs contended that cap studies showing increased abortion rates proved that the cap impacted reproductive decisions.

Nevertheless, the New Jersey Supreme Court held that the cap did not "unduly burden" fundamental procreative rights.²⁴⁹ The court assumed that the cap influenced procreative choices but noted that all such decisions are influenced by available income.²⁵⁰ The court repeated the analogy touted by the federal district court in *C.K.*, noting that working families do not receive automatic wage increases for new children.²⁵¹

The court held that the New Jersey Department of Human Services provided sufficient justification for the cap and applauded the Department's goals of promoting self-sufficiency and decreased dependency.²⁵² The Court held that despite the plaintiffs' argument that children suffered increased health risks as a result of the cap, the government would "insure the health and safety of families in need."²⁵³ The court concluded that the case was "not about a woman's right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice."²⁵⁴ Thus, courts appear reluctant to overturn state cap policies based on equal protection or due process challenges as based on the right to autonomy in reproductive choices.²⁵⁵

ers of named plaintiffs were Angela B., whose husband was abusive and who became pregnant despite sterilization; Rose C., whose caseworker never provided her with an interpreter even though she was deaf; and Crystal D., who had separated from her husband due to abuse. *Id.* at 3–4.

²⁴⁷ *Sojourner A.*, 828 A.2d at 322.

²⁴⁸ *Sojourner A. v. N.J. Dep't of Human Servs.*, 794 A.2d 822, 825 (N.J. Super. Ct. App. Div. 2002).

²⁴⁹ *Sojourner A.*, 828 A.2d at 315–16. The New Jersey Superior Court had held that the cap did not "substantially interfere" with the plaintiffs' rights because it did not place a "direct legal obstacle in the path of a woman's decision to have additional children," even though it did, without a doubt, have some impact on a welfare recipient's choice whether to have a child: "By passage of the statute, the state did not deprive women of the right or the ability to have children, but simply chose not to subsidize the increased costs associated with the birth of an additional child." *Sojourner A.*, 794 A.2d at 833.

²⁵⁰ *Sojourner A.*, 828 A.2d at 316.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 316 n.8 (citing *Franklin v. N.J. Dep't of Human Servs.*, 543 A.2d 1, 4 (N.J. 1988)).

²⁵⁴ *Id.* at 317.

²⁵⁵ Some scholars have suggested that race discrimination claims based on equal protection rights fail largely because of courts' failure to examine the intersection of race and class at play in cap policies and subsequently review for purposeful discriminatory intent. See Kaufman, *supra* note 15, at 326–28. "It is precisely because of the interlocking nature of race and poverty that legal doctrine requiring a showing of purposeful intent to discriminate

2. *Criticisms of the Denials of Constitutional Challenges*

These decisions reveal that courts, like policy makers, adopt many of the faulty assumptions upon which caps are based.

a. *The Adoption of Myths*

In *C.K.*, *N.B.*, and *Sojourner A.*, courts accepted the precept that caps merely place welfare recipients on the same footing as “working people.” In *N.B.*, the state professed that welfare recipients should be placed on par with the “working poor,” as though that were the highest end to which government assistance programs should aspire.²⁵⁶ Such a statement is indicative of a larger problem present in welfare reforms where the goal is to remove recipients from the welfare rolls, even if that means forcing them into low-paying, dead-end jobs.²⁵⁷

New Jersey’s assumption, explicit in its waiver request, that work is the best route for every poor parent is also telling.²⁵⁸ New Jersey Governor Evan Bayh echoed this belief in stating that children benefit from having their parents work outside the home: “[t]he best thing I can think of for a child is to grow up in a family where the parents are working.”²⁵⁹ Yet this presumption by the government seems only to apply when those parents are low-income, a questionable presumption as such parents may not be able to afford high-quality, costly day care while they work.

Moreover, the court in *C.K.* held that caps created financial incentives for a recipient to work. But there are many other choices a pregnant recipient may make when faced with a cap: abortion, adoption, seeking child support, obtaining assistance from family, or even marriage.²⁶⁰ Yet Congress and states have shown a lack of confidence that caps will result in more working welfare mothers: TANF now requires mandatory work requirements directly aimed at accomplishing that objective.²⁶¹

on just one of these factors—race—fails, thereby enabling the underlying race discrimination. Instead, courts should look to the historical and social context in which a legislative measure operates to determine if a statute is racially discriminatory.” *Id.* at 320–21. Others have argued that caps, as measures that discriminate between children based on their birth status, should be subject to heightened scrutiny under the precedents governing laws that operate on the basis of an illegitimacy classification. In such cases, courts have clearly stated that the state’s interest in molding the behavior of adults cannot justify discrimination among those adults’ children, as the plaintiffs argued unsuccessfully in *N.B.* Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue Burden Test*, 49 *VAND. L. REV.* 1, 37–38 (1996) [hereinafter Appleton, *Standards for Constitutional Review*].

²⁵⁶ *N.B. v. Sybinski*, 724 N.E.2d 1103, 1107 (Ind. Ct. App. 2000).

²⁵⁷ REBEKAH J. SMITH ET AL., *PARENTS AS SCHOLARS: EDUCATION WORKS* 4 (2002), available at <http://www.mejp.org/PDF/pas.pdf>.

²⁵⁸ *C.K. v. Shalala*, 883 F. Supp. 991, 1005 (D.N.J. 1995).

²⁵⁹ Sullivan, *supra* note 6, at 644.

²⁶⁰ Appleton, *When Welfare Reforms Promote Abortion*, *supra* note 8, at 166–67.

²⁶¹ *Id.* at 167.

Another example of state rhetoric adopted by the courts is the theory of “irresponsible reproduction.” New Jersey’s AFDC waiver application recounted the cap’s purpose as encouraging responsibility in recipients’ decisions to have additional children, expressly denigrating the choice to have a child while receiving welfare as “irresponsible” and “not socially desirable.”²⁶² The court in *C.K.* deemed this explicit message appropriate and necessary: low-income families should consider carefully the lack of assistance they can expect for a child. The implicit edict of such a message is that low-income women should not have children.

The family cap cases reveal that courts also adopt the myth that families rely on welfare across generations. The court in *C.K.* referenced the “crushing cycle of poverty” that a cap would alleviate by encouraging low-income mothers to avoid out-of-wedlock births.²⁶³ In *N.B.*, the court alluded to the “cycle of welfare dependency.”²⁶⁴

Finally, in both *N.B.* and *Sojourner A.*, the courts accepted the state’s explanation that reducing poverty and decreasing dependence on welfare were goals of the cap. Yet neither court questioned how refusing families additional assistance when it is most needed leads to the reduction of poverty or a decreased need for assistance. In fact, in a footnote, the court in *Sojourner A.*, without discussion, accepted the supposition that the state would always provide help to families in dire circumstances.²⁶⁵ Likewise, an oft-cited goal of cap policies is the stabilization of families, as stated in *C.K.* and *Sojourner A.* Yet, as the court readily accepted in *N.B.*, caps may result in families removing children from their homes in order to ensure that the children receive assistance, serving to destabilize or even break up families rather than support them. Thus, courts appear willing to focus exclusively on the stated purposes of caps while ignoring their underlying assumptions and likely ramifications.

b. Application of Unconstitutional Conditions Doctrine

Courts have been similarly reluctant to address a potential violation of the unconstitutional conditions doctrine, the essence of which “is that the government may not grant a benefit with the condition that the recipient forego a constitutionally protected right,” even if the government is not otherwise obligated to grant the benefit.²⁶⁶ For example, the doctrine has been applied to protect economic liberties impeded by state laws.²⁶⁷

²⁶² *C.K. v. N.J. Dep’t of Health & Human Servs.*, 92 F.3d 171, 180 (3d Cir. 1996).

²⁶³ *C.K. v. Shalala*, 883 F. Supp. at 1013–14.

²⁶⁴ *N.B. v. Sybinski*, 724 N.E.2d 1103, 1109 (Ind. Ct. App. 2000).

²⁶⁵ *Sojourner A. v. N.J. Dep’t of Human Servs.*, 828 A.2d 306, 316 n.8 (N.J. 2003).

²⁶⁶ Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15, 25 (1994).

²⁶⁷ *Id.*

The doctrine also holds, however, that the government *can* place a condition on a benefit so long as the condition is merely the refusal to subsidize the right, as opposed to a burden or penalty imposed on the exercise of the right. Nevertheless, courts have been inconsistent in their determinations as to the distinction between penalties and non-subsidies, a critical demarcation in the application of the unconstitutional conditions doctrine.²⁶⁸ This inconsistency is most notable in the context of abortion funding cases, in which courts have repeatedly held that the government is not required to fund abortion services for Medicaid recipients, even if it chooses to fund childbirth services as an alternative.²⁶⁹

The abortion funding cases have allowed welfare reforms to invade welfare recipients' privacy by permitting the government to influence constitutionally protected choices so long as its efforts can plausibly be described as inaction.²⁷⁰ The penalty versus non-subsidy distinction has been criticized as a method of protecting the "haves" while exposing the "have-nots" to constitutional right infringements. This is particularly so in regard to welfare recipients, who depend on government assistance to purchase basic necessities such as food, clothing, and shelter.²⁷¹ As one writer commented, there is "no principled reason for treating express rights-based harm by denial of funding differently than express rights-based harm by fine or penalty [because] [i]n both cases, the government attacks the constitutional right by harming individuals because of their exercise of the right."²⁷² The harm caused by denying assistance, whether it is categorized as a penalty or a non-subsidy, should be held to violate the constitutional right at issue.²⁷³ As the authors of the New Jersey cap study noted, "[i]n the world of many

²⁶⁸ Friedman, *supra* note 29, at 651.

²⁶⁹ Roberts, *The Only Good Poor Woman*, *supra* note 60, at 935 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977)). Although *Dandridge* was the first case to grapple with cap-type provisions, it was decided prior to the landmark decision of *Roe v. Wade*, which decriminalized most abortions, and so plaintiffs did not argue that the unconstitutional conditions doctrine applied. Appleton, *When Welfare Reforms Promote Abortion*, *supra* note 8, at 172.

²⁷⁰ Appleton, *When Welfare Reforms Promote Abortion*, *supra* note 8, at 163. The application of the unconstitutional conditions doctrine to policies impacting low-income people may also reflect the Supreme Court's effective communication of the message that funding decisions are solely the province of state legislatures and may be utilized to impose judgments on the citizenry subject only to rational-basis review. Appleton, *Standards for Constitutional Review*, *supra* note 255, at 3.

²⁷¹ Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 *LAW & INEQ.* 1, 70 (1995).

²⁷² *Id.* at 9, 10.

²⁷³ *See id.* at 9, 69–70. In the context of female prisoners, courts have held that the government may not include as a condition of probation that the released prisoner not have a child. *See, e.g., People v. Pointer*, 151 Cal. App. 3d 1128, 1141 (Cal. Ct. App. 1984). As one commenter noted, the only crime of an AFDC recipient is her poverty, yet her rights are more freely trampled even than those of prisoners. Friedman, *supra* note 29, at 649.

recipients, the point that demarks the carrot and the stick is often blurred beyond easy recognition.”²⁷⁴

As applied to caps, the unconstitutional conditions doctrine allows courts to adopt the construct that caps are rights-neutral government decisions not to subsidize a private choice. Yet in reality, caps are “effectively government oversight of a welfare recipient’s procreative choices through the simple expedient of reducing subsistence welfare payments for state-disfavored procreative choices.”²⁷⁵ By applying the abortion funding cases to cap challenges, courts have “embraced the behavior-modification rationale at the core of these precedents.”²⁷⁶ Thus, it is disingenuous for a court, as in *C.K.*, to reject the applicability of illegitimacy cases on the ground that the state is not trying to change parental behavior by depriving their children of assistance.²⁷⁷

In addition, the unconstitutional conditions doctrine calls for the application of only rational basis review,²⁷⁸ which offers scant constitutional protection against state incentives that influence a poor pregnant woman’s decision to obtain an abortion. Thus, the application of the unconstitutional conditions doctrine to welfare caps authorizes official manipulation of reproductive choices for those dependent on state assistance and the codification of official value judgments in favor of abortion, especially for the poor.²⁷⁹ Yet cap proponents ignore the fact that a government so empowered could also constitutionally choose to fund only abortions but not childbirth; in fact, such a scheme would logically achieve cost savings.²⁸⁰

B. *Post-TANF Federal Legislation*

In 1998, Representative Chris Smith (R-N.J.), one of the congressmen who requested the GAO study, introduced a bill in Congress, which died in committee, seeking to prohibit states from enacting caps.²⁸¹ Smith cited as the “two most predictable outcomes” of state family cap policies “the

²⁷⁴ CAMASSO ET AL., *supra* note 40, at 94.

²⁷⁵ Barksdale, *supra* note 271, at 8.

²⁷⁶ Appleton, *Standards for Constitutional Review*, *supra* note 255, at 41.

²⁷⁷ *Id.*

²⁷⁸ *Maier v. Roe*, 432 U.S. 464, 478 (1977).

²⁷⁹ See Appleton, *When Welfare Reforms Promote Abortion*, *supra* note 8, at 186.

²⁸⁰ *Id.* Others have noted that use of the unconstitutional conditions doctrine in cap challenges involves a tension between the desire to protect the procreative choices of welfare recipients and the need to assist them after they have exercised their rights to choose. See, e.g., Roberts, *The Only Good Poor Woman*, *supra* note 60, at 931. The unconstitutional conditions doctrine “requires us to close our eyes for a moment and pretend that poor women are not dependent on government assistance; then we may open our eyes the next moment and plead for government support for their decision to have children.” *Id.* at 940. As such, the unconstitutional conditions doctrine does not serve well as a device for maintaining the distinction between the private spheres of individuals receiving welfare and the public spheres in which they seek assistance because it “fails to justify the affirmative demand for public support for private decisions.” *Id.* at 941.

²⁸¹ H.R. 4066, 105th Cong. (1998).

likely increase in the number of babies aborted by indigent women—many of whom will feel financially trapped and abandoned—and the further impoverishment of children born to women on welfare.”²⁸² Referencing the New Jersey study that revealed an increase in abortions and a national survey in which 68% of women who obtained abortions indicated they did so because they could not afford to have a child, Smith argued that a cap was “likely to tip the balance for each poor woman who feels that society has no real interest in the survival of her baby. She will get a powerfully negative message—that her child has no value—especially from those states where Medicaid abortion is readily available.”²⁸³

Smith also noted the unlikelihood that the modest benefit increase for a newborn would encourage women to get pregnant in order to get more benefits. Noting that the median state benefit increase was unlikely to cover even the most basic necessities for a baby, he contended that “[w]e simply mislead ourselves when we assume that this constitutes an incentive to have more babies.”²⁸⁴ Smith concluded his statement on the floor of the House of Representatives by stating,

[I]f we want welfare to be temporary and to be a true safety net—a safety net against abortion under duress, a safety net against descent into deeper poverty, then we must ban the family cap. . . . It is wrong for the government, whether it be federal, state, or local to embrace policies that would promote abortion and financial impoverishment. The family cap does just that.²⁸⁵

In 2002, the federal TANF law expired and Congress debated various TANF reauthorization proposals, but passed none. Instead, Congress extended the current TANF law pending a thorough reauthorization process.²⁸⁶ Although various proposals sought to prohibit caps,²⁸⁷ bills passed by the full House of Representatives and the Senate Finance Committee did not speak on family caps, either to prohibit or to require them.²⁸⁸ In 2003 and 2004, Congress again debated welfare reauthorization, and although substantial revisions were considered, family caps were not the subject of much debate. The TANF law currently remains silent on the issue of fam-

²⁸² 144 CONG. REC. E1142-01 (daily ed. June 16, 1998) (statement of Rep. Christopher H. Smith).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ H.R. 4589, 108th Cong. (2004).

²⁸⁷ *See, e.g.*, H.R. 3113, 107th Cong. (2003).

²⁸⁸ The House of Representatives passed a bill that would not have required family caps. H.R. 4737, 107th Cong. (2002). The bill presented to the Senate by the Senate Finance Committee also omitted a mandatory family cap. S. 2052, 107th Cong. (2002). The full Senate never voted on a bill.

ily caps, and the interest in eliminating caps, or at the other extreme mandating them, through national legislation seems to have waned for the moment.

C. State Legislative Efforts

Many states have rejected efforts to impose caps, including Indiana, Louisiana, Maine, Missouri, Oklahoma, South Carolina, and Virginia.²⁸⁹ A few states actually lifted caps since the passage of TANF. Kansas, for example, was granted an AFDC waiver for a cap but chose not to implement one after TANF was passed, reasoning that “[s]ince the purpose of the family cap is to assure adults do not continue having children in order to receive increased public assistance, the 5-year time limit [introduced in TANF] does an effective job curtailing such practice.”²⁹⁰

Maryland, which provided funds to designated nonprofit third party payees to buy goods for capped children, discontinued its cap at the request of the Department of Human Resources (DHR).²⁹¹ Because Maryland’s system eliminated the benefit increase for a newborn in favor of a third-party voucher, it required significant staff time to administer, and therefore was “very costly and cumbersome” to implement. Furthermore, it was difficult to find nonprofit or faith-based organizations to serve as third-party payees, and administrative costs exceeded \$100,000 per year in some counties. In fact, the DHR director believed that the suspension of the cap would result in actual savings to the state.²⁹²

Moreover, the cap did not appear to affect the birth rate among TANF recipients in Maryland. The DHR director also felt that the cap defeated the program’s primary goal of encouraging independence among TANF recipients, stating:

The [cap] program fosters dependence. One message to a [welfare] family is that we will work with you to help you learn how to take care of your family financially. On the other hand, we say because you choose to have additional children while receiving cash assistance, we do not think you are financially responsible to meet the needs of that child. This mixed message defeats the goal of independence.²⁹³

²⁸⁹ Friedman, *supra* note 29, at n.11.

²⁹⁰ CAPS ON KIDS, *supra* note 134, at 2.

²⁹¹ Dep’t of Human Res., Family Inv. Program, Child Specific Benefit Waiver Request, to the Joint Comm. on Welfare Reform (July 3, 2002) (on file with author). Although both houses of the Maryland legislature passed a repeal of the cap in 2002, that bill died in committee. Later in 2002, for the third year in a row, the director of the Department of Human Resources requested a waiver, ultimately granted by the state legislature’s Joint Committee on Welfare Reform, to cease application of the family cap. *Id.*

²⁹² *Id.*

²⁹³ *Id.*

She contended that the reallocation of resources from newborns to the administration of a voucher system did not alter the behavior of TANF parents and only served to harm children.²⁹⁴ The DHR director also highlighted confusion among staff and recipients about the cap and the voucher system. She reported that many children were without Medicaid or food stamps because of parents' mistaken belief that the cap excluded their children from all benefit programs.²⁹⁵ In 2002, the legislature granted the waiver request lifting the cap for a period of two years.

Most recently, in August 2003, the Illinois legislature responded to the requests of advocates who sought to repeal that state's cap. The broad coalition of welfare advocates convinced the legislature that families with capped benefits had "much harder lives, more medical needs, greater barriers to work, and poorer outcomes for children."²⁹⁶ The coalition argued that capping benefits led to increased costs in Medicaid, education, and other social programs, exacerbating Indiana's budget crisis.²⁹⁷ The advocates simply "exposed the family cap for what it is—pure punishment."²⁹⁸ Illinois's cap is being phased out rather than abruptly discontinued in order to alleviate the immediate budgetary impacts; it will cease to exist by July 2007.²⁹⁹

Opponents of caps in New Jersey and Arizona also sought to overturn them in the state legislature, although their efforts have thus far proved unsuccessful. In 2001, the Arizona legislature passed legislation to eliminate the cap, but Governor Jane Hull vetoed the bill.³⁰⁰ Advocates for the repeal of the cap cited a potential increase in abortions and the possibility that the state would spend more in the years to come to aid capped children that grew up in deeper poverty.³⁰¹ In vetoing the proposal, Hull stated: "[e]mbedded in the policies of welfare reform is the concept that individuals must accept at least some of the consequences of their own choices, an idea I support."³⁰² Hull also indicated that the savings achieved by refusing benefits to newborns each year (\$3.3 million) were essential to keeping Arizona's budget balanced.³⁰³ Efforts to override Governor Hull's veto failed.³⁰⁴

It is clear that efforts in state legislatures have been the only successful avenue to stop family caps. When federal TANF proposals first suggested

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Repealing the Family Cap in Illinois: An Interview with Wendy Pollack*, CLASP UPDATE (Ctr. for Law & Soc. Policy, Wash., D.C.), Sept. 2003, at 5.

²⁹⁷ *Id.* at 5, 7.

²⁹⁸ *See id.* at 7.

²⁹⁹ *Id.* at 5.

³⁰⁰ "Family Cap" *Decapitated and Reinstated*, CLASP UPDATE (Ctr. for Law & Soc. Policy, Wash., D.C.), June 2001, at 16.

³⁰¹ *See id.* at 17.

³⁰² *Id.* at 16.

³⁰³ *See id.* One advocate characterized Hull's veto as a "tribute to her view that the state surplus is more important than the well being of a newborn." *Id.* at 17.

³⁰⁴ *Id.*

mandatory family caps, “there was a strange coalition of anti-abortion, feminist, and pro-choice groups” lobbying to prevent their passage.³⁰⁵ This was possible because “family values” proponents have not yet “so marginalized the poor that their abortions no longer matter.”³⁰⁶ At the state level, advocates may be able to form such coalitions and find persuasive force in evidence of economic and other damage to children as well as the preliminary indications that caps coerce poor women into obtaining abortions, with these effects exaggerated by race.³⁰⁷ The successful efforts in Maryland and Illinois emphasized the potentially costly impact of meeting the long-term needs of capped children who suffer from growing up in deeper poverty. Armed with a variety of data on the invidious effects of caps on the state’s own citizens,³⁰⁸ advocates may convince state legislatures that the immediate cost savings of caps, if any, are greatly outspent by the practical and philosophical harm to poor children and mothers.³⁰⁹

VI. EVALUATING AND MITIGATING THE HARM DONE BY CAPS

Family caps continue to exist in nearly half of the states in the country. Aside from the disturbing rhetoric, assumptions, and motives providing the impetus for caps, there are distressing indications that caps are causing serious harm. The possibility of increased rates of abortion due to coercion and suffering by impoverished children are paramount among potential harms.

Even though mothers receiving welfare overwhelmingly confirm that they do not have children for the purpose of receiving an increase in benefits, it appears that knowing that their family will get no increased support may in fact encourage them to obtain abortions when faced with pregnancy. It is difficult, however, to separate the economic effects of caps from

³⁰⁵ Hirsch, *supra* note 23, at 339–40.

³⁰⁶ Appleton, *When Welfare Reforms Promote Abortion*, *supra* note 8, at 189.

³⁰⁷ The researchers who reported the race-based effects of the New Jersey cap have suggested that “[l]egal and political action could only be expected to increase if attention becomes refocused on differential racial effects.” Jagannathan & Camasso, *supra* note 211, at 69.

³⁰⁸ Another author has recently suggested advocating for state legislatures to abolish caps by providing information about the failure of caps to accomplish their own goals or those of TANF. Kelly J. Gastley, *Why Family Caps Just Aren’t Getting it Done*, 46 WM. & MARY L. REV. 373, 412–13 (2004) (arguing that caps do not achieve their goals because they fail to “promote personal responsibility, strengthen families, reduce the welfare rolls, and reduce poverty”).

³⁰⁹ State constitutions may provide more proactive and family protections. State constitutional prohibitions on race discrimination, such as that included in the Massachusetts Constitution, might be used to attack caps’ racially discriminatory bases. Kaufman, *supra* note 15, at 323. State constitutional provisions have also been invoked successfully in efforts to require state Medicaid programs to subsidize abortions. See Appleton, *When Welfare Reforms Promote Abortion*, *supra* note 8, at 189 n.229 (citing Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 783–99 (Cal. 1981); Moe v. Sec’y of Admin. & Fin., 417 N.E. 2d 387, 404 (Mass. 1981)).

the social message conveyed: as a society we would prefer that women on welfare not have children. Whether women control fertility through family planning or abortion apparently does not matter to states, as they have done little to improve access to family planning services while implementing caps. Whether poor women feel coerced to obtain an abortion when facing an unplanned pregnancy is also without consequence to policy makers. The single message sent by caps is that society will not tolerate the prospect of helping another poor child.

While abortion rights assuredly merit ardent protection, the state should not be in the business of coercing low-income women into making the choice to abort a pregnancy. The fact that very few states evaluate abortion rates among welfare recipients subsequent to caps is telling. In the state with the most extensive research on this topic, New Jersey, fears are confirmed: abortions among welfare recipients are on the rise.³¹⁰ Moreover, in order to achieve a reduction in birth rates, partially through increased abortion, the state of New Jersey turned away 28,000 newborns between 1993 and 1998.³¹¹

Ultimately, “for a significant number of those targeted by family caps and child exclusions, the financial and practical considerations . . . —many prompted by the government itself—will promote abortion.”³¹² Welfare reforms designed to reduce childbirth among the poor and unmarried “necessarily encourage—some may say coerce—abortion within these groups.”³¹³ Caps contradict the usual anti-abortion message of “family values” proponents that childbirth is always a wonderful choice, at least for middle- and upper-class women: welfare reforms “along with Congress’s stringent work requirements even for the mothers of young children, communicate that staying home to care for children is not socially worthwhile; no substantial leap is necessary to move from this compulsory rejection of the traditional maternal role to a pro-abortion value judgment.”³¹⁴

Caps’ message to poor women, that “they do not deserve to have a family because they are poor,” communicates disrespect and destroys self-esteem.³¹⁵ Many feel caps are an attempt “to force the mother to feel the

³¹⁰ The findings that

New Jersey’s family cap did not work as designed are far from shocking to serious students of state and federal family policy. . . . [P]olicies targeting families are not what they seem to be and can exhibit latent and unintended as well as manifest and intended consequences. The family policy literature is replete with examples of government policies working unwittingly on family composition, family economic support, childrearing practices, and family care.

Jagannathan & Camasso, *supra* note 211, at 68.

³¹¹ CAPS ON KIDS, *supra* note 134, at 3.

³¹² Appleton, *When Welfare Reforms Promote Abortion*, *supra* note 8, at 172.

³¹³ *Id.* at 156.

³¹⁴ *Id.* at 183.

³¹⁵ Friedman, *supra* note 29, at 659.

burden of her poverty and to behave more responsibly.”³¹⁶ By denying poor women the right to bear children, caps deprive them of a basic piece of their humanity and denigrate their dignity and equality within society.³¹⁷ By stressing “the personal traits of the poor and cast[ing] welfare beneficiaries as deviants who are the cause of their own problems,” policymakers stigmatize them and make it appear more acceptable for the government to regulate them.³¹⁸

Caps implicitly adopt the rationale of conservative welfare reform advocates who encourage the regeneration of social stigma surrounding out-of-wedlock births: “[a]n illegitimate birth must become the socially horrific act it used to be Stigma and shotgun marriages may or may not be good for those on the receiving end, but their deterrent effects on others is wonderful—and indispensable.”³¹⁹ Given such rhetoric, some women’s advocates are calling for a new definition of reproductive freedom. These advocates wish to define caps as a violation of women’s reproductive rights since “it’s not reproductive freedom [if because] you’re receiving money from the government, the government has the ability to try to manipulate your reproductive decisions and tell you that you aren’t good enough to have a child.”³²⁰ As one author stated, “[g]overnment control of reproduction in the name of science, social policy, or fiscal restraint masks racist and classist judgments about who deserves to bear children.”³²¹

Consistent with the gendered assumptions on which caps are based, caps’ detrimental effects target single mothers. More than one cap uses language aimed directly at mothers, exclusive of fathers. Arkansas’s cap excludes “[a] child who is born while the *mother* is receiving TEA cash assistance.”³²² South Carolina provides vouchers to allow a family with a capped child to obtain goods and services for the child if such assistance will “permit the child’s *mother* to participate in education, training and employment-related activities.”³²³ At least according to the law in those states, a child living with a custodial father rather than a mother is protected from cap provisions.

Furthermore, this anti-child message is channeled most strongly to black women. As data from New Jersey reveals, poor black women are more likely to opt for abortion if receiving benefits under cap laws. Moreover, the failure of states to provide improved family planning services supports caps’ pro-abortion message. Only five states even mentioned the concept of family planning in enacting their caps; the rest have been content

³¹⁶ Broomfield, *supra* note 7, at 226.

³¹⁷ See Roberts, *The Only Good Poor Woman*, *supra* note 60, at 943.

³¹⁸ Brito, *supra* note 28, at 236.

³¹⁹ White, *supra* note 84, at 435 (quoting Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14).

³²⁰ Martha Davis et al., *supra* note 14, at 215 (comments of panelist Dorothy Roberts).

³²¹ Roberts, *The Only Good Poor Woman*, *supra* note 60, at 944.

³²² 016-20-002 ARK. CODE. R. § 2150.1 (Weil 2000) (emphasis added).

³²³ S.C. CODE ANN. REGS. 114-1140B(2) (2004) (emphasis added).

to impose the cap on poor women and disregard the consequences.³²⁴ President George Bush's insistence on using welfare funds for abstinence-only education will erect even more barriers to family planning services.³²⁵

Moreover, caps' message to low-income mothers is directly contrary to the message projected to middle- and upper-class mothers—that more affluent women deserve to be mothers and their children deserve stay-at-home parenting. Caps exacerbate the division between the “haves” and the “have-nots.” While Congress enacts tax cuts to assist middle-class families with child-rearing responsibilities, poor families continue to face the implication that their children are not worthy of being born.³²⁶

These criticisms of caps do not suggest that states should swing to the opposite end of the pendulum and discourage abortion as an option. Nor should government be disempowered from encouraging citizens to make wise procreative choices.³²⁷ But cap policies are coercive and compromise the fundamental procreative rights of women. States should instead “seek constitutional, non-oppressive means to achieve legitimate ends—means that respectfully seek to persuade citizens to make wise choices rather than bludgeon them into compliance.”³²⁸ Above all, welfare policies should convey a neutral message about abortion that does not depend on the race and income level of the audience.

Furthermore, any savings that states derive from caps can hardly be worth the economic and social costs to children. Yet, as the federal government acknowledges, no state understands the impact of caps on the children directly impacted.³²⁹ By ignoring their potentially devastating consequences, cap proponents accomplish an “amazing sleight of hand [that]

³²⁴ STARK & LEVIN-EPSTEIN, *supra* note 2, at 11.

³²⁵ The TANF law's provision that allows the federal government to provide requesting states with funds to promote abstinence education, 42 U.S.C. § 710 (2000), would have been continued under the House-passed TANF reauthorization law. H.R. 4, 108th Cong. § 701 (2003).

³²⁶ Caps are indicative of the current bifurcation between the Social Security program's norms and procedures for defining and dealing with parental relationships and the alternative set of rules and expectations for parents within the welfare system. Jill Elaine Hasday, *Parenthood Divided: Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 300–01 (2002). Although both programs are forms of family law, they determine who is considered a family member and how the legal rights and responsibilities of family members are conceived very differently. *Id.* at 300. Social Security is highly respectful of familial autonomy and self-government; it distributes benefits to spouses and minor dependent children of qualified workers but makes no attempt to determine whether that worker adequately fulfills familial responsibilities in the home. *Id.* Welfare programs take a different tact: instead of respecting familial autonomy, they “scrutinize the familial relations of their recipients, doubt parental judgment, and undercut familial autonomy.” *Id.* at 300–01. This division in familial treatment “is not inevitable nor a one-time anomaly, [it is] simply the product of unique political commitments and coalitions shaping individual statutory schemes along different lines.” *Id.* at 301.

³²⁷ Barksdale, *supra* note 271, at 71.

³²⁸ *Id.*

³²⁹ MORE RESEARCH NEEDED, *supra* note 99, at 22.

will prove devastating to the nation's poor children in ways that even opponents of welfare reform may not have foreseen."³³⁰

The assumption that states employing caps will actually save money in the long run should not remain untested. Obviously, states reap an initial savings in allowing poor children to go without assistance. In the long run, however, states may well pay more to confront the issues that those children will have to face if they must grow up in more impoverished conditions. Caps contravene government investments in early childhood development and education, ignoring new brain research suggesting that well-being during the first few years of life is essential for children's development.³³¹ Thus, any cost savings, if they exist, are short-sighted. It has been determined that "[e]ach dollar cut from monthly . . . assistance levels reduces future economic output by between 92 cents and \$1.51 solely due to the effect of lost years of schooling on productivity."³³² At the extreme, caps have the potential to force parents to put children into the custody of the state in order to ensure that their basic needs are met,³³³ a far more costly proposition to the government than an incremental increase in time-limited TANF benefits.

More generally, welfare policy should focus on lifting people out of poverty.³³⁴ Many states profess the goal of increasing the economic prospects for low-income families while enacting poverty-increasing caps. Nebraska's welfare reform statute states that its first priority is "[p]ursuing efforts to help Nebraskans avoid poverty and prevent the need for welfare."³³⁵ Many other states, while avoiding the direct language of poverty reduction, focus on "economic self-sufficiency." Delaware's Welfare Employment Program states that its purpose is "expanded opportunity for increased personal responsibility and advancement toward economic independence and self-sufficiency."³³⁶ Arkansas's Transitional Employment Assistance program is designed to "help economically needy families become more responsible for their own support and less dependent on public assistance."³³⁷

Even assuming, as courts routinely have, that caps promote work, not abortion, as the best option for low-income mothers, and that work, with-

³³⁰ Federle, *supra* note 72, at 1505.

³³¹ STARK & LEVIN-EPSTEIN, *supra* note 2, at 15.

³³² *Id.* at 27 n.64 (quoting ARLOC SHERMAN, *WASTING AMERICA'S FUTURE* (1994)).

³³³ Federle, *supra* note 72, at 1508.

³³⁴ The plaintiffs in *C.K.* focused on the goal of AFDC to encourage the care of dependent children in their homes or with relatives in contending that the waiver did not promote AFDC's objectives. *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 184 (3d Cir. 1996) (citing 42 U.S.C. § 601 (repealed 1996)). The court, however, validated the federal government's findings that the waiver would break the cycle of poverty and enhance the role of individual responsibility, thus promoting the objectives of AFDC. *Id.* at 188.

³³⁵ NEB. REV. STAT. § 68-1709 (2005).

³³⁶ DEL. CODE ANN. tit. 31, § 1501(a) (2005).

³³⁷ 016-20-002 ARK. CODE. R. § 1010 (Weil 2000).

out acquisition of skills, is a viable route out of poverty, cutting a family's benefits in the meantime can hardly be described as a meaningful effort at poverty reduction. Caps only serve to exacerbate the fact that "[p]oor families in the United States [live] further below the poverty line and [are] less likely to escape from poverty after one year" than in other developed countries.³³⁸ As such, caps represent the continued,

. . . significant redistribution of wealth away from some of the nation's most impoverished families—families that are overwhelmingly comprised of women and their children. This shift of federal dollars away from welfare will merely accelerate a broader trend in this country over the last two decades: the massive redistribution of this country's wealth and income into the hands of an increasingly small and insulated elite class. This trend is rapidly giving the country an income distribution profile that is out-of-line with the other industrialized nations, and resembles the typical pattern of wealth distribution in the rigid, caste-based neocolonial oligarchies.³³⁹

Furthermore, the vitality of caps in the new world of welfare reform is limited. Federal TANF rules require states to implement "work first" principles and to ensure that most families are working a substantial number of hours outside the home.³⁴⁰ In addition, federal law limits families to five years of federally funded benefits in a lifetime.³⁴¹ These rigorous restrictions on state welfare programs support the same objectives that caps promote: discouraging families from having additional children and encouraging families to work rather than receive welfare. The additional burdens imposed by caps on poor children are therefore unnecessarily duplicative.³⁴²

³³⁸ NOW LEGAL DEF. & EDUC. FUND, *supra* note 33, § IV.

³³⁹ White, *supra* note 84, at 433.

³⁴⁰ 42 U.S.C. §§ 604-19 (2000). States wield the mandatory work requirements through individual responsibility agreements with participants and strict hourly mandates that include provisions regarding child-rearing. *See, e.g.*, Brito, *supra* note 28, at 247. The federal TANF law also lists parenting restrictions deemed appropriate for inclusion in individual responsibility agreements, such as requiring that parents keep children in school, immunize them, and attend parenting and money management classes. 42 U.S.C. § 608(b)(2)(A)(ii). Some particularly noteworthy state policies include Alabama's mandate that children of welfare parents make satisfactory grades and get regular health examinations and immunizations; Georgia's requirements that parents attend parent-teacher conferences, participate in parenting classes and family planning counseling, and ensure that children go to school; Indiana's restriction allowing children no more than three unexcused school absences per semester; and Wyoming's requirement that teenagers age sixteen or over maintain a "C" average in school and work during the summer. Brito, *supra* note 28, at 246 (citing JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POLICY, STATE BY STATE SUMMARY OF FAMILY LIFE OBLIGATIONS IN IRAS (1998), available at <http://www.clasp.org/publications/IRA.pdf>).

³⁴¹ 42 U.S.C. § 608(a)(7).

³⁴² CAPS ON KIDS, *supra* note 134, at 1.

Thus, for a myriad of reasons, family caps do not merit a place in our welfare policies. Despite the harmful messages and effects of caps, however, court challenges based on procreative rights have proven unsuccessful, as have efforts to achieve a federal prohibition on caps. State legislatures, where some success has already been realized, are the best hope for the end of cap policies and the healing of their harmful effects.