Commentary
Challenging Child Exclusion in California State Court

Erica Franklin†

ABSTRACT
This article contends that California's child exclusion policy, which prevents children from receiving CalWORKS funds if their mothers received cash assistance for ten months prior to giving birth, runs afoul of the unconstitutional conditions doctrine as interpreted by the California Supreme Court. After examining the historical underpinnings and current impact of the child exclusion policy, the author argues that California's expansive view of the unconstitutional conditions doctrine, as articulated in the analogous context of abortion funding, renders California courts uniquely amenable to a legal challenge of the child exclusion policy.

INTRODUCTION
I. THE HISTORICAL UNDERPINNINGS OF CHILD EXCLUSION
II. THE IMPACT OF CHILD EXCLUSION
III. LEGAL CHALLENGES TO CHILD EXCLUSION IN OTHER JURISDICTIONS
IV. FERTILE GROUND: THE CALIFORNIA STATE CONSTITUTION AND THE
MYERS FRAMEWORK
V. CHALLENGING FAMILY CAPS UNDER THE MYERS FRAMEWORK
   A. The Insufficiency of Childbirth Subsidies
   B. Conditioning Per Capita Benefits on the Waiver of a Constitutional Right
   C. Challenging Child Exclusion under Strict Scrutiny
VI. COLLAPSING THE DISTINCTION BETWEEN PENALTIES AND NONSUBSIDIES
CONCLUSION
INTRODUCTION

In California, children in at least 69,000 households\(^1\) are ineligible for CalWORKS, or cash assistance—a tragic by-product of a coercive state policy that discourages welfare recipients from having children. With limited exceptions, if a woman gives birth after receiving cash assistance for ten consecutive months, her family’s total grant will not increase to account for the increased need, even though the grant was initially predicated on her household size.\(^2\) Thus, to maintain the per capita level of income that California deems necessary for subsistence, she must refrain from having additional children as long as she needs assistance from the state. Twenty-one states, in addition to California, currently have similar family caps, also known as child exclusion policies.\(^3\)

To some extent, California’s child exclusion policy was enacted as and remains a fiscal policy measure.\(^4\) Because the child exclusion policy affects approximately 69,000 households,\(^5\) it would cost more than one hundred million dollars per year\(^6\) to repeal the policy and provide aid to excluded children—a tall order for a legislature facing a budget crisis of astronomical and unprecedented proportions.\(^7\) Thus, advocates in California, recognizing the need for an incremental approach, have sought to lay the groundwork for a legislative repeal in the future while simultaneously exploring federal repeal efforts via the Tempo-

\(^1\) The author received an undergraduate degree in political science from Yale University in 2005 and a degree in law from the University of California, Berkeley, School of Law (Boalt Hall) in 2010. She is currently a law clerk at the Washington State Supreme Court. As a law student, the author spent a semester at the East Bay Community Law Center (EBCLC) in the Income Support unit, where she provided legal assistance to CalWORKS recipients, many of whom were subject to the child exclusion policy. As a member of Law Students for Reproductive Justice (LSRJ), she participated in advocacy efforts to repeal child exclusion in partnership with EBCLC. She is grateful to Professor Jennifer Dunn, whose Women’s Health and the Law seminar provided the impetus for this piece and who provided valuable feedback and suggestions. She is also grateful to Allie Hartry for excellent editorial assistance.


\(^3\) CAL. WEL. & INST. CODE § 11450.04 (West 2009).

\(^4\) See NAT’L CONF. OF STATE LEGISLATURES, FAMILY CAP POLICIES, http://www.ncsl.org/IssuesResearch/HumanServices/WelfareReformFamilyCapPolicies/tabid/16306/Default.aspx (last visited Oct. 30, 2010). While “family cap” is the more common term for these policies, advocates in California favor the term “child exclusion” for its persuasive value. Interviews with Edward Barnes, Director, and Luan Huynh, Staff Attorney, Income Support Unit, East Bay Community Law Center, in Berkeley, Cal. (Spring 2010).

\(^5\) Id.


\(^7\) McKeever, supra note 1.
rary Assistance for Needy Families (TANF) reauthorization process.\(^8\)

Outside of California, opponents of child exclusion statutes have waged legal and legislative battles at both the state and federal levels. Two states, Maryland and Illinois, recently repealed child exclusion provisions: Maryland at the request of the state Department of Human Resources, due to the administrative burdens associated with the policy, and Illinois at the behest of advocates.\(^9\) In addition, Kansas received a waiver from Aid to Families with Dependent Children (AFDC) to implement a cap but decided not to implement it after TANF was passed.\(^10\) To date, advocates in New Jersey and Arizona have fought unsuccessfully to repeal child exclusion policies.\(^11\)

While federal repeal efforts have been unsuccessful thus far,\(^12\) a new administration in Washington may prove more sympathetic to reformers. Nevertheless, because the child exclusion policy implicates the constitutional rights of disenfranchised women and families—liberties that all too often yield to budgetary pressures and political expediencies—advocates should remain cognizant of the shortcomings of political approaches and consider possibilities for challenging child exclusion in the courtroom. As I explain in more detail below, previous legal challenges to child exclusion have failed.\(^13\) However, unsuccessful lawsuits in other jurisdictions should not deter enterprising advocates in California because the California Constitution may prove more favorable to opponents of child exclusion than the federal constitution and its state counterparts.

In this essay, following a brief survey of the historical underpinnings and current impact of this policy, I argue that California’s child exclusion policy runs afoul of the unconstitutional conditions doctrine as interpreted by the California Supreme Court. California’s expansive view of the unconstitutional conditions doctrine, articulated in the analogous context of abortion funding, renders California courts uniquely amenable to a renewed legal challenge of family caps. In particular, California’s provision of Medicaid funding for abortion compels the state to provide meaningful subsidies for women who choose to bear a child, and the failure to do so amounts to conditioning benefits on the waiver of constitutional rights. Next, I argue that the child exclusion policy is subject to heightened scrutiny under both California’s unconstitutional conditions doctrine and the federal Equal Protection Clause and that the policy cannot withstand such scrutiny. Finally, I draw on scholarly approaches to the unconstitutional conditions doctrine to argue that, even under narrow conceptions of the doctrine that draw a distinction between penalties and nonsubsidies, California’s child exclusion policy cannot pass muster.

\(^8\) Interviews with Edward Barnes and Luan, supra note 3.
\(^10\) Id. at 192.
\(^11\) Id. at 193.
\(^12\) Id. at 190-92.
\(^13\) See discussion infra Part III.
I. The Historical Underpinnings of Child Exclusion

A brief digression into the history of the American welfare state, TANF, and the state-sponsored sterilization and eugenics movements provides important background and context for understanding child exclusion. Aid to Dependent Children (ADC), the precursor to modern welfare, emerged in 1935 as part of the landmark Social Security Act. It was designed to help single mothers—and in particular, white widows—stay at home to rear their children. The administrators of ADC often prevented black families and families with children born out of wedlock from receiving aid as a means of maintaining public approval for the program and defraying costs. However, in the 1960s and 1970s, a number of legal, economic, and political developments greatly increased access to welfare among communities of color, and the number of individuals receiving aid skyrocketed. Between 1965 and 1970, the ADC program doubled in size, and after 1958, almost half of ADC recipients were people of color. These trends resulted in a significant backlash. While the public had no trouble supporting the "deserving poor" and enabling white, middle-class women to stay home with their children, public support for the program waned as taxpayers increasingly came to see welfare as a program for unwed African American mothers. In light of the widespread public sentiment that welfare recipients used their grants on non-essential consumer goods and profited at the expense of working families, state and federal officials vigorously prosecuted welfare fraud.

This rhetoric continued into the 1990s. In 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), more commonly known as welfare reform. Welfare reform replaced AFDC with TANF and, among other reforms, allowed states to subject TANF recipients to strict time limits. California has adopted a five-year lifetime limit for adults receiving aid, but it has not imposed similar time limits on children.

Welfare reform was, in many ways, the product of conservative rhetoric and widespread anti-welfare sentiment. The work of Charles Murray, a political

16. Id.
17. Id.
18. Id.
19. Id. at 332-33.
20. Id. at 333.
21. Id. at 333-34.
22. Id. at 329.
scientist from the American Enterprise Institute, was particularly influential. Murray argued that AFDC promoted "moral hazard" by inducing single parents to forego work in favor of welfare and that this behavior gave rise to a variety of social ills, from illegitimacy to laziness to family strife. His work dramatically altered the public discourse. "Pre-Murray, welfare's main critics had attacked on equity grounds: it was costly, wasteful, unfair to taxpayers. Post-Murray, the criticisms became much more profound: welfare was the evil from which all other evils flowed . . . . To cut was to care."27

PRWORA only mentions family caps with reference to domestic violence; otherwise, it is silent on the adoption of family caps by individual states. However, the text of the federal legislation lays the foundation for the enactment of family caps. For example, Congress indicated that one of the purposes of the TANF program is to "prevent and reduce the incidence of out-of-wedlock pregnancies." In addition, PRWORA legislation directs the states to develop plans to provide TANF with the goals of encouraging self-sufficiency and reducing out-of-wedlock pregnancies.

The rhetoric underlying family caps is also reminiscent of the American eugenics movement of the not-so-distant past. Over the course of the twentieth century, more than 60,000 individuals underwent involuntary sterilization in state-run homes and hospitals in the United States. More than one third of these procedures took place in California. Initially, state-sponsored sterilizations targeted individuals in prisons and mental health institutions, with an eye to eliminating "mental disease," "feeblemindedness," and "perversion or marked departures from normal mentality." In the 1950s and 1960s, however, the rationale for compulsory sterilization shifted. State courts and state legislatures began to use compulsory sterilization to curb welfare dependency and illegitimacy. By the late 1970s, proposals for the involuntary sterilization of welfare recipients had arisen in at least ten

26. Id.
27. DEPARLE, supra note 23, at 96.
32. Alexandra Minna Stern, Sterilized in the Name of Public Health: Race, Immigration and Reproductive Control in Modern California, 95 AM. J. PUB. HEALTH 1128, 1128 (2005).
33. Id.
34. Id. at 1129 (quoting HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 19 (1922)).
35. Id. at 1132.
Women of color underwent sterilizations at a disproportionate rate, and black women in particular accounted for forty-three percent of those sterilized through federally-subsidized sterilization programs. Foreign-born women were also overrepresented.

In *Buck v. Bell*, a now infamous 1927 opinion, the United States Supreme Court upheld the practice of involuntary sterilization. There, the Court noted,

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

Even early proponents of birth control, who championed reproductive freedom among white, middle-class women, embraced the rhetoric of the eugenics movement. As one commentator noted:

> Thus class bias and racism crept into the birth control movement when it was still in its infancy. More and more, it was assumed within birth control circles that poor women, Black and immigrant alike, had a “moral obligation to restrict the size of their families.” What was demanded as a “right” for the privileged came to be interpreted as a duty for the poor.

Indeed, Margaret Sanger, one of the founders of the birth control movement, heralded birth control as a means to ensure “more children from the fit, less from the unfit.” According to the Birth Control Federation of America, “[t]he mass of Negroes, particularly in the South, still breed carelessly and disastrously, with the result that the increase among Negroes, even more than among whites, is from that portion of the population least fit, and least able to rear children properly.”

---

40. *Id.* at 207.
42. *Id.* (quoting Gordon, *supra* note 41, at 281).
43. *Id.* at 21 (quoting Gordon, *supra* note 41, at 332).
II. THE IMPACT OF CHILD EXCLUSION

Against this historical backdrop, it comes as no surprise that child exclusion has a devastating impact on the children and families it touches. To add insult to injury, because adult recipients of CalWORKS are subject to a five-year lifetime limit, it is not unusual for a family to include multiple “Maximum Family Grant” (MFG) children ineligible for aid under the child exclusion policy in addition to a “timed-out” adult. The result is a grant that is grossly disproportionate to household size. For example, in Alameda County, a family of five with a timed-out adult and two MFG children will receive a total of $561 per month in CalWORKS funds. Child support, which is capped at fifty dollars per child per month for CalWORKS recipients, and food stamps help, but they are not enough to make ends meet. The meager funds these families receive barely cover crowded, substandard housing, let alone resources such as childcare and job training that might lift these families out of poverty. Furthermore, because women and children of color are overrepresented among CalWORKS recipients, child exclusion serves to compound poverty within low-income communities of color.

The narrow exceptions to California’s punitive child exclusion policy underscore the extent to which it conflicts with reproductive justice principles. If a welfare recipient subject to the child exclusion policy puts forth documented evidence of a contraceptive failure, California will deem her child eligible for CalWORKS—but only if she was using a state-approved form of long-term, invasive contraception, namely an IUD, norplant, or sterilization. These provisions also throw the parallels between child exclusion and the American eugenics movement into sharp relief.

44. STATE OF CAL., MANUAL OF POLICIES AND PROCEDURES, supra note 24, at 42-302.1.
45. This information is based on the author’s observations at the East Bay Community Law Center in Berkeley, California, where she represented CalWORKS recipients.
47. See CAL. WEL. & INST. CODE § 11475.3 (West 2009).
48. This information is based on the author’s observations at the East Bay Community Law Center.
50. The term “reproductive justice” emerged in 1994, when advocates, led by women of color, grew disenchanted with the traditional reproductive rights movement. The reproductive justice movement approaches issues of reproductive autonomy from a broad-based, intersectional human rights perspective. Reproductive justice is concerned not only with the right not to have a child but also with the right to have a child and the right to autonomy in the arenas of childbirth and parenting. See generally LORETTA J. ROSS, SISTERSONG WOMEN OF COLOR REPROD. HEALTH COLLECTIVE, UNDERSTANDING REPRODUCTIVE JUSTICE, available at http://www.sistersong.net/publications_and_articles/Understanding_RJ.pdf.
51. See CAL. WEL. & INST. CODE § 11450.04 (West 2009).
III. LEGAL CHALLENGES TO CHILD EXCLUSION IN OTHER JURISDICTIONS

To date, advocates have mounted unsuccessful legal challenges to child exclusion policies in four jurisdictions.52 While none of these decisions are binding on California courts as to state law questions, they merit examination here nonetheless. In Dandridge v. Williams, more than a quarter century before welfare reform, the plaintiffs brought suit in federal court to challenge Maryland’s child exclusion policy, alleging, inter alia, that the policy discriminated based on family size and therefore ran afoul of the Equal Protection Clause.53 The Supreme Court applied rational basis review and upheld the statute, holding that “a solid foundation for the regulation can be found in the State’s legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor.”54

In C.K v. New Jersey Department of Human Services, the plaintiffs challenged New Jersey’s family cap in federal court, alleging federal due process and equal protection violations.55 The Third Circuit failed to apply strict scrutiny, maintaining that a failure to subsidize a reproductive choice did not constitute a state-imposed burden on that choice.56 It upheld the child exclusion policy based on the proffered rationale of placing welfare recipients on par with working families.57 Similarly, in N.B. v. Sybinski, the Indiana Court of Appeals drew a distinction between penalties and nonsubsidies, holding that the latter did not impose an unconstitutional burden on reproductive decisions.58 The court also rejected an equal protection challenge.59

Finally, in the most recent challenge to a child exclusion policy, Sojourner v. New Jersey Department of Human Services, the New Jersey Supreme Court declined to apply strict scrutiny and, like its sister courts, held that the state did not need to subsidize the exercise of reproductive freedom.60 Like the C.K. court, the Sojourner court also found parity arguments persuasive.61 Finally, the high court also rejected an equal protection challenge on the ground that excluded children within a family share benefits with non-excluded children and

53. 397 U.S. at 475.
54. Id. at 486.
55. 92 F.3d at 177.
56. Id. at 195 (“We have nothing to add to the district court’s opinion on this point except to observe that it would be remarkable to hold that a state’s failure to subsidize a reproductive choice burdens that choice. In short, there are no constitutional implications when the state does not pay a benefit to parents who have a child that it would not pay to parents who did not have a child.”).
57. Id. at 194.
59. Id. at 1111, 1112.
60. 828 A.2d 306, 313, 317 (2003) (“This case is not about a woman’s right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice.”).
61. Id. at 316.
thus do not face disparate treatment. 62

IV. FERTILE GROUND: THE CALIFORNIA STATE CONSTITUTION AND THE MYERS FRAMEWORK

California’s distinctive case law renders California courts uniquely amenable to a challenge of this kind and suggests that advocates may prevail in California courts despite their poor track record in other jurisdictions. First, the California Constitution is arguably more favorable to plaintiffs than the U.S. Constitution in that the former explicitly protects privacy. 63 While the right to procreate is well established under federal constitutional law, 64 it does not enjoy the stature of an enumerated right. 65 Indeed, the California Supreme Court has characterized California’s right to privacy as more robust than its federal counterpart. 66

Second, the California Supreme Court has taken an expansive view of the unconstitutional conditions doctrine, a longstanding doctrine that limits the state’s ability to condition public benefits on the waiver or nonexercise of constitutional rights. In particular, the California Supreme Court has held that, under certain circumstances, the failure to subsidize elective abortions burdens reproductive freedom and thus runs counter to the California Constitution. 67 In so holding, California’s high court has taken a liberal approach to the unconstitutional conditions doctrine, recognizing “a simple failure to fund,” even absent a concrete penalty, as constitutionally suspect. 68 In light of this expansive reading of the unconstitutional conditions doctrine, California courts may be more amenable to a legal challenge premised on the State’s failure to subsidize constitutionally protected procreative rights.

In Committee to Defend Reproductive Rights v. Myers, the plaintiffs brought suit in California state court to enjoin the enforcement of Budget Act provisions that provided Medicaid funding for medical costs associated with childbirth but not elective abortions. 69 They alleged that this arrangement burdened a constitutionally protected right by favoring childbirth over abortion in contravention of the unconstitutional conditions doctrine. 70 The California Su-

62. Id. at 317.
63. CAL. CONST. art I, § 1.
66. Id. at 783 n.4.
67. Id. at 786-87.
68. Charles W. Sherman, Note, Committee to Defend Reproductive Rights v. Myers: Abortion Funding Restrictions as an Unconstitutional Condition, 70 CAL. L. REV. 978, 992 (1982) (contrasting Myers to similar federal cases which had held a mere “failure to fund” insufficient to trigger the unconstitutional conditions doctrine).
69. Myers, 625 P.2d at 780-81.
70. Id.
Supreme Court upheld this challenge and, in so doing, recognized a failure to subsidize a constitutional right as an unconstitutional condition. Specifically, the court held that:

Although the state has no constitutional obligation to provide medical care to the poor, a long line of California decisions establishes that once the state has decided to make such benefits available, it bears a heavy burden of justification in defending any provision which withholds such benefits from otherwise qualified individuals solely because they choose to exercise a constitutional right.

The court further indicated that the state’s decisions to withhold benefits under such a scheme would be subject to heightened scrutiny.

In contrast, New Jersey, a jurisdiction that has proven unfavorable to plaintiffs in this arena, has taken a narrower view of this doctrine. A previous New Jersey Supreme Court decision, Right to Choose v. Byrne, figured prominently in the Sojourner Court’s holding that the state need not subsidize a woman’s decision to bear a child. In Right to Choose, the high court held that the state could not withhold Medicaid funding for medically necessary abortions while providing Medicaid funding for other medically necessary care.

Plaintiffs in Sojourner seized on that prohibition in their briefing, arguing that the state could not burden the right to procreate by withholding state funds from women who choose to exercise that disfavored right. However, as the Sojourner Court repeatedly emphasized in distinguishing the earlier case, the court in Right to Choose confined its holding to women seeking medically necessary abortions and maintained that the state had no obligation to subsidize elective, non-therapeutic abortions.

Only the dissenting justices in Right to Choose embraced the broader proposition that “[t]he constitutional right to an abortion includes the freedom to choose the desired medical response to pregnancy free from government interference.” The limited scope of the holding in Right to Choose was critical to the holding in Sojourner. In upholding New Jersey’s family cap provision, the Sojourner court referenced the narrow view of the unconstitutional conditions doctrine it had espoused in Right to Choose:

This case is not about a women’s right to choose whether and when to bear
children, but rather, about whether the State must subsidize that choice. In *Right to Choose*, we held that the State may decline to fund a woman’s choice to obtain an abortion when the abortion is not medically necessary. We hold today that the state is not required to provide additional cash assistance when a woman chooses to bear a child more than ten months after her family has received welfare benefits.81

V. CHALLENGING FAMILY CAPS UNDER THE *MYERS* FRAMEWORK

In light of the divergent paths that California and New Jersey courts have taken in interpreting the unconstitutional conditions doctrine, advocates in California may succeed where their counterparts in New Jersey have faltered.

A. The Insufficiency of Childbirth Subsidies

The *Myers* court made clear that the state’s failure to subsidize the exercise of a right runs afoul of the California Constitution only when the state chooses to subsidize the non-exercise of the right.82 In *Myers*, a failure to subsidize abortion was problematic because the state fully funded prenatal care and childbirth, thereby disadvantaging those who chose to terminate a pregnancy.83 Conversely, the *Myers* court noted, “similar constitutional issues would arise if the Legislature as a population control measure, for example funded Medi-Cal abortions but refused to provide comparable medical care for poor women who choose childbirth.”84

That premise, carried to its logical conclusion, lays the groundwork for a potential challenge to California’s child exclusion policy. While California provides the requisite medical care for the delivery process and thus places the right to physically deliver a child on par with the right to terminate a pregnancy, the state reenters the fray shortly thereafter, using the power of the purse to impose a significant hardship on “poor women who choose childbirth” and thereby disfavoring the right to procreate.

Otherwise stated, by funding abortion and family planning and simultaneously withholding CalWORKS benefits from excluded children, the state puts a heavy thumb on the scale—notwithstanding the subsidies it provides for the

81. Sojourner, 828 A.2d at 317.
83. *Id.* at 780-81 (“[T]he question presented is not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so; plaintiffs do not contend that the state would be required to fund abortions for poor women if the state had not chosen to fund medical services for poor women who choose to bear a child. Rather, we face the much narrower question of whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support.”).
84. *Id.* at 780.
purely medical costs of childbirth. The less-than-savory goals and assumptions behind family caps\textsuperscript{85} and this country's long history of sterilizing poor women of color\textsuperscript{86} further belie the neutrality of the current scheme. Indeed, preliminary evidence from New Jersey suggests that child exclusion policies have led to an increase in abortion rates and a decrease in birth rates, thus testifying to the tangible burden that family caps impose on the constitutional right to procreate.\textsuperscript{87}

In response to such an argument, opponents may argue that withholding CalWORKS benefits is not tantamount to withholding funds for the medical costs of childbearing. Further, naysayers may claim that abortion is a medical procedure\textsuperscript{88} and therefore that funding abortion only requires the state to fund the analogous medical costs associated with childbirth.\textsuperscript{89} However, such a distinction is overly formalistic. It ignores the realities of welfare recipients' lives and the essence of the unconstitutional conditions doctrine, namely the protection of the meaningful exercise of constitutional rights. For a woman contemplating whether to carry a pregnancy to term, the knowledge that the state will subsidize the delivery process is of little consequence if she has limited means to support the child once she returns home from the hospital. For a "capped" family that has to choose between diapers and utilities, the neutrality of the current scheme is a mere legal fiction. Subsidizing the right to procreate may be more costly than subsidizing the right to prevent or terminate a pregnancy, but the unconstitutional conditions doctrine sets no monetary cap on subsidies.

In sum, while the state need not subsidize child-rearing \textit{per se}, California's practice of subsidizing the right to prevent or terminate a pregnancy imposes a concomitant duty on the state to provide more than a token subsidy for the right to bear a child.

\textsuperscript{85} See Smith, supra note 9, at 154-65.
\textsuperscript{86} See, e.g., Davis, supra note 31, at 23-24.

\textsuperscript{88} While that proposition is debatable, it is beyond the scope of this essay.

\textsuperscript{89} Indeed, the \textit{Myers} court alluded to this distinction in citing to a Massachusetts decision: "As the Massachusetts high court observed, although 'the Legislature need not subsidize any of the costs associated with childbearing, or with healthcare generally... once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference.' Myers, 625 P.2d at 799 (citations omitted).
B. Conditioning Per Capita Benefits on the Waiver of a Constitutional Right

Whether or not the provision of Medicaid benefits for preventing and terminating a pregnancy precludes the State from withholding CalWORKS benefits, the family cap likely fails California’s longstanding Danskin-Bagley test for unconstitutional conditions.90 As reaffirmed in Myers, this test precludes the state from conditioning the receipt of benefits on waiver of a constitutional right.91

Under California’s child exclusion policy, a woman who foregoes her right to procreate will receive more cash assistance per child than a woman who exercises her right to procreate upon entering the welfare rolls. A woman who chooses to bear a child in spite of the child exclusion policy will not lose CalWORKS dollars in absolute terms, but her per capita grant will diminish appreciably.92 Per capita dollars are the relevant metric for the receipt of CalWORKS benefits; the state awards cash assistance on a per-capita basis,93 recognizing that the level of need varies with family size. Moreover, as the Sojourner Court aptly noted, families allocate funds among children, even if one or more child is formally excluded under a family cap scheme.94 Consequently, the receipt of public benefits—as measured in meaningful terms—is directly contingent on the exercise or nonexercise of a constitutional right and therefore runs afoul of California’s Danskin-Bagley test for unconstitutional conditions.95

C. Challenging Child Exclusion under Strict Scrutiny

Whether it is challenged under the federal Equal Protection Clause or the unconstitutional conditions doctrine, California’s child exclusion policy is subject to strict scrutiny. It cannot withstand such a challenge.

Because the family cap influences a woman’s decision to terminate a pregnancy or bear a child, it implicates a fundamental right.96 Thus, in accordance with Equal Protection jurisprudence, disparate treatment under this policy is sub-

---

91. Myers, 625 P.2d at 788 ("Under Danskin-Bagley principles, whenever the state conditions the receipt of a benefit upon the waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right, the state must demonstrate the propriety of the condition" according to principles of heightened scrutiny).
92. For exact dollar amounts, see McKeever, supra note 1.
93. See CAL. WEL. & INST. CODE § 11450 (West 2009) (establishing per capita payment levels under CalWORKS).
95. For a similar argument, see Catherine R. Albiston and Laura Beth Nielsen, Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls, 38 HOW. L.J. 473, 505 (1995).
ject to strict scrutiny even in the absence of a suspect classification. The child exclusion policy amounts to disparate treatment of CalWORKS recipients based on the timing of childbirth relative to the receipt of benefits. An uncapped recipient might have conceived within weeks of entering the welfare rolls; a capped recipient just a month after receiving her first CalWORKS check. As a result of this slight variation in timing, the former will receive cash assistance to cover all of her children, while the latter will receive cash assistance for only some of her children. As noted previously, the level of per capita benefits will vary considerably between the two households. Consequently, this policy only withstands scrutiny if it is narrowly tailored to serve a compelling governmental interest.

None of the potential justifications for the child exclusion policy constitute a compelling governmental interest. The budgetary concerns that played a central role in California’s adoption of the child exclusion policy do not amount to a compelling justification for burdening a fundamental right, particularly when the impact falls on a disenfranchised community and when, despite misconceptions, CalWORKS represents only three percent of the California budget. Furthermore, it is far from clear that depriving children of the means of subsistence is a sound fiscal policy in the long term; money saved today may lead to increased spending on social services and incarceration in the future. Moreover, a family cap is unlikely to encourage self-sufficiency; even if it did serve such a purpose, the state has less restrictive means at its disposal, such as the lifetime limits on TANF eligibility and other requirements imposed by welfare reform.

Proponents of child exclusion also justify this policy on the grounds that it places families receiving cash assistance on par with “working families” that do not receive a wage increase upon the birth or adoption of a child. Such a comparison is misplaced for several reasons. First, working families receive income for additional dependents in the form of tax credits and deductions. However, tax breaks and credits for families with dependent children all too often disappear from this analysis because the public often fails to recognize such tax benefits.

97. Cf. Skinner, 316 U.S. at 541 (“When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”).
98. Id.
99. See ANALYSIS OF ASSEMB. B. 473, supra note 4.
102. For example, Kansas was granted a waiver to implement a family cap program but declined to do so, citing other means of encouraging self-sufficiency. See SHELLEY STARK & JODIE LEVIN-EPSTEIN, EXCLUDED CHILDREN: FAMILY CAP IN A NEW ERA 6-7 (1999), available at http://www.clasp.org/admin/site/publications_archive/files/0030.pdf.
breaks as government subsidies.\textsuperscript{105} Moreover, this "parity" argument implies that a parent who is not receiving cash assistance will not receive support from the state if she has more children than she can afford to feed. However, CalWORKS is a means-tested program predicated on income and family size; consequently, a "working family" will be eligible for cash assistance when per capita income falls below a given threshold, just as a capped family would in the absence of the family cap.

Similarly, under the \textit{Myers} framework, unconstitutional conditions trigger a variant of strict scrutiny.\textsuperscript{106} In \textit{Bagley}, affirmed in \textit{Myers}, the California Supreme Court set forth a three-part standard the State must meet in order to burden constitutional rights under a conditional benefits scheme:

\begin{quote}
At the very least it must establish that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege. . . . Not only must the conditions annexed to the enjoyment of a publicly conferred benefit reasonably tend to further the purposes sought by conferment of that benefit but also the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights. Further, in imposing conditions upon the enjoyment of publicly-confferred benefits, as in the restriction of constitutional rights by more direct means, the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits.\textsuperscript{107}
\end{quote}

In light of the aforementioned less-than-compelling justifications for child exclusion and the availability of other, less draconian means of encouraging self-sufficiency, California's child exclusion policy is unlikely to pass muster under the heightened scrutiny standard announced in \textit{Bagley}.

\section{VI. Collapsing the Distinction Between Penalties and Nonsubsidies}

Previous challenges to family caps, like other challenges under the unconstitutional conditions doctrine, have failed where courts have required an affirmative penalty in connection with the exercise of a disfavored right.\textsuperscript{108} In con-
trast, as previously noted, the California Supreme Court has adopted a comparatively liberal standard for unconstitutional conditions that recognizes nonsubsidies as well as affirmative penalties. Thus, California state courts arguably provide a promising forum for challenging child exclusion.

However, because the penalty/nonsubsidy dichotomy amounts to a distinction without a difference, family cap policies also run afoul of narrower formulations of the unconstitutional conditions doctrine that require a state-imposed penalty associated with the protected conduct. Thus, even if California courts were to draw a distinction between a penalty and nonsubsidy in applying the unconstitutional conditions doctrine, plaintiffs should not be deterred by this distinction. For women and families dependent on the state for subsistence, a nonsubsidy is often tantamount to a penalty and thus amounts to an unconstitutional condition, even in the narrowest sense.

Scholars have criticized the sharp distinction the unconstitutional conditions doctrine draws between penalties and nonsubsidies and have offered various theories under which family caps constitute penalties. For example, Yvette Marie Barksdale argues that the state’s withholding of the means of subsistence from “have-nots,” or welfare recipients “who depend on government largesse for survival,” is functionally equivalent to taking something away from “haves,” or those who are not dependent on the state for their means of subsistence. Barksdale says that the relevant inquiry is the state’s infliction of harm in connection with the exercise of a constitutional right. She argues that under a scheme in which only affirmative penalties are legally cognizable, “the rights of the ‘have-nots’ are jeopardized because the government constitutionally retains weapons to affect their rights, namely, the deprivation of subsistence government aid.” This perspective is in line with human rights approaches, which recognize affirmative rights in addition to negative liberties. Under this approach, whether or not the state has an affirmative obligation to subsidize child-rearing, the withholding of benefits is tantamount to a penalty and cannot stand absent a compelling justification.

Similarly, Kathleen Sullivan calls for a broad reading of the unconstitutional conditions doctrine draws between penalties and nonsubsidies and have offered various theories under which family caps constitute penalties. For example, Yvette Marie Barksdale argues that the state’s withholding of the means of subsistence from “have-nots,” or welfare recipients “who depend on government largesse for survival,” is functionally equivalent to taking something away from “haves,” or those who are not dependent on the state for their means of subsistence. Barksdale says that the relevant inquiry is the state’s infliction of harm in connection with the exercise of a constitutional right. She argues that under a scheme in which only affirmative penalties are legally cognizable, “the rights of the ‘have-nots’ are jeopardized because the government constitutionally retains weapons to affect their rights, namely, the deprivation of subsistence government aid.” This perspective is in line with human rights approaches, which recognize affirmative rights in addition to negative liberties. Under this approach, whether or not the state has an affirmative obligation to subsidize child-rearing, the withholding of benefits is tantamount to a penalty and cannot stand absent a compelling justification.

Similarly, Kathleen Sullivan calls for a broad reading of the unconstitutional conditions doctrine draws between penalties and nonsubsidies and have offered various theories under which family caps constitute penalties. For example, Yvette Marie Barksdale argues that the state’s withholding of the means of subsistence from “have-nots,” or welfare recipients “who depend on government largesse for survival,” is functionally equivalent to taking something away from “haves,” or those who are not dependent on the state for their means of subsistence. Barksdale says that the relevant inquiry is the state’s infliction of harm in connection with the exercise of a constitutional right. She argues that under a scheme in which only affirmative penalties are legally cognizable, “the rights of the ‘have-nots’ are jeopardized because the government constitutionally retains weapons to affect their rights, namely, the deprivation of subsistence government aid.” This perspective is in line with human rights approaches, which recognize affirmative rights in addition to negative liberties. Under this approach, whether or not the state has an affirmative obligation to subsidize child-rearing, the withholding of benefits is tantamount to a penalty and cannot stand absent a compelling justification.
tional conditions doctrine predicated on "the systemic effects that conditions on benefits have on the exercise of constitutional rights."116 In particular, she argues for the application of strict scrutiny for "any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government."117 Further research is needed to document the effect of child exclusion policies, but, as noted previously, preliminary evidence suggests that such policies have decreased birth rates among welfare recipients.118 Moreover, child exclusion policies are sustained, at least in part, by a desire to curb childbearing among welfare recipients in light of widespread misconceptions that welfare creates perverse incentives by inducing welfare recipients to have children.119 Thus, in applying Sullivan's inquiry, it is not difficult to argue that the "primary purpose or effect" of child exclusion policies is to discourage the exercise of a constitutional right. Sullivan's broad reading of the unconstitutional conditions doctrine is persuasive because it eschews formalistic distinctions in favor of an inquiry that is grounded in reality and faithful to the doctrine's fundamental purpose.

CONCLUSION

Opponents of California's child exclusion policy should not dismiss the possibility of challenging this policy in the California courts. Because the California Constitution includes robust privacy protections, and because California has recognized a nonsubsidy as an unconstitutional burden, the California courts provide fertile ground for challenging this policy. Under Myers, California must provide CalWORKS benefits to place childbearing on truly equal footing with preventing or terminating a pregnancy. Furthermore, by reducing per capita aid to capped families, the state also contravenes Myers by conditioning the receipt of benefits on the waiver of constitutional rights. California's child exclusion policy cannot withstand the strict scrutiny to which it is subject under California's unconstitutional conditions doctrine and federal Equal Protection jurisprudence. Finally, even if the child exclusion policy falls outside of the Myers framework for constitutionally suspect nonsubsidies, there is good reason to abandon the strict dichotomy between subsidies and penalties that has characterized the unconstitutional conditions doctrine and doomed child exclusion challenges in the past.

Child exclusion has plunged struggling families deeper into poverty at the same time that it has compromised the fundamental right to bear children. For women, children, families, and reproductive freedom, the stakes are enormous. In a dismal economic climate, where political approaches have fallen short, a le-
gal challenge remains a viable avenue for reform and therefore merits serious consideration.