

# Welfare Family Caps and the Zero-Grant Situation

Christopher Dinkel

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## NOTE

### WELFARE FAMILY CAPS AND THE ZERO-GRANT SITUATION

*Christopher Dinkel*†

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† B.A., Pomona College, 2007; J.D. Candidate, Cornell Law School, 2011; Articles Editor, *Cornell Law Review*, Volume 96. I wish to thank my family, especially my Mom and my Dad, for their love and support. I also wish to thank Robin Shin, Michael Potere, Luan Huynh, and Ed Barnes for their helpful suggestions for this Note. Finally, I am grateful to the members of the *Cornell Law Review*, particularly Alex Coedo, Kelly Vaughan, Britt Hamilton, Charles Brown, and Eduardo Bruera for their work on this Note.

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### INTRODUCTION

Dajohn is a nine-year-old child who is in desperate need of financial assistance.<sup>1</sup> His mother, Drusilla, is disabled and cannot find employment.<sup>2</sup> As a result, Drusilla cannot afford to care for Dajohn, and his basic needs are often unmet.<sup>3</sup> Contributing to their dire financial situation, Drusilla spent what little money she had on moving out of their public housing because the mold in their furniture severely aggravated Dajohn's asthma.<sup>4</sup> Drusilla also had to purchase clothes for Dajohn to replace the ones that the mold had infected.<sup>5</sup> Although the family receives food stamps to help make ends meet, the food stamps often do not last until the end of the month.<sup>6</sup> Consequently, the family must subsist on Ramen noodles and expired canned goods.<sup>7</sup> Although these foods upset Dajohn's stomach, they are all the family can afford.<sup>8</sup>

Drusilla previously received \$398 per month for her older son Derrick as part of a grant from a California welfare program called CalWORKS, which provides aid to indigent families with children.<sup>9</sup> Because Drusilla was receiving welfare when she gave birth to Dajohn

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<sup>1</sup> Petitioners' Memorandum of Points and Authorities in Support of Motion for Writ of Mandate at 1, *McCormick v. Cnty. of Alameda*, No. RG08415945 (Cal. Super. Ct. May 8, 2009) (unpublished decision) [hereinafter *McCormick Memorandum*], available at <http://apps.alameda.courts.ca.gov/domainweb/html/index.html>.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *See id.*

<sup>4</sup> *Id.* Drusilla used much of her Supplemental Security Income (SSI), which she received for her disability, on these moving expenses. *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

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

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

<sup>9</sup> *Id.* at 2-3; see also CAL. WELF. & INST. CODE § 11200 (West 2010) (establishing CalWORKS).

in July 2000, a CalWORKs “family cap” called the Maximum Family Grant (MFG) rule prohibited her from receiving additional money for Dajohn.<sup>10</sup> She had to then care for both Derrick and Dajohn with Derrick’s \$398 grant.<sup>11</sup> When Derrick left the household in January 2008, the family’s monthly CalWORKs grant dropped to \$0 because of the family cap.<sup>12</sup> The family cap blocked Drusilla from receiving any financial assistance for Dajohn, who otherwise met the eligibility requirements for a CalWORKs grant.<sup>13</sup>

Drusilla then turned to a Social Services Agency worker for help.<sup>14</sup> The worker explained that Dajohn could receive financial assistance if someone else cared for him.<sup>15</sup> With Derrick no longer at home, Drusilla was determined not to also lose Dajohn.<sup>16</sup> What Dajohn needed was not foster care but financial assistance to help him purchase the basic necessities of life, such as clothes, shoes, and school supplies.<sup>17</sup> The family cap, however, denied Dajohn that desperately needed assistance.<sup>18</sup>

When families that are receiving welfare assistance give birth to additional children, their monthly welfare grants do not increase because those additional, “capped” children are ineligible for a welfare grant.<sup>19</sup> As a result of family cap policies, families often have to share resources for their children, just as Drusilla had to split the \$398 grant between Derrick and Dajohn.<sup>20</sup> Dajohn’s situation illustrates, how-

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<sup>10</sup> McCormick Memorandum, *supra* note 1, at 2; *see also* WELF. & INST. § 11450.04 (establishing the MFG rule and explaining that “[f]or purposes of determining the maximum aid payment . . . the number of needy persons in the same family shall not be increased for any child born into a family that has received aid under this chapter continuously for the 10 months prior to the birth of the child”); CAL. DEP’T OF SOC. SERVS., MANUAL OF POLICIES AND PROCEDURES: ELIGIBILITY AND ASSISTANCE STANDARDS § 44-314.2 (2009) [hereinafter MPP], available at <http://www.dss.cahwnet.gov/ord/entres/getinfo/pdf/12EAS.pdf> (outlining the application of the MFG rule).

<sup>11</sup> McCormick Memorandum, *supra* note 1, at 2–3.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 1–2.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.* at 3.

<sup>18</sup> *See id.* at 1–3.

<sup>19</sup> *See, e.g.,* Melynda 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, 227 (1996) (explaining that a “‘family cap’ refers to a program whereby a mother already receiving [welfare] would be prevented from getting an increase in the standard monthly cash grant if she gives birth to another baby”).

<sup>20</sup> *See* McCormick Memorandum, *supra* note 1, at 2 (stating that the \$398 grant Drusilla received for Derrick did not increase after Dajohn was born). Indeed, one justification for family caps is to discourage families receiving welfare from having more children by making them share the welfare grant of their children who are not subject to the family cap with their children who are. *See, e.g.,* Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 154 (2006)

ever, one of the most severe, although perhaps unforeseen, side effects of welfare family caps: in certain situations, family caps can block families with children who are otherwise eligible for a welfare grant from receiving any financial assistance to purchase basic necessities.<sup>21</sup>

As Dajohn's situation demonstrates, the operation of family caps can completely deprive parents of welfare grants when their oldest children leave the household and only capped children remain. This deprivation occurs when a noncapped child reaches adult age and becomes ineligible for welfare, or when a noncapped child leaves the household to go into foster care and only capped children remain in the household.<sup>22</sup>

When family caps completely deprive otherwise eligible families of all financial assistance, they thwart the public policy goals of reducing poverty and strengthening families on welfare.<sup>23</sup> This complete deprivation of welfare funds could have grave health effects for the significant number of capped children in the United States.<sup>24</sup> Completely denying financial assistance to families in need also undercuts a central justification of family caps: that families will be able to share the welfare benefits of noncapped children with capped children.<sup>25</sup>

Family cap policies and their effects are particularly important in light of current political debates regarding the proper role of welfare, especially in states like California that have recently faced significant

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("The obvious purpose of a family cap is to discourage low-income women receiving welfare from having children . . .").

<sup>21</sup> Here, "financial assistance" refers to a cash welfare grant. It does not include food stamps or health care, such as Medicaid.

<sup>22</sup> For example, under CalWORKs, children are ordinarily eligible for aid only until they turn eighteen or until they turn nineteen provided they are a full-time student and will graduate from high school or a vocational training program before their nineteenth birthday. CALWORKS POLICY, CW 42.101-.101.2 (2010), <http://www.ladpss.org/dpss/calworks/cwPolicy08-30-10.pdf>. Families also cannot receive CalWORKs benefits for children who leave the home to go into foster care. *See id.* at CW 82-812.68.

<sup>23</sup> *See, e.g.,* Sojourner A. v. N.J. Dep't of Human Servs., 794 A.2d 822, 824 (N.J. Super. Ct. App. Div. 2002) (finding legitimate state interests for family caps to be "breaking the cycle of poverty" and "strengthening families").

<sup>24</sup> *See* THE HENRY J. KAISER FAMILY FOUND., WELFARE POLICY AND REPRODUCTIVE HEALTH: "CAPPING" A FAMILY'S BENEFITS 3 (1999) [hereinafter CAPPING A FAMILY'S BENEFITS], available at <http://www.kff.org/womenshealth/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13282> (discussing the possible health effects of reduced welfare benefits for children). One government study in 2000 found that 108,000 families in twenty states were subject to family caps in an average month; some commentators believe that the actual number is much larger. *See* Smith, *supra* note 20, at 170 (citing U.S. GEN. ACCOUNTING OFFICE, GAO-01-924, WELFARE REFORM: MORE RESEARCH NEEDED ON TANF FAMILY CAPS AND OTHER POLICIES FOR REDUCING OUT-OF-WEDLOCK BIRTHS 13 (2001)).

<sup>25</sup> *See, e.g.,* C.K. v. Shalala, 883 F. Supp. 991, 1013 (D.N.J. 1995) (concluding that a family cap "does . . . [not] completely deprive children of benefits which they might otherwise receive but for the conduct of their parents" but instead merely "permit[s] any additional child to share in [the] 'capped' family income").

budget deficits.<sup>26</sup> The issue also has a considerable national dimension because roughly one third of the states have a family cap provision<sup>27</sup> and because Congress has left states free to implement them in their welfare programs.<sup>28</sup>

Part I of this Note examines the history of welfare and welfare reform in the United States. Part II explores the history of welfare family caps. It discusses the status of family caps after federal welfare reform in 1996. It also analyzes the MFG rule, CalWORKs' family cap. Using the MFG rule as a case study, it examines what this Note calls the "zero-grant situation," which arises when families' monthly welfare grants are \$0 as a result of a family cap, even though their capped children technically are welfare participants. This Part then highlights criticism of family caps. Part III discusses judicial challenges to family caps. Part IV analyzes how the zero-grant situation demonstrates the flaws in courts' reasoning in rejecting legal challenges to family caps. It also criticizes the use of family caps on public policy grounds. Part V examines federal and state legislative solutions. It calls for Congress to reexamine its decision to allow states to impose family caps under Temporary Assistance for Needy Families (TANF), the broader federal welfare program that encompasses individual state welfare programs like CalWORKs.<sup>29</sup> Specifically, this Part urges Congress to pass legislation to prohibit states from enacting family caps.<sup>30</sup> Alternatively, this Part recommends that Congress create an exception to family caps that would provide some amount of financial assistance to families in the zero-grant situation. Finally, this Part calls for states to either eliminate family caps on their own or to create an exception for the zero-grant situation at the state level.

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<sup>26</sup> See, e.g., Daniel B. Wood, *California Faces \$19 Billion Budget Deficit Despite Massive Cuts*, CHRISTIAN SCI. MONITOR (June 22, 2010), <http://www.csmonitor.com/USA/2010/0622/California-faces-19-billion-budget-deficit-despite-massive-cuts> (discussing California's \$19.1 billion budget deficit).

<sup>27</sup> See GRETCHEN ROWE & MARY MURPHY, THE URBAN INST., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2008, at 142-43 (2009), <http://anfdata.urban.org/data/books/Databook%202008%20FINAL.pdf> (listing states' family cap policies).

<sup>28</sup> See Smith, *supra* note 20, at 153-54 (explaining that the federal legislation that enacted welfare reform in 1996, "by remaining silent, allowed states to continue utilizing existing family cap policies or enact new caps without federal oversight").

<sup>29</sup> See LEGAL MOMENTUM, IMPROVING THE FEDERAL SAFETY NET FOR WOMEN AND CHILDREN: AN AGENDA FOR TANF REFORM 2 (2009), <http://www.legalmomentum.org/assets/pdfs/lm-tanf-reform-agenda.pdf> (calling for a ban on family caps).

<sup>30</sup> See *id.* (urging Congress to prohibit family caps).

## I.

## WELFARE IN THE UNITED STATES

## A. History of Welfare

The first modern federal welfare legislation in the United States was the Social Security Act of 1935.<sup>31</sup> In addition to creating other public benefit programs like old-age assistance and unemployment compensation, the Social Security Act established Aid to Dependent Children (ADC).<sup>32</sup> The purpose of ADC was to provide aid for children whose fathers had died.<sup>33</sup> ADC did so by providing federal assistance to states by extending “mother’s pensions,” which were welfare programs that many states had previously established.<sup>34</sup> Consequently, ADC was small and provided relief almost solely to white widows.<sup>35</sup> After World War II, the number of ADC recipients rose considerably,<sup>36</sup> but until the 1960s, many poor, single mothers could not obtain any financial assistance because they fell outside ADC’s coverage.<sup>37</sup>

The scope of federal welfare assistance expanded considerably under President Lyndon Johnson, as the Great Society programs he instituted aimed to drastically reduce poverty.<sup>38</sup> Against this backdrop, welfare-rights advocates achieved significant legal victories when federal courts invalidated certain laws that restricted welfare.<sup>39</sup> During this period, women of color and individuals who were unmarried, divorced, or separated gained greater access to welfare, especially under Aid to Families with Dependent Children (AFDC), the new version of ADC.<sup>40</sup>

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<sup>31</sup> See Social Security Act of 1935, Pub L. No. 74-271, 49 Stat. 620 (1935); JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 21 (1995).

<sup>32</sup> See Social Security Act §§ 401–406, 49 Stat. at 627–29 (establishing ADC); *id.* § 1, 49 Stat. at 620 (establishing old-age assistance); *id.* § 301, 49 Stat. at 626 (establishing unemployment compensation benefits); JEFFREY GROGGER & LYNN A. KAROLY, *WELFARE REFORM: EFFECTS OF A DECADE OF CHANGE* 10 (2005); Kelly J. Gastley, Note, *Why Family Cap Laws Just Aren’t Getting It Done*, 46 WM. & MARY L. REV. 373, 375–77 & n.12 (2004).

<sup>33</sup> GROGGER & KAROLY, *supra* note 32, at 11.

<sup>34</sup> See *id.* at 10–11.

<sup>35</sup> See HANDLER, *supra* note 31, at 23, 25.

<sup>36</sup> See 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, 306 & n.26 (1997) (stating that the number of families receiving ADC increased from 371,000 in 1940 to 803,000 in 1960).

<sup>37</sup> HANDLER, *supra* note 31, at 28.

<sup>38</sup> See Lyke Thompson & Donald F. Norris, *Introduction: The Politics of Welfare Reform*, in *THE POLITICS OF WELFARE REFORM* 1, 5 (Donald F. Norris & Lyke Thompson eds., 1995).

<sup>39</sup> HANDLER, *supra* note 31, at 28; see, e.g., *King v. Smith*, 392 U.S. 309, 312 & n.3, 313, 334 (1968) (holding Alabama’s regulation that denied federal welfare assistance to children of mothers who “cohabitated” with any single or married able-bodied man to be invalid as conflicting with § 406 of the Social Security Act of 1935).

<sup>40</sup> See HANDLER, *supra* note 31, at 28–29; Kaufman, *supra* note 36, at 307. AFDC replaced ADC in 1962. Kaufman, *supra* note 36, at 305 n.15; see also Public Welfare Amend-

Control over welfare programs began to shift from the federal government to the states in the 1980s.<sup>41</sup> Under the Family Support Act of 1988,<sup>42</sup> the focus of welfare also changed from providing mothers with income maintenance to preparing them for the workforce.<sup>43</sup> Additionally, states started to require AFDC mothers to obtain employment outside the home.<sup>44</sup>

#### B. Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

With the support of the Republican congressional leaders, who pledged to reform welfare as part of their "Contract with America," President Clinton signed the Conference Agreement for H.R. 3734, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), on August 22, 1996.<sup>45</sup> PRWORA abolished AFDC and created Temporary Assistance for Needy Families (TANF).<sup>46</sup> In doing so, PRWORA greatly scaled back the extent of federal welfare assistance and passed even more responsibility from the federal government to the states to design and administer welfare programs for families with children.<sup>47</sup> Under AFDC, the federal government matched every dollar that a state spent on welfare programs with between one and four dollars of federal funds.<sup>48</sup> Under TANF, however, the federal government instead gives each state a fixed block grant that does not change in size, regardless of the amount of money

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ments of 1962, Pub. L. No. 87-543, § 104(a)(3), 76 Stat. 172, 185 (1962) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) (replacing ADC with AFDC). By 1971, widows comprised only 4.3% of AFDC recipients. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 725 (1992).

<sup>41</sup> Thompson & Norris, *supra* note 38, at 6.

<sup>42</sup> Pub. L. No. 100-485, 102 Stat. 2343 (1988).

<sup>43</sup> See Cheryl Sullivan, *Welfare in America: What Is Being Reformed?*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 633, 634 (1997).

<sup>44</sup> See Kaufman, *supra* note 36, at 307-08.

<sup>45</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996); see also Hugh Heclo, *The Politics of Welfare Reform*, in *THE NEW WORLD OF WELFARE* 169 (Rebecca M. Blank & Ron Haskins eds., 2001) (discussing the political dimensions of welfare reform); Sullivan, *supra* note 43, at 635-36 (discussing congressional negotiations regarding welfare reform and President Clinton's signing of PRWORA).

<sup>46</sup> See 110 Stat. 2105; Smith, *supra* note 20, at 153.

<sup>47</sup> See LAURA LEIN & DEANNA T. SCHEXNAYDER, *LIFE AFTER WELFARE: REFORM AND THE PERSISTENCE OF POVERTY* 12 (2007) (stating that under PRWORA, "[w]ithin general guidelines from the federal government, states were able to develop and adopt their own plans, and they did so, often pursuing somewhat diverse philosophies about what measures were most important"); Christopher Jencks, *Foreword* to KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* ix, xvi (1997) (stating that the legislation that President Clinton signed "gives states a lot of freedom to design their own TANF rules"); Sullivan, *supra* note 43, at 636 (stating that under TANF, "eligibility and benefit levels may now be determined by individual states").

<sup>48</sup> See Jencks, *supra* note 47, at xvi.



that each state spends.<sup>49</sup> As a result, states that desire to provide more than the block grant amount must do so out of their own funds.<sup>50</sup>

TANF has a maintenance of effort (MOE) requirement under which each state must spend at least 75% of the amount it spent under AFDC.<sup>51</sup> However, states increasingly count money spent on other programs, as well as expenditures by nongovernmental entities, towards their MOE requirement.<sup>52</sup> Thus, researchers have found that while the total amount that states count towards their MOE requirement has increased since 2001, the amount that states have spent on nonmedical social services has declined.<sup>53</sup>

## II.

### WELFARE FAMILY CAPS

#### A. History of Family Caps

A “family cap” is a welfare provision that prohibits parents who are currently receiving welfare for their child from receiving an increase in their monthly welfare grant following the birth of another child.<sup>54</sup> Under AFDC, states that wanted to implement family caps had to obtain a waiver from the federal government.<sup>55</sup> If a state did not obtain this waiver, it violated the Social Security Act by impermissibly including behavior-based criteria in its eligibility determination.<sup>56</sup> Nineteen states received AFDC waivers from the Department of Health and Human Services and subsequently adopted family cap policies.<sup>57</sup>

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<sup>49</sup> *Id.* at xvi–xvii; ELIZABETH LOWER-BASCH, CTR. FOR LAW & SOC. POLICY, LOOKING AHEAD TO TANF REAUTHORIZATION 2 (2009), <http://www.clasp.org/admin/site/publications/files/Looking-Ahead-to-TANF-Reauthorization.pdf>.

<sup>50</sup> Jencks, *supra* note 47, at xvii.

<sup>51</sup> ELIZABETH LOWER-BASCH, CTR. FOR LAW & SOC. POLICY, GOALS FOR TANF REAUTHORIZATION 7 (2010), <http://www.clasp.org/admin/site/publications/files/TANF-Reauthorization-Goals.pdf>. States must spend 80% of their AFDC expenditure on their MOE requirement if they do not meet certain work participation-rate requirements. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See* Broomfield, *supra* note 19, at 227.

<sup>55</sup> *See* Williams, *supra* note 40, at 721 (“Because projects that condition eligibility on behavior contravene the mandated eligibility requirements set forth in the Social Security Act, they require the United States Department of Health and Human Services (HHS) to waive the entitlement provisions under 42 U.S.C. § 1315.” (footnote omitted)).

<sup>56</sup> *See id.* at 721 & n.11. Under 42 U.S.C. § 602(a)(10)(A) (1994) (current version at 42 U.S.C. § 602 (2006)), which provides that “aid to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals,” states had to obtain an AFDC waiver to enact family caps because they were not permitted to alter the Social Security Act’s categorical eligibility requirements. *See id.*

<sup>57</sup> SHELLEY STARK & JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POLICY, EXCLUDED CHILDREN: FAMILY CAP IN A NEW ERA 18 n.2 (1999). The nineteen states were: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, New Jersey, North Carolina, South Carolina, Tennes-

Family caps became a part of the congressional debate regarding welfare reform in 1995.<sup>58</sup> While the House of Representatives passed initial welfare reform legislation that required each state to adopt a family cap,<sup>59</sup> the Senate rejected that mandatory cap provision.<sup>60</sup> As a compromise, the House and Senate conference report included a mandatory family cap requirement for states unless they specifically opted out.<sup>61</sup> President Clinton vetoed that legislation, and the House and Senate then adopted mandatory family caps in their subsequent attempts at welfare reform legislation.<sup>62</sup> However, due to a procedural violation, the final bill President Clinton signed in August 1996 did not include a family cap provision.<sup>63</sup> Through its silence regarding family caps, the final bill permitted states to continue to use their existing family cap policies or to adopt new ones that were free from federal regulation.<sup>64</sup>

Lawmakers have since made several attempts to limit states' freedom to implement family caps, but none have been successful. In 1998, Representative Chris Smith [R-NJ] introduced a bill to prohibit states from receiving TANF funds if they adopted or planned to adopt family caps.<sup>65</sup> Representative Patsy Mink [D-HI] introduced legislation in 2001 that would have penalized states that used family caps.<sup>66</sup> In 2003, Representative Dennis Kucinich [D-OH] sponsored legisla-

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see, Virginia, and Wisconsin. *Id.* Kansas obtained a waiver and passed legislation to implement the provision but chose not to because the new federal law required time limits for cash grants. *Id.*

<sup>58</sup> See Smith, *supra* note 20, at 153.

<sup>59</sup> See *id.*

<sup>60</sup> See H.R. 4, 104th Cong. § 101 (1995) (as passed by Senate, Sept. 19, 1995); Smith, *supra* note 20, at 153.

<sup>61</sup> See 141 CONG. REC. H15323, H15402 (daily ed. Dec. 21, 1995); Smith, *supra* note 20, at 153.

<sup>62</sup> Smith, *supra* note 20, at 153.

<sup>63</sup> See 2 U.S.C. § 644 (1994); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); 141 CONG. REC. H8903 (daily ed. July 30, 1996); 141 CONG. REC. S8506-07 (daily ed. June 15, 1995); Smith, *supra* note 20, at 153.

<sup>64</sup> See Personal Responsibility and Work Opportunity Reconciliation Act; STARK & LEVIN-EPSTEIN, *supra* note 63, at 6; Smith, *supra* note 20, at 153-54.

<sup>65</sup> Jodie Levin-Epstein, *Lifting the Lid Off the Family Cap: States Revisit Problematic Policy for Welfare Mothers*, CLASP POLICY BRIEF: CHILDBEARING AND REPRODUCTIVE HEALTH SERIES, BRIEF NO. 1, Dec. 2003, at 1, 4, <http://www.clasp.org/admin/site/publications/files/0166.pdf>; see also H.R. 4066, 105th Cong. (1998) (prohibiting states from using TANF funds if they enacted family caps). Representative Smith explained his reasons for opposing family caps: "[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." 144 CONG. REC. E1142-01 (daily ed. June 16, 1998) (statement of Rep. Christopher H. Smith).

<sup>66</sup> See H.R. 3113, 107th Cong. § 405 (2001) (penalizing each state that uses family caps by reducing its TANF grant by 5%); Levin-Epstein, *supra* note 65, at 4.

tion that would have reduced each state's TANF grant by 5% if the state "penalize[d] the birth of a child."<sup>67</sup> Each bill failed to pass the House of Representatives.<sup>68</sup>

Five states continued their AFDC family cap policies after the establishment of TANF.<sup>69</sup> Other states, however, elected to discontinue their existing AFDC waivers to free themselves of their monitoring and reporting obligations under AFDC.<sup>70</sup> While some states have subsequently enacted family caps under TANF, a number of states have eliminated their family caps altogether.<sup>71</sup> For example, Maryland previously had a family cap but chose to distribute funds to selected non-profit third-party payees to purchase goods for the capped children.<sup>72</sup> However, it ended its program in October 2002<sup>73</sup> and stopped applying its family cap in September 2004.<sup>74</sup> Illinois also passed legislation in 2003 to discontinue its family cap starting in January 2004.<sup>75</sup> Additionally, Nebraska repealed its family cap in 2007.<sup>76</sup>

## B. The Maximum Family Grant (MFG) Rule

### 1. *Operation of the MFG Rule*

The MFG rule is CalWORKs' family cap.<sup>77</sup> CalWORKs provides cash grants to indigent families with children.<sup>78</sup> Generally, adults in California may only receive aid for themselves from CalWORKs for a total of sixty months, but their children, if eligible, may continue to

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<sup>67</sup> See H.R. REP. NO. 108-9 (2003), reprinted in CONG. REC. H513-23 (daily ed. Feb. 13, 2003) (Patsy Mink Memorial TANF Reauthorization Act); Levin-Epstein, *supra* note 65, at 4.

<sup>68</sup> Levin-Epstein, *supra* note 65, at 4.

<sup>69</sup> See Smith, *supra* note 20, at 154 n.11.

<sup>70</sup> *Id.* at 154.

<sup>71</sup> *Id.* at 154 & nn.11-12.

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

<sup>73</sup> *Id.*

<sup>74</sup> See *Family Cap Policies*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/IssuesResearch/HumanServices/WelfareReformFamilyCapPolicies/tabid/16306/Default.aspx> (last visited Nov. 19, 2010); Levin-Epstein, *supra* note 65, at 4; ROWE & MURPHY, *supra* note 27, at 142, 143 n.8.

<sup>75</sup> See Levin-Epstein, *supra* note 65, at 4; *Family Cap Policies*, *supra* note 74.

<sup>76</sup> See Diana Romero & Madina Agénor, *US Fertility Prevention as Poverty Prevention: An Empirical Question and Social Justice Issue*, 19 WOMEN'S HEALTH ISSUES 355, 356 (2009); ROWE & MURPHY, *supra* note 27, at 142.

<sup>77</sup> See CAL. WELF. & INST. CODE § 11450.04 (West 2010); MPP, *supra* note 10, § 44-314.2 (establishing the MFG rule).

<sup>78</sup> See *CalWORKs*, CAL. DEP'T OF SOC. SERVS., <http://www.ladpss.org/dpss/calworks/> (last visited Aug. 1, 2010). There are basic deprivation requirements and income and resource limits to make a family eligible for CalWORKs. See *CalWORKs Eligibility*, CAL. DEP'T OF SOC. SERVS., <http://www.ladpss.org/dpss/calworks/eligibility.cfm> (last visited Aug. 1, 2010); CALWORKS POLICY, *supra* note 22, at CW-44-207.1-2 (explaining financial eligibility).

receive aid beyond sixty months.<sup>79</sup> The cash grant that a family receives each month is the difference between the family's reasonably anticipated "Net Nonexempt Income" (NNI)<sup>80</sup> and the Maximum Aid Payment (MAP) for the Assistance Unit (AU), which is the number of family members in the household for purposes of calculating the grant.<sup>81</sup> For instance, if a family of two, living in region 1, has no income and therefore an NNI of 0, it will normally receive \$627 per month, the MAP for an AU of 2.<sup>82</sup> Likewise, a family of three with no income will normally receive \$776 per month, the MAP for an AU of 3.<sup>83</sup> The potential CalWORKs grant may vary depending on family size, region, and other factors, such as the MFG rule.<sup>84</sup>

Under the MFG rule, a child born into a family that received CalWORKs cash aid for the ten months prior to that child's birth without a break in aid for two or more months is not a part of the AU for purposes of determining the family's MAP to calculate the grant amount.<sup>85</sup> Children subject to the MFG rule still retain technical eligibility for ancillary CalWORKs benefits, such as child care if the parent is working or \$10 per month in special-needs payments if the child has a qualifying condition, such as special dietary requirements like low-calorie or salt diets, special travel expenses related to a medical diffi-

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<sup>79</sup> See *CalWORKs Time Limits*, CAL. DEP'T OF SOC. SERVS., <http://www.ladpss.org/dpss/calworks/timelimits.cfm> (last visited Aug. 1, 2010).

<sup>80</sup> "Net Nonexempt Income" includes "all earned income and disability-based unearned income less applicable disregards, plus any unearned income." MPP, *supra* note 10, § 44-315.1.11.

<sup>81</sup> See WELF. & INST. CODE § 11450(a); MPP, *supra* note 10, § 44-315.31-.38 (detailing how to calculate the amount of a grant).

<sup>82</sup> See MPP, *supra* note 10, § 44-315.321; *CCWRO 2010 Public Assistance Tables*, CAL. COAL. OF WELFARE RIGHTS ORG., INC. [hereinafter *Public Assistance Tables*], [http://www.ccwro.org/images/2010\\_pat.pdf](http://www.ccwro.org/images/2010_pat.pdf) (last visited Aug. 1, 2010). This amount represents a grant level for families who live in region 1 (which includes most major metropolitan areas in California) and who either are exempt from work participation requirements or are families in which only the children receive aid. California's nonexempt grant amounts are less than the exempt grant amounts. The nonexempt grant amounts in region 1 are currently \$561 for a family of two and \$694 for a family of three. See *id.* (listing exempt and nonexempt grant amounts); see also *CalWORKs: Cash Aid for Families with Children*, CONTRA COSTA CNTY. EMP'T & HUMAN SERVS. DEP'T 4 (Jan. 2010), <http://www.ehsd.org/work/pdfs/CalWORKs%20Facts%20Sheet-Rev011410.pdf> (explaining qualifications for exempt and nonexempt grant levels).

<sup>83</sup> See MPP, *supra* note 10, § 44-315.321; *Public Assistance Tables*, *supra* note 82 (listing grant amount for an exempt family of three in region 1 in California).

<sup>84</sup> See WELF. & INST. CODE §§ 11450(a), 11450.04; MPP, *supra* note 10, §§ 44-314.2, 44-315.31-.38.

<sup>85</sup> WELF. & INST. CODE § 11450.04; MPP, *supra* note 10, § 44-314.2.

culty, or telephone services for a hearing impairment.<sup>86</sup> However, certain exemptions make the MFG rule inapplicable.<sup>87</sup>

## 2. *Zero-Grant Situation Under the MFG Rule*

A family can have children who are eligible for CalWORKs yet still receive a monthly cash grant of \$0 because of the MFG rule. To illustrate this zero-grant situation, suppose that a family satisfies the income and eligibility requirements for CalWORKs. The mother does not qualify for CalWORKs because, for instance, she has already received aid under the program for sixty months.<sup>88</sup> She therefore does not count as a member of her family's AU for purposes of determining the MAP.<sup>89</sup> She has one child for whom she is receiving aid. She then has a second child while continuously receiving aid for the first child during the ten months prior to the birth of the second child. The second child is subject to the MFG rule and is therefore not a part of the AU for purposes of determining the MAP.<sup>90</sup> Suppose then that the first child reaches the CalWORKs age limit or leaves the home and goes into foster care. The first child's CalWORKs eligibility does not transfer to the second child because the second child is considered a capped child. The mother is not working, so she cannot receive benefits to cover child care for the second child. The second child does not have any qualifying "special needs" to receive the \$10 per month in special-needs payments. In this situation, the AU to determine the MAP is zero, and the MAP is therefore zero. Consequently, the family's monthly CalWORKs grant is \$0 even though

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<sup>86</sup> See CAL. EDUC. CODE § 8263(b)(2) (West 2009) (establishing payment of child care benefits to families who are income eligible); MPP, *supra* note 10, § 44-315.4-5 (establishing payment of "special needs payments"); see also CALWORKS POLICY, *supra* note 22, at CW-44-314.1 (discussing application of the MFG rule); *id.* at CW-44-211 (discussing "special needs").

<sup>87</sup> See, e.g., WELF. & INST. CODE § 11450.04(f); MPP, *supra* note 10, § 44-314.3.31 (establishing that recipients must receive notice of MFG rule); WELF. & INST. CODE § 11450.04(a); MPP, *supra* note 10, § 44-314.3.32 (exempting for two month break in aid in the ten months prior to birth of MFG child); WELF. & INST. CODE § 11450.04(d)(1); MPP, *supra* note 10, § 44-314.4 (exempting for family living off of aid for twenty-four consecutive months while child lived with family); WELF. & INST. CODE § 11450.04(b)(1)-(2); MPP, *supra* note 10, § 44-314.5.51-.52 (exempting for child conceived due to rape or incest); WELF. & INST. CODE § 11450.04(b)(3); MPP, *supra* note 10, § 44-314.5.53 (exempting for child conceived due to certain types of contraceptive failure); WELF. & INST. CODE § 11450.04(d)(2); MPP, *supra* note 10, § 44-314.5.54 (exempting for child if, when conceived, either parent was an "unaided nonparent caretaker relative"); WELF. & INST. CODE § 11450.04(d)(3); MPP, *supra* note 10, § 44-314.5.55 (exempting for child who does not live with either parent); *id.* § 44-314.5.56 (exempting for teen parent who moves out of AU and establishes own AU).

<sup>88</sup> See *supra* note 79 and accompanying text.

<sup>89</sup> See CALWORKS POLICY, *supra* note 22, at CW-82-832 (detailing persons who must be excluded from the AU). See generally *CalWORKs Time Limits*, *supra* note 79 (outlining sixty-month limit on adults receiving aid).

<sup>90</sup> See MPP, *supra* note 10, § 44-314.2.

there is one child in the household who is otherwise eligible for CalWORKs.

### 3. *General Assistance for MFG Children in the Zero-Grant Situation*

To try to obtain at least some financial support, some MFG children in the zero-grant situation have unsuccessfully applied for General Assistance (GA),<sup>91</sup> a form of public assistance in California that some counties refer to as General Relief.<sup>92</sup> Whereas CalWORKs is a grant for indigent families with children, GA is a loan that is typically provided to indigent adults.<sup>93</sup> California Welfare and Institutions Code (WIC) section 17000 establishes GA:

Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.<sup>94</sup>

WIC section 10000 outlines the purpose of the GA statute: “[T]o provide for protection, care, and assistance . . . and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to all of its needy and distressed.”<sup>95</sup> Consequently, California courts have concluded that the GA statute “imposes a *mandatory* duty upon the county to support its indigent and disabled persons.”<sup>96</sup>

In *McCormick v. County of Alameda*, a recent California superior court case, the court addressed the issue of allowing MFG children to

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<sup>91</sup> See, e.g., McCormick Memorandum, *supra* note 1, at 3 (explaining that Drusilla applied for GA but was denied because Dajohn was “eligible” for CalWORKs).

<sup>92</sup> See *General Assistance or General Relief*, CAL. DEP’T OF SOC. SERVS., <http://www.dss.ca.gov/cdssweb/PG132.htm> (last visited Aug. 1, 2010).

<sup>93</sup> See CAL. WELF. & INST. CODE § 11450 (West 2010); *General Assistance or General Relief*, *supra* note 92; see also WELF. & INST. CODE § 17300 (requiring reimbursement for the GA loan).

<sup>94</sup> WELF. & INST. CODE § 17000.

<sup>95</sup> *Id.* § 10000.

<sup>96</sup> *Jennings v. Jones*, 165 Cal. App. 3d 1083, 1092 (Cal. Ct. App. 1985) (emphasis in original). California courts have repeatedly struck down county regulations restricting the scope of the GA statutes. See, e.g., *Mooney v. Pickett*, 483 P.2d 1231, 1240–41 (Cal. 1971) (striking down a county regulation denying GA to unmarried persons on the sole ground that they were “employable”); *Arenas v. San Diego Cnty. Bd. of Supervisors*, 93 Cal. App. 4th 210, 214, 217 (Cal. Ct. App. 2001) (striking down a San Diego ordinance preventing all individuals convicted of a drug felony after August 22, 1996, from receiving GA); *Clay v. Tryk*, 177 Cal. App. 3d 119, 124–25 (Cal. Ct. App. 1986) (invalidating a county regulation that excluded GA recipients who were members of a shared household from receiving housing and utility benefits unless all the members of the household were GA recipients); *Bernhardt v. Bd. of Supervisors*, 58 Cal. App. 3d 806, 810–11 (Cal. Ct. App. 1976) (invalidating a county regulation denying GA to “young adults” absent “exceptional circumstances”).

receive GA when the family's monthly cash grant is \$0.<sup>97</sup> In that case, Drusilla had been receiving a \$398 monthly CalWORKs grant for her son, Derrick.<sup>98</sup> She then gave birth to Dajohn, for whom she could not receive any cash aid because of the MFG rule even though Dajohn was otherwise eligible for CalWORKs aid.<sup>99</sup> After Derrick left the household, Drusilla applied for GA for Dajohn.<sup>100</sup> The Social Services Agency denied the request.<sup>101</sup> An administrative hearing officer upheld the denial, contending that even though Dajohn could not receive a monthly CalWORKs cash grant, he was technically "eligible" for ancillary CalWORKs benefits such as child care and special-needs payments.<sup>102</sup> Drusilla appealed the administrative hearing officer's decision to the Alameda County Superior Court on behalf of petitioners Dajohn and Lifetime, an organization that assists low-income individuals with educational and training programs.<sup>103</sup>

In their superior court challenge, the petitioners asserted that the matter was a straightforward case of statutory interpretation of the GA statutes under California law.<sup>104</sup> They argued that the goal of statutory interpretation is to ascertain the legislature's intent so as to carry out the purpose of the law.<sup>105</sup> To determine statutory intent, the petitioners argued, courts must look first to the language of the statute, giving the words their usual, ordinary meaning.<sup>106</sup> If there is no ambiguity, a court should presume that the legislature "meant what it said."<sup>107</sup> The petitioners contended that Dajohn is eligible for GA because WIC section 17000 mandates providing GA to "all . . . persons," not "all . . . adults," who are not supported and relieved by other sources.<sup>108</sup> Accordingly, technical eligibility for ancillary CalWORKs benefits does not relieve and support Dajohn as required by WIC section 17000.<sup>109</sup>

In addition, the petitioners argued that because the legislature had created explicit exemptions in others areas, the lack of an explicit

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<sup>97</sup> See Order Denying Petitioner's Writ of Mandate and Granting Petitioner's Cause of Action for Declaratory Relief at 2-5, *McCormick v. Cnty. of Alameda*, No. RG08415945 (Cal. Super. Ct. Aug. 3, 2009) (unpublished decision) [hereinafter *McCormick Order*], available at <http://apps.alameda.courts.ca.gov/domainweb/html/index.html>; see also *supra* INTRODUCTION (providing background on the situation at issue in *McCormick*).

<sup>98</sup> *McCormick Memorandum*, *supra* note 1, at 2.

<sup>99</sup> *Id.* at 1-2.

<sup>100</sup> *Id.* at 3.

<sup>101</sup> *Id.*

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

<sup>103</sup> *Id.* at 3-4.

<sup>104</sup> See *id.* at 4.

<sup>105</sup> See *id.* at 4 (citing *People v. Snook*, 947 P.2d 808, 810 (Cal. 1997)).

<sup>106</sup> See *id.* at 4-5 (citing *Hunt v. Superior Court*, 987 P.2d 705, 716-17 (Cal. 1999)).

<sup>107</sup> *Id.* at 4-5 (citing *Hunt*, 987 P.2d at 716).

<sup>108</sup> See *id.* at 5 (citing CAL. WELF. & INST. CODE § 17000 (West 2010)).

<sup>109</sup> See *id.* at 9-10.

categorical exclusion for children—or MFG children for that matter—in the WIC sections for GA further demonstrated the legislature’s intent.<sup>110</sup> For example, the legislature prohibited adults who have received their maximum sixty months of welfare assistance through CalWORKs<sup>111</sup> or who have drug-related sanctions<sup>112</sup> from receiving GA.<sup>113</sup> The petitioners further stated that if a statute has explicit exemptions, then under the canon of statutory construction *expressio unius est exclusio alterius*, a court should not infer additional exemptions in the absence of clear legislative intent to do so.<sup>114</sup>

Finally, the petitioners contended that WIC recognizes that children are authorized to receive GA.<sup>115</sup> Under WIC section 17300, a GA recipient’s “responsible relative” is required to reimburse the county for the GA loan.<sup>116</sup> WIC section 17300 defines “responsible relative” as “the spouse of the recipient and parent of a *minor child who is a recipient*.”<sup>117</sup>

The court held that Dajohn was ineligible to receive GA.<sup>118</sup> It noted that Dajohn “qualifies in every way for a GA cash aid grant except one and it is disqualifying.”<sup>119</sup> It concluded that Alameda County Regulation section 9-2-0.1 disqualified him.<sup>120</sup> The regulation states: “An individual meets the age requirement for General Assistance eligibility if he or she is . . . a minor who lacks a source of basic care and support but does not qualify for any federal or state assistance program.”<sup>121</sup> The court held that even though Dajohn did not receive any cash aid from CalWORKs, he still *qualified* for and participated in CalWORKs.<sup>122</sup> The court then simply stated that it “determine[d] that GA Regulation § 9-2-0.1 is not inconsistent with California statutes. Indeed, it is entirely consistent with the disincentive provision of the CalWorks program found at California Welfare and Institutions Code § 11450.04 that ‘punishes’ children like Petitioner, whose

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<sup>110</sup> See *id.* at 5.

<sup>111</sup> See WELF. & INST. CODE § 11454.

<sup>112</sup> See *id.* § 11327.5.

<sup>113</sup> See McCormick Memorandum, *supra* note 1, at 5.

<sup>114</sup> See *id.* (citing Rojas v. Superior Court, 93 P.3d 260, 270–71 (Cal. 2004)).

<sup>115</sup> See Petitioners’ Reply to Respondents’ Opposition to Motion for Writ of Mandate at 4, McCormick v. Cnty. of Alameda, No. RG08415945 (Cal. Super. Ct. June 26, 2009) (unpublished decision), available at <http://apps.alameda.courts.ca.gov/domainweb/html/index.html>.

<sup>116</sup> *Id.* (citing WELF. & INST. CODE § 17300).

<sup>117</sup> *Id.* (quoting WELF. & INST. CODE § 17300).

<sup>118</sup> See McCormick Order, *supra* note 97, at 2–3.

<sup>119</sup> *Id.* at 3.

<sup>120</sup> See *id.* at 5.

<sup>121</sup> *Id.* at 3 (quoting ALAMEDA CNTY. GEN. ASSISTANCE REG. § 9-2-0.1 (revised July 19, 2010), [http://www.alamedasocialservices.org/public/services/financial\\_assistance/GA\\_Regulations/index.cfm](http://www.alamedasocialservices.org/public/services/financial_assistance/GA_Regulations/index.cfm))).

<sup>122</sup> See *id.* at 5.



mother knowingly bore additional children without the monetary means with which to support them.”<sup>123</sup>

### C. Criticism of Family Caps

#### 1. *The Punitive Purpose of Family Caps*

A prominent criticism of family caps is that one reason for enacting family caps is the belief 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.”<sup>124</sup> Proponents of welfare caps thus “argue that by withholding . . . benefits, the government can transform present recipients into productive members of society, thereby solving the intractable problems of poverty.”<sup>125</sup> Historically, welfare policies have distinguished between the “deserving” poor and “undeserving” poor and have justified punishing the latter to prevent them from becoming dependent upon public aid.<sup>126</sup> Legislators often blame the “undeserving” poor for social problems and, accordingly, base welfare reform policies such as family caps on the assumption that these individuals do not deserve to have children.<sup>127</sup>

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<sup>123</sup> *Id.* at 6. While the court in *McCormick v. County of Alameda* concluded that the petitioner could not receive GA, an appellate court might disagree with the superior court’s conclusion that the county regulation and the GA statutes are not in conflict. Indeed, the case is currently pending in appellate proceedings. See Receipt for Notice of Appeal by DCA Filed, *McCormick v. Cnty. of Alameda*, No. RG08415945 (Cal. Super. Ct. Dec. 17, 2009) (unpublished decision), available at <http://apps.alameda.courts.ca.gov/domainweb/html/index.html>.

California courts have not hesitated to strike down county regulations limiting the scope of the GA statutes. See cases cited *supra* note 96. Just as the California Supreme Court in *Mooney v. Pickett* invalidated a county regulation that denied GA to unmarried individuals on the sole basis that they were potentially employable, a California appellate court may strike down this county regulation that denies relief to MFG children based on their potential eligibility for ancillary CalWORKs benefits. See *Mooney v. Pickett*, 483 P.2d 1231, 1240–41 (Cal. 1971). As the court stated in *Mooney*, “To the man who cannot obtain employment his theoretical employability is a barren resource; it is inedible; it provides neither shelter nor any other necessity of life.” *Id.* at 1238. Such is also the case for MFG children who have theoretical CalWORKs eligibility. See *McCormick Memorandum*, *supra* note 1, at 6.

<sup>124</sup> Kaufman, *supra* note 36, at 313.

<sup>125</sup> Williams, *supra* note 40, at 720.

<sup>126</sup> See *id.* The Social Security Act originally allowed states to exclude African-Americans from receiving welfare. See Williams, *supra* note 40, at 722.

<sup>127</sup> See Broomfield, *supra* note 19, at 220 (“[O]ne theory behind welfare reform is based on the same premise—that certain people in our society do not deserve to procreate.”); Kaufman, *supra* note 36, at 308 (“[M]yths which differentiate the ‘undeserving’ poor from the ‘deserving’ poor justify punitive welfare policies on the basis that certain populations (unwed mothers, ‘lazy’ and shiftless paupers) are responsible for their poverty and must be discouraged and prevented from depending upon public assistance.”).

## 2. *The Myth of the "Welfare Queen"*

A common misconception is that welfare recipients have more children in order to receive additional welfare benefits.<sup>128</sup> Social science research indicates, however, that welfare recipients do not base their childbearing decisions on receipt of welfare benefits.<sup>129</sup> Although methodological limitations make it difficult to study the impact of family caps,<sup>130</sup> one review of twenty-three studies "generally show[ed] no direct relationship between AFDC benefit levels (or differentials) and family size."<sup>131</sup>

Furthermore, the argument that family caps may discourage welfare recipients from having more children in order to increase their grant levels also presupposes that welfare recipients calculate how their family-planning decisions affect their grant levels. It is nonsensical to argue that welfare recipients, who are often struggling to survive from day to day, have the time and energy to fully learn the vast number of state and federal welfare regulations and apply those rules to their reproductive decisions.<sup>132</sup> Consistent with this intuition, research indicates that welfare recipients often do not understand the welfare system and its labyrinth of regulations.<sup>133</sup> For example, a 2001 study of Arizona's family cap found that between 29% and 37% of Arizona's welfare recipients did not even know the family cap existed.<sup>134</sup> Similarly, a 1997 study found that only 63% percent of Delaware's welfare recipients were aware of Delaware's family cap.<sup>135</sup> Even if welfare recipients fully understand how their grant levels may vary

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<sup>128</sup> See Smith, *supra* note 20, at 156–57.

<sup>129</sup> See MICHAEL J. CAMASSO ET AL., A FINAL REPORT ON THE IMPACT OF NEW JERSEY'S FAMILY DEVELOPMENT PROGRAM 127–28 (1998) (citing studies that generally find no direct correlation between benefit amounts and family size); Smith, *supra* note 20, at 157 ("Social science research . . . consistently concludes that women on welfare do not have additional children for the purpose of obtaining an increase in benefits."); see also Williams, *supra* note 40, at 739–40 ("Empirical studies have consistently documented the lack of a correlation between the receipt of AFDC benefits and the child-bearing decisions of unmarried women—even for young, unmarried women.").

<sup>130</sup> See JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POLICY, OPEN QUESTIONS: NEW JERSEY'S FAMILY CAP EVALUATION 2 (1999), available at <http://www.clasp.org/admin/site/publications/files/0040.pdf>.

<sup>131</sup> CAMASSO ET AL., *supra* note 129, at 127–28 (quotations omitted).

<sup>132</sup> See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 673 (2009) (stating that welfare recipients have a limited knowledge of welfare rules and that "[i]n some states the rules are so complex that it is unlikely any welfare recipient knows or fully understands them unless or until she finds herself subject to them.").

<sup>133</sup> See *id.* (discussing how welfare recipients frequently do not understand welfare rules).

<sup>134</sup> See GREGORY MILLS ET AL., ABT ASSOCS. INC., EVALUATION OF THE ARIZONA EMPOWER WELFARE REFORM DEMONSTRATION: EXECUTIVE SUMMARY 4 (2001), available at [http://www.abtassociates.com/reports/ES-2001367766680\\_93366.pdf](http://www.abtassociates.com/reports/ES-2001367766680_93366.pdf).

<sup>135</sup> See GREGORY MILLS ET AL., ABT ASSOCS. INC., THE ABC EVALUATION: THE EARLY ECONOMIC IMPACTS OF DELAWARE'S A BETTER CHANCE WELFARE REFORM PROGRAM 15 (1997), available at <http://www.abtassociates.com/reports/early-impacts.pdf>.

according to family size, it is unreasonable to believe that a welfare recipient would choose to have another child—with all the corresponding challenges and obligations—for a grant increase that could be as little as \$24 a month.<sup>136</sup>

### 3. *Harmful Health Effects of Family Caps*

Most welfare recipients live in dire poverty.<sup>137</sup> With the paltry amount of aid that TANF provides, families frequently cannot afford to obtain the basic necessities of life.<sup>138</sup> While little research currently exists on the health effects of family caps in particular, research indicates that preventing families from receiving basic necessities by reducing welfare benefits could lead to greater familial poverty, which in turn contributes to “poor health, developmental, and social outcomes” in children.<sup>139</sup> For example, children in poverty are more likely to experience health and physiological problems than more af-

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<sup>136</sup> See Smith, *supra* note 20, at 158; *Temporary Assistance for Needy Families (TANF)*, MISS. DEP'T OF HUMAN SERVS., DIV. OF ECON. ASSISTANCE [hereinafter Mississippi TANF], [http://www.mdhs.state.ms.us/ea\\_tanf.html](http://www.mdhs.state.ms.us/ea_tanf.html) (stating that the maximum monthly TANF benefit in Mississippi is \$110 for the first person, \$36 for the second person, and \$24 for each additional person) (last visited Nov. 19, 2010).

<sup>137</sup> See Smith, *supra* note 20, at 158.

<sup>138</sup> See *id.* (stating that “the median benefit increase for a new child . . . is barely enough to cover the monthly costs of diapers, formula, and clothing”); see also *supra* notes 82–83 and accompanying text (discussing grant levels in California); *supra* note 136 (discussing grant levels in Mississippi). Many states have frozen their TANF benefits at the 1996 levels, and for states that have increased the benefits, the amounts have not kept pace with inflation. LIZ SCHOTT & ZACHARY LEVINSON, CTR. ON BUDGET AND POLICY PRIORITIES, TANF BENEFITS ARE LOW AND HAVE NOT KEPT PACE WITH INFLATION 2 (2008), available at <http://www.cbpp.org/pdf/11-24-08tanf.pdf>.

The 2009 federal poverty line in the contiguous forty-eight states and the District of Columbia is \$14,570 per year for a family of two and \$18,310 per year for a family of three. See Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199 (Jan. 23, 2009), available at <http://aspe.hhs.gov/poverty/09fedreg.pdf>. Each state's benefit levels fall far below the poverty line. See ROWE & MURPHY, *supra* note 27, at 88–90 (listing states' benefit levels). Research suggests that families require incomes that are *twice* the poverty level to fully cover necessities such as food, housing, and utilities, and therefore, none of these grants come even close to sufficiently providing for a family's basic needs. See NANCY K. CAUTHEN & 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), available at [http://www.nccp.org/publications/pdf/text\\_528.pdf](http://www.nccp.org/publications/pdf/text_528.pdf). In one study of families with incomes below 200% of the poverty line, 18% stated that they had missed meals often or sometimes, and 12.5% reported that they did not have enough food often or sometimes. Of the families studied, 12.5% also reported that they had a family member who did not receive medical care or had to delay medical care in the previous year. Twenty-five percent stated that they were unable to pay their mortgage, rent, or utility bill. JOEL F. HANDLER & YEHESEKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 24 (2007) (citing John Iceland & Kurt Baum, *Income Poverty and Material Hardship: How Strong Is the Association?* (Nat'l Poverty Ctr. Working Paper Series No. 04-17 (2004))).

<sup>139</sup> CAPPING A FAMILY'S BENEFITS, *supra* note 24, at 3.

fluent children.<sup>140</sup> Through neural imaging and other testing, researchers have also discovered cognitive deficits among impoverished children.<sup>141</sup> Finally, studies have shown that children in poverty have a greater risk of developing social and emotional problems.<sup>142</sup> Consequently, by reducing the benefits families receive to spend on basic necessities, family caps are likely to exacerbate the many mental and physical health problems that children in poverty are already at increased risk of developing.<sup>143</sup>

### III.

#### COURT CHALLENGES TO FAMILY CAPS

##### A. Federal Courts

Legal efforts to overturn state family cap policies in federal courts have been unsuccessful. In *Dandridge v. Williams*, the Supreme Court upheld the “maximum grant regulation” of Maryland’s AFDC program.<sup>144</sup> This regulation imposed an upper limit on the grant amount that a single family could receive.<sup>145</sup> The plaintiffs, who were AFDC recipients, contended that the regulation violated the Social Security Act, which provided that aid “shall . . . be furnished with reasonable promptness to all eligible individuals,”<sup>146</sup> as well as the Equal Protection Clause of the Fourteenth Amendment.<sup>147</sup> The Court held that the regulation did not violate the Social Security Act because it did not completely deprive children of the largest families of aid but merely limited the overall size of the family grant.<sup>148</sup> Applying rational basis review, the Court further held that the regulation did not violate the Equal Protection Clause of the Fourteenth Amendment be-

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<sup>140</sup> See, e.g., David Wood, *Effect of Child and Family Poverty on Child Health in the United States*, 112 PEDIATRICS 707, 709 (2003) (citing Deborah A. Dawson, *Family Structure and Children’s Health: United States, 1988*, 7 VITAL HEALTH STAT. 1, 1–47 (1997)).

<sup>141</sup> See, e.g., Mark M. Kishiyama et al., *Socioeconomic Disparities Affect Prefrontal Function in Children*, 21 J. COGNITIVE NEUROSCIENCE 1106, 1106 (2008).

<sup>142</sup> See, e.g., KRISTEN ANDERSON MOORE ET AL., CHILD TRENDS RESEARCH BRIEF: CHILDREN IN POVERTY: TRENDS, CONSEQUENCES, AND POLICY OPTIONS 4 n.35 (2009) (citing W. Jean Yeung et al., *How Money Matters for Young Children’s Development: Parental Investment and Family Processes*, 73 CHILD DEV. 1861, 1861–79 (2002)), available at [http://www.childtrends.org/Files//Child\\_Trends-009\\_04\\_07\\_RB\\_ChildreninPoverty.pdf](http://www.childtrends.org/Files//Child_Trends-009_04_07_RB_ChildreninPoverty.pdf).

<sup>143</sup> See STARK & LEVIN-EPSTEIN, *supra* note 57, at 15 (“Numerous studies have measured the effects of poverty on child well-being; a family cap, by definition, would increase the poverty of excluded children. To the extent that the family cap increases the poverty experienced by some families, it increases the likelihood that the child will experience the well-documented negative effects of poverty such as: stunted growth from poor nutrition, impaired educational development, and weakened family cohesion.” (emphasis omitted)).

<sup>144</sup> See 397 U.S. 471, 486 (1970).

<sup>145</sup> See *id.* at 473.

<sup>146</sup> 42 U.S.C. § 602(a)(10)(A) (1994) (current version at 42 U.S.C. § 602 (1996)); see *Dandridge*, 397 U.S. at 473.

<sup>147</sup> See *Dandridge*, 397 U.S. at 471, 473.

<sup>148</sup> See *id.* at 480–81, 483.

cause it was rationally related to the state's "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor."<sup>149</sup>

In *C.K. v. New Jersey Department of Human Services*, the plaintiffs, who were AFDC recipients, challenged New Jersey's AFDC family cap provision, which eliminated the standard increase in AFDC benefits for a woman who gave birth to another child while receiving AFDC benefits.<sup>150</sup> The plaintiffs challenged the family cap provision on equal protection and due process grounds.<sup>151</sup> The United States Court of Appeals for the Third Circuit disposed of their claims and upheld the district court's grant of summary judgment in favor of the Department of Health and Human Services.<sup>152</sup>

The Third Circuit rejected the plaintiffs' contention that the program should be subject to strict scrutiny.<sup>153</sup> In doing so, it agreed with the district court that the program does not unduly burden the plaintiffs' procreative choices because the program "in no way conditions receipt of benefits upon [the] plaintiffs' reproductive choices."<sup>154</sup> It also agreed with the district court that the program is "rationally related to a legitimate governmental purpose, in that the state's interests in giving AFDC recipients the same structure of incentives as working people, promoting individual responsibility, and strengthening and stabilizing the family unit are clearly legitimate."<sup>155</sup> Finally, it concluded that the district court was correct in holding that the welfare program was rationally related to the legitimate state interests of "altering the cycle of welfare dependency that it has determined AFDC engenders in its recipients as well as promoting individual responsibility and family stability."<sup>156</sup>

## B. State Courts

### 1. *Federal Constitutional Rights*

Challenges to family caps based on alleged violations of federal constitutional rights have received a similarly hostile reception in state courts. In an Indiana case, *N.B. v. Sybinski*, the plaintiffs were a mother, N.B., her minor child, L.K., and a certified class of TANF recipients who, because of the state's family cap, could not receive in-

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<sup>149</sup> *Id.* at 486.

<sup>150</sup> *See* 92 F.3d 171, 177 (3d Cir. 1996).

<sup>151</sup> *See id.*

<sup>152</sup> *See id.* at 177-78, 195.

<sup>153</sup> *See id.* at 194-95.

<sup>154</sup> *Id.* at 194 (quoting *C.K. v. Shalala*, 883 F. Supp. 991, 1014 (D.N.J. 1995)).

<sup>155</sup> *Id.* at 194.

<sup>156</sup> *Id.* at 195 (quoting *Shalala*, 883 F. Supp. at 1015). The court also rejected the petitioners' claim that the waiver for the family cap violated the Administrative Procedure Act (APA). *See id.* at 181, 188-89.

creased benefits after having given birth to another child.<sup>157</sup> The plaintiffs argued that the family cap violated their rights under the Equal Protection Clause because it discriminated against children who lived with their parents by treating them differently than children who did not live with their parents.<sup>158</sup> Under the family cap, children who lived with their parents could not receive benefits, but children who lived with a qualified caretaker other than their parents could receive benefits.<sup>159</sup> The plaintiffs claimed that the family cap infringed upon the fundamental right of family association and did not substantially relate to permissible state objectives.<sup>160</sup>

The court rejected the plaintiffs' claim that the family cap should be subject to strict scrutiny for infringing upon a fundamental right.<sup>161</sup> While conceding that the family cap "may have some incidental effect on family structure," it declined to apply a heightened level of review.<sup>162</sup> The court analogized the case to *Bowen v. Gilliard*, in which the Supreme Court, using rational basis review, upheld a law that counted child support as income in the AFDC program even though the law had an unintended effect on family association.<sup>163</sup> In *Bowen*, the Supreme Court concluded: "That some families may choose to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect are to intrude on choices concerning family living arrangements."<sup>164</sup> Similarly, the court in *Sybinski* found that the family cap does not require a capped child to be removed from the home but merely prevents the parents of a capped child from receiving additional benefits for the child.<sup>165</sup>

The plaintiffs in *Sybinski* contended that the purpose of the family cap was simply to discourage the birth of more children, which they claimed was not a legitimate interest.<sup>166</sup> On the other hand, the state asserted that the family cap promoted a legitimate interest in "altering the cycle of welfare dependency."<sup>167</sup> It also contended that the family cap "encourages self-sufficiency and personal responsibility, maintains parity between welfare recipients and the working poor, and provides incentives for family planning" and therefore passes the rational basis

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

158 *See id.* at 1108.

159 *See id.*

160 *Id.* at 1112.

161 *See id.* at 1108.

162 *Id.*

163 *Id.* at 1108–09 (citing *Bowen v. Gilliard*, 483 U.S. 587, 601–02 (1987)).

164 *Id.* at 1109.

165 *See id.*

166 *See id.*

167 *Id.*

test.<sup>168</sup> The court agreed with the state and concluded: “[T]o give TANF recipients the same structure of incentives as working people, to promote individual responsibility, and to strengthen and stabilize the family unit” are legitimate state interests.<sup>169</sup>

Finally, the court disposed of the plaintiffs’ substantive due process claim that the family cap “punishe[d] children by increasing their poverty without any rational justification for that punishment that would relate to a legitimate government interest.”<sup>170</sup> The court determined that the state has a legitimate interest in “reforming welfare.”<sup>171</sup> Mirroring the reasoning in *C.K. v. Shalala*,<sup>172</sup> the district court decision in *C.K. v. New Jersey Department of Human Services*,<sup>173</sup> the court in *Sybinski* concluded that “the family cap does not punish children for the behavior of their parents, nor does it completely deprive children of benefits they might otherwise receive.”<sup>174</sup>

## 2. State Constitutional Rights

State courts have also rejected challenges to family caps based on alleged violations of state constitutional rights. In *Sojourner A. v. New Jersey Department of Human Services*, a class of plaintiffs alleged that New Jersey’s family cap violated their rights to privacy and equal protection under the New Jersey Constitution.<sup>175</sup> The plaintiffs claimed that the family cap infringed upon their right to privacy because it coerced poor women into not having more children.<sup>176</sup> They further contended that the family cap violated their equal protection rights because certain classes of poor children could not receive welfare benefits while, in contrast, other classes of similarly situated children could—provided that their families did not begin receiving welfare until after they were born.<sup>177</sup>

On appeal, the court rejected the plaintiffs’ claims and affirmed the trial court’s grant of summary judgment to the New Jersey Depart-

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<sup>168</sup> See *id.*

<sup>169</sup> See *id.* at 1110.

<sup>170</sup> See *id.* at 1112–13.

<sup>171</sup> *Id.* at 1113.

<sup>172</sup> See 883 F. Supp. 991, 1013 (D.N.J. 1995).

<sup>173</sup> 92 F.3d 171 (3d Cir. 1996).

<sup>174</sup> *Sybinski*, 724 N.E.2d at 1113 (citing *Shalala*, 883 F. Supp. at 1013). The court in *Shalala* similarly concluded that New Jersey’s family cap “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.” *Shalala*, 883 F. Supp. at 1013.

<sup>175</sup> See 794 A.2d 822, 824–25 (N.J. Super. Ct. App. Div. 2002).

<sup>176</sup> See *id.* at 825.

<sup>177</sup> See *id.* at 829.

ment of Human Services.<sup>178</sup> While the court's precedent required the application of strict scrutiny if a regulation placed a "direct legal obstacle" in the path of a woman's decision to have additional children, the court nonetheless concluded that the family cap "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."<sup>179</sup> It determined that the added burden that the family cap imposed was not "substantial" and therefore did not require a heightened level of review.<sup>180</sup> The court followed the reasoning from *C.K. v. Shalala*.<sup>181</sup> In *Shalala*, the court asserted that working families do not receive increases in their wages when they have additional children, and therefore, families on welfare also should not receive increases in their welfare grants when they have additional children.<sup>182</sup> The court in *Sojourner* consequently found the family cap to be "reasonably related to [the] legitimate governmental objectives [of] breaking the cycle of poverty, promoting responsibility and self-reliance, and decreasing welfare dependency and strengthening families."<sup>183</sup>

### 3. California

In *Sneed v. Saenz*, a California appellate court upheld the MFG rule.<sup>184</sup> The plaintiffs were welfare recipients with children subject to the MFG rule who challenged the income-calculating procedures that determined the grant amounts for children subject to the MFG rule.<sup>185</sup> They claimed that the procedures violated their rights to privacy and equal protection.<sup>186</sup> The court rejected the plaintiffs' claims and concluded: "[T]he MFG statute has no coercive effect so as to make it unconstitutional. Any impact on family living arrangements is unintended, indirect and attenuated."<sup>187</sup> The court applied rational basis review after determining that the case involved no fundamental

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<sup>178</sup> See *id.* at 824.

<sup>179</sup> See *id.* at 833.

<sup>180</sup> See *id.* at 833-34.

<sup>181</sup> See *id.* at 830, 834 (citing *Shalala*, 883 F. Supp. at 1013-14).

<sup>182</sup> See *Shalala*, 883 F. Supp. at 1013-14 ("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.").

<sup>183</sup> *Sojourner A.*, 794 A.2d at 824. The court also asserted that the family cap provision does not "completely deprive either the family unit of the benefits it is already receiving, or eliminate all benefits to the newborn child." *Id.* at 834.

<sup>184</sup> 120 Cal. App. 4th 1220, 1251 (Cal. Ct. App. 2004).

<sup>185</sup> See *id.* at 1232-33.

<sup>186</sup> *Id.* at 1248.

<sup>187</sup> *Id.* at 1249.



right or suspect classification.<sup>188</sup> Applying this deferential standard of review, the court held that “[t]he MFG statute is rationally related to California’s legitimate purposes: to encourage families to provide for their own economic security by participating in the work force and to provide sufficient support and protection for their children, with the goal of ending the cycle of welfare dependence.”<sup>189</sup>

#### IV.

#### PROBLEMS WITH FAMILY CAPS IN THE ZERO-GRANT SITUATION

##### A. Flawed Legal Reasoning

When a family cannot receive any aid because of a family cap even though the family has children who are otherwise eligible for welfare funds, the operation of the family cap creates a situation that contradicts the reasoning courts use to justify upholding the constitutionality of family caps.

##### 1. *Not Completely Depriving Families of Welfare Benefits*

Courts often assert that because the effect of the family cap is only to make a family share the welfare resources of noncapped children with capped children, the family cap does not completely deprive families of welfare funds. For instance, in *N.B. v. Sybinski*, the court stated that “the family cap . . . does [not] completely deprive children of benefits they might otherwise receive.”<sup>190</sup> Similarly, the court in *C.K. v. Shalala* concluded that New Jersey’s family cap “does . . . [not] 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.”<sup>191</sup> Finally, the court in *Sojourner A. v. New Jersey Department of Human Services* asserted that the family cap provision does not “completely deprive either the family unit of the benefits it is already receiving, or eliminate all benefits to the newborn child.”<sup>192</sup>

Yet, as illustrated in Part II.B, a family cap actually does completely deprive a family of benefits in the zero-grant situation. For example, a family receiving welfare benefits for a child may have another child who is otherwise eligible for welfare benefits but cannot receive those welfare benefits because of the family cap. If the first

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<sup>188</sup> See *id.* at 1249–50.

<sup>189</sup> *Id.* at 1250.

<sup>190</sup> 724 N.E.2d 1103, 1113 (Ind. Ct. App. 2000).

<sup>191</sup> 883 F. Supp. 991, 1013 (D.N.J. 1995).

<sup>192</sup> 794 A.2d 822, 834 (N.J. Super. Ct. App. Div. 2002).

child reaches the age limit or leaves the home to go into foster care, the monthly grant becomes \$0 because the noncapped child's welfare eligibility does not transfer to the capped child. The family cap in the zero-grant situation thus completely deprives the family of welfare benefits, contradicting the reasoning that courts have used to uphold family caps.

## 2. *Putting Families on Welfare on Par with Working Families*

Next, courts frequently analogize the situation of a family receiving welfare to that of a working family as a justification for upholding the constitutionality of family caps. For example, the court in *C.K. v. Shalala* stated:

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.<sup>193</sup>

This analogy is misleading because working families are in a drastically different situation than families on welfare. When working families do not receive wage increases upon having additional children, they likely can still manage to get by because they can use their income to care for those children. Families on welfare, on the other hand, receive barely enough to survive and are often desperately struggling to avoid suffering a serious illness or becoming homeless.<sup>194</sup> Adding the costs of having another child to a family that is already living on the edge—perhaps on as little as a few hundred dollars a month—could seriously jeopardize that family's ability to buy enough food or pay its rent.<sup>195</sup>

Another problem with the courts' analogy is that not receiving an increase in wages for a working family is a very different situation from not receiving any wages at all. Likewise, not receiving an increase in welfare benefits is much different from not receiving any welfare benefits at all. The analogy fails when family caps completely deny families any welfare benefits rather than simply make families share the benefits of noncapped children with capped children.

In fact, taken to its logical conclusion, the analogy between working families and families on welfare would support providing at least some benefits to families in the zero-grant situation. When working families lose their employment and consequently do not receive any wages at all, society provides those families with some form of finan-

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<sup>193</sup> *Shalala*, 883 F. Supp. at 1013–14.

<sup>194</sup> See Smith, *supra* note 20, at 158–59.

<sup>195</sup> I am grateful to Ed Barnes for pointing out this problem with the courts' analogy.

cial assistance, such as unemployment insurance or welfare benefits; working families thus have a safety net to fall back on. However, the consequences for families on welfare are disastrous when the safety net upon which they rely completely disappears, as in the zero-grant situation. Consequently, when families on welfare are subject to the family cap in the zero-grant situation, society should provide them, like working families, with at least some financial assistance.

## B. Flawed Public Policy

Courts have articulated certain public policy goals as legitimate state interests in their decisions upholding the constitutionality of family caps.<sup>196</sup> In the zero-grant situation, completely denying a family of benefits almost certainly does not further a legitimate state interest. The application of family caps in the zero-grant situation more likely frustrates, rather than supports, these public policy goals.

### 1. *Reducing Poverty*

Courts have claimed that states have a legitimate interest in reducing poverty and that family caps are rationally related to that interest. For instance, the court in *Sojourner A. v. New Jersey Department of Human Services* found New Jersey's family cap to be rationally related to the legitimate state interest of "breaking the cycle of poverty."<sup>197</sup>

How family caps can promote this legitimate state interest in the zero-grant situation is unclear. Families will most likely be unable to escape poverty or the need for welfare if they do not receive any cash assistance to purchase the basic necessities of life. Even when capped families are not completely deprived of welfare benefits, the effects of poverty on their children are profound. Research indicates that children in poverty are more likely to suffer adverse health and physiological effects.<sup>198</sup> For example, impoverished children experience increased rates of hospital admissions and disability days.<sup>199</sup> One longitudinal study, examining thirteen-year-old children living in poverty, found that their stress-regulatory mechanisms are compromised, placing more physiological strain on their organs and tissues than on those of children who are not poor.<sup>200</sup> Poor children are also more

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<sup>196</sup> See *supra* notes 144–89 and accompanying text.

<sup>197</sup> See 794 A.2d 822, 824 (N.J. Super. Ct. App. Div. 2002).

<sup>198</sup> See, e.g., Wood, *supra* note 140, at 709 (citing Dawson, *supra* note 141).

<sup>199</sup> See, e.g., *id.*

<sup>200</sup> See *How the Physiological Effects of Poverty on Young Children Takes Its Toll on Health*, MED. NEWS TODAY (Nov. 8, 2007) [hereinafter *Physiological Effects*], <http://www.medicalnewstoday.com/articles/88146.php>. One of the study's authors explained: "These muted responses of stress regulatory mechanisms, which are part of the cardiovascular system, not only compromise the ability of the adolescents' bodies to respond to such stressors as noise, poor housing and family turmoil but also indicate they are suffering from more

likely to have low birth weight; poor nutrition; conditions such as asthma, anemia, and pneumonia; and increased exposure to environmental toxins like toxic waste sites and lead paint.<sup>201</sup>

Children in poverty are also more likely to suffer severe cognitive deficits.<sup>202</sup> For example, one study found significantly diminished brain function in low-income nine- and ten-year-old children compared to wealthier children.<sup>203</sup> The study found that the poorer children suffered lesions in their prefrontal cortex, the brain region that controls higher-level thinking and problem solving, which was similar to that experienced by stroke patients.<sup>204</sup> One explanation for these outcomes is that children from low-income families receive fewer cognitively stimulating experiences necessary for their brain development.<sup>205</sup> As some experts have noted: "Because of economic limitations, poor parents have more difficulty providing intellectually stimulating facilities such as toys, books, adequate day-care, or pre-school education that are essential for children's development."<sup>206</sup>

Impoverished children are also more likely to develop social problems.<sup>207</sup> For example, poor children experience an increased risk of behavioral problems such as impulsiveness, difficulty getting along with others, aggression, and conduct disorder.<sup>208</sup> They are also more likely to have emotional problems such as anxiety, depression, and low self-esteem.<sup>209</sup> Literature on child development also indicates that children in poverty attain much lower educational achievement than children who are not poor.<sup>210</sup> For instance, researchers have found that children in poverty are more than twice as likely to drop

stress-induced physiological strain on their organs and tissues than other young people . . ." *Id.*

<sup>201</sup> *Effects of Poverty, Hunger, and Homelessness on Children and Youth*, AM. PSYCHOL. ASS'N [hereinafter *Effects of Poverty*], <http://www.apa.org/pi/families/poverty.aspx> (last visited Sept. 28, 2010). Even after controlling for a number of demographic factors, experts have concluded that poor children are more likely to have increased levels of lead in their blood. See J. Lawrence Aber et al., *The Effects of Poverty on Child Health and Development*, 18 ANN. REV. PUB. HEALTH 463, 475 (1997) (citing Debra J. Brody et al., *Blood Lead Levels in the US Population*, 277 J. AM. MED. ASS'N 277, 277-83 (1994)).

<sup>202</sup> See, e.g., Kishiyama et al., *supra* note 141, at 1106.

<sup>203</sup> See *id.*; see also Greg Toppo, *Study: Poverty Dramatically Affects Children's Brains*, USA TODAY (Dec. 10, 2008), [http://www.usatoday.com/news/health/2008-12-07-childrens-brains\\_N.htm](http://www.usatoday.com/news/health/2008-12-07-childrens-brains_N.htm).

<sup>204</sup> See *id.*

<sup>205</sup> See Kishiyama et al., *supra* note 142, at 1113.

<sup>206</sup> Aber et al., *supra* note 201, at 475.

<sup>207</sup> See, e.g., MOORE ET AL., *supra* note 142, at 4 (citing Yeung et al., *supra* note 142, at 1861-79); *Effects of Poverty*, *supra* note 201.

<sup>208</sup> See MOORE ET AL., *supra* note 142, at 4; *Effects of Poverty*, *supra* note 201.

<sup>209</sup> See MOORE ET AL., *supra* note 142, at 4; *Effects of Poverty*, *supra* note 201.

<sup>210</sup> See, e.g., Wood, *supra* note 140, at 709.

out of high school and almost twice as likely to be unemployed in early adulthood.<sup>211</sup>

These grave effects could also have serious consequences for capped children's ability to contribute to society. For example, studies have found that every dollar eliminated from a welfare grant results in an expected future economic loss by *at least* that amount due to diminished future productivity.<sup>212</sup> According to one estimate, for each year that children remain impoverished, society loses \$130 billion in future economic output over those children's lifetime.<sup>213</sup> Thus, society will save \$26 billion for each year of poverty it ends.<sup>214</sup> Similarly, some economists estimate that child poverty costs the United States \$500 billion a year due to lost workforce productivity and expenses for health care and the criminal justice system.<sup>215</sup> One expert explained the many costs of child poverty to society:

Schools pay for remedial education for poor children, businesses pay for poorly educated and trained workers, consumers pay for lower product and service quality, hospitals and social services pay for the added mental and physical disabilities; citizens pay when poor children grow up to become violent, and ultimately everyone pays for all these losses.<sup>216</sup>

Several state legislatures have recognized that family caps do not fulfill their ostensible public policy goals and have consequently eliminated them.<sup>217</sup> These legislatures have concluded that among other things, family caps do not reduce poverty among welfare recipients.<sup>218</sup> For example, during the Illinois House debate on the bill that eliminated family caps in Illinois, one representative asserted that family caps do not fulfill the "main goal" of welfare, which "is that the child is supported and not living in poverty."<sup>219</sup> Similarly, family caps among

<sup>211</sup> See *id.* (citing Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, 7 FUTURE CHILD. 55, 55-71 (1997)).

<sup>212</sup> See *id.* at 15, 27 n.64.

<sup>213</sup> HANDLER & HASENFELD, *supra* note 138, at 47 (citing ARLOC SHERMAN, POVERTY MATTERS: THE COST OF CHILD POVERTY IN AMERICA 15 (1997)).

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

<sup>215</sup> *Effects of Poverty*, *supra* note 201.

<sup>216</sup> SHERMAN, *supra* note 213, at 14, *quoted in* HANDLER & HASENFELD, *supra* note 138, at 47.

<sup>217</sup> See 23 ILL. COMP. STAT. 5/4-2 (2003) (repealing Illinois' family cap); Romero & Agénor, *supra* note 76, at 356 (stating that Nebraska repealed its family cap); *Family Cap Policies*, *supra* note 74 (noting that neither Illinois nor Maryland still uses family cap policies).

<sup>218</sup> See, e.g., 93d Gen. Assemb., Reg. Sess., 39th Leg. Day, at 20 (Ill. Apr. 1, 2003) (noting representatives' doubts that the family cap in Illinois had the effect it was expected to).

<sup>219</sup> *Id.* at 20. A number of representatives also emphasized that family caps do not impact welfare recipients' decisions to have more children. One representative stated, "[A] lot of academic studies have shown us that welfare is not the reason low-income women have kids. And that the family cap does nothing to effect [sic] childbearing." *Id.* Another representative concluded, "I think more education on family planning and other

families in the zero-grant situation could very likely increase poverty instead of furthering the goal of reducing poverty.

## 2. *Strengthening Families*

Courts have also claimed that family caps are rationally related to the legitimate state interest of strengthening families on welfare. In *C.K. v. New Jersey Department of Human Services*, the court concluded that “promoting . . . family stability” was a legitimate state interest.<sup>220</sup> Similarly, the court in *Sojourner A. v. New Jersey Department of Human Services* found “strengthening families” to be a legitimate state interest.<sup>221</sup>

Yet, it is difficult to understand how there can be any measure of family stability in the zero-grant situation. When a family has no cash resources to purchase essential items such as shoes, clothing, or school supplies, this lack of income can lead to further familial instability due to any number of difficulties. Most prominent are problems resulting from the children’s diminished health, developmental, and social capacities.<sup>222</sup> Poverty also contributes to “‘abusive family processes, parental depression and stress, and disruptions in caregiving’ which can significantly compromise the safety and stability of a child’s home environment.”<sup>223</sup>

Furthermore, some families in the zero-grant situation will suffer another source of familial instability as a result of family caps. Even though they desperately want to keep their family together, they will have to choose to give up their children to foster care simply because they do not have the financial resources to care for them.<sup>224</sup> When this happens, rather than supporting the public policy goal of strengthening families, family caps lead to increased instability among those families in the zero-grant situation.

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things . . . would make a difference more than just saying we’re not gonna pay.” *Id.* at 20–21.

<sup>220</sup> 92 F.3d 171, 195 (3d Cir. 1996) (quoting *C.K. v. Shalala*, 883 F. Supp. 991, 1015 (D.N.J. 1995)).

<sup>221</sup> 794 A.2d 822, 824 (N.J. Super. Ct. App. Div. 2002).

<sup>222</sup> See CAPPING A FAMILY’S BENEFITS, *supra* note 24, at 3; *supra* Part IV.B.1 (discussing the effects of poverty on children).

<sup>223</sup> STARK & LEVIN-EPSTEIN, *supra* note 57, at 14 (quoting CSR, INC., UNDERSTANDING YOUTH DEVELOPMENT (1997)); see also Aber et al., *supra* note 201, at 476 (discussing how parents’ poverty-related stress affects their children’s development).

<sup>224</sup> See, e.g., McCormick Memorandum, *supra* note 1, at 3.

## V.

## POTENTIAL LEGAL SOLUTIONS

## A. Federal Legislative Solutions

1. *Congressional Family Cap Prohibition*

Congress should make a number of changes to TANF to demonstrate its commitment to caring for America's neediest residents.<sup>225</sup> One change should be to end its practice of allowing states to use family caps in their TANF programs. Congress should take a definitive stance against family caps, which fail to fulfill their ostensible purposes of reducing poverty and strengthening families.<sup>226</sup> Just as Illinois, Maryland, and Nebraska have recognized that family caps do not achieve their intended public policy goals and have repealed them,<sup>227</sup> Congress should as well. Congress should eliminate family caps by passing legislation to prohibit states from using them in their TANF programs.

2. *Federal Legislative Exception for the Zero-Grant Situation*

If Congress is unwilling to enact a complete ban on family caps, it should at least create an exception for the zero-grant situation. This exception would leave a family cap intact but would provide some amount of cash aid to families when they have otherwise eligible capped children but no longer receive any aid for the children for whom they were originally receiving aid. This exception would help to safeguard against the most extreme health effects that children suffer when their families cannot afford the basic necessities of life.

## B. State Legislative Solutions

1. *State Family Cap Prohibitions*

States could also ban family caps on their own.<sup>228</sup> Illinois, Maryland, and Nebraska have discontinued their family caps,<sup>229</sup> and other states could follow their lead. One likely hurdle, however, is that many states currently face record deficits and may be unwilling to discontinue their family caps if the elimination of those family caps

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<sup>225</sup> For a list of other changes Congress should consider making to TANF, see, for example, TIMOTHY CASEY ET AL., LEGAL MOMENTUM, TANF REAUTHORIZATION ROUND II—AN OPPORTUNITY TO IMPROVE THE SAFETY NET FOR WOMEN AND CHILDREN 3–9 (2009), available at <http://www.legalmomentum.org/assets/pdfs/tanf-dvr-article.pdf> (outlining several problems with TANF that could be addressed).

<sup>226</sup> See Smith, *supra* note 20, at 194.

<sup>227</sup> See Romero & Agénor, *supra* note 76, at 356; ROWE & MURPHY, *supra* note 27, at 142; Smith, *supra* note 20, at 154.

<sup>228</sup> See Smith, *supra* note 20, at 193.

<sup>229</sup> See Romero & Agénor, *supra* note 76, at 356; ROWE & MURPHY, *supra* note 27, at 142; *Family Cap Policies*, *supra* note 74.

would have any immediate impact on their state budgets.<sup>230</sup> For this reason, a congressional prohibition on states' use of family caps is potentially a more viable solution, as discussed above in Part V.A.1, at least until states realize that a healthy population ultimately creates net gains.

## 2. *State Legislative Exceptions for the Zero-Grant Situation*

Like the federal legislative exception, if state leaders are unwilling to enact a complete ban on family caps, they should create an exception for the zero-grant situation. Again, this exception would not eliminate a family cap, but it would permit families to receive some amount of cash aid when they have otherwise eligible children who are subject to a family cap but no longer receive aid for the children for whom they were originally receiving aid. This exception would likewise help to safeguard against the most severe health effects that children suffer when their families cannot afford basic necessities.

## CONCLUSION

The history of welfare in the United States illustrates the stereotypes and discrimination that often underlie welfare reform policies. Family caps are a manifestation of the punitive nature of those reform policies. Research suggests that family caps also do not fulfill their purported goals of reducing poverty and strengthening families. In fact, they often do the opposite, particularly when they completely deprive families of welfare benefits.

Such is the case for Dajohn, a child who is otherwise eligible for CalWORKs but whose family cannot receive any cash assistance from CalWORKs to purchase shoes, clothing, and school supplies for him. The fact that family cap policies like the MFG rule can operate to completely deprive an indigent family like Dajohn's of any cash resources compounds an already dire situation for many individuals. Not only does this situation undermine many courts' reasoning in upholding family caps, but it also makes little sense from a public policy perspective due to the potentially grave effects on children's social, developmental, and health needs.

Congress has the ability to remedy this situation. It could prohibit states from implementing family caps in their TANF programs. Alternatively, Congress could create an exception for the zero-grant situation to provide some financial assistance to families that have eligible children but are not receiving any cash grants because of a fam-

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<sup>230</sup> See, e.g., Wood, *supra* note 26 (discussing political clashes over California's budget deficits).



ily cap. States could also follow the lead of Illinois, Maryland, and Nebraska and ban family caps on their own. Finally, states could create an exception for the zero-grant situation. By reforming welfare family cap policies, legislators can demonstrate their commitment to helping the country's neediest residents, like Dajohn, obtain the basic necessities of life.