Resolved, That the American Bar Association opposes any state, federal, or territorial legislation, rule, or regulation that denies the public benefits or the incremental increase in public benefits to which a family otherwise would be entitled upon the birth of a child, based on the family’s receipt of public assistance at the time of the child’s conception or birth, or the mother’s age or marital status at the time of the child’s birth, or the fact that the child’s paternity has not been established.
I.

INTRODUCTION

This Association long has been concerned about the welfare of children in America. Three years ago, the ABA adopted a policy urging that welfare programs be funded at a level required to meet the need for the basic essentials of life and opposing efforts to link public assistance for needy persons to requirements that infringe upon individual freedoms, such as the right to privacy. The report accompanying that resolution expressly denounces "family cap" or "child exclusion" proposals that deny benefit increases to children born into a family that is receiving assistance through the AFDC (Aid to Families with Dependent Children) program. Several states, however, as well as the current Administration, recently have embraced these proposals under the rubric of welfare reform. Although child exclusions may be touted as "reform," they typically are based upon myths and stereotypes about individuals receiving welfare benefits. If adopted, these measures only will force poor children deeper into poverty.

In addition, child exclusions raise serious constitutional concerns. Such provisions irrationally penalize poor children for their parents' behavior. See Plyler v. Doe, 457 U.S. 202, 220 (1982) ("legislation directing the onus of a parent's misconduct against his children does not comport with

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\(^7\) In 1984, the ABA adopted policy supporting implementation of statutory and programmatic resources to meet the health and welfare needs of children. See Recommendation of 2/84 and accompanying Report ("children are . . . often without many of the basic necessities of life, such as adequate food, shelter, and medical care"). The Association also supports the enactment of legislation providing for quality child care. Recommendation of 8/83. In addition, the ABA has established a Commission on Homelessness and Poverty and a Steering Committee on the Unmet Legal Needs of Children.

\(^8\) A report prepared by the ABA's Presidential Working Group on the Unmet Legal Needs of Children and Their Families similarly urges that Congress and state legislatures ensure that public assistance programs be funded at a level sufficient to meet the need for the basic essentials of life. America's Children At Risk: A National Agenda for Legal Action, p. 11 (July 1993) (hereinafter "Children at Risk").

\(^9\) Recommendation of 8/92.
fundamental conceptions of justice"). The fundamental right of procreation and equal protection of the laws also are implicated in the proposals denying AFDC benefits to children conceived or born while their families are receiving benefits.

The ABA, in accordance with its missions to "uphold and defend the Constitution of the United States" and to promote "the administration of justice" and "the public good," should oppose child exclusions because they raise serious constitutional concerns and are inconsistent with sound public policy. By expressly opposing these provisions, the current recommendation clarifies and strengthens existing ABA policy.

II. THE AFDC PROGRAM AND THE FAMILIES IT SERVES

Perhaps the most significant of all welfare programs, AFDC is a federal-state income support program that serves very low income families. Its purpose is to encourage "the care of dependent children in their own homes or in the homes of relatives" and to provide "financial assistance and rehabilitation and other services, ... to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the

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maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.\textsuperscript{3} 42 U.S.C. § 601.

More than two-thirds of all AFDC recipients are children.\textsuperscript{4} Nevertheless, not one state in the nation provides AFDC families with income sufficient to meet their basic needs for food, health care, and housing.\textsuperscript{5} The AFDC grants in every state are far below the federal poverty line for a family of three of $991 per month. For 1994, the median state AFDC benefit for a family of three was $366 per month.\textsuperscript{12} Maximum monthly benefits for a family of three in 1994 were shockingly low: Mississippi, $120; Alabama, $164; Texas, $188; the District of Columbia, $420; New York, $577; and California, $607.\textsuperscript{12} Many families have been forced into homelessness even while receiving benefits because AFDC income was insufficient to support them. In 1988 83 percent of the women with children in homeless shelters in the Twin Cities of Minnesota received AFDC, as did 64 percent of the women with children in Atlanta's homeless shelters.\textsuperscript{12}

III. CHILD EXCLUSION PROPOSALS

Because programs that condition eligibility on behavior violate the mandated eligibility requirements set forth in the Social Security Act,\textsuperscript{13} they require the United States Department of Health and Human Services (HHS) to waive the entitlement provisions under 42 U.S.C. § 1315. The Clinton Administration's

\textsuperscript{3} "Facts that Refute Common Myths About AFDC," Selected Background Material on Welfare Programs, Center on Budget and Policy Priorities, Center for Law and Social Policy, Children's Defense Fund (February 1992).

\textsuperscript{4} Children At Risk, p. 11 (July 1993).


\textsuperscript{12} Id at 36, Table 6.

\textsuperscript{13} A Vision for America's Future, Children's Defense Fund, p. 23 (1989).

\textsuperscript{14} 42 U.S.C. § 602(a)(10)(A) (1989) ("[A]id to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals").
welfare reform plan, however, would allow states to "experiment" with child exclusions without first receiving a waiver from HHS.\textsuperscript{10}

New Jersey became the first state to enact a child exclusion provision (and receive a federal waiver) in 1992. Similar provisions have been enacted by the legislatures in Arizona, Arkansas, California, Georgia, Mississippi, Nebraska, Virginia, and Wisconsin and have been proposed in many other states.

The stated goal of child exclusion programs is to discourage women receiving AFDC from having children. However, the underlying assumptions of child exclusion provisions -- that AFDC mothers have many children, that they bear children in order to receive increased benefits, and that they have free access to medical options for family planning -- are insupportable. Indeed, child exclusion provisions rest only upon pervasive myths about families receiving public assistance that bear no relation to the facts:

- **Families receiving AFDC are not larger than those in the general population.** On average, AFDC families are no larger than two-parent families in the general population.\textsuperscript{11} In 1992, the average AFDC family had 2.9 members (including adults); 72.5% of all families on AFDC had only one or two children, and almost 90% had three or fewer children.\textsuperscript{12} In fact, AFDC family size has declined substantially in recent years; in 1969, 32.5% of AFDC families had four or more children, but in 1992, only 10.1% had four or more children.\textsuperscript{13}

- **Recipients of AFDC do not plan pregnancies in order to obtain increased benefits.** Empirical studies consistently have demonstrated that there is no

\textsuperscript{10} S. 2224, H.R. 4605, 103rd Cong., 2nd Sess. (1994).


\textsuperscript{12} Staff of House Comm. on Ways and Means, 102nd Cong., 2d Sess., Overview of Entitlement Programs: Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means, 669 (1992) (Hereinafter "1992 Green Book"). p. 401.

\textsuperscript{13} Id. at p. 401.
correlation between the receipt of AFDC benefits and the child-bearing decisions of unmarried women. In one study, 100% of the mothers responding said that their ability to receive AFDC had no effect on the decision to have a child. Moreover, families surviving on AFDC assistance already live well below the poverty level. If the paltry level of existing benefits does not influence childbearing decisions, withholding benefits for an additional child certainly can have only a punitive effect. The incremental increase that an AFDC family typically receives when a new child enters the family is negligible: in New Jersey, $64; in Mississippi, $24. These grants do not even cover money spent on diapers and formula each month. If, as the proposals assume, AFDC recipients are basing their procreation decisions on economics, they clearly would make the "rational" decision not to have additional children.

On the contrary, the facts show that decreasing benefits will not decrease the birth rate. Families receiving AFDC are not larger in states with higher AFDC grants. Moreover, the number of families receiving AFDC has risen in recent years, despite the fact that, from 1970 to 1991, the maximum AFDC benefit for a family of three with no other income declined 42 percent in the typical state, after adjusting for

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\[ ^{18} \] Staff of House Comm. on Ways and Means, 103rd Cong., 2d Sess., Overview of Entitlement Programs: Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means. (1994), pp. 368-69.

Indeed, social welfare analysts and scholars consistently find that the great majority of pregnancies among women on AFDC are unintended.\textsuperscript{22} Unintended pregnancies cannot be curbed through an economic incentive structure.

- **Women are not solely "at fault" for additional births.** Child exclusion provisions rest upon the obviously flawed premise that only women are "at fault" for additional births. Child exclusion provisions thus deny AFDC-recipient parents (about 90% of whom are women) and their children additional need-based benefits, while imposing no sanction whatsoever on non-custodial parents (about 90% of whom are men). Even when a woman does obtain birth control, the failure rates for the most reliable forms of contraceptives (i.e., the pill, diaphragms, condoms) range from 6% to 16% per year.\textsuperscript{23} In addition, women receiving AFDC who wish to terminate their pregnancies may not have access to abortion facilities or government funding. For those women who otherwise would not otherwise choose to terminate a pregnancy, child exclusion provisions create circumstances where they feel they have no choice.\textsuperscript{24}

\textsuperscript{22} *Children at Risk* at 12 citing Isaac Shapiro, et al., *The States and the Poor: How Budget Decisions in 1991 Affected Low Income People* 8 (Center on Budget and Policy Priorities and the Center for the Study of the States, 1992).

\textsuperscript{23} David Ellwood, *Poor Support: Poverty in the American Family*, 72 (1988) (80 percent of teenage mothers report that pregnancy was not wanted); William J. Wilson, *The Truly Disadvantaged*, 78-79 (1987) (citing studies conducted by Placek and Hendershot that demonstrated "women on welfare ... were significantly less likely [than women not on welfare] to desire an additional pregnancy").

The impact of child exclusion policies is likely to be devastating. The AFDC program is designed to ensure that women and children have the bare minimum -- roofs over their heads and enough food to survive. Denying this minimum support as a parent's punishment for having another child is destructive to families. The only certain effect of these proposals is that poor children will become poorer.

IV. CONCLUSION

This Association consistently has spoken out on behalf of the nation's disadvantaged children. While America's welfare system may need reform, child exclusion policies are the wrong approach for achieving change. This Association should continue its longstanding commitment to the welfare of our nation's children and speak out against "welfare reform" proposals that would deny children subsistence benefits.

Respectfully submitted,

Rebecca J. Westerfield, Chair
Section of Individual Rights and Responsibilities

February 1995
GENERAL INFORMATION FORM

Submitting Entity: Section of Individual Rights and Responsibilities

Submitted By: Rebecca J. Westerfield, Chair

1. Summary of Recommendation: The recommendation opposes legislation, rules, or regulations that would deny the incremental increase in public benefits to which a family otherwise would be entitled upon the birth of a child, on the ground that the child was conceived or born while the family was receiving public assistance.

2. Approval by Submitting Entity: The Section Council approved the recommendation in principle at its fall meeting on October 14-15, 1994; the Council's Executive Committee approved the specific language of the recommendation and the substance of the report by telephone poll in early November 1994.

3. Similar recommendations submitted to the House of Delegates or Board of Governors: In August 1992, the Association adopted a policy that urges that welfare programs be funded at a level required to meet the need for the basic essentials of life and opposes efforts to link public assistance for needy persons to requirements that infringe upon individual freedoms, such as the right to privacy. However, this policy does not specifically oppose child exclusion provisions.

4. Existing Association Policies Relevant to this Recommendation: In addition to the policy referenced in (3), above, the Association adopted policy in February 1984 supporting the implementation of statutory and programmatic resources to meet the health and welfare needs of children. The previous year, in August 1983, the Association had approved a recommendation urging that legislation be passed that provides for quality child care. A report issued by the ABA's Presidential Working Group on the Unmet Legal Needs of Children and Their Families in August 1992 urges that Congress and state legislatures ensure that public assistance programs be funded at a level sufficient to meet the need for the basic essentials of life. In August 1993, the Association went on record opposing programs that condition the level of public benefits received upon a woman's agreement to refrain from childbearing.
5. **Need for Action at this Meeting:** Both the Administration and the new Congressional leadership have stated that welfare reform will be a top priority in the coming months. Adoption of this policy would enable the ABA, on behalf of the nation's children, to take part in this important national legal and public policy debate. In doing so, the ABA will be furthering its own priority of substantively addressing children's legal needs.

6. **Status of Legislation:** The Clinton Administration's proposed welfare reform plan, already presented to the Congress, would allow states to "experiment" with child exclusion provisions without first receiving a waiver from the Department of Health and Human Services. Numerous other proposals scheduled to be debated in the next Congress also are likely to contain child exclusion provisions. Such provisions, already enacted in several states, undoubtedly will be considered in numerous other states in the coming months.

7. **Cost to the Association:** N/A

8. **Potential Conflicts of Interest:** N/A

9. **Referrals:** On or before Nov. 21, 1994, this report with recommendation was sent to all ABA Sections and Divisions, as well as to other ABA entities considered to have a potential interest in it. A copy also has been sent to the American Immigration Lawyers Association.

10. **Contact Person:** (Prior to Meeting)

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12. Proposed Amendments: None known at this time.