



Legal Studies Research Paper Series Paper No. 1234

**Fathers Behind Bars: Rethinking Child Support Policy
Toward Low-Income Fathers and Their Families**

Tonya L. Brito

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection at:

<http://ssrn.com/abstract=2338159>

Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families

*Tonya L. Brito**

I. INTRODUCTION

Since September 2005, Michael Turner has been incarcerated on six different occasions for nonpayment of child support.¹ His prison terms total over three years in jail.² He currently owes over \$20,000 in unpaid child support, and while he remains in prison on his current sentence, he will accumulate even more debt that he is unable to pay.³ After his release, South Carolina's automated case processing machinery will issue another order to show cause.⁴ At the hearing the court will ask Turner why he should not again be held in contempt because of his failure to pay the outstanding

* Professor of Law, University of Wisconsin Law School; Faculty Affiliate, Institute for Research on Poverty, University of Wisconsin; J.D., 1989, Harvard Law School; A.B., 1986, Barnard College. Many thanks to the participants of the 2011 Lutie A. Lytle Black Women Law Faculty Writing Workshop and the Ideas and Innovations in Legal Scholarship Workshop Series, University of Wisconsin Law School, for helpful discussion and comments on earlier versions of this Article, to Lisa Jacobson for her valuable research assistance, to reference librarian Jenny Zook for her excellent assistance, and to Jacqueline Langland and the editorial staff of *The Journal of Gender, Race & Justice* for their exceptional work in preparing this Article for publication. I am also grateful to the University of Wisconsin for its support of this research through the Murphy Summer Fellowship. Finally, I wish to thank Jacquelyn Boggess and David Pate, Jr., co-founders and co-directors of the Center for Family Policy and Practice (CFFPP), for their research, analysis, and outreach on behalf of low-income fathers of color and their families, and for giving me the opportunity to draft amicus briefs on CFFPP's behalf in the *Turner v. Rogers* litigation in the U.S. Supreme Court.

1. Brief for Petitioner at 8–15, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 49898 at *8–16. Many poor noncustodial parents lack attorney representation in civil contempt proceedings. See Petition for Writ of Certiorari at 12–19, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2010 WL 2604155 at *12–19. The lack of civil counsel was challenged on constitutional grounds before the U.S. Supreme Court in *Turner*. *Turner*, 131 S. Ct. at 2512. Turner argued that indigent defendants have a constitutional right to appointed counsel in civil contempt proceedings that may result in incarceration. *Id.* at 2514.

2. Brief for Petitioner, *supra* note 1.

3. *Id.* at *25.

4. *Id.* at *24–25.

arrears.⁵ Absent an unforeseen circumstance that bestows \$20,000 on Turner making it possible for him to pay off the arrears, it is virtually certain that he will be civilly incarcerated for the seventh time and that this cycle will continue.⁶

Turner's experience with the child support system is all too common.⁷ Other poor noncustodial fathers⁸ report similar dystopian experiences.⁹ A noncustodial father who participated in a research study focus group explained: "I'm just tired of getting locked up every so often, every eight months or so. I don't have no bad record, no record at all. But I keep getting locked up for child support, that's the main thing."¹⁰ In South Carolina, where Michael Turner was incarcerated,¹¹ child support obligors imprisoned for civil contempt comprise approximately thirteen to sixteen percent of the jail population.¹² It seems a pointless expenditure of state resources to repeatedly arrest poor fathers, jail them for nonpayment of child support, then later release them (when either the law requires their release or the court eventually concludes that civil incarceration is not succeeding in coercing compliance with child support orders), and repeat the cycle all over again.

Few would imagine that the child support system views as consistent with its mission the practice of repeated civil incarcerations of fathers like Michael Turner, whose indigence prevents them from paying their crushing child support debts. Indeed, Turner's jail terms undoubtedly do far more to hinder his efforts to find stable employment than they do to provide

5. *Id.* at *15–16.

6. *Id.* at *16. In *Turner*, the Court rejected respondents' mootness claim and concluded that there was a reasonable likelihood that Turner would be imprisoned again through the civil contempt process for nonpayment of child support. *See Turner*, 131 S. Ct. at 2515.

7. *See infra* pp. 652–56.

8. Of course, noncustodial mothers can and do face a similar experience. Indeed, a recent study of child support civil contempt hearings observed that twelve percent of parent-debtors were mothers. *See* Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae in Support of Petitioner at 7, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 141223 at *7 [hereinafter Brief of Elizabeth G. Patterson]. This Article, however, focuses on low-income noncustodial fathers because they are primarily impacted by the problems discussed in this Article and their experiences are sufficiently distinct from female noncustodial parents to warrant focused attention.

9. Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. POL'Y ANALYSIS & MGMT. 89, 105 (2001).

10. *Id.* (citing Kay E. Sherwood, *Child Support Obligations: What Fathers Say About Paying*, in *CARING AND PAYING: WHAT FATHERS AND MOTHERS SAY ABOUT CHILD SUPPORT* (Frank F. Furstenberg, Jr. et al. eds., 1992), available at <http://fatherhood.hhs.gov/pfs92/index.htm>).

11. *See Turner*, 131 S. Ct. at 2513–14.

12. *See* Brief of Elizabeth G. Patterson, *supra* note 8, at 6.

economic security to his children.¹³ However, across the United States, destitute noncustodial parents are incarcerated for failing to meet child support obligations they have no means to pay.¹⁴ The end result is that indigent child support debtors fill jails across the country.¹⁵

Although child support law and policy is targeted at so-called “deadbeat dads” who have the ability to pay but choose not to pay,¹⁶ the prison door continues to revolve for poor noncustodial fathers who are unable to pay.¹⁷ Inflexible application of child support collection and enforcement measures designed to ensure that child support payments are “automatic and inescapable,” no matter the circumstances,¹⁸ lead to this devastating phenomenon when applied to the chronically poor.¹⁹ Although effective in securing payments from noncustodial parents with the means to pay, the impact of these reforms on no- and low-income noncustodial parents and their families has been disproportionate and destructive.²⁰

Today, noncustodial parents who live in poverty owe the vast majority of child support owed in the United States.²¹ These parents lack the means to pay their child support debt, yet they experience the full panoply of enforcement measures, including civil incarceration for nonpayment of support.²² Ironically, low-income noncustodial parents who lack the ability to pay their child support debts are more likely to face incarceration than are the more culpable noncustodial parents who have the means to pay child support but refuse to pay.²³ This is because other routine and less severe enforcement measures, such as wage garnishment, are effective in securing support from those with the means to pay.²⁴

Furthermore, poor noncustodial fathers lack the resources to hire

13. See *infra* pp. 658–60.

14. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J.L. & PUB. POL’Y 95, 116–17 (2008).

15. *Id.*

16. See *infra* pp. 628–30.

17. See *infra* pp. 650–57.

18. See Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, in CHILD SUPPORT: THE NEXT FRONTIER 46, 49–50 (J. Thomas Oldham & Marygold S. Melli eds., 2000) [hereinafter Legler, *The Impact of Welfare Reform*].

19. See *infra* pp. 652–53.

20. See *infra* pp. 657–61.

21. See *infra* pp. 649–51.

22. See *infra* pp. 652–53.

23. See *infra* pp. 652–53.

24. See *infra* pp. 650–51.

lawyers to represent them in their contempt proceedings and press their defense of inability to comply with court orders.²⁵ When states charge indigent fathers criminally for failure to pay child support, courts appoint counsel for the fathers.²⁶ However, because states may seek to enforce delinquent child support orders through civil contempt rather than criminal charges,²⁷ many indigent fathers do not receive appointed counsel.²⁸ In *Turner v. Rogers*,²⁹ Michael Turner argued that South Carolina's denial of his request for appointed counsel in a nonpayment civil contempt proceeding with the possibility of incarceration violated the Constitution.³⁰ Although the Supreme Court held that South Carolina's procedures did not satisfy the Due Process Clause, the Court refused to find that indigent obligors categorically have a constitutional right to counsel in civil contempt proceedings in child support cases, even when there is a possibility of incarceration.³¹ In the absence of a right to counsel, it is almost certain that no- and low-income child support obligors will not be able to effectively assert the defense of inability to comply and will continue to be improperly incarcerated.³²

This Article highlights Michael Turner's experience with the child support system to illuminate the experience of thousands of poor fathers exactly like him. Rather than the due process and right to counsel questions addressed in *Turner v. Rogers*, this Article presents other, more foundational and difficult problems that were not litigated in Turner's Supreme Court case. Part II provides an overview of the historical development of the federal-state child support program and its interrelationship with the public welfare system. It demonstrates how the governmental interest in welfare cost recoupment has influenced public policy and law surrounding child support enforcement and further traces the changes that have strengthened the private child support system while reducing poor families' reliance on government cash assistance.

Part III explores the systemic policies and practices of the child support

25. See *supra* note 1.

26. See *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

27. See *Patterson*, *supra* note 14, at 115.

28. See *Petition for Writ of Certiorari*, *supra* note 1.

29. *Turner*, 131 S. Ct. 2507.

30. See *id.* at 2515–16.

31. *Id.* at 2520.

32. See Brief of Elizabeth G. Patterson, *supra* note 8, at 3, 10–12 (reporting findings of a 2010 observational study of South Carolina child support contempt hearings, which showed that “parents who appeared without counsel were held in contempt *more than twice as often as parents who were represented by counsel*”) (emphasis in original).

system that operate to create a revolving prison door for no- and low-income fathers who are under an order of child support. Part III then reviews the empirical evidence regarding the economic status and employment capabilities of disadvantaged fathers. It further chronicles their experience with the child support system, from the establishment of unrealistically high child support orders to the accumulation of onerous arrearages and ultimately, the application of punitive and unwarranted enforcement measures (including imprisonment). In concluding, Part III argues that this approach to secure child support payments from disadvantaged noncustodial fathers has not only been largely ineffective but has also produced unintended consequences that run counter to the goal of improving the economic well-being of poor children.

Part IV proposes a novel approach to child support enforcement in poor families. It contemplates a change in program priorities such that the goal of providing economic support to poor children is made paramount, even if this shift is made at the expense of pursuing the dual (and often conflicting) goal of welfare cost recoupment. With this enhanced commitment to children's economic needs in mind, Part IV presents a multi-pronged alternative scheme for child support. First, the scheme proposes reforms to the child support system to ensure that disadvantaged fathers' child support orders realistically reflect their income potential and capacity to pay. Second, the scheme provides for significant government investments in effective capacity building strategies, including education, job training, and other work-related supports, so that disadvantaged fathers are better able to meet their child support responsibilities. Part IV recognizes that implementing the first two prongs of this proposal may not succeed in achieving the goal of securing sufficient private support for poor children. Given the intractable systemic barriers to secure employment that disadvantaged fathers experience and their particular vulnerability to broader economic downturns, Part IV also imagines a more robust public-private sharing of financial responsibility for poor children.³³ Under this vision, private support of poor children would be complemented by, rather than substituted for, public support. More specifically, Part IV proposes a system that provides resources to children and their families so that, coupled with private family resources, the children are guaranteed a minimum level of economic security. This public benefit would operate to ensure a child support floor so that, paired with court-ordered child support payments, the funds would lift poor single mothers and their children above the poverty threshold.

33. See *infra* Part IV.

II. CHILD SUPPORT, PUBLIC WELFARE, AND THE SHIFT FROM PUBLIC TO PRIVATE RESPONSIBILITY FOR POOR CHILDREN'S ECONOMIC NEEDS

The federal child support program originates in, and is historically linked to, the public welfare system.³⁴ Indeed, the passage of the first federal law in this area, the Child Support Act of 1974, was prompted by concerns about sharp increases in government welfare expenditures on behalf of poor women and their children.³⁵ As part of the Social Security Act of 1935, Congress established the federal welfare system, Aid to Dependent Children (later renamed Aid to Families with Dependent Children, or AFDC), a means-tested cash assistance program.³⁶ AFDC was modeled on the then existing Mothers' Pension welfare programs, which states established between 1910 and 1920.³⁷ At that time, advocates for government aid for poor mothers and children championed the value of mothering and argued that mothers would best serve their children's well-being by caring for them in their own homes.³⁸ These advocates urged that without government aid to poor mothers and children, family destitution would result, causing institutionalization of children in orphanages, child neglect due to maternal employment outside the home, or the children themselves working long hours in factories alongside their mothers.³⁹ Like Mothers' Pensions, AFDC provided small cash benefits to poor single mothers.⁴⁰ However, eligibility was broadened under AFDC. While Mothers' Pensions were primarily reserved for widows,⁴¹ mothers qualified for AFDC assistance if the family

34. See Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 252–53 (2000) [hereinafter Brito, *The Welfarization of Family Law*].

35. *Id.*

36. Social Security Act, Pub. L. No. 74-271, §§ 401–406, 49 Stat. 620, 627–29 (1935) (codified at 42 U.S.C. §§ 601–06 (1940)). Initially, the program was called Aid to Dependent Children (ADC), and in 1962, its name was changed to AFDC. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104, 76 Stat. 172, 185 (codified as amended in scattered sections of 42 U.S.C.).

37. Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 417–18 (1999) [hereinafter Brito, *From Madonna to Proletariat*].

38. See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935*, at 37–40 (1994).

39. *Id.*

40. See Brito, *From Madonna to Proletariat*, *supra* note 37, at 419–23.

41. See Susan Tinsley Gooden, *Contemporary Approaches to Enduring Challenges: Using Performance Measures to Promote Racial Equality Under TANF*, in *RACE AND THE POLITICS OF WELFARE REFORM* 254, 255 (Sanford F. Schram et al. eds., 2003). Social service agency employees at the local level exercised considerable discretion in their administration of Mothers' Pensions and limited enrollment to almost entirely White widows. *Id.* A federal study of the racial composition of state Mothers' Pensions found that in 1931, ninety-six percent of recipients were White and three

lacked a male wage earner because of death, desertion, or incapacity.⁴²

In practice, however, local welfare officials did not base their eligibility determinations under AFDC solely on applicants' economic needs.⁴³ From the 1940s through the early 1960s, applying morals means tests, caseworkers limited welfare caseloads by ensuring that only the most "deserving" mothers received benefits.⁴⁴ States defined eligibility criteria narrowly, and applying "suitable home," "man in the house," and "substitute father" rules, AFDC caseworkers exercised considerable discretion, by subjecting applicants and recipients of AFDC benefits to intrusive and judgmental supervision of their parenting, "morals," and home environment.⁴⁵ Nonmarital cohabitation and childbirth were among the most common restrictions,⁴⁶ and caseworkers conducted surprise visits to welfare recipients' homes in the middle of the night in order to find out if there was a "man in the house."⁴⁷ Termination or reduction of benefits was often the penalty when caseworkers determined that mothers violated these rules.⁴⁸

The 1960s brought an end to these exclusionary practices.⁴⁹ Challenges by activists and lawyers succeeded in dismantling the arbitrary barriers to welfare access.⁵⁰ Welfare became a statutory "right," and welfare agencies applied a uniform means test to determine applicants' eligibility for

percent were Black. *Id.* Wanting to preserve benefits for only the most "prestigious" of mothers, administrators excluded many White widows who may have otherwise qualified. *Id.* Caseworkers conducted inspections of mothers' homes to determine whether they were "suitable" and typically obtained character evaluations from family, employers, neighbors, and clergy members. *Id.*

42. *Id.*

43. See *infra* notes 44–47 and accompanying text.

44. See GORDON, *supra* note 38, at 294–99; see also Brito, *From Madonna to Proletariat*, *supra* note 37, at 422.

45. See Brito, *From Madonna to Proletariat*, *supra* note 37, at 420.

46. For example, Louisiana passed a law providing that "no assistance shall be granted to a child living with its mother if the mother has had an illegitimate child after receiving assistance." Gooden, *supra* note 41, at 261 (quote not attributed in original source).

47. June Carbone, *Child Support Comes of Age: An Introduction to the Law of Child Support*, in *CHILD SUPPORT: THE NEXT FRONTIER*, *supra* 18, at 3, 8.

48. See GORDON, *supra* note 38, at 299.

49. See GWENDOLYN MINK, *WELFARE'S END 50–51* (1998) [hereinafter MINK, *WELFARE'S END*] (describing how entitlement status of AFDC emerged in the 1960s from the Court's decision in *King v. Smith* and lasted for approximately thirty years).

50. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (striking down AFDC residency requirements); *King v. Smith*, 392 U.S. 309, 333–34 (1968) (striking down a state substitute-father rule that denied benefits to families when mothers engaged in sexual relationships with men); see also MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 107–08* (1989) (recounting successes of welfare and poverty lawyers).

benefits.⁵¹ Welfare caseloads quickly soared, and in a ten-year period (from 1961 to 1971), the number of recipients increased threefold (from 3.5 million to 11 million).⁵² The expanded rolls of welfare recipients included so many Black single mothers that by 1961 the AFDC program, which had been eighty-nine percent White in 1939, became forty-four percent Black.⁵³ Another significant demographic shift in the welfare population was the marital status of recipients. Whereas the majority of recipients previously were widowed mothers, by 1961, widowed mothers made up less than eight percent of the welfare caseload, and instead, the typical recipient was more likely to be divorced, separated, or never married.⁵⁴

Increased welfare costs resulting from the tremendous growth in caseloads as well as the shifting demographics of recipients drew public attention, and politicians made calls for reform.⁵⁵ Critics viewed the exponential increase in welfare expenditures as problematic, particularly because public monies were being provided to “unworthy” single mothers.⁵⁶ Also, because recipients were more likely to be divorced or never married than in years past, policymakers began to view absent fathers as the individuals ultimately responsible for the increase in welfare costs and looked to them as a potential source of economic support for the families.⁵⁷ Congress’s desire to reduce AFDC costs motivated its interest in increasing support from fathers.⁵⁸

The federal government thus ventured into the arena of child support with the passage of the Child Support Enforcement Act of 1974, which

51. See MINK, WELFARE’S END, *supra* note 49.

52. See *id.* at 51–52 (“From 1961 to 1971, enrolled individuals increased from 3.5 million to 11 million, with the number of recipients growing at an annual rate of almost 20 percent between 1967 and 1971.”).

53. See *id.* at 46–48; Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 891 (1994) (analyzing the structural coincidence of race, gender, low wages, and poverty on the population that welfare began to serve).

54. See MINK, WELFARE’S END, *supra* note 49, at 46–47; Brito, *The Welfarization of Family Law*, *supra* note 34, at 238–40. Widows constituted sixty-one percent of the welfare caseload in 1939. See *id.* A 1939 amendment to the Social Security Act created a new federal social insurance program that provided survivor’s benefits. MINK, WELFARE’S END, *supra* note 49, at 46–47. Many qualifying widows departed welfare in favor of the new program, which lacked the stigma and caseworker oversight of AFDC. *Id.*

55. See JOEL F. HANDLER & YEHESKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* 32 (1997); see also MINK, WELFARE’S END, *supra* note 49, at 50–61 (tracing activities of the judiciary and states through the 1960s and 1970s as the population of welfare recipients grew).

56. See Brito, *From Madonna to Proletariat*, *supra* note 37, at 424.

57. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 253.

58. *Id.*

established the Office of Child Support Enforcement (OCSE) and mandated the creation of state-level counterparts administered in compliance with specific federal guidelines.⁵⁹ Importantly, the Act required that custodial AFDC parents assign to the state their rights to collect child support payments and that the funds collected on behalf of AFDC families be used to reimburse the government for welfare benefits paid to the families.⁶⁰ If AFDC families did not have a support order in place, they were required to cooperate with states' efforts to establish support orders by, among other things, identifying putative fathers in cases of nonmarital births.⁶¹ Additionally, states used all child support collected on behalf of AFDC families to reimburse the government for the cost of welfare expenditures.⁶² Consequently, for AFDC families, whether the noncustodial parents paid child support did not matter, because their financial situation remained the same either way.⁶³

Amendments to the Child Support Act in 1984 and 1988⁶⁴ further expanded the Act's scope. The amendments allowed non-welfare families use of state child support offices' services and required states to strengthen paternity establishment, create and utilize child support guidelines in setting orders, and implement wage withholding to increase collections.⁶⁵

59. Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (codified as amended at 42 U.S.C. §§ 651-60 (2006)).

60. Child Support Enforcement Act, 42 U.S.C. §§ 602(a)(26)(A), 602(a)(28), 657 (1975); see Irwin Garfinkel et al., *A Brief History of Child Support Policies in the United States*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 14, 19 (1998) [hereinafter Garfinkel et al., *A Brief History of Child Support Policies in the United States*] (explaining that the 1974 child support amendments to the Social Security Act established OCSE and required that states create counterparts at the state level).

61. Maria Cancian et al., *Welfare and Child Support: Complements, Not Substitutes*, 27 J. POL'Y ANALYSIS & MGMT. 354, 355 (2008) [hereinafter Cancian et al., *Welfare and Child Support*].

62. *Id.*

63. *Id.* Since the 1974 Act, Congress has sought reimbursement for welfare expenditures from noncustodial fathers who fail to pay support. See HANDLER & HASENFELD, *supra* note 55, at 128.

64. See Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 26 and 42 U.S.C.).

65. The Child Support Enforcement Amendments of 1984 required states to create guidelines (or formulas) for calculating child support orders, rather than relying solely on judicial discretion. Child Support Enforcement Acts § 18(a). The Family Support Act of 1988 included several provisions designed to increase the rate of paternity establishment in cases of nonmarital births. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, §§ 121-129 (codified as amended in scattered sections of 42 U.S.C.). Prior to the new focus on paternity establishment as part of an enhanced child support enforcement strategy, states had little involvement in the area of paternity establishment. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 258-59. Nonmarital parents were free to address the issue of paternity recognition as they saw fit and, as a result, paternity was established in only one-third of nonmarital births each year. *Id.* at 259. The paternity provisions of The Family Support Act: (1) required that each state establish a minimum number of

Moreover, the 1984 enactment established a distribution scheme for child support collected on behalf of AFDC families.⁶⁶ Specifically, families received the first fifty dollars of child support collected, and the federal and state governments shared any remaining funds necessary to reimburse themselves for welfare benefits paid to the families.⁶⁷ The purpose of this change in the law, referred to as a “pass through” of current child support collected, was to incentivize parental cooperation with the child support system while continuing the practice of offsetting welfare expenditures.⁶⁸

Despite the efforts of these wide-ranging provisions, improvements in child support enforcement were only modest, and collections overall were insufficient.⁶⁹ In light of these deficiencies, calls for reform of the child support system intensified and arose alongside a broader debate concerning overhaul of the federal welfare system.⁷⁰ Unlike other aspects of welfare reform,⁷¹ members of both political parties enthusiastically joined the

paternity declarations annually, 42 U.S.C. § 652(g) (2006), (2) permitted genetic testing in contested paternity cases, 42 U.S.C. § 666(a)(5)(B)(i) (2006), and (3) imposed time limits on states’ processing of paternity cases. 42 U.S.C. § 652(h). If states failed to comply with these new federal mandates, they could face financial penalties. 42 U.S.C. § 655.

66. Cancian et al., *Welfare and Child Support*, *supra* note 61.

67. *Id.* To accomplish the goal of welfare cost recoupment, the federal and state government initially allocated the child support received between the two governments in proportion to each government’s share of welfare expenditures. See MARIA CANCIAN ET AL., INST. FOR RESEARCH ON POVERTY, TESTING NEW WAYS TO INCREASE THE ECONOMIC WELL-BEING OF SINGLE-PARENT FAMILIES: THE EFFECTS OF CHILD SUPPORT POLICIES ON WELFARE PARTICIPANTS 3 (2007), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp133007.pdf>. With the passage of the Deficit Reduction Act of 1995, the federal government has amended the rules governing distribution of child support collected. See Deficit Reduction Act of 1995, 42 U.S.C. § 657 (2006). The new law provides that the federal share of child support collections is waived if a state pays collected child support to former TANF families. *Id.* And, with respect to current TANF families, the law provides that a portion of the federal share of child support collections is waived if the state passes through and disregards child support (up to \$100 for one child and \$200 for two or more children). *Id.*

68. Cancian et al., *Welfare and Child Support*, *supra* note 61, at 355–56.

69. See HANDLER & HASENFELD, *supra* note 55, at 128–29.

70. In 1988, Congress created the U.S. Commission on Child Support and directed the Commission to study the child support system and make recommendations for improvements. See Samuel V. Schoonmaker, IV, *Consequences and Validity of Family Law Provisions in the “Welfare Reform Act,”* 14 J. AM. ACAD. MATRIMONIAL L. 1, 4–5 (1997). The Commission’s report, issued in 1992, called for far-reaching changes to state child support systems and to the interstate establishment of support orders. See U.S. COMM’N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM (1992), reprinted in *Official Recommendations of the United States Commission on Interstate Child Support*, 27 FAM. L.Q. 31 (1993). The proposals the Commission endorsed later served as a foundation for child support provisions in the new federal welfare reform law, the Personal Responsibility Act and Work Opportunity Reconciliation Act. See Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L. Q. 519, 522 n.16 (1996) [hereinafter Legler, *The Coming Revolution in Child Support Policy*] (citing H.R. REP. NO. 98-925, at 1 (1984), reprinted in 1984 U.S.C.C.A.N. 2397, 2397).

71. See Stephen D. Sugarman, *Financial Support of Children and the End of Welfare As We*

crusade to crack down on delinquent fathers.⁷² Although both parties supported the idea of tougher child support enforcement, conservatives and liberals had different goals in mind.⁷³ Conservatives emphasized the need to “get tough” on absent fathers by requiring them to live up to their financial responsibilities to their children.⁷⁴ Liberals and moderates, on the other hand, tended to emphasize the goal of utilizing child support to enhance the financial well-being of low-income single-parent households.⁷⁵

Much public attention was focused on the economic plight of single-mother families and the failure of absent fathers to provide for their children.⁷⁶ The figures were sobering. Nearly half of all poor mothers, and their children lived in poverty⁷⁷ and about the same number relied on welfare to make ends meet.⁷⁸ They received almost no financial assistance from noncustodial fathers.⁷⁹ Most fathers did not pay any child support whatsoever, and for those who did, the amounts were meager.⁸⁰ Even more troubling was data regarding child support receipt in single-parent households.⁸¹ In 1994, as the public, policymakers, and Congress debated competing proposals for welfare reform,⁸² only 12.5% of single-parent families receiving welfare were also receiving child support.⁸³ Advocates for reform, including liberals, conservatives, and even some feminists, believed that the availability of child support from noncustodial fathers would raise some families above the poverty threshold.⁸⁴

Know It, 81 VA. L. REV. 2523, 2547 (1995) (“[T]he bipartisan welfare reform effort launched in 1988 has largely failed.”).

72. See David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583, 597–99 (2009).

73. Legler, *The Coming Revolution in Child Support Policy*, *supra* note 70, at 526 n.42.

74. *Id.*

75. *Id.*

76. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 252.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. See *id.*

82. During the period from 1992 to 1996, congressional Republicans and Democrats presented competing proposals to reform welfare. See HANDLER & HASENFELD, *supra* note 55, at 5. In addition to submitting their own legislative proposals for reform at the federal level, governors received permission from the U.S. Department of Health and Human Services to experiment with welfare reform at the state level. *Id.*

83. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 252.

84. See MINK, WELFARE'S END, *supra* note 49, at 78; see also VICKI TURETSKY, CTR. FOR

Against this backdrop, the child support reforms of 1996 were propelled by widespread societal hostility toward “deadbeat dads,” a term that was applied indiscriminately to all noncustodial fathers who were delinquent on their payments.⁸⁵ The public viewed nonpaying fathers as men who could afford to pay child support but flagrantly chose not to pay, depriving their children of desperately needed economic support.⁸⁶ Political leaders contributed to the heated rhetoric.⁸⁷ Days before signing the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), President Clinton, who pledged to “end welfare as we know it,” threatened deadbeat dads that the government would be relentless in its pursuit of them for past due child support.⁸⁸ “[He] warned: ‘[I]f you owe child support, you better pay it. If you deliberately refuse to pay it, you can find your face posted in the Post Office. We’ll track you down with computers We’ll track you down with law enforcement. We’ll find you through the Internet.’”⁸⁹ State agencies followed through on these threats and went so far as to post “wanted ads” of fathers who failed to support their children.⁹⁰ Subsequent media coverage of deadbeat dads fueled public outrage, particularly because the popular image conveyed was that of a father who enjoyed an affluent standard of living yet shirked his child support obligation while his children

LAW & SOC. POLICY, REALISTIC CHILD SUPPORT POLICIES FOR LOW INCOME FATHERS 2 (2000) (citing LYDIA SCOON-ROGERS, U.S. CENSUS BUREAU, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1995 (1999), available at <http://www.census.gov/prod/99pubs/p60-196.pdf>) available at www.clasp.org/admin/site/publications/files/0061.pdf [hereinafter TURETSKY, REALISTIC CHILD SUPPORT POLICIES] (reporting data showing that the poverty rate of families headed by single mothers drops from thirty-three to twenty-two percent when they receive child support).

85. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 263–64. Politicians also adopt tough stances on deadbeat dads during election campaigns to win support with voters. See, e.g., Jennifer Goulah, *The Cart Before the Horse: Michigan Jumps the Gun in Jailing Deadbeat Dads*, 83 U. DET. MERCY L. REV. 479, 479–80 (2006) (describing Mike Cox’s crack down on deadbeat dads once he was elected Attorney General of Michigan).

86. Brito, *The Welfarization of Family Law*, *supra* note 34, at 263–64.

87. See Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 41, at 171, 177–81 (examining congressional discussions of welfare reform during which politicians characterized poor mothers receiving public assistance as “welfare queens,” cheaters, drug users, unfit mothers, and generally lazy and sexually promiscuous persons).

88. Ann Cammett, *Deadbeats, Deadbroke, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL’Y 127, 138–41 (2011).

89. *Id.* at 141 (citing Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1124 (1999) (quoting President William J. Clinton, Remarks Made to the Citizens of Denver (July 18, 1996)).

90. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1001 (2006).

lived in abject poverty.⁹¹

In 1996, Congress passed sweeping reforms of the federal welfare and child support enforcement systems. The new welfare law, PRWORA,⁹² ended AFDC⁹³ and replaced it with Temporary Assistance to Needy Families (TANF),⁹⁴ a federal block grant program.⁹⁵ TANF abolished the entitlement to benefits under AFDC, imposed strict work requirements on recipients in exchange for government assistance, established time limits on receipt of welfare benefits, and required states to sanction those who did not engage in work or work-related activities.⁹⁶ The reforms imposing a time limit on receipt of benefits and eliminating the entitlement status of welfare benefits heightened the importance of child support as a supplemental economic resource for TANF families.⁹⁷

The unmistakable message underlying PRWORA was that poor mothers must go to work to support their children.⁹⁸ To achieve the welfare-to-work goal, the law provided short-term cash benefits, employment-related services to address the labor market barriers poor mothers experienced, and supports to enhance the likelihood that mothers would succeed in the workplace.⁹⁹ The practical effect of these changes in welfare law was that poor children and their families could no longer rely on a long-term cash benefit.¹⁰⁰

Today, the government “safety net” is a system of supports focused on

91. *Id.* Warren Matthei, a former executive with Merrill Lynch, was one such wealthy father. Dana Kaufman, *Debt-Beat Dad*, 86 A.B.A. J., Apr. 2000, at 28. Matthei, who owed more than \$1 million in past due child support, chose civil incarceration for nonpayment of child support over compliance. *Id.*

92. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601-617 (2006)).

93. Social Security Act, Pub. L. No. 74-271, §§ 401-406, 49 Stat. 627, 627-29 (1935) (codified at 42 U.S.C. §§ 601-606 (1940)). The name of the federal welfare program was changed from Aid to Dependent Children (ADC) to Aid to Families with Dependent Children (AFDC) in 1962. *See supra* note 36.

94. PRWORA §§ 101-116.

95. Ron Haskins & Rebecca M. Blank, *Five Years After Welfare Reform: An Agenda for Reauthorization*, in *THE NEW WORLD OF WELFARE* 1, 3-13 (2001).

96. *Id.*

97. *See* Cancian et al., *Welfare and Child Support*, *supra* note 61, at 356.

98. *See* HANDLER & HASENFELD, *supra* note 55, at 38; Lawrence M. Mead, *Welfare Employment*, in *THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY* 39, 45-46 (Lawrence M. Mead ed., 1997).

99. *See* Haskins & Blank, *supra* note 95.

100. PRWORA terminates the entitlement status of welfare benefits and imposes strict time limits on their receipt. *See* HANDLER & HASENFELD, *supra* note 55, at 6-7.

helping poor custodial parents (primarily mothers) find and maintain jobs.¹⁰¹ The system includes services that help individuals find paid work (such as job placement assistance, job training, and subsidized work experiences) and supports that subsidize low-wage employment (such as child care assistance, food stamps, and the Earned Income Tax Credit (EITC)).¹⁰² The rationale for the expanded income security measures was an effort to “make work pay,” so that single mothers leaving welfare for work would be better off financially than those who remained on welfare.¹⁰³ For low-wage custodial mothers, packaging post-tax, post-transfer income with other non-cash government benefits and regular child support payments greatly enhanced their ability to provide for their children.¹⁰⁴

The child support enforcement amendments in PRWORA were as extensive and far-reaching as the welfare reforms.¹⁰⁵ Indeed, when President Clinton signed PRWORA, he stated: ““For a lot of women and children, [t]he only reason they’re on welfare today—the only reason—is that the father up and walked away when he could have made a contribution to the welfare of the children.””¹⁰⁶ The primary purpose of these reforms was to

101. Maria Cancian et al., *Child Support: Responsible Fatherhood and the Quid Pro Quo*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 156–57 (2011) [hereinafter Cancian et al., *Child Support*]. “In 1997, states spent around 70 percent of TANF funds on cash assistance. Today, 70 percent of TANF is spent on work supports like child care, transportation, and emergency assistance and 30 percent goes toward cash assistance.” See *TANF Hearing: Improving Work and Other Welfare Reform Goals, Hearing Before the H. Comm. on Ways and Means*, 112th Cong. 7 (2011) [hereinafter *TANF Hearing*] (statement of Jill Groblewski, Center for Family Policy and Practice), available at http://cffpp.org/publications/CFFPP_TANF_Testimony.pdf.

102. Mincy et al., *Income Support Policies for Low-Income Men and Noncustodial Fathers: Tax and Transfer Programs*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 240, 242–43 (2011) [hereinafter Mincy et al., *Income Support Policies for Low-Income Men and Noncustodial Fathers*] (describing EITC and illustrating its application to hypothetical families). The EITC is a tax credit that benefits low-wage workers with children by “offset[ing] payroll taxes . . . and refund[ing] the difference.” *Id.* It is currently the “largest antipoverty program” in the United States, but its availability to “workers without custody of their children” is limited. *Id.* at 243. “[Noncustodial parents] are eligible for the same EITC as childless workers,” and thus, for them, the EITC offsets only half of earnings deducted for payroll taxes. *Id.* at 246–49.

103. Sheldon Danziger et al., *Does It Pay to Move from Welfare to Work?*, 21 J. POL’Y ANALYSIS & MGMT. 671, 671–75 (2002).

104. The package of supports can greatly enhance the living standard of working poor families. “For example, in 2002 a single parent with two children earning \$10,000 (a full-time job at minimum wage) could have received about \$23,600 in work supports (including child care subsidies of \$12,000 for two young children, Medicaid for the parent and both children, food stamps and the EITC).” See OFFICE OF PUBLIC AFFAIRS, THE URBAN INST., GOVERNMENT WORK SUPPORTS AND LOW-INCOME FAMILIES: FACTS AND FIGURES 1 (2006), available at http://www.urban.org/UploadedPDF/900981_worksupports.pdf. Unfortunately, the work support programs do not fully meet the needs of working poor families, and only seven percent of eligible families received all four supports in 2002. *Id.* at 2.

105. See Haskins & Blank, *supra* note 95, at 12.

106. See Papke, *supra* note 72, at 599 (2009) (quoting President William Clinton, Remarks on

improve the operation of child support systems so that those systems could collect more money from noncustodial fathers to assist single mothers in the process of moving from welfare to work.¹⁰⁷ The reforms also advanced the goal of welfare cost recovery: the government practice of seeking reimbursement of welfare costs through child support enforcement.¹⁰⁸ Central features of the law included enhanced procedures for establishing paternity in nonmarital births,¹⁰⁹ implementation of a national directory of newly hired employees that child support agencies could use to locate non-payers, and streamlined administrative procedures.¹¹⁰ Additionally, PRWORA gave states more discretion regarding how to allocate child support payments received on behalf of TANF families, no longer mandating that states pass through the first fifty dollars per month of payments to recipient families directly.¹¹¹

Another significant systemic change in PRWORA was implementation of mass case processing in lieu of judicial and quasi-judicial individualized proceedings.¹¹² The enforcement system has been described as follows:

If we do not know where a father is, policymakers can find him in one of many available databases. If we do not know which man is the father of a particular child, administrative agencies can order DNA tests. Formulas spit out order awards, and remote computers assess award levels. Support is deducted from individuals' paychecks before they even know it was there to begin with. And

Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters (Aug. 22, 1996), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=1326&dbname=1996_public_papers_vol2_misc (providing a transcript)).

107. See *id.* at 601.

108. The federal government introduced this practice in the landmark Child Support Act of 1974, which established the OCSE. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 253.

109. Mincy et al., *Income Support Policies for Low-Income Men and Noncustodial Fathers*, *supra* note 102, at 249. In order to establish an order and collect child support on behalf of never-married mothers, paternity must first be established. *Id.* In 1992, an executive order established in-hospital paternity programs, encouraging nonmarital fathers to voluntarily acknowledge paternity rather than go through a formal judicial process. See *id.*

110. *Id.* at 252–56. The reforms have been tremendously successful in achieving many of their goals. For example, the number of absent parents the child support enforcement program has located has increased from 454,000 in 1978 to 6,585,000 in 1998; the number of paternities established increased from 111,000 in 1978 to 1,556,000 in 2000; and the number of child support orders established has increased from 315,000 in 1978 to 1.1 million in 2000. See JOCELYN ELISE CROWLEY, *THE POLITICS OF CHILD SUPPORT IN AMERICA* 44–47 (2003).

111. See Cancian et al., *Welfare and Child Support*, *supra* note 61, at 356. A majority of states abandoned the fifty dollar per month pass-through and now use all the child support received on behalf of TANF families to offset welfare costs. *Id.*

112. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 256.

money is sent back to the recipient families, so that housing, food, and utility bills can all be paid on time.¹¹³

Overall, the child support system became more automated and, particularly with respect to enforcement methods, more stringent and punitive.¹¹⁴ As some described it at the time, “[t]he vision for child support enforcement that guided legislative development is that support payments should be automatic and inescapable.”¹¹⁵

This image of non-payers as “deadbeats” was fairly applied to the many well-to-do fathers whose children were suffering economically,¹¹⁶ but it did not take account of the twenty-six percent of noncustodial fathers who were themselves poor.¹¹⁷ When Congress enacted the welfare law, it was known that a number of child support obligors were so poor that they fell below the poverty threshold.¹¹⁸ When considering the reform proposals, policymakers

113. CROWLEY, *supra* note 110, at 51. Through enactment of the Child Support Recovery Act of 1992 (CSRA), Congress criminalized child support delinquency. *See* Papke, *supra* note 72, at 599–600. Under the law, noncustodial parents who owed child support in one state but resided in another could face fines and imprisonment for nonpayment. *Id.* at 600. Congress amended CSRA in 1998 with the passage of the Deadbeat Parents Punishment Act, which heightened the penalties for child support delinquency. Catherine Wimberly, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single Mother Families*, 53 STAN. L. REV. 729, 746 (2000). Under the law, defendants face prison terms of up to two years if they owe \$10,000 or more in support or if they have failed to pay support for two years or more. *Id.*

114. CROWLEY, *supra* note 110, at 51.

115. Legler, *The Impact of Welfare Reform*, *supra* note 18, at 49.

116. In addition to ability to pay, willingness to pay also impacts child support receipts. *See* Lenna Nepomnyaschy & Irwin Garfinkel, *Child Support Enforcement and Fathers' Contributions to Their Nonmarital Children*, 84 SOC. SERV. REV. 341, 342 (2010). Several studies have examined the characteristics of fathers who pay child support as compared to those that do not (when ability to pay is held constant). *Id.* at 342–46 (reviewing findings of prior research). Fathers who have lived with the mother and child in addition to fathers who exercise their visitation rights are among the noncustodial parents who are more likely to pay support. *Id.* at 342–43. On the other hand, child support payments tend to decline over time. *Id.* at 343. This is more likely to occur in cases where either the father or mother has additional children with a new partner or the mother has a new relationship. *Id.*

117. *See* Elaine Sorensen & Chava Zibman, *Getting To Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. 420, 422 (2001) [hereinafter Sorensen & Zibman, *Getting To Know Poor Fathers*]. Examination of 1997 data reveals that twenty-six percent of noncustodial fathers (2.8 million) were poor and unable to pay, while forty-two percent (4.5 million) of noncustodial fathers were able to pay support but did not. *Id.* at 422–23 (providing that there are 10.8 million noncustodial fathers, and of that group, twenty-six percent were poor and not able to pay, and forty-two percent were not poor and did not pay child support).

118. *See* Cammett, *supra* note 88, at 140. Data on the prison population, for example, revealed the meager earnings of fathers who are incarcerated. *Id.* A federal report from 1997 found that “most fathers in state prisons reported incomes below the poverty line prior to incarceration, with 53% earning less than \$1,000 in the month before their arrest.” *Id.* (citing CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 10 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf>).

and the media gave little thought to fathers with limited means to meet their child support obligations, or how to help them meet their financial obligations to their children.¹¹⁹

Poor noncustodial fathers, characterized by some researchers as either “deadbroke”¹²⁰ or as “turnips,”¹²¹ have limited abilities to provide economic support to their children. One empirical study found that twenty-three percent of noncustodial fathers are indeed “unable nonpayers.”¹²² About thirty percent of poor fathers who do not pay child support are incarcerated and the remainder experience some or all of the following barriers to employment: limited education, limited work experience, health problems, transportation barriers, and/or housing instability.¹²³ The researchers’ conclusion—that it would be futile to pursue child support payments from these impoverished fathers¹²⁴—has been borne out. “In other words, [noncustodial] fathers are rarely poor *and* paying child support (3 percent).”¹²⁵ Rather than providing assistance to attain job skills and employment so that these men are better able to pay support, unnecessarily harsh child support laws place the poorest fathers in an economically untenable position by setting child support orders at levels that exceed their capacity to pay and then later punishing them for shirking their responsibilities when they are inevitably delinquent.¹²⁶

119. See Brito, *The Welfarization of Family Law*, *supra* note 34, at 263–64.

120. See Maldonado, *supra* note 90, at 1003.

121. Young, uneducated, noncustodial parents who lack income to pay child support are called “turnips” after the phrase, “You can’t get blood from a turnip.” Ronald Mincy & Elaine Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL’Y ANALYSIS & MGMT. 44, 44–45 (1998) [hereinafter Mincy & Sorensen, *Deadbeats and Turnips*].

122. Sorensen & Zibman, *Getting To Know Poor Fathers*, *supra* note 117, at 422. Another study, reviewing data from the 1990 Survey of Income and Program Participation conducted by the U.S. Census Bureau, estimated that between sixteen and thirty-three percent of noncustodial fathers are unable nonpayers. See Mincy & Sorensen, *Deadbeats and Turnips*, *supra* note 121, at 47.

123. See Sorensen & Zibman, *Getting To Know Poor Fathers*, *supra* note 117, at 424–26.

124. See CROWLEY, *supra* note 110, at 164 (citing Mincy & Sorensen, *Deadbeats and Turnips*, *supra* note 121, at 44–51).

125. See Sorensen & Zibman, *Getting To Know Poor Fathers*, *supra* note 117, at 423.

126. Although low-income fathers and mothers encounter similar labor market barriers, fathers have not been provided with as many opportunities to participate in job placement, training, and educational programs. ELAINE SORENSEN & CHAVA ZIBMAN, THE URBAN INST., ASSESSING THE NEW FEDERALISM PROJECT, POOR DADS WHO DON’T PAY CHILD SUPPORT: DEADBEATS OR DISADVANTAGED? 1 (2001), available at http://www.urban.org/UploadedPDF/anf_b30.pdf. “In 1996, for example, only 6 percent of the fathers received job search assistance, compared with 11 percent of the mothers. The gap is even more striking for training/education classes, with only 4 percent of the fathers engaging in such activities, compared with 19 percent of the mothers.” *Id.* at 3. See generally Sandra K. Danziger & Kristin S. Seefeldt, *Barriers to Employment and the “Hard to Serve”*: *Implications for Services, Sanctions, and Time Limits*, FOCUS (Inst. for Research on Poverty at the Univ. of Wis.-Madison, Madison, Wis.), 2002, at 80–81, available at <http://www.irp.wisc.edu/>

III. CHILD SUPPORT ENFORCEMENT AND LOW-INCOME FATHERS

This Part explores the experiences of no- and low-income fathers within the child support system. In brief, although poor fathers are expected to pay support (and very often at levels that are high relative to their earnings), collections from this population remain low.¹²⁷ Low collections persist despite states' employing aggressive and punitive enforcement strategies.¹²⁸ This Part closely explores each aspect of this phenomenon. The analysis begins with the mechanism for establishing and modifying child support orders. It pays particular attention to guidelines governing low-income families and the application, in practice, of those guidelines to disadvantaged fathers. This Part next looks at the facts and figures concerning child support collections from poor fathers, examining not only to what extent they pay support, but also their capacities to pay given their actual earnings and opportunities for labor force participation. This Part next examines state enforcement strategies and their impact and finds that the child support system's systemic policies and practices operate to create a revolving prison door for many disadvantaged noncustodial fathers. This Part concludes by arguing that the prevailing approach to securing child support payments has been largely ineffective at improving the economic well-being of poor children, and further, that many of the existing policies and practices work to undermine achievement of that goal.

A. Establishing Child Support Awards for Low-Income Fathers

Reforms to the child support system have resulted in ever-larger numbers of noncustodial parents under orders of support.¹²⁹ The number of child support orders that states have established increased from 315,000 in 1978 to 1,100,000 in 2000.¹³⁰ This trend continued during the last decade, with the number of child support orders increasing to 1,297,020 in 2010.¹³¹

publications/focus/pdfs/foc221-part3.pdf#page=26 (discussing limitations of welfare-to-work programs and barriers to successful workforce entry). For a discussion of the Parents' Fair Share program, a small-scale demonstration project implemented in the 1990s to improve fathers' abilities to pay support, see Earl S. Johnson & Fred Doolittle, *Low-Income Parents and the Parents' Fair Share Program: An Early Qualitative Look at Improving the Ability and Desire of Low-Income Noncustodial Parents To Pay Child Support*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 253, 253–301 (1998).

127. See *infra* pp. 649–50.

128. See *infra* pp. 653–55.

129. See Elaine Sorenson, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 *J. POL'Y ANALYSIS & MGMT.* 604, 604 (2010).

130. See CROWLEY, *supra* note 110, at 47.

131. See ADMIN. FOR CHILDREN & FAMILIES, *CHILD SUPPORT ENFORCEMENT FY 2010*

This development is consistent with the widely held view and expectation that all parents, including poor parents, should contribute to the support of their children.¹³² Child support laws purport to treat all noncustodial parents alike in terms of holding them financially responsible for their children, and there is no exception that categorically excuses low-income fathers from this obligation.¹³³

State child support guidelines base the amount of the child support award on the noncustodial parent's income (or the parent's proportionate share of both parents' income).¹³⁴ Pursuant to the Child Support Enforcement Amendments of 1984,¹³⁵ Congress required states to adopt statewide guidelines for establishing child support.¹³⁶ Initially the guidelines were advisory; however, under the Family Support Act of 1988,¹³⁷ the guidelines became mandatory and presumptively applied to all child support orders.¹³⁸ Congress intended the numeric guidelines to promote consistent child support orders among families with similar circumstances and to reduce judicial discretion leading to disparate orders.¹³⁹ The guidelines are intended to simplify the process of determining child support and to make

PRELIMINARY REPORT, at tbl.P-13 (2011), http://www.acf.hhs.gov/programs/cse/pubs/2011/reports/preliminary_report_fy2010/table_13.html [hereinafter ADMIN. FOR CHILDREN & FAMILIES, CHILD SUPPORT ENFORCEMENT FY 2010 PRELIMINARY REPORT].

132. See Carbone, *supra* note 47, at 9 (explaining that the policy of pursuing child support in AFDC cases was not controversial because parents' legal duty to support their children is "well established" and "axiomatic").

133. For examples of state guidelines that establish a minimum child support order amount, regardless of the payor's lack of earnings, see COLO. REV. STAT. § 14-10-115(7)(a)(II)(D) (2011), CONN. GEN. STAT. § 46b-215a-4a(c) (2011), DEL. CODE ANN. tit. 13, §§ 501, 503 (West 2011), D.C. CODE § 16-916-01(g)(3) (LexisNexis 2011), and GA. CODE ANN. § 19-6-15(i)(2)(B)(v) (West 2011). See also HAWAII CHILD SUPPORT GUIDELINES, at app.C (2010), available at <http://www.courts.state.hi.us/docs/form/maui/2CE248.pdf> (providing that child support orders may be as large as seventy percent of the obligor's net income and, in some cases, may be set at an amount that exceeds seventy percent of net income).

134. Pursuant to the Family Support Act of 1988, states promulgated, and now apply, mandatory presumptive child support guidelines when calculating child support awards. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.). See LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS § 1.03 (2010) (describing various child support models).

135. Child Support Enforcement Amendments § 17.

136. See MORGAN, *supra* note 134, § 1.02(b)(1).

137. Family Support Act.

138. See 42 U.S.C. § 667(b)(2) (1988) ("There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded.").

139. See MORGAN, *supra* note 134, § 1.02(e).

outcomes more predictable.¹⁴⁰ Guidelines operate as a rebuttable presumption, and should circumstances warrant, judges may deviate from the prescribed formula.¹⁴¹

Each state may develop its own child support formula, but two formulas are most prevalent: the percentage-of-income formula and the income-shares formula.¹⁴² The percentage-of-income model is based on the child support guidelines enacted in Wisconsin.¹⁴³ Under this framework, only the noncustodial parent's income is considered when calculating the support order.¹⁴⁴ States that use the percentage-of-income model may either require the obligor to pay a flat percentage of income or apply a varying percentage based on both the obligor's income and the number and age of children the obligor supports.¹⁴⁵ For example, under Wisconsin's formula, noncustodial parents are required to pay seventeen percent of their gross income in child support for one child.¹⁴⁶ The child support order increases to twenty-five percent for two children, twenty-nine percent for three children, thirty-one percent for four children, and thirty-four percent for five or more children.¹⁴⁷ With this model, only the noncustodial parent's income is directly factored into the child support calculation.¹⁴⁸ Embodied in the percentage-of-income formula is a presumption that the custodial parent is contributing an appropriate amount through the ordinary course of parenting.¹⁴⁹

The income-shares model, by contrast, factors in the incomes of both the custodial and noncustodial parent.¹⁵⁰ The formula first calculates the combined income of both parents and then estimates the amount spent on

140. *Id.*

141. *Id.* § 1.02(b)(2).

142. *Id.* § 1.03, tbl.1–3. Both the percentage-of-income and income-shares formulas for calculating child support are based on a “continuity of expenditure” rationale, which establishes a child support amount that (if combined with the presumed amount spent on the child by the custodial parent) approximates what the parents would have spent on the child had they remained an intact family. *Id.* §§ 1.03(b), (c).

143. See R. Mark Rogers, *Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation*, 33 FAM. L.Q. 135, 137 (1999) (“The percent of obligor income model is generally known as the Wisconsin-style child support model because this type of guideline originated with Wisconsin’s use in welfare cases.”).

144. MORGAN, *supra* note 134, § 1.03(c)(1).

145. *Id.*

146. See WIS. ADMIN. CODE DCF § 150.03(1) (2009).

147. *Id.*

148. See *id.*

149. See MORGAN, *supra* note 134, § 1.03(c)(1).

150. *Id.* § 1.03(b)(1).

children by multiplying the parents' total income by a percentage that varies with income and number of children.¹⁵¹ Once the total support amount is determined, each parent's child support responsibility is determined by distributing the support amount between them based on his or her proportional share of the total parental income.¹⁵²

Because child support calculations are based on the income of the noncustodial parent,¹⁵³ a low income would presumably yield a similarly low child support obligation.¹⁵⁴ Indeed, recognizing the precarious economic situation of poor noncustodial parents, most state child support guidelines include alternative provisions for low-income payers.¹⁵⁵ With respect to low-income payers, state guidelines take a variety of approaches.¹⁵⁶ Under one approach, typically applied in situations in which the payer falls below the poverty threshold, the guidelines set a presumptive (and rebuttable) award of fifty dollars per month for each child.¹⁵⁷ Under a similar approach, the guidelines do not establish a presumptive child support amount and leave the amount to judicial discretion.¹⁵⁸ With both of these models, the guidelines provide discretionary decision-making, thus permitting a consideration of all relevant factors and determinations on a case-by-case basis.¹⁵⁹

Some states, like Wisconsin, have established special child support schedules that apply only to low-income cases.¹⁶⁰ Wisconsin's "Low-Income Payer" rule takes a graduated approach to determining child support obligations for payers whose incomes fall between 75% and 150% of the federal poverty guidelines.¹⁶¹ Within that income range, the percentage rates

151. *Id.*

152. *Id.*

153. *See* WIS. ADMIN. CODE DCF § 150.05(1) (2009).

154. *See id.* § 150.04(4).

155. Most states include a self-support reserve in their guidelines. *See* PAUL LEGLER, LOW-INCOME FATHERS AND CHILD SUPPORT: STARTING OFF ON THE RIGHT TRACK 11 (Jan. 30, 2003), available at <http://www.aecf.org/upload/publicationfiles/starting%20off.pdf> [hereinafter LEGLER, LOW-INCOME FATHERS AND CHILD SUPPORT]; *see, e.g.*, WIS. ADMIN. CODE DCF § 150.04(4) (2009); IOWA R. PRACT. & PROC. § 9.3(2) (2011); KY. REV. STAT. ANN. § 403.212 (West 2011); MINN STAT. § 518A.42 (2010).

156. *See* MORGAN, *supra* note 134, § 4.07(c).

157. *Id.* § 4.07(c)(i).

158. *Id.* § 4.07(c)(iii).

159. *Id.* § 4.07(c).

160. *See, e.g.*, COLO. REV. STAT. § 14-10-115(7)(a)(II)(C) (2011); D.C. CODE § 16-916-01(m) (2011); WIS. ADMIN. CODE DCF § 150.04(4) (2009).

161. *See* WIS. ADMIN. CODE DCF § 150.0(4).

in the formula gradually increase as income increases.¹⁶² For example, assuming a child support order for one child, the obligor whose income is at 75% of the federal poverty guidelines would have an order set at 11.11% of his gross income. The guidelines apply gradually increasing percentages to gross income (to calculate the child support owed) until the full seventeen percent of gross income formula is used to establish an order for those obligors with gross monthly incomes that equal 150% of the federal poverty guideline.¹⁶³ In the case of obligors with income below seventy-five percent of the federal poverty guideline, courts have discretion in setting orders.¹⁶⁴ Wisconsin guidelines provide that “the court may set an order at an amount appropriate for the payer’s total economic circumstances.”¹⁶⁵

Another approach to establishing child support orders for low-income payers is to set a minimum order (usually falling somewhere between twenty and fifty dollars).¹⁶⁶ Because the minimum child support order is for a flat amount and cannot be adjusted downward regardless of the level of actual earnings, it is a higher percentage of income for those obligors with the lowest incomes than under a graduated approach.¹⁶⁷ Even in cases where it is undisputed that the noncustodial father is unemployed and earns no salary, a minimum order may be set.¹⁶⁸ Incarcerated fathers, in particular, have been negatively impacted where minimum orders are set and the fathers lack opportunities to earn wages.¹⁶⁹ This practice reflects the policy views that no parents, even very poor parents, should be excused from the legal obligation to support their children and that establishing an award will encourage fathers to make every effort to comply with their support obligations.¹⁷⁰ Unfortunately, this practice results in poor fathers becoming even more impoverished when courts order them to pay support in amounts greater than

162. *Id.*

163. *Id.* at app.C.

164. *See* WIS. ADMIN. CODE DCF § 150.04(4).

165. *Id.* § 150.04(4).

166. *See* MORGAN, *supra* note 134, § 4.07(c)(ii).

167. *See id.* § 4.07(c).

168. *See* Patterson, *supra* note 14, at 109–10.

169. *See* JUDI BARTFELD, INST. FOR RESEARCH ON POVERTY, FORGIVENESS OF STATE-OWED CHILD SUPPORT ARREARS 7 (2003), available at <http://www.irp.wisc.edu/publications/sr/pdfs/sr84.pdf>; REBECCA MAY, CTR. FOR FAMILY POLICY & PRACTICE, THE EFFECT OF CHILD SUPPORT AND CRIMINAL JUSTICE SYSTEMS ON LOW-INCOME NONCUSTODIAL PARENTS: WHEN YOU NEED A SAFETY NET, BUT THERE’S ONLY A DRAGNET 13 (2004), available at <http://www.cffpp.org/publications/Effect%20of%20Child%20Support.pdf>.

170. *See* STEVEN COOK & JENNIFER L. NOYES, INST. FOR RESEARCH ON POVERTY, THE USE OF CIVIL CONTEMPT AND CRIMINAL NONSUPPORT AS CHILD SUPPORT ENFORCEMENT TOOLS: A REPORT ON LOCAL PERSPECTIVES AND THE AVAILABILITY OF DATA 4 (2011) (on file with author).

they can afford.¹⁷¹

Finally, the self-support reserve is an approach used in a number of states.¹⁷² It operates to set aside a portion of a payer's income to cover "minimal, basic living expenses."¹⁷³ The child support award is then calculated based on the remaining income.¹⁷⁴ This approach allows low-income noncustodial parents to retain a portion of their income so that they may maintain at least a subsistence level of living.¹⁷⁵

Unfortunately, the existence of alternative "low-income parent" rules does not solve the dilemma of determining the appropriate level of child support to order in cases involving indigent fathers. In practice, the amount of child support that courts actually order no- and low-income fathers to pay often bears no relationship to their actual incomes and far exceeds their abilities to pay.¹⁷⁶ This mismatch between award amounts and low-income fathers' financial means results from several systemic practices, including: establishing default orders, courts "imputing income" when setting support orders, adding additional costs that the state incurred before the initial child support order was established, and courts failing to modify existing orders downward when circumstances warrant.¹⁷⁷

1. Default Orders and Imputed Income

The child support guidelines states use to set awards base child support on parents' earned incomes.¹⁷⁸ Often, however, courts establish the child support order for no- and low-income fathers based on imputed earnings rather than actual earnings.¹⁷⁹ The rationale underlying child support imputation of income regulations is that imputation addresses situations where obligors either underreport their incomes or are intentionally

171. See REBECCA MAY & MARGUERITE ROULET, CTR. FOR FAMILY POLICY & PRACTICE, A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT: ENFORCEMENT, COURT AND PROGRAM PRACTICES 40 (2005), available at <http://www.cpr-mn.org/Documents/noncompliance.pdf>.

172. Many states include a self-support reserve in their guidelines. See LEGLER, LOW-INCOME FATHERS AND CHILD SUPPORT, *supra* note 155.

173. *Id.*

174. *Id.*

175. *Id.*

176. See *infra* pp. 640–41.

177. See *infra* pp. 641–47.

178. See MORGAN, *supra* note 134, § 2.03(a).

179. See MAY, *supra* note 169, at 5.

underemployed.¹⁸⁰ In imputing income to noncustodial fathers, courts make assumptions about how much the fathers earn or should earn.¹⁸¹ Generally, a court imputes to the obligor the ability to earn minimum wage¹⁸² and assumes a full-time, forty-hour week, which overestimates the income of low-income parents who lack stable employment and often work fewer than forty hours per week.¹⁸³

A court typically imputes income and enters a default order when a noncustodial father does not appear for his child support hearing.¹⁸⁴ Many disadvantaged fathers are not even aware of the initial proceedings and fail to appear in court because, due to their poverty and insecure living arrangements, they do not receive a copy of their summons.¹⁸⁵ If they fail to appear, courts enter default paternity establishments and child support orders.¹⁸⁶

Fathers who receive actual notice may, nonetheless, fail to appear at their court hearings.¹⁸⁷ In a number of qualitative empirical studies, Professor David Pate interviewed low-income noncustodial fathers about their experiences with the child support system.¹⁸⁸ The studies show that disadvantaged fathers fail to participate in child support proceedings for a number of reasons. First, some “fathers complained about the negative reception they perceived in the Milwaukee courthouse because they were viewed as ‘deadbeat dads.’”¹⁸⁹ Second, they do not appreciate the consequences (the entry of default orders and significant financial

180. See MORGAN, *supra* note 134, §2.04[a], [c].

181. See Patterson, *supra* note 14, at 108.

182. See *id.*; see also Michael F. v. Sharon R., No. OT-00-034, 2001 WL 227068, at *2 (Ohio Ct. App. Mar. 9, 2001) (finding that a court may exercise broad discretion when imputing income).

183. See MAY, *supra* note 169, at 5; Jessica Pearson & Esther Ann Griswold, *New Approaches to Child Support Arrears*, 59 POL'Y & PRAC. PUB. HUM. SERVICES 33, 33 (2001).

184. See MAY, *supra* note 169, at 5.

185. See MAY & ROULET, *supra* note 171.

186. *Id.*

187. See MAY, *supra* note 169, at 5.

188. See DAVID PATE, INST. FOR RESEARCH ON POVERTY, WELFARE AND CHILD SUPPORT POLICY KNOWLEDGE AMONG PARENTS OF CHILDREN ON W-2 IN DANE COUNTY 3 (2006), available at <http://www.irp.wisc.edu/research/childsup/csde/publications/pate-j2.pdf> [hereinafter PATE, WELFARE AND CHILD SUPPORT POLICY KNOWLEDGE]; David J. Pate, Jr., *Chapter 2: An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2, in W-2 CHILD SUPPORT DEMONSTRATION EVALUATION REPORT ON NONEXPERIMENTAL ANALYSES, VOL. II: FATHERS OF CHILDREN IN W-2 FAMILIES*, at vi (Daniel R. Meyer & Maria Cancian, Inst. for Research on Poverty eds., 2002), available at <http://www.irp.wisc.edu/research/childsup/csde/publications/nonexp/vol2-final.pdf> [hereinafter Pate, *An Ethnographic Inquiry*].

189. See Pate, *An Ethnographic Inquiry*, *supra* note 188, at 70.

obligations) of failing to appear at their court hearings.¹⁹⁰

The establishment of child support orders by default is widespread and contributes to the problem of large arrearages.¹⁹¹ For example, “in 2000, 70 percent of the noncustodial parents with arrears [in California] had their awards established by default.”¹⁹² Even when an obligor appears for his proceeding and has valid defenses to the imputation of income, without attorney representation, it is very unlikely that he will be effective in providing evidence about his income and inability to pay.¹⁹³

The practice of setting minimum child support orders and/or default orders can, particularly in the case of very low- and no-income fathers, leads to an overestimation of the actual income of low- and no-income fathers who are unemployed or underemployed, working intermittently or on a part-time basis.¹⁹⁴ Consequently, the resulting child support order is high relative to the fathers’ actual incomes.¹⁹⁵ This further causes the build-up of onerous child support debt, which further burdens disadvantaged fathers.¹⁹⁶

190. One qualitative study, involving in-depth interviews with noncustodial, Black disadvantaged fathers under an order of child support in Wisconsin, showed that these fathers had very little knowledge of child support laws or policies and reported the “intersection of family law, child support enforcement, and welfare law and policy [to be] confusing and discouraging.” *See id.* at 79. When asked specific questions about various aspects of child support enforcement processes and their underlying rationales, the fathers’ responses ranged from no comprehension to minimal comprehension. *Id.* at 67–76. For example, when questioned about the Child Support Receipt and Disbursement statement that the child support agency sends on a monthly basis to noncustodial parents with a child support order, one father mistakenly “thought the ‘bill’ he received for \$57,000 was for *all* fathers in the city of Milwaukee.” *Id.* at 71. Knowledge gaps can limit the effectiveness of a law or policy’s impact, and several empirical studies have attempted to measure participants’ knowledge of public welfare and child support policy rules. *See, e.g.,* Daniel R. Meyer et al., *Welfare and Child Support Program Knowledge Gaps Reduce Program Effectiveness*, 26 J. POL’Y ANALYSIS & MGMT. 575, 575–78, 593–94 (2007) (finding low levels of knowledge of child support welfare rules among custodial mothers receiving TANF).

191.

Default orders, in which the noncustodial parent or alleged father fails to appear in court and so paternity and a child support order are established in his absence, are at the root of many of the cases that result in child support debt and subsequent arrest for child support nonpayment.

See MAY, *supra* note 169, at 5.

192. Elaine Sorenson, *Understanding How Child Support Arrears Reached \$18 Billion in California*, 94 AM. ECON. REV. 312, 312 (2004).

193. *See* Patterson, *supra* note 14, at 119–21.

194. *See* BARTFELD, *supra* note 169, at 9.

195. *Id.*

196. *Id.*

2. Retroactive Support Orders and Debt

On top of inflated orders resulting from imputed income and minimum awards, fathers of children receiving welfare are often required to reimburse states for additional welfare costs the states incurred before courts established the initial child support orders.¹⁹⁷ “Many states charge . . . arrearages . . . immediately with the imposition of retroactive child support that dates as far back as the birth of the child in some states, or in others, to the beginning of welfare receipt.”¹⁹⁸ Additionally, a court may require a father to reimburse the costs of welfare benefits previously paid to the family.¹⁹⁹ Courts may add Medicaid childbirth costs to initial orders as well.²⁰⁰ Other add-ons include fees for paternity testing, litigation costs, interest on the arrearages owed, and penalties for not paying.²⁰¹

As a result, at the time a court sets an order, the order is “front-loaded” with welfare costs (sometimes in the thousands of dollars) that the court retroactively imposes on noncustodial fathers.²⁰² Coupled with imputed earnings, these practices result in child support orders that often exceed fifty percent of reported earnings among low-income fathers²⁰³ and burden them with unmanageable child support arrearages from the outset.²⁰⁴

197. See MAY & ROULET, *supra* note 171, at 13.

198. *Id.* at 9.

199. *Id.* at 13.

200. *Id.* at 9; see also Garfinkel et al., *A Brief History of Child Support Policies in the United States*, *supra* note 60, at 22–23 (noting that some fathers must repay state “Medicaid and welfare benefits”).

201. See TURETSKY, REALISTIC CHILD SUPPORT POLICIES, *supra* note 84, at 7. The accrual of interest (as high as twelve percent in some states) on the debt leads to even higher arrearages. See MAY & ROULET, *supra* note 171, at 9. With eighteen states charging interest on arrears, it is the primary factor contributing to the exponential increase in child support debt. See Mincy et al., *Income Support Policies for Low-Income Men and Noncustodial Fathers*, *supra* note 102, at 251.

202. See MAY & ROULET, *supra* note 171, at 9. Retroactive child support orders are another practice that contributes to the creation of large, lump-sum debts. *Id.* at 9. Most states follow this practice, which does not limit child support obligations to the date of the initial filing or the date the order is established. *Id.* Instead, courts are permitted to retroactively hold fathers liable for child support for some or all of the time between the birth of their child and the establishment of the court order. *Id.*

203. ELAINE SORENSEN ET AL., THE URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 77 (2007), available at http://www.urban.org/UploadedPDF/1001242_child_support_arrears.pdf. “In 1997, a noncustodial father of two with earnings of \$500-750 per month could plausibly have faced a monthly support order equal to 40+ percent of his income in nine states, and 20-39 percent of his income in another 20.” Waller & Plotnick, *supra* note 9, at 92 (citation omitted).

204. See BARTFELD, *supra* note 169, at 6.

3. Failure to Modify Child Support Orders

Poor noncustodial fathers are also unlikely to have courts adjust their child support orders downward to reflect detrimental changes in their financial circumstances, such as job loss or decreased earnings.²⁰⁵ State child support guidelines allow parents to seek modification of their child support orders upon a showing that there has been substantial change in their circumstances that warrants adjustment.²⁰⁶ The obligor's involuntary unemployment or underemployment typically qualifies as the type of substantial change in circumstances that justifies a decrease in the amount of the child support order.²⁰⁷ On the other hand, downward modifications in child support orders are not available to obligors who attempt to shirk their parental responsibilities by intentionally reducing their earnings.²⁰⁸ Thus, courts reject requests for child support modifications if there is evidence that the noncustodial parent is "voluntarily" unemployed (or underemployed).²⁰⁹

Although the employment status of low-income noncustodial fathers is often unstable and precarious, courts typically do not modify child support orders to reflect reduced earnings.²¹⁰ Even though child support laws specifically allow for such adjustments,²¹¹ numerous problems limit the implementation of the rule. Poor fathers lack access to counsel who could

205. See MAY, *supra* note 169, at 6.

206. See MORGAN, *supra* note 134, § 5.01. Many states further limit access to order modification by applying quantitative modification standards. See *Impact of Modification Thresholds on Review and Adjustment of Child Support Orders*, STORY BEHIND NUMBERS, (Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs., Wash., D.C.), Dec. 8, 2007, at 1, available at <http://www.acf.hhs.gov/programs/cse/pol/IM/2007/im-07-04b.pdf>. The quantitative standards serve as a percentage threshold, which allow for an adjustment to child support only when the change in circumstances would result in a specified percentage change in the order amount. *Id.* The percentage threshold varies from state to state, but most states employ a ten, fifteen, or twenty percent figure. *Id.*

207. MORGAN, *supra* note 134, § 5.01.

208. *Id.*

209. *Id.*

210. See MAY, *supra* note 169, at 9–10; see also Yoonsook Ha et al., *Unchanging Child Support Orders in the Face of Unstable Earnings*, 29 J. POL'Y ANALYSIS & MGMT. 799, 816–18 (2010) (finding that changes to child support orders are not proportional to changes in noncustodial parents' earnings, even when there has been a significant decrease in earnings).

211. Under the common law, courts have jurisdiction to modify child support awards when there is a material change in circumstances, including reduced earnings. See MORGAN, *supra* note 134, § 5.01. Some states have codified this standard in their child support guidelines. See, e.g., OKLA. STAT. ANN. tit. 43, § 118I(A)(1) (West 2012) ("Child support orders may be modified upon a material change in circumstances which includes . . . an increase or decrease in the income of the parents . . .").

seek modification on their behalf when their earnings decline.²¹² They are also unlikely to file *pro se* petitions in courts for downward modification.²¹³ A recent study examining the experience of low-income families with the child support system revealed that many poor fathers lacked awareness of the child support system and related court processes, so much so that they did not know that they could seek a downward modification of their child support orders or what steps to follow to obtain reductions in the awards.²¹⁴

Incarcerated fathers, in particular, are unlikely to secure modifications, even though they earn little or nothing during their periods of confinement.²¹⁵ There is not one consistent approach among states concerning how to address child support obligations and accumulated debt of imprisoned fathers.²¹⁶ The divergent state practices reflect competing policy views regarding whether incarceration is “voluntary unemployment.”²¹⁷ One group of states treats incarceration as voluntary unemployment and refuses to grant prisoners’ requests to modify child support.²¹⁸ This approach reflects the policy view that it would be tantamount to rewarding a parent’s criminal behavior if a court took into account the parent’s incarceration when calculating his or her child support obligation.²¹⁹

212. See Cancian et al., *Child Support*, *supra* note 101, at 147 (discussing “the administrative difficulty associated with frequent adjustments for fathers with unstable employment and earnings”).

213. See Patterson, *supra* note 14, at 113–14.

214. Waller & Plotnick, *supra* note 9, at 106. Even the fathers who sought modifications at times of earnings loss reported difficulties. *Id.*; see also Michele Hermann & Shannon Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. REV. 275, 279 (1984) (confirming that transcripts from civil contempt proceedings in child support nonpayment cases “show [that] defendants [] are too confused and inarticulate to explain their allegedly contemptuous behavior”).

215. “A time series for 1980 to 2000 shows that the total number of children with incarcerated fathers increased sixfold from about 350,000 to 2.1 million, nearly 3 percent of all children nationwide in 2000.” Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 235 (2009). Data from 2010 show that the figure has risen to 2.7 million children with an incarcerated parent. See ECON. MOBILITY PROJECT & PUB. SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUST, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 18 (2010), available at www.economicmobility.org/assets/pdfs/EMP_Incarceration.pdf. Although there is no national database that provides definitive figures regarding the extent to which incarcerated parents are under an order of child support, state estimates put the figure at twenty-two to twenty-eight percent of inmates. See JENNIFER L. NOYES, INST. FOR RESEARCH ON POVERTY, REVIEW OF CHILD SUPPORT POLICIES FOR INCARCERATED PAYERS 2 (Dec. 2006), available at www.irp.wisc.edu/research/childsup/cspolicy/pdfs/Noyes-Task5A-2006.pdf.

216. See Cammett, *supra* note 88, at 151–52.

217. *Id.* at 151.

218. *Id.*

219. *Id.*

Other states' approaches include either treating incarceration as a factor to take into account when considering modification requests or having a categorical rule that allows for suspension of child support obligations during the periods of confinement.²²⁰ These alternative rules, which more directly tie child support payments to the earning capacities of noncustodial parents, reflect a more realistic approach to the economic condition of imprisoned obligors.²²¹ Further, states that employ this approach recognize that if incarcerated parents accumulate staggering child support debts during their confinement, they will likely be less inclined to comply with their child support orders or otherwise be involved with their children when released from prison.²²² Even in states where incarceration may be a permissible basis for modification, it is nevertheless unlikely that child support orders will be reduced.²²³ The parent must still make a formal, legal request for a modification.²²⁴ Because many low-income fathers do not make these requests, their incarcerations lead to further build-up of their child support debts.²²⁵

Generally, poor and/or incarcerated fathers cannot look to state child support offices to update their orders when circumstances warrant. This barrier exists even though the 2005 Deficit Reduction Act requires that state agencies review and adjust all support orders for TANF families on a triennial basis.²²⁶ Despite the law, there is a small likelihood that state agencies will pursue the adjustment of orders.²²⁷ A recent study found that child support orders are generally not responsive to changes in noncustodial parents' earnings.²²⁸ Although sixty percent of child support orders examined in the study met the requirements for modification, only eight percent of those child support orders were modified.²²⁹ The authors of the study reflected that given the large number of noncustodial fathers who experienced a significant change in income, it would be administratively

220. *Id.* at 151–52.

221. *See* TURETSKY, REALISTIC CHILD SUPPORT POLICIES, *supra* note 84, at 7, 9.

222. *See* Cammett, *supra* note 88, at 151.

223. *Id.* at 152 (noting that “most prisoners are completely unaware that they must petition a court for a modification of a support order . . .”).

224. *Id.*

225. *See* MAY, *supra* note 169, at 14–15.

226. *See* 42 U.S.C. § 666(a)(10)(A)(i) (2006).

227. *See infra* notes 229–30 and accompanying text.

228. *See* Yoonsook Ha et al., *supra* note 210, at 817–18.

229. *Id.*

challenging for child support agencies to adjust all of the eligible orders.²³⁰ The child support system does not have administrative processes in place to promptly respond to frequent job changes (and losses) with corresponding changes to child support orders.²³¹

Further, where downward modifications of child support awards are concerned, states' fiscal interests are diametrically opposed to the economic interests of noncustodial fathers whose children receive welfare benefits. States have an incentive not to update orders when fathers' incomes decrease because such updates result in potential revenue losses for states.²³² Empirical data assessing modification practices in several states confirm that child support offices tend not to pursue modifications in cases where child support orders would be reduced.²³³

B. Low-Income Fathers' Child Support Payments: Figures and Realities

Practices regarding establishing and modifying child support orders do not realistically take account of the large number of noncustodial parents who are as poor as the custodial parents and children with whom they are associated.²³⁴ Most fathers who do not pay child support are poor and unable to find jobs that would enable them to pay.²³⁵ About twenty-six percent of noncustodial fathers (about 2.8 million) are poor, and the vast majority of this group (approximately eighty-eight percent) does not pay any child support.²³⁶ These fathers earn an average of \$5627 annually.²³⁷ One study found that only one-quarter of noncustodial fathers with incomes less than 130% of the poverty line worked full-time year round, and their average income was only \$6989 (just above the \$6800 poverty level for a single

230. *Id.*

231. See Cancian et al., *Child Support*, *supra* note 101, at 147.

232. See Garfinkel et al., *A Brief History of Child Support Policies in the United States*, *supra* note 60, at 23.

233. *Id.*

234. See Marsha Garrison, *The Goals and Limits of Child Support Policy*, in *CHILD SUPPORT: THE NEXT FRONTIER*, *supra* note 18, at 22–25.

235. See Sorensen & Zibman, *Getting To Know Poor Fathers*, *supra* note 117.

236. *Id.* at 422 fig.1 (providing that there are 10.8 million noncustodial fathers, twenty-six percent of noncustodial fathers are poor, twenty-three percent of noncustodial fathers are poor and do not pay child support, and three percent of noncustodial fathers are poor and do pay child support). The Author has calculated that twenty-six percent of 10.8 million noncustodial fathers is 2.8 million poor noncustodial fathers, that twenty-three percent is 2.5 million, and three percent is 324,000.

237. *Id.* at 424.

adult).²³⁸

Another study found that sixty percent of poor fathers who do not pay child support are racial and ethnic minorities, and twenty-nine percent were institutionalized (mostly in prison) at the time of interview.²³⁹ Only forty-three percent of men not in prison were working, and those employed in 1996 worked an average of just twenty-nine weeks and earned \$5627 that year.²⁴⁰ Their barriers to employment²⁴¹ were also considerable: forty-three percent were high-school dropouts, thirty-nine percent had health problems, and thirty-two percent had not worked in three years.²⁴² Overall, job prospects are not promising for men with already weak attachments to the labor force and other significant barriers to employment.²⁴³

Given the dire employment and economic status of poor noncustodial fathers, it is not particularly surprising that child support collections from this population remain low.²⁴⁴ The OCSE has confirmed that the poorest children (i.e., those receiving government welfare payments) receive a small portion of child support collected overall.²⁴⁵ In 2010, families receiving public assistance accounted for fourteen percent of the caseload of the Child Support Enforcement Program; however, they represented only four percent

238. Elaine Sorensen & Robert Lerman, *Welfare Reform and Low-Income Noncustodial Fathers*, 41 CHALLENGE 101, 103 (1998).

239. See Sorensen & Zibman, *Getting To Know Poor Fathers*, *supra* note 117, at 423.

240. *Id.* at 424.

241. Welfare program administrators classify certain welfare recipients as “hard to employ” because of characteristics that act as “barriers to employment.” See, e.g., PAMELA LOPREST ET AL., THE URBAN INST., TANF POLICIES FOR THE HARD TO EMPLOY: UNDERSTANDING STATE APPROACHES AND FUTURE DIRECTIONS 8–9 (2007), available at http://www.urban.org/UploadedPDF/411501_hard_to_employ.pdf. Barriers to employment include: limited education, limited work skills, addictions, criminal records, and physical and mental health problems. *Id.* at 1.

242. See Sorensen & Zibman, *Getting To Know Poor Fathers*, *supra* note 117, at 425 fig.2.

243. DAN BLOOM ET AL., MDRC, FOUR STRATEGIES TO OVERCOME BARRIERS TO EMPLOYMENT: AN INTRODUCTION TO THE ENHANCED SERVICES FOR THE HARD-TO-EMPLOY DEMONSTRATION AND EVALUATION PROJECT 2–3 (2007), available at <http://www.mdrc.org/publications/469/full.pdf>. Additionally, noncustodial fathers’ abilities to pay child support are also affected by whether they have additional support obligations because they have additional children with other partners. TONYA BRITO, INST. FOR RESEARCH ON POVERTY, CHILD SUPPORT GUIDELINES AND COMPLICATED FAMILIES: AN ANALYSIS OF CROSS-STATE VARIATION IN LEGAL TREATMENT OF MULTIPLE PARTNER FERTILITY 4–9 (2007), available at http://www.irp.wisc.edu/research/childsup/csde/publications/brito_05.pdf; see also Marilyn Sinkewicz & Irwin Garfinkel, *Unwed Fathers’ Ability To Pay Child Support: New Estimates Accounting for Multiple Partner Fertility*, 46 DEMOGRAPHY 247, 259–60 (2009) (concluding that prior studies may have overestimated the aggregate ability of low-income noncustodial fathers to pay child support by thirty-three to sixty percent because of failure to take account of multiple partner fertility).

244. See *supra* pp. 647–49.

245. ADMIN. FOR CHILDREN & FAMILIES, CHILD SUPPORT ENFORCEMENT FY 2010 PRELIMINARY REPORT, *supra* note 131, at fig.1 (2011).

of the cases for which child support was collected.²⁴⁶ In 2010, these children only received one-tenth as much child support collected through the enforcement system as did non-poor children (i.e., children whose families have never received public assistance).²⁴⁷ Additionally, the poorest children generally do not receive the full amount of child support they are owed.²⁴⁸ Among custodial parents with formal child support orders in place, only about thirty-five percent of parents who were never married, thirty-three percent who were Black and thirty-six percent who were living in poverty, received the full amount of child support courts award.²⁴⁹

The low rate of child support collections for poor children from their equally poor fathers has not changed significantly over time,²⁵⁰ nor has the child support enforcement program been successful in accomplishing its goal of reducing child poverty through enhanced collections from noncustodial parents.²⁵¹ Indeed, there are more children living below the

246. *Id.* at fig.1, fig.5. Of the remaining support collected by state child support agencies, distribution was as follows: thirty-four percent was collected on behalf of families that formerly received government assistance, forty-four percent was collected on behalf of families that had never received government assistance, and eighteen percent was collected on behalf of families who were then receiving Medicaid. *Id.* at fig.5.

247. *Id.* at tbl.P-3.

248. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 9 (2011), available at <http://www.census.gov/prod/2011pubs/p60-240.pdf>. By contrast, custodial parents who were White, currently married or divorced, or more educated were more likely to receive the full amount of child support owed to them. *Id.* at tbl.2. Notably, even though indigent noncustodial fathers have not succeeded in regularly providing formal child support to their children, studies confirm that they make economic contributions to the children in other ways and on a more intermittent basis. See Steven Garasky et al., *Toward a Fuller Understanding of Nonresident Father Involvement: An Examination of Child Support, In-Kind-Support, and Visitation*, 29 POPULATION RES. POL'Y REV. 363, 364–66 (2010). Many noncustodial fathers who do not pay formal cash child support pursuant to a court order nonetheless often voluntarily provide informal cash support and/or in-kind support to meet their children's economic needs. *Id.* Nearly sixty percent of custodial parents receive in-kind (i.e., noncash) contributions of some form, including toys/gifts, food, clothing, or school materials. See GRALL, *supra*, at 1. Numerous studies of low-income and unmarried parents confirm that these families rely on, and benefit from, these alternative means of support, even though employment-related barriers prevent low-income fathers from providing such support on a regular or systematic basis. *Id.*; see also Jennifer B. Kane et al., *In Kind Support from Nonresident Fathers: A Population-Level Analysis*, Population Ass'n of Am., 3 (Apr. 2011), <http://paa2011.princeton.edu/download.aspx?submissionId=110994>. While these contributions benefit the economic well-being of custodial parents' households, child support laws do not recognize in-kind support as satisfying nonresident fathers' formal court-ordered child support obligations. See, e.g., *Stewart v. Rogers*, 92 P.3d 615, 619–20 (Mont. 2004) (affirming trial court ruling that Montana's child support regulations did not permit the father to receive a credit against his child support arrears for the in-kind contributions he provided for his daughter's benefit).

249. See GRALL, *supra* note 248, at 9.

250. See *supra* pp. 628–29.

251. See *supra* pp. 647–49.

poverty line today than in 1975,²⁵² the year in which Congress created the federal child support program.²⁵³ In 1975, seventeen percent of children in the United States lived below the poverty line.²⁵⁴ In 2010, twenty-two percent did.²⁵⁵

Rather than succeeding in reducing child poverty, aggressive enforcement practices directed at poor families instead produce large unpaid child support debts.²⁵⁶ No- and low-income parents are responsible for the greatest portion of unpaid child support, according to the OCSE.²⁵⁷ Of the more than \$70 billion in child support debt nationally, noncustodial parents who have no quarterly earnings or earn less than \$10,000 annually owe seventy percent of all arrears owed to the government as reimbursement for welfare expenditures.²⁵⁸ A small number of child support obligors (eleven percent) owe a majority of the arrearages, and they each owe over \$30,000 in debt.²⁵⁹ Yet, they are among the poorest obligors.²⁶⁰ Twenty-nine percent of child support debtors earn between \$1 and \$10,000, and thirty-four percent have no reported earnings.²⁶¹ Noncustodial parents with more than \$40,000 in annual income hold only four percent of child support arrears.²⁶² The problem is nationwide; child support caseloads in every state include very low-income fathers who have accumulated enormous arrearages and who have virtually no prospect of ever satisfying the debt.²⁶³

252. CHILD TRENDS DATABANK, CHILDREN IN POVERTY: INDICATORS ON CHILDREN AND YOUTH 3 fig.1 (2011), http://www.childtrendsdatbank.org/sites/default/files/04_Poverty.pdf [hereinafter CHILD TRENDS DATABANK, CHILDREN IN POVERTY].

253. Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351–58 (1975) (codified as amended at 42 U.S.C. §§ 651–60 (2006)).

254. See CHILD TRENDS DATABANK, CHILDREN IN POVERTY, *supra* note 252.

255. See *id.*

256. See MAY, *supra* note 169, at 9–13.

257. *Understanding and Managing Child Support Debt*, STORY BEHIND NUMBERS 1, (Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs., Wash., D.C. 2008)

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 2.

262. U.S. Dep't of Health & Human Services, Admin. for Children & Families, Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide To Exploring Child Support Debt in Your State* (2004), available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28.htm>.

263. See MAY, *supra* note 169, at 9.

C. Enforcing Child Support Orders Against Low-Income Fathers

With the collection rate so low, it is important to examine the enforcement efforts the child support system employs. The child support system has developed a broad arsenal of enforcement strategies to ensure that noncustodial parents pay child support that is owed.²⁶⁴ According to the OCSE, their automated enforcement tools are very effective when applied to the parents comprising their caseloads who are regularly employed or have assets.²⁶⁵ Automatic withholding of child support payments from employer payroll accounts for two-thirds of all child support collections.²⁶⁶ Child support is also secured from able nonpayers through a range of alternative mechanisms, such as intercepting federal and state income tax refunds, seizing bank account balances, restricting or revoking drivers', occupational, and professional licenses, and placing liens on properties.²⁶⁷ Because of these automated systems of collection, many fathers who may have been inclined to evade their child support obligations no longer have the option to do so.²⁶⁸ Thus, willingness to comply with a support order is a much less salient factor influencing collections.²⁶⁹ Put another way, an employed father is very likely to pay child support whether he chooses to or not.

However, these conventional collection methods are not effective in collecting past due child support from noncustodial parents who lack stable, consistent employment and financial assets.²⁷⁰ Indeed, utilizing these less severe sanctions with dead broke noncustodial parents would be futile. Wage assignment will not work if the parent is unemployed. Intercepting tax refunds will not work if the parent is not due a tax refund. Seizing bank balances will not work if the parent does not have assets squirreled away in an account. Denying a passport will not work if the parent lacks the resources to travel outside the country. Having failed to collect support by

264. See Legler, *supra* note 18, at 49–56.

265. See VICKI TURETSKY, COMMISSIONER'S VOICE: 'BUBBLE CHART' MIRRORS CHILD SUPPORT NATIONWIDE, CHILD SUPPORT REPORT, Nov. 2010, at 2, available at <http://www.acf.hhs.gov/programs/cse/pubs/2010/csr/csr1011.pdf> [hereinafter TURETSKY, COMMISSIONER'S VOICE].

266. Of the \$32 billion in child support payments collected nationally in fiscal year 2010, over sixty-six percent were from income withholding of employee wages. ADMIN. FOR CHILDREN & FAMILIES, CHILD SUPPORT ENFORCEMENT FY 2010 PRELIMINARY REPORT, *supra* note 131.

267. See TURETSKY, COMMISSIONER'S VOICE, *supra* note 265.

268. See Cancian et al., *Welfare and Child Support*, *supra* note 61, at 357–58.

269. *Id.*

270. TURETSKY, COMMISSIONER'S VOICE, *supra* note 265 (“[T]raditional enforcement tools have been less effective for the approximately 25 percent of parents who owe child support but have a limited ability to pay.”).

these traditional methods, the child support system inevitably turned to more aggressive enforcement measures when pursuing collections from indigent parents.²⁷¹ Although Congress implemented such tools to collect unpaid support from deadbeat dads, it is low-income parents who most likely face the threat of incarceration through the civil contempt process.²⁷² Consequently, the most severe child support enforcement sanctions tend to have the greatest impact on men on the bottom of the income distribution who are the least able to meet their child support obligations.²⁷³

The extent to which noncustodial parents in the United States are jailed for failure to pay child support has not been extensively studied. The Center for Family Policy and Practice (CFFPP),²⁷⁴ which has been studying the challenges and barriers faced by low-income fathers since 1995, has completed the most work in this area.²⁷⁵ CFFPP examined the intersection of child support and incarceration (civil contempt and criminal charges for nonpayment of child support) in several studies.²⁷⁶ CFFPP found that in most states there were reports of civil contempt arrests and incarcerations for nonpayment of child support.²⁷⁷ Notably, civil contempt arrests and incarcerations outnumber criminal nonsupport arrests in many jurisdictions.²⁷⁸ Some jurisdictions, such as Marion County, Indiana, find

271. Cancian et al., *Welfare and Child Support*, *supra* note 61, at 357–58.

272. See MAY, *supra* note 169, at 9.

273. Recognizing that child support law and policy never intended for low-income nonresident parents to be saddled with unrealistically large arrearages that result in harsh penalties for delinquency, some localities and states throughout the country are beginning to implement alternative policies and practices in order to mitigate some of these devastating consequences. See generally NAT'L WOMEN'S LAW CTR. & CTR. ON FATHERS, FAMILIES, & PUB. POLICY, DOLLARS AND SENSE: IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN (2002), available at <http://www.nwlc.org/sites/default/files/pdf/CommonGroundDollarsandSense.pdf>.

274. CFFPP, previously named The Center on Fathers, Families, and Public Policy, changed its name to The Center for Family Policy and Practice in 2004. See CTR. ON FATHERS, FAMILIES, & PUB. POLICY, FAMILY POLICY PRACTICE: A YEAR OF ACHIEVEMENT AND CHANGE 4 (2003), available at http://www.cffpp.org/annual_reports/2003_Annual_Report.pdf.

275. See, e.g., MAY, *supra* note 169; MAY & ROULET, *supra* note 171; DAVID PATE ET AL., CTR. ON FATHERS, FAMILIES & PUBLIC POLICY, NEGOTIATING THE CHILD SUPPORT SYSTEM: RECOMMENDATIONS FROM A DISCUSSION OF POLICY AND PRACTICE 3 (2000), <http://cffpp.org/publications/NegotiatingChdSupReco.pdf>; MARGUERITE ROULET ET AL., CTR. ON FATHERS, FAMILIES & PUBLIC POLICY, NEGOTIATING THE CHILD SUPPORT SYSTEM: REPORT FROM A DISCUSSION OF POLICY AND PRACTICE 44 (2000), available at <http://cffpp.org/publications/NegotiatingChdSup.pdf>; SCOTT SUSSMAN, CTR. FOR FAMILY POLICY & PRACTICE, CHILD SUPPORT DISTRIBUTION FOR LOW-INCOME FAMILIES (2006), available at <http://cffpp.org/publications/Distribution.pdf>.

276. See, e.g., MAY & ROULET, *supra* note 171; MAY, *supra* note 169, at 16.

277. See, e.g., MAY & ROULET, *supra* note 171.

278. *Id.*

civil enforcement more efficient than criminal enforcement.²⁷⁹ In that county, it is “reported that out of 80,000 to 100,000 open child support cases each year, about 3%, or 2,400 to 3,300, result in incarceration for nonpayment. Roughly 15–20 of these are criminal charges, and the rest are civil contempt.”²⁸⁰ CFFPP’s studies examining data at the local level in Wisconsin confirmed that the most aggressive child support enforcement policies tend to have the greatest impact on the poorest parents who are unable to pay.²⁸¹ The study revealed that in Madison and Milwaukee there is a higher rate of arrests for nonpayment of child support for low-income minority parents than for other parents.²⁸² This is the case even though in Wisconsin, as in other states, inability to pay is a defense to civil contempt.²⁸³ Other researchers have raised similar concerns about the demographics of delinquent parents incarcerated for failure to pay support.²⁸⁴

More recently, the Institute for Research on Poverty (IRP) commenced a study of child support and incarceration, focusing on Wisconsin’s use of both civil contempt and criminal nonsupport enforcement tools.²⁸⁵ The first report issued as part of this research project revealed that researchers’ efforts to document the prevalence of incarceration for failure to pay child support in Wisconsin were unsuccessful.²⁸⁶ Child support agencies do not routinely report data on the use of arrest and incarceration as an enforcement tool.²⁸⁷ In Wisconsin, existing case tracking systems, county child support offices, and other state agencies involved in child support enforcement do not systematically keep track of the extent to which the use of civil contempt

279. See *MAY*, *supra* note 169, at 9.

280. *Id.*

281. *Id.* at 7–8.

282. *Id.* The data in this study groups together felony, misdemeanor, and civil contempt proceedings for nonpayment of child support. *Id.*

283. See *Balaam v. Balaam*, 187 N.W.2d 867, 872 (Wis. 1971). In an earlier study, the Center for Family Policy and Practice researched the extent of civil and criminal jailings for nonpayment of child support in two counties in Wisconsin: Dane and Milwaukee. See *MAY*, *supra* note 169, at 7–8. The study reported that in Dane County “there were 2,899 bookings to jail for nonpayment of child support (felony, misdemeanor, and civil contempt) from January 2000 to August 2003.” *Id.* at 8. The Milwaukee County data showed similar results. “From April 1999 to April 2001, over 6,200 people who were booked to the county jail had nonpayment of child support listed as one of their offenses.” *Id.* The practice of incarcerating poor fathers who fail to pay court-ordered child support is not a recent phenomenon. In their 1984 study, Michele Hermann and Shannon Donahue documented the practice in Bernalillo County, New Mexico. See *generally* Hermann & Donahue, *supra* note 214.

284. See *Patterson*, *supra* note 14, at 95.

285. See *COOK & NOYES*, *supra* note 170, at 13–17.

286. See *id.*

287. See *MAY & ROULET*, *supra* note 171, at 11.

processes result in incarceration of delinquent parents.²⁸⁸ Researchers' efforts to ascertain the information by examining sheriffs' offices' and House of Corrections' data sources were similarly unavailing.²⁸⁹ Further, although child support office personnel indicated to researchers that it would be fairly straightforward to determine figures for cases that they referred to district attorneys for criminal nonsupport charges, researchers encountered numerous challenges with the relevant data sources.²⁹⁰ Consequently, IRP's exploration of available data sources regarding incarceration has not yet yielded information regarding either how often these enforcement tools result in the incarceration of delinquent parents or the demographic characteristics of the noncustodial parents most likely to be incarcerated.²⁹¹

Although figures regarding prevalence were not forthcoming, IRP researchers examined the reported local practices associated with the use of civil contempt processes and criminal nonsupport charges as enforcement tools.²⁹² They found that, although the counties actively employ civil contempt as an enforcement tool,²⁹³ whether doing so will lead to a finding of contempt varies tremendously both across and within counties in Wisconsin.²⁹⁴ Many factors are at play, including existing child support agency practices, individual caseworker discretion, differences in the predisposition of county courts and family court commissioners to find civil contempt, and differing law enforcement practices.²⁹⁵

County child support offices approach the use of civil contempt differently. One county treats contempt as a "last resort" measure to employ if other enforcement methods fail, while another county, which does not see civil contempt as the most severe method of encouraging compliance,

288. See COOK & NOYES, *supra* note 170, at 15–16.

289. *Id.*

290. *Id.* at 14, 17. Specifically, because researchers discovered a significant and unexplained discrepancy in the data available from different sources, they declined to use those sources for their analysis. *Id.* at 17.

291. IRP's research project is ongoing, and a second report studying this phenomenon is expected. *Id.* at 3.

292. IRP conducted telephone interviews with representatives of local agencies involved in child support enforcement in five Wisconsin counties, including county child support agencies, county sheriffs' offices, the police departments of each county's largest city, county family courts, and county district attorney's offices. *Id.* at 6. The counties (cities) included in the study were Brown County (Green Bay), Dane County (Madison), Milwaukee County (Milwaukee), Racine County (Racine), and La Crosse County (La Crosse). *Id.*

293. Four of the five counties studied report that they actively use civil contempt, while one county, following staff reductions in 2006, indicated that it now concentrates on less-costly administrative remedies to secure compliance. See *id.* at 7–8.

294. COOK & NOYES, *supra* note 170, at 8–9.

295. *Id.* at 7–11.

utilizes it earlier in the enforcement process as a “wake-up call” to impress upon noncustodial parents the gravity of the situation.²⁹⁶ Caseworker discretion figures prominently in the extent to which civil contempt is used, even in counties that employ written guidelines.²⁹⁷ While caseworkers generally make case-by-case determinations after examining the individual circumstances of each case, personal preference influences whether an individual caseworker uses civil contempt.²⁹⁸ Officials that researchers interviewed pointed out that “some [case]workers are more willing than others to invest the time to work with a delinquent payer prior to beginning civil contempt proceedings.”²⁹⁹

Family court commissioners’ approaches to civil contempt proceedings also factor into whether courts find obligors in contempt.³⁰⁰ Agency officials reported that some courts employ a higher burden of proof than others and that purge conditions vary.³⁰¹ Judicial findings regarding whether the lack of payment is “willful” similarly result from case-by-case determinations by family court commissioners, who enjoy substantial judicial discretion in making such rulings.³⁰² Finally, with respect to law enforcement practices, the report found that some counties “proactively enforce[] [bench] warrants associated with child support,” while in other counties, incarceration pursuant to a warrant takes place only when a delinquent obligor has “an interaction with law enforcement for some other reason.”³⁰³

According to child support officials, they utilize criminal nonsupport charges as a child support enforcement tool much less frequently than civil contempt; in Wisconsin, however, empirical data regarding the prevalence of the use of this enforcement tool is lacking.³⁰⁴ Representatives from prosecutor’s offices in two counties (Dane and Racine) reported making

296. *See id.* at 8–9.

297. *Id.* at 9.

298. *Id.*

299. *See id.* at 9.

300. COOK & NOYES, *supra* note 170, at 9–10.

301. *Id.* at 9–11. In cases where a court reaches a finding of civil contempt, it may enter a remedial sanction and set a purge condition. *Id.* at 4. The court stays the remedial sanction to provide an obligor “with an opportunity to meet the purge condition.” *Id.* Under a civil contempt order, an obligor “carries the keys of his prison in his own pocket” in that he can cure the contempt by complying with the order. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911) (internal citation omitted). If an obligor meets the purge condition, the court will not impose the remedial sanction. *See COOK & NOYES, supra* note 170. If they do not, the court may lift the stay and issue a bench warrant. *Id.*

302. COOK & NOYES, *supra* note 170, at 9–10.

303. *Id.* at 11.

304. *Id.* at 11–13.

referrals fewer than ten times per year, while representatives in Milwaukee County reported making seventy to one hundred referrals per year.³⁰⁵ As with civil contempt, referral making varies from county to county within Wisconsin.³⁰⁶ Where the child support agency did not pursue criminal nonsupport, staff explained that they preferred civil contempt because it is more efficient and more likely to provoke compliance with a child support order.³⁰⁷ By contrast, counties that bring criminal nonsupport charges against delinquent payers tend to have more personnel and resources available for this purpose.³⁰⁸

D. Questioning the Efficacy of the Prevailing Approach

The poorest noncustodial parents are the most likely to face incarceration for nonpayment through the civil contempt process,³⁰⁹ even though lawmakers enacted such harsh enforcement measures with deadbeat dads in mind.³¹⁰ The accumulation of unrealistic and excessive child support debts results, in large part, from subjecting impoverished noncustodial parents to an “automatic and inescapable” child support system that has reimbursement of welfare benefits as its primary focus and far too often does not account for parents’ inability to pay.³¹¹ The low-income noncustodial parent who lacks attorney representation experiences the child support system as a virtually unstoppable chain of events that inevitably leads to unfathomable levels of debt that he or she has no hope of ever paying off.³¹²

While civil contempt for nonpayment is an efficient and justifiable tool for able-to-pay parents, when child support agencies apply this practice to all noncustodial parents regardless of their ability to pay, primarily poor parents end up in jail.³¹³ For a destitute person, civil contempt is an inappropriate remedy to secure payment of a child support obligation: the party cannot be

305. *Id.* at 12. Child support personnel from Brown and La Crosse counties reported, on the other hand, that they generally did not make referrals to law enforcement for criminal prosecution of nonpayment of child support. *Id.* at 11.

306. *Id.* at 11–13.

307. *Id.* at 11–12.

308. COOK & NOYES, *supra* note 170, at 12–13.

309. *See* Patterson, *supra* note 14.

310. *See supra* pp. 628–30.

311. *See* Legler, *The Impact of Welfare Reform*, *supra* note 18.

312. *Cf. In re Gault*, 387 U.S. 1, 36 (1967) A low-income noncustodial parent requires counsel “to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether [the parent-debtor] has a defense.” *Id.*

313. *See* MAY, *supra* note 169, at 9.

coerced into paying child support that instant because they have no funds to pay it. Under such circumstances, incarcerating destitute child support debtors serves no purpose at all. Because the goal of civil contempt is to “coerce compliance with a court’s order,”³¹⁴ the justification for imprisonment is lost when compliance is impossible.

The goal of recouping welfare expenditures incentivizes states to aggressively pursue child support collections from the very poorest parents, rather than from middle- or upper-income parents, who do not have children in the welfare caseload.³¹⁵ For these poor fathers, it is virtually inevitable that they will experience the full brunt of the child support enforcement system, including penalties, sanctions, and potentially even incarceration. Yet, even with the government’s enhanced, automated, and stringent enforcement tools in operation, noncustodial parents still owe over \$110 billion to state child support systems as recoupment of welfare cash assistance provided to their children.³¹⁶ The staggering amount of child support arrears confirms that child support payments, standing alone, are insufficient to meet the needs of poor children.³¹⁷ Given the dismal collection rate of arrears,³¹⁸ one must question the efficacy of the current child support system in achieving its stated goals of reducing child poverty and reimbursing the state for welfare expenditures.³¹⁹ Moreover, recent studies reveal that, in some circumstances, child support enforcement may hinder collections rather than enhance them.³²⁰

314. See Patterson, *supra* note 14, at 102–03.

315. See MAY, *supra* note 169, at 7–9. The state’s interest in maximizing its revenue through pursuit of collections from poor fathers is also fueled by the federal government’s incentive payment system. See Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1050–51 (2007). Under this system, states have the potential to win financial awards based on their performance in several areas of child support enforcement. *Id.* Significantly, the program provides larger cash payments for child support collections from the states’ welfare caseloads as compared to the non-welfare caseloads. *Id.* The proceeds from welfare cost recovery together with potential extra cash payments from the federal government create a powerful incentive for states to pursue collections from poor fathers, even when to do so is tantamount to trying to get blood from a turnip.

316. In its most recent data report, the OCSE reports that, while overall child support collections for fiscal year 2010 were \$26.6 billion, \$110 billion remains unpaid. ADMIN. FOR CHILDREN & FAMILIES, CHILD SUPPORT ENFORCEMENT FY 2010 PRELIMINARY REPORT, *supra* note 131. During 2010, only about \$7 billion of these arrearages was collected. *Id.*

317. See *supra* pp. 648–50.

318. See *supra* pp. 649–51.

319. See Hatcher, *supra* note 315, at 1048–54.

320. See Harry J. Holzer et al., *Declining Employment Among Young Black Less-Educated Men: The Role of Incarceration and Child Support*, 24 J. POL’Y ANALYSIS & MGMT. 329, 346–47 (2005). See generally Nepomnyaschy & Garfinkel, *supra* note 116, at 370 (finding that mothers in states with strong child support enforcement regimes may be worse off economically than mothers living in weak regimes because those “mothers living in strong enforcement regimes receive no

For example, one recent empirical study determined that aggressive child support measures not only fail to lead to the collection of more support, but “mothers living under strong enforcement regimes may actually be worse off than those living in weak regimes.”³²¹ Researchers concluded that when child support agencies utilized formal enforcement measures against noncustodial fathers who voluntarily contributed informal cash and in-kind support to custodial mothers, the contributions ceased and tended not to be replaced by equivalent levels of formal cash support.³²² Moreover, there is evidence that states’ aggressive and relentless pursuit of child support pushes some poor noncustodial fathers of children receiving public benefits to seek genetic testing and disestablishment of paternity in order to be freed from the duty to pay child support.³²³ The resulting unintended consequence is that some children become legally fatherless and lose the economic support and nurturing provided by their (non-biological) fathers.³²⁴

Another recent study focused on the impact of child support enforcement on the labor force behavior of young Black men and concluded that child support enforcement negatively affects labor force activity for this demographic group, especially those between the ages of twenty-five and thirty-four.³²⁵ As noted, for this population, child support orders are high relative to income (typically in the range of twenty to thirty-five percent of income).³²⁶ And when child support is combined with regular taxation, obligors can experience an effective tax rate as high as sixty to eighty percent.³²⁷ When poor noncustodial fathers fail to pay support (as often happens), the enforcement mechanisms are triggered, and through wage garnishment, the child support system takes up to sixty-five percent of the

more total cash support than those in weak regimes” and “strong enforcement is negatively associated with receipt of in-kind support”).

321. See Nepomnyaschy & Garfinkel, *supra* note 116, at 370 (using the Fragile Families and Child Wellbeing Study’s data set, which examined the total package of child support (formal court-order cash payments, informal cash payments, and in-kind support) that mothers receive from their children’s noncustodial fathers).

322. *Id.*

323. Jane Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 329 (2005).

324. *Id.*

325. See Holzer et al., *supra* note 320, at 346. Further, the child support system is no more effective in its goal of reimbursing the state for welfare costs. See Murphy, *supra* note 323, at 370 (citing Laura Wheaton & Elaine Sorenson, *Reducing Welfare Costs and Dependency: How Much Bang for the Child Support Buck?*, 4 GEO. PUB. POL’Y REV. 23, 30, 34 (1998)). Because these fathers are themselves living in poverty, even under the best circumstances (i.e., full payment of their child support order) the total costs incurred by states for welfare payments, food stamps, and Medicaid would only be reduced by eight percent. *Id.*

326. See Holzer et al., *supra* note 320, at 235.

327. *Id.*

parent's net income to satisfy the child support debt.³²⁸

Incarcerating indigent noncustodial fathers also undermines child support program goals. Most fundamentally, few obligors generate income while incarcerated,³²⁹ and incarceration may negatively impact their employment prospects upon release.³³⁰ It is well-documented that ex-offenders have limited employment opportunities and that employers are much less likely to hire Black men with criminal records than they are to hire similarly situated White men.³³¹ A prison record not only erodes job opportunities because of employer aversion, it also disqualifies ex-offenders from some skilled and licensed occupations.³³² And even when they do find work, noncustodial parents with criminal records earn significantly less than they did prior to their incarceration.³³³ Thus imprisonment further prevents noncustodial fathers from paying their required support.³³⁴

Moreover, both the practice of aggressive child support enforcement and the prospect of imprisonment for nonpayment push some indigent parents to participate in underground employment.³³⁵ In one qualitative study, low-income fathers who lack the financial means to pay their support orders "have said they faced the choice between generating income in the underground economy or being 'caught' by the child support enforcement

328. *Id.* (explaining that sixty-five percent of take-home pay "is the federal limit on wage garnishment for debt purposes"). Not surprisingly, since the 1990s child support orders have been regressive, with lower-income fathers being ordered to pay a much higher percentage of their income than higher-income fathers. See Garfinkel et al., *A Brief History of Child Support Policies in the United States*, *supra* note 60, at 23 (stating that low-income fathers are ordered to pay twenty-eight percent of their income, while higher-income fathers are ordered to pay ten percent).

329. See Cammett, *supra* note 88, at 129 n.6 and accompanying text ("For instance, inmates in Massachusetts may earn as little as \$1 per day, and inmates in Colorado earn between 25¢ and \$2.50 per day.>").

330. See Holzer et al., *supra* note 320, at 334. "Job seekers with a criminal record are offered half as many positions as those without criminal records, and African American applicants receive two-thirds fewer offers." ECON. MOBILITY PROJECT & PUB. SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUST, *supra* note 215, at 22.

331. See Holzer et al., *supra* note 320, at 334.

332. See Western & Wildeman, *supra* note 215, at 230.

333. Following release, ex-offenders earn approximately forty percent less than what they earned prior to their incarceration. *Id.* at 240.

334. There are reported cases in which imprisonment caused contemnors to lose jobs from which wage withholding was providing or could have provided some level of support. See, e.g., *Sevier v. Turner*, 742 F.2d 262, 265–66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

335. UNWED FATHERS, THE UNDERGROUND ECONOMY, AND CHILD SUPPORT POLICY, FRAGILE FAMILIES RES. BRIEF (BENDHEIM-THOMAN CTR. FOR RESEARCH ON CHILD WELLBEING, PRINCETON UNIV. & SOC. INDICATORS SURVEY CTR., COLUMBIA UNIV.), Jan. 2001, at 2, available at <http://www.fragilefamilies.princeton.edu/briefs/researchbrief3.pdf> [hereinafter UNWED FATHERS, THE UNDERGROUND ECONOMY, AND CHILD SUPPORT POLICY].

and, possibly, imprisoned.”³³⁶ Underground employment, which includes self-employment, off-the-books and under-the-table jobs, and illegal activities, such as selling drugs and selling stolen merchandise, provides earnings that are easily hidden from the child support system.³³⁷ Fathers who engage in underground employment enjoy a greater degree of payment discretion because the automated and routine enforcement mechanisms are less effective for obligors who work outside the formal employment sector.³³⁸ Incarceration for nonpayment can have similar effects, driving poor fathers into the underground economy, thereby reducing the amount of income available to children through child support payments and undermining the intended purpose of stronger enforcement.³³⁹

IV. RETHINKING THE CHILD SUPPORT SYSTEM’S APPROACH TO LOW-INCOME FATHERS

Addressing the problems identified earlier in this Article entails a rethinking of the child support system’s approach to low-income fathers and their families. Because many difficulties are linked to states’ practices of privileging welfare cost recoupment over the economic well-being of poor children,³⁴⁰ the goal of providing economic support to poor children must be paramount. A stronger focus on children’s economic needs invites reconsideration of many existing practices, such as the amount of child support paid by noncustodial parents that the state will “pass through” to families receiving welfare benefits rather than retain for reimbursement purposes; the requirement that welfare applicants assign their rights to collect past-due child support to states; and states’ efforts to collect, from noncustodial fathers, Medicaid costs associated with a nonmarital birth.³⁴¹

A state’s interest in recouping welfare expenditures is in tension with the goal of improving the economic well-being of children living in poverty. As noted, custodial parents receiving TANF are required to assign their rights to collect child support to states as reimbursement for welfare benefits.³⁴² Because most states use the entire monthly support payment to

336. Waller & Plotnick, *supra* note 9, at 106.

337. See Pate, *An Ethnographic Inquiry*, *supra* note 188, at 59–62; UNWED FATHERS, THE UNDERGROUND ECONOMY, AND CHILD SUPPORT POLICY, *supra* note 335, at 2.

338. Judi Bartfeld & Daniel R. Meyer, *Child Support Compliance Among Discretionary and Nondiscretionary Obligor*, 77 SOC. SERV. REV. 347, 364–65 (2003).

339. Waller & Plotnick, *supra* note 9, at 105–06.

340. See Hatcher, *supra* note 315, at 1048–51.

341. See Cancian et al., *Child Support*, *supra* note 101, at 154–55.

342. See CROWLEY, *supra* note 110, at 42.

recoup welfare expenditures, the child support collected does not enhance the family's living standard.³⁴³ About one-third of states pass through fifty dollars of collected child support to children's families.³⁴⁴ "In 2004, states collected approximately \$635 million in child support on behalf of TANF families and distributed about 27 percent of it to TANF families, keeping the rest to reimburse the federal and state governments for welfare costs."³⁴⁵ States could give families on welfare all the child support they collect through the assignment process.³⁴⁶ Doing so would remove many more families from poverty.³⁴⁷ Even fathers who later reunite with their families are not shielded from state efforts to collect child support.³⁴⁸ In these cases, the child welfare system pursues child support from low-income fathers residing with their children in intact families, thus reducing the economic resources available to the families and privileging recoupment of state welfare expenditures.³⁴⁹

Although reform in this area would likely lead to reduction in reimbursement revenue for the child support enforcement system,³⁵⁰ reform may nonetheless have a positive fiscal impact on poor families. Child support payments would inure to the economic benefit of disadvantaged children rather than states. While such a move might not be politically popular across the board because of its potential to reduce state revenue,³⁵¹

343. Waller & Plotnick, *supra* note 9, at 91.

344. *Id.*

345. LAURA WHEATON & ELAINE SORENSEN, THE URBAN INST., THE POTENTIAL IMPACT OF INCREASING CHILD SUPPORT PAYMENTS TO TANF FAMILIES 1 (Dec. 2008), available at http://www.urban.org/UploadedPDF/411595_child_support.pdf.

346. See ADMIN. FOR CHILDREN & FAMILIES, FY 2008 ANNUAL REPORT TO CONGRESS (2008), available at http://www.acf.hhs.gov/programs/cse/pubs/2011/reports/fy2008_annual_report/.

347. WHEATON & SORENSEN, *supra* note 345, at 2. Some scholars have called for reexamination of federal child support policy because of its overall failure to reduce child poverty. See, e.g., Murphy, *supra* note 323, at 352 ("[T]he ever-increasing resources devoted to collect child support from low-income fathers have no direct impact on the financial well-being of children on welfare.").

348. See TURETSKY, REALISTIC CHILD SUPPORT POLICIES, *supra* note 84, at 9; Hatcher, *supra* note 315, at 1057–63 (describing *Harvey v. Marshall*, 884 A.2d 1171, 1176–77 & n.4 (Md. 2005), a case in which the noncustodial father gained custody of his four children and the state continued to pursue ten thousand dollars in arrearages that accumulated prior to the change in custody).

349. See Hatcher, *supra* note 315, at 1060–63.

350. See WHEATON & SORENSEN, *supra* note 345, at 6.

351. Any focus on cost recovery would need to account for the fact that reduction in state child support revenue would likely be matched by administrative and other cost savings. See *id.* For example, when Wisconsin conducted an experiment to determine the impact of a full pass through and disregard of child support, research findings showed positive impacts on several measures. See DANIEL R. MEYER & MARIA CANCIAN ET AL., INST. FOR RESEARCH ON POVERTY, W-2 CHILD SUPPORT DEMONSTRATION EVALUATION PHASE 2: FINAL REPORT 42–58 (July 2003),

some have argued convincingly that it is unreasonable to expect the child support system to self-finance its operations.³⁵²

With this enhanced commitment to children's economic needs in mind, Part IV presents a multi-pronged alternative scheme for child support that falls into three distinct areas: corrections, investments, and shared responsibility. First, it proposes a system of corrections (or reforms) to the child support system that makes the financial obligations imposed on disadvantaged fathers more realistically reflect individual fathers' income potential. Second, significant government investment in effective capacity building strategies is needed so that disadvantaged fathers are better able to meet their child support responsibilities. At a minimum, progress should be made on both these fronts in order to address the economic needs of poor children and their families.

There are no guarantees, however, and implementing the first two prongs of this proposal may not succeed in achieving the goal of maximizing private support for poor children. The systemic barriers to securing employment that disadvantaged fathers (and mothers) experience are long-standing, intractable, and hard to surmount.³⁵³ The experiences of single-mother households that have left the TANF-caseload (i.e., welfare leavers) demonstrate the tremendous difficulty and fragility of even modest upward mobility from the lowest rungs of the socioeconomic ladder.³⁵⁴ Even more

<http://www.irp.wisc.edu/research/childsup/csde/publications/phase2/phase2-final.pdf>. In the study, the Wisconsin Child Support Demonstration Evaluation included an evaluation in which participants were randomly assigned to either an experimental or a control group. *Id.* at 4–5. Those in the experimental group received the full amount of current support paid on their behalf, and nothing was disregarded, or ignored, in calculating the mother's welfare benefits. *Id.* Those in the control group received a portion of the support (the first fifty dollars per month or forty-one percent of the child support amount, whichever was greater) while they received W-2 cash benefits, with this same amount disregarded. *Id.* Those who received W-2 services, but no cash benefits received the full amount paid, regardless of experimental-group status. *Id.* The evaluation found that the new policy (i.e., the full pass through of child support received) increased the amount of support mothers received, increased fathers' likelihood of paying child support, and increased paternity establishment, but did not cost the government more than the partial pass through and disregard policy. *Id.* at 68–72.

352. See Cancian et al., *Child Support*, *supra* note 101, at 155. "Enforcing policy and law with regard to parents' obligations to their children is a general social responsibility and should be funded from general revenues, not by diverting money meant for children." *Id.*

353. See Danziger & Seefeldt, *supra* note 126, at 76–80.

354. One study examining the economic status of former TANF recipients reported on cohorts of individuals who left welfare in three different time periods. See MARIA CANCIAN ET AL., INST. FOR RESOURCE ON POVERTY, THE EMPLOYMENT, EARNINGS, AND INCOME OF SINGLE MOTHERS IN WISCONSIN WHO LEFT CASH ASSISTANCE: COMPARISON AMONG THREE COHORTS, SPECIAL REPORT NO. 85, at 2–3 (2003), available at <http://www.ssc.wisc.edu/irpweb/publications/sr/pdfs/sr85.pdf>. Although "four-fifths of leavers were employed at some point in the first year after exit . . . 20 percent of leavers return[ed] to cash benefits within the first several months and . . . receiving Food Stamps is fairly common in the first year." *Id.* at 40. Also, the post-TANF poverty rates for these cohorts of leavers were very high (sixty-three, seventy-two, and seventy-three percent). *Id.*; see

sobering are the consistent findings from decades of research involving disadvantaged men that confirm that, after completing a transitional (subsidized) job program, these men do not generally locate unsubsidized employment that pays a higher salary.³⁵⁵ Simply put, long-term gains in employment and earnings have been elusive for this population, and they are especially vulnerable to losing ground during economic downturns.³⁵⁶ Consequently, a more robust public-private sharing of financial responsibility for poor children ought to be a part of any reform. Private support of poor children thus would be complemented by, rather than substituted for, public support.

The time to reform the child support system is long overdue. The reforms envisioned can be characterized more as a series of corrections, an attempt to redress the harmful, unintended consequences of prior reforms that swung too far in the direction of punishing so-called “deadbeat dads.” The prior reforms failed to take account of the appropriateness and potential impact of such harsh measures on disadvantaged fathers and their families—and did so at the expense of accomplishing child support program goals. Indeed, there is growing recognition that, as applied to low-income parents, the child support system is not functioning effectively because collections are low, arrearages are excessively large, and poor children remain in poverty.³⁵⁷ The Commissioner of the OCSE acknowledges that, for disadvantaged populations, the “growing body of research suggests that reduced orders and debt balances can improve employment and child support outcomes.”³⁵⁸ The proposed reforms are thus directed primarily at setting realistic child support orders at the outset and implementing mechanisms to forgive (or compromise) existing onerous and un-payable child support debts.

The elimination or reduction of large child support debts is an important first step. There is growing acknowledgement in the field that, as a practical

also MARIA CANCIAN ET AL., INST. FOR RESEARCH ON POVERTY, BEFORE AND AFTER TANF: THE ECONOMIC WELL-BEING OF WOMEN LEAVING WELFARE, SPECIAL REPORT 77, at 1–3 (2000), available at <http://www.ssc.wisc.edu/irpweb/publications/sr/pdfs/sr77.pdf>; Pamela Loprest, *How Are Families Who Left Welfare Doing Over Time? A Comparison of Two Cohorts of Welfare Leavers*, FED. RES. BANK N.Y. ECON. POL’Y REV. 10–17 (2001), available at <http://newyorkfed.org/research/epr/01v07n2/0109lopr.pdf>;

355. See Mincy et al., *Income Support Policies for Low-Income Men and Noncustodial Fathers*, *supra* note 102, at 255.

356. Women leaving welfare earn, on average, only seven to eight dollars per hour. See *TANF Hearing*, *supra* note 101, at 5. TANF rules that emphasize work, over education and training, require that recipients accept the first available job, even if the salary keeps the family below the poverty line. *Id.*

357. See TURETSKY, COMMISSIONER’S VOICE, *supra* note 265, at 2.

358. See *id.*

matter, low-income fathers will never be able to pay the enormous child support debts they have accumulated and that, as a consequence, the very existence of the debt can discourage some fathers from even trying to repay it.³⁵⁹ Indeed, “the federal Office of Child Support Enforcement recently reissued a policy statement clearly stating that states have the authority to compromise unpaid welfare arrears owed to the government.”³⁶⁰ The federal government permits states to compromise child support arrearages when the debt is owed to the state.³⁶¹ Some state and localities are taking a close look at the large arrearages that have built up for low-income fathers.³⁶² The methods used to manage uncollectible arrears include amnesty (debt forgiveness) programs for arrearages owed to states and the automatic suspension of orders when fathers are in jail or participating in job programs.³⁶³ So far, however, movement on this front has been piecemeal, and a more systematic and comprehensive effort is needed.³⁶⁴

Furthermore, there is growing recognition that the arrearage problem is best handled through prevention.³⁶⁵ States are thus reconsidering the practice

359. See Carolyn Heinrich et al., *Reducing Child Support Debt and Its Consequences: Can Forgiveness Benefit All?*, 30 J. POL’Y ANALYSIS MGMT. 755, 757 (2011) (reviewing research demonstrating how the large child support debt of low-income noncustodial parents accrues, the likelihood that their arrears will continue to grow over time, and the near impossibility that the debt will ever be collectible).

360. See TURETSKY, REALISTIC CHILD SUPPORT POLICIES, *supra* note 84, at 9 (citing PIQ-89-02, ADMIN. FOR CHILDREN & FAMILIES (1989) (on file with author); PIQ-99-03, ADMIN. FOR CHILDREN & FAMILIES (1999), <http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9903.htm>).

361. See Heinrich et al., *supra* note 359, at 757–58. The federal government also permits states to forgive child support arrears owed to custodial parents, so long as custodial parents agree. *Id.*

362. See SORENSEN ET AL., *supra* note 203, at 10–12.

363. *Id.* Amnesty programs vary with regard to how much debt they forgive and the conditions that child support obligors must satisfy in order for a particular state to eliminate arrearages. See CROWLEY, *supra* note 110, at 189–90. In Iowa’s Satisfaction Support Program, for example, the percentage of past-due debt that the Program forgives depends on how long an obligor satisfies current support obligations. *Id.* at 188. Successful payments for anywhere from six to twenty-four months will result in debt forgiveness of anywhere from fifteen to eighty percent. *Id.* Maryland and Minnesota, on the other hand, require noncustodial parents to complete a fatherhood program in order to have their past due support excused. *Id.* at 188–89.

364. See JACQUELINE BOGGESE, CTR. FOR FAMILY POLICY & PRACTICE, LOW INCOME FATHERS AND CHILD SUPPORT DEBT: A PRIMER FOR FINANCIAL LITERACY AND FATHERHOOD SERVICE PROVIDERS 13 (2010), available at <http://www.cfpp.org/publications/Child%20Support%20Debt%202011.pdf>; see also KARIN MARTINSON, THE URBAN INST., SERVING NONCUSTODIAL PARENTS THROUGH WELFARE-TO-WORK GRANTS: LABOR MARKET CHARACTERISTICS, EMPLOYMENT BARRIERS, AND SERVICE STRATEGIES 1–4 (Oct. 1, 1998), <http://www.urban.org/UploadedPDF/408092.pdf>.

365. See Letter from the Office of Child Support Enforcement, to All State and Tribal IV-D Directors (May 30, 2007), available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2007/dcl-07-17.htm> (“PAID: Project to Avoid Increasing Delinquencies, an initiative emphasizing activities that will increase the collection of current support and prevent and reduce arrears.”).

of routinely imputing income, setting large retroactive orders based on welfare debt and other costs that bear no relationship to fathers' abilities to pay, and keeping orders current by implementing procedures to facilitate prompt review and adjustment of orders when appropriate.³⁶⁶ As with arrearages, additional efforts must be made in order to have a meaningful impact.

First, it is essential that the federal OCSE mandate (and state child support agencies implement) realistic and appropriate child support policies in cases involving low- and no-income noncustodial parents. This approach will, in part, require that child support personnel, at both the order setting and enforcement phase, assess the noncustodial parent's ability and willingness to pay. Determining ability to pay will necessarily require an individualized, fact-based determination that takes into account a number of relevant factors. The assessment would consider such factors as the obligor's past work history, job skills, level of education, criminal record (if any), physical and mental health, and past efforts to secure employment or job training. A track record of compliance with child support obligations would also be relevant when evaluating willingness to pay. Assessment of willingness to pay should also consider the existence (or lack thereof) of employment opportunities in the obligor's community for job seekers with similar qualifications and characteristics. Such inquiries would no doubt provide the child support system (and individual caseworkers) with a better understanding of low-income fathers' economic predicaments and the efforts they resort to in order to survive economically. As noted previously, many low-income nonpaying fathers exhibit multiple barriers to steady employment.³⁶⁷ An assumption that all nonpaying fathers are deadbeats is inequitable and unjust, especially in light of the current recession and historically high unemployment rate, particularly for low-skilled workers.³⁶⁸

Another area of proposed reform emphasizes capacity building to enhance poor noncustodial parents' labor market prospects so that they are better able to meet their economic duties to their children.³⁶⁹ The federal government now urges state child support programs to examine the underlying reasons fathers are not paying child support and to provide job-related support and services to poor fathers to help them meet their support

366. FED. OFFICE OF CHILD SUPPORT ENFORCEMENT, ADMIN. FOR CHILDREN & FAMILIES, PROJECT TO AVOID INCREASING DELINQUENCIES 2-6, 8-9 (2008), available at www.acf.hhs.gov/programs/cse/pol/DCL/2007/dcl-07-17a.pdf.

367. See *supra* pp. 647-49.

368. See Mincy et al., *Income Support Policies for Low-Income Men and Noncustodial Fathers*, *supra* note 102, at 253 ("It seems merciless to insist on full compliance with child support during the longest recession in the postwar period, especially while forgiving debts accumulated on Wall Street and Main Street.").

369. See TURETSKY, COMMISSIONER'S VOICE, *supra* note 265, at 2.

obligations.³⁷⁰ There is widespread understanding that many low-income fathers who want to pay support are unable to simply because of obstacles to full participation in the labor market.³⁷¹ Just as in the case of disadvantaged custodial mothers, similarly situated poor noncustodial fathers need a work-focused state safety net that helps to enable them to work and pay child support.³⁷² Government assistance and social programs today are almost universally either predicated on participation in the formal labor market or restricted to low-income children and their custodial parents;³⁷³ because disadvantaged men are only tenuously attached to the labor market and tend to be noncustodial parents, they are ineligible for most income security programs.³⁷⁴ Thus, child support enforcement efforts must be coupled with measures designed to improve the employment prospects and overall financial security of poor fathers.³⁷⁵ Research showing a strong correlation between child support compliance and ability to pay supports this approach.³⁷⁶ Also, steady employment in the formal labor market enhances the efficacy of the enforcement system, which largely relies on routine and automated systems to target parents through their connections to the formal

370. See *id.* Adequate funding is vital for such programs. See Mincy et al., *Income Support Policies for Low-Income Men and Noncustodial Fathers*, *supra* note 102, at 256. Currently, because of lack of funding, most states do not provide employment related services to noncustodial parents who are behind on their child support payments. See *id.* States that previously made such services available ceased doing so after 2001, when the federal government eliminated its funding for the Welfare-to-Work program. *Id.*

371. See Virginia Knox et al., *Policies That Strengthen Fatherhood and Family Relationships: What Do We Know and What Do We Need To Know?*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 216, 232 (2011).

372. See MARTINSON, *supra* note 364, at 8 (reporting that there are few programs providing employment and training to noncustodial fathers, especially when compared to the number and size of programs serving custodial parents).

373. See JILL GROBLEWSKI, CTR. FOR FAMILY POLICY & PRACTICE, COMPREHENSIVE ADVOCACY FOR LOW-INCOME AFRICAN-AMERICAN MEN AND THEIR COMMUNITIES 12–13 (2010), available at http://cffpp.org/publications/Comp_advocacy.pdf.

374. “[T]he only income support program generally available to help younger single men is the Supplemental Nutrition Assistance Program (SNAP) or food stamps.” Timothy M. Smeeding et al., *Young Disadvantaged Men: Fathers, Families, Poverty, and Policy*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 13 (2011); see also GROBLEWSKI, *supra* note 373 (“[SNAP] stands out as an exception [because] [i]t is one government social protection provided to able-bodied adults who do not have legally recognized custody of a child.”).

375. There is considerable evidence that even if the child support system were effective in securing payments from poor fathers, the amounts would not be sufficient to lift their children out of poverty. See Jane Waldfogel, *The Role of Family Policies in Antipoverty Policy*, in CHANGING POVERTY, CHANGING POLICIES 242, 253–54 (Maria Cancian & Sheldon Danziger eds., 2009). No matter how aggressive and relentless the enforcement efforts, the reality is that these poor fathers have limited and unstable incomes. *Id.*

376. See Bartfeld & Meyer, *supra* note 338, at 349.

employment system.³⁷⁷

This approach is reflected in President Obama's agenda for strengthening families, the Fatherhood, Marriage and Family Innovation Fund.³⁷⁸ The proposal, included in the administration's fiscal year 2011 budget proposal, would establish a new \$500 million fund to provide grants to states to conduct and evaluate "comprehensive responsible fatherhood initiatives" and "comprehensive demonstrations to improve child and family outcomes in low-income families with serious barriers to self-sufficiency."³⁷⁹ While state- and local-level pilot programs providing comprehensive employment and other supportive services to low-income noncustodial parents exist,³⁸⁰ the Obama Administration's Fatherhood, Marriage and Family Innovation Fund would be the first such federal program.³⁸¹

The advantages of providing services to low-income fathers to assist them in their efforts to find and retain stable employment far outweigh resulting negative impacts to the child support system. Some might argue that the costs of the additional employment-related services would be prohibitive.³⁸² Certainly, the child support system's functions will expand significantly. Its core duties, which today focus primarily on establishing and enforcing child support orders,³⁸³ would also include services designed to aid noncustodial parents in finding work and meeting their support obligations. Child support agencies or service providers in local communities would provide services in areas such as job readiness, job training, and job placement. Under this system, more caseworker time and attention would be expended assessing a low-income parent's ability and

377. *Id.* at 364–65.

378. ADMIN. FOR YOUTH & FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE FATHERHOOD, MARRIAGE AND FAMILY INNOVATION FUND (2010), *previously available at* http://www.acf.hhs.gov/programs/cse/pubs/2010/Innovation_Fund_One_Pager.html (last visited July 28, 2010) (on file with author).

379. *Id.*

380. For example, in 2006, the New York legislature enacted the Strengthening Families Through Stronger Fathers Initiative, which, among other things, funded a three-year pilot program to provide employment services to low-income noncustodial parents. *See* TESS TANNEHILL ET AL., THE URBAN INST., STRENGTHENING FAMILIES THROUGH STRONGER FATHERS INITIATIVE: PROCESS EVALUATION REPORT 2–4 (2009), *available at* <http://www.urban.org/UploadedPDF/1001412-stronger-fathers-initiative.pdf>.

381. *See* JACQUELINE BOGCESS, CTR. FOR FAMILY POLICY & PRACTICE, THE PRESIDENT'S FATHERHOOD, MARRIAGE, AND FAMILY INNOVATION FUND 1–2 (2010), *available at* http://cffpp.org/publications/Innov_fund.pdf.

382. Such opposition would likely stem from an overall lack of public support for unmarried fathers. For several decades, this group has not benefited from public income support programs. *See* Smeeding et al., *supra* note 374.

383. *See* Legler, *The Impact of Welfare Reform*, *supra* note 18, at 46–55.

willingness to provide support. Conducting fact-based inquiries of all relevant information on a case-by-case basis is likely to be more time consuming and labor intensive than the current automated enforcement system, which is largely reliant on mass case processing.³⁸⁴ Because mass case processing is accomplished through computerized and automated systems, it relies less on the efforts of individual child support agency staff.³⁸⁵ By contrast, when a child-support staff member determines a noncustodial father's job readiness (or the package of services to eliminate barriers to employment), he or she will likely conduct a structured interview with the individual and possibly also utilize a range of specialized tools and assessment measures.³⁸⁶

This approach will be more equitable and cost effective as well (with potential fiscal gains to states from a reduction in unwarranted civil incarcerations offsetting any additional costs associated with individualized determinations).³⁸⁷ Michael Turner, for example, was incarcerated on numerous occasions for nonpayment of support, even though he was unemployed and lacked the ability to satisfy his debt.³⁸⁸ Some of Turner's jail sentences lasted for as long as a year.³⁸⁹ Not only did jailing him not succeed in coercing compliance with his child support order,³⁹⁰ it also imposed significant costs on the State of South Carolina.³⁹¹ In light of the fact that thirteen to sixteen percent of South Carolina's jail population is comprised of child support obligors imprisoned for civil contempt,³⁹² ample savings would be realized by ceasing the current practice of jailing poor parents who are unable to pay child support. Although empirical information regarding the national scope of this phenomenon is limited,³⁹³ and the

384. See Legler, *The Coming Revolution in Child Support Policy*, *supra* note 70, at 543–50 (describing how child support reform provisions in PRWORA mandate the use of mass case processing and reduce the need for agency staff to handle cases on an individual basis).

385. *Id.*

386. See Danziger & Seefeldt, *supra* note 126, at 80.

387. Representatives of local agencies involved in child support enforcement in Wisconsin report that they do not typically consider the cost effectiveness of utilizing civil contempt processes and criminal nonsupport charges. See COOK & NOYES, *supra* note 170, at 18. Yet, these enforcement measures demand considerable investment of agency resources. *Id.*

388. See Brief for Petitioner, *supra* note 1.

389. *Id.*

390. *Id.*

391. See S.C. DEP'T OF CORR., FREQUENTLY ASKED QUESTIONS (FAQS), <http://www.doc.sc.gov/faqs.jsp> (last visited Feb. 13, 2012). In South Carolina, the yearly operational costs per inmate were \$14,409 (or \$39.48 per day) during the 2006 fiscal year. *Id.*

392. See *supra* note 12 and accompanying text.

393. See Patterson, *supra* note 14, at 117.

limitations of existing data sources have presented challenges for researchers seeking to generate such empirical information,³⁹⁴ reports confirm that across the United States a significant number of noncustodial fathers are jailed for nonpayment of child support.³⁹⁵ The cost of incarcerating delinquent parents, however, is not likely to be a significant factor that influences child support agencies' enforcement decisions, given that those costs, which are shared with the states' judicial and criminal justice systems, are partly externalized.³⁹⁶ Nonetheless, the considerable costs incurred to incarcerate Turner (and similarly situated poor fathers) did not result in increased child support payments for his children.³⁹⁷ Savings from reducing civil incarceration rates could be redirected to provide employment-related services to indigent child support obligors, a practice that has a far greater chance of leading to paid employment and ultimately compliance with support orders.³⁹⁸

Although policies emphasizing jobs (rather than jail) for poor fathers are necessary, there is strong reason to be skeptical regarding the likely efficacy (and sufficiency) of such measures. The current presidential administration has encouraged state and local child support offices to shift their emphasis in enforcement proceedings from an overreliance on punitive measures to capacity building efforts.³⁹⁹ Policymakers at both the federal and state levels recognize that there is a convincing body of evidence showing that the potential contribution of poor noncustodial fathers to the improved economic well-being of their children is seriously constrained and falls far short of their child support orders' amounts.⁴⁰⁰ Unfortunately, however, this new thinking has not yet transformed how child support systems operate nationwide. For the most part, the systemic and automated practices that contributed to Turner's multiple imprisonments remain the status quo.⁴⁰¹

Successful implementation of this new system requires the acceptance and support of large bureaucratic institutions and other individual actors in the child support field. Yet, institutional resistance to reform is strong

394. See COOK & NOYES, *supra* note 170, at 13–18.

395. See Patterson, *supra* note 14, at 117.

396. See COOK & NOYES, *supra* note 170, at 18.

397. Brief for Petitioner, *supra* note 1, at 8–15 (describing how Turner's child support payments were made through other child support enforcement mechanisms, including wage withholding, interception of federal and state tax refunds, and interception of disability benefits).

398. See *supra* pp. 650–51.

399. See *supra* notes 377–81 and accompanying text.

400. *Id.*

401. See *infra* pp. 672–73.

(particularly at the local and individual levels).⁴⁰² Change will likely be slow because perceptions and basic attitudes also need to be changed.⁴⁰³ The myth of the deadbeat dad poses a considerable obstacle to implementing change. For example, even during the current economic downturn, which has been described by many as “the Great Recession,”⁴⁰⁴ child support officials and courts persist in the practice of setting minimum orders and imputing income to fathers who lack jobs.⁴⁰⁵ A recent study by the Institute for Research on Poverty reported on the effect of the recession on child support operations in five Wisconsin counties.⁴⁰⁶ The five counties included in the study represent a range of population sizes, and researchers selected them for inclusion in the study because they had high unemployment rates that rose sharply in 2009.⁴⁰⁷ The study examined how child support and court staff set original orders when the noncustodial parent was unemployed.⁴⁰⁸ It also assessed whether, in response to the recession, child support agencies and courts changed their practices.⁴⁰⁹

The study determined that, despite recession and high unemployment rates in these counties, there has not been a significant change in the practice

402. See, e.g., Heinrich et al., *supra* note 359, at 772 (observing that child support agency staff in one Wisconsin county were not receptive to implementing a debt forgiveness program).

403. Fathers report that experiences with courts, child support agencies, and their frontline workers have been unpleasant. See MARGUERITE ROULET, CTR. ON FATHERS, FAMILIES, & PUBLIC POLICY, NEGOTIATING THE CHILD SUPPORT SYSTEM: A REPORT FROM A DISCUSSION OF POLICY AND PRACTICE 9–11, 14–22 (2000), available at <http://cffpp.org/publications/NegotiatingChdSup.pdf>. They speak of being treated by judges and local administrators in a dismissive and intimidating manner; their experiences are confirmed by the caseworkers who provide services to them. *Id.* Even custodial mothers sense that agency staff have a negative attitude toward noncustodial fathers. See PATE, WELFARE AND CHILD SUPPORT POLICY KNOWLEDGE, *supra* note 188, at 31. In a research focus group, a mother described a conversation with child support staff as follows: “[if] you try to let them know that the father helps you out with the child and all that, they get mad at you.” Distrust runs deep as well. In a study evaluating outcomes in a child support debt forgiveness pilot program, researchers learned, in focus groups with noncustodial fathers participating in the program, that the men were afraid to respond to the letter inviting them to participate in the program. See Heinrich, et al., *supra* note 359, at 771. The men suspected that the letter was a ruse designed to lure them into a “child support sting operation” and that, if they responded, they might be jailed because they were delinquent on their payments. *Id.*

404. See Michael Elsby et al., *The Labor Market in the Great Recession*, Brookings Panel on Economic Activity 2 (2010), www.brookings.edu/~media/Files/Programs/ES/BPEA/2010_spring_bpea_papers/2010a_bpea_eslby.pdf.

405. See *infra* pp. 672–73; see also Yoonsook Ha et al., *supra* note 210.

406. See THOMAS KAPLAN, INST. FOR RESEARCH ON POVERTY, CHILD SUPPORT IN A RECESSION: A REPORT ON INTERVIEWS WITH CHILD SUPPORT STAFF AND COURT COMMISSIONERS IN FIVE COUNTIES 1 (June 2010), available at <http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/T8a2009Kaplan.pdf>.

407. *Id.*

408. *Id.*

409. *Id.*

of setting initial orders in cases involving unemployed noncustodial parents who have no income from unemployment insurance.⁴¹⁰ “Courts in the counties are generally reluctant to order no cash payment, even when the obligor clearly has no means to make the payment, because the courts want to reinforce the seriousness of a parent’s financial obligation to his children.”⁴¹¹ In establishing child support orders, the most common approach continues to be the establishment of an order based on imputed income (either based on the minimum wage or the prior work history of the parent) and requiring immediate payment of child support.⁴¹² Some counties impose a work search requirement along with the support order, and so long as the father satisfies the requirement to seek work, child support officials will refrain from filing a motion for contempt if there is nonpayment of the support order.⁴¹³ Child support staff declining to pursue the harshest enforcement measures in response to nonpayment of support demonstrates an understanding and recognition of the economic difficulties experienced by noncustodial parents.⁴¹⁴ However, because courts continue to set initial orders at an imputed amount that bears no relationship to unemployed parents’ actual earnings,⁴¹⁵ parents in these counties continue to accumulate arrearages.

In a time of shrinking government budgets, it is unlikely that there will be widespread public support for making significant monetary investments in programs targeting disadvantaged fathers.⁴¹⁶ For decades this population has been left behind and very few government services are available to poor noncustodial fathers.⁴¹⁷ By contrast, Congress passed and implemented welfare reforms in the mid-1990s, during a period when the U.S. economy was experiencing tremendous growth and state budgets could more easily

410. *Id.* at 3–4.

411. *Id.* at 4.

412. KAPLAN, *supra* note 406, at 5. In imputed income cases, child support personnel and family court commissioners in all five counties reported that they lowered the hours of expected employment to thirty or thirty-five hours per week. *Id.* at 6.

413. *Id.* at 4. Some counties have been more responsive to obligors’ precarious economic predicaments. *Id.* Rather than setting orders and requiring immediate payment of child support, these counties often postpone cash payments for a month or two to provide obligors an opportunity to find paid employment. *Id.* at 5.

414. *Id.* at 11.

415. *Id.* at 3–6.

416. In three recent public opinion surveys, the Pew Center for the People and the Press found that a majority of Americans are opposed to increased spending on the poor and needy. See D’Vera Cohn, *Adding Context to the Census Bureau’s Income and Poverty Report*, PEW SOCIAL & DEMOGRAPHIC TRENDS (Sept. 12, 2011), available at <http://www.pewsocialtrends.org/2011/09/12/adding-context-to-the-census-bureaus-income-and-poverty-report/>.

417. See Smeeding et al., *supra* note 374 and accompanying text.

absorb the additional expenses associated with providing job-related services and other necessary supports to welfare recipients.⁴¹⁸ A shift in the child support context toward securing jobs for noncustodial fathers who are delinquent in their child support payments will likely be less feasible as a practical matter and less acceptable as a political matter.

Thus, in addition to addressing the problems posed by institutional resistance to reform, efforts to improve low-income fathers' job prospects must not fail to take account of several systemic factors hindering possible success in the labor market, namely pervasive racial discrimination in employment, the difficulty that former inmates have in securing employment, and the current dismal economic climate, which has made jobs scarce and eroded upward mobility.⁴¹⁹ Even though the recession in the United States officially ended over two years ago, the recovery has been sluggish and the unemployment crisis persists.⁴²⁰ As of November 2011, the national unemployment rate was 8.6 percent.⁴²¹ The Great Recession has hit Black workers particularly hard.⁴²² During 2010, the unemployment rate among Black workers was two to nearly three times greater than that of White workers in some states.⁴²³ For example, unemployment among Black workers in Mississippi peaked at twenty percent in the first quarter of 2010, a rate that was more than three times the six percent rate of White

418. See Thomas L. Gais et al., *Implementation of the Personal Responsibility Act of 1996*, in *THE NEW WORLD OF WELFARE* 35, 36 (Rebecca M. Blank & Ron Haskins eds., 2001). The lessons learned from the history of welfare reform can be instructive as welfare reform similarly focused on the implementation of work related goals and services directed toward low-income populations. See *id.*

419. See generally GREGORY ACS, *DOWNWARD MOBILITY FROM THE MIDDLE CLASS: WAKING UP FROM THE AMERICAN DREAM*, PEW CHARITABLE TRUSTS ECONOMIC MOBILITY PROJECT 8–20 (2011), available at <http://www.economicmobility.org/assets/pdfs/MiddleClassReport.pdf> (empirical study examining downward and upward economic mobility among various demographic groups and describing factors that correlate with outcomes); JANE L. COLLINS & VICTORIA MAYER, *BOTH HANDS TIED: WELFARE REFORM AND THE RACE TO THE BOTTOM OF THE LOW-WAGE LABOR MARKET* 1–20 (2010) (empirical ethnographic research study examining labor market and welfare receipt experiences of low-wage working mothers in Wisconsin in the time period following enactment of PRWORA); KATHERINE S. NEWMAN, *CHUTES AND LADDERS: NAVIGATING THE LOW-WAGE LABOR MARKET* 1–4, 84–116 (2006) (empirical ethnographic research study tracking Black and Latino low-wage workers in Harlem over a ten-year period and describing paths that provided upward mobility for some study participants).

420. See Editorial, *Waiting for Recovery*, N.Y. TIMES, Jan. 6, 2012, <http://www.nytimes.com/2012/01/07/opinion/waiting-for-recovery.html>.

421. See *The Employment Situation – November 2011*, BUREAU OF LABOR STATISTICS, U.S. DEPT'N LABOR 5 (2011), <http://www.bls.gov/news.release/pdf/empisit.pdf>. The Bureau of Labor Statistics later revised that figure to 8.7%. *Id.*

422. See *Black Unemployment Two to Nearly Three Times Higher Than White Unemployment in Some Southern States*, POL'Y BRIEFING (Ctr. for Family Policy and Practice, Madison, Wis.), July 2011, at 3, available at http://www.cffpp.org/publications/PB_July_2011.pdf.

423. *Id.*

workers.⁴²⁴ The employment and labor force participation for less-educated Black men between the ages of sixteen and thirty-four has been on a steady decline over the last two decades, continuing even through the strong economic years of the 1990s.⁴²⁵ Studies examining the decline attribute most of it to the negative impact that past incarceration and strict child support enforcement has on the labor force participation of young Black men.⁴²⁶ Notably, the period of declining employment coincides with the growth in incarceration rates and reforms to strengthen child support enforcement, both of which disproportionately impacted young Black men.⁴²⁷ As of 2002, the incarceration rate for Black men was five percent, and for young Black men it was twelve percent; additionally, approximately twenty-two percent of all Black men were ex-offenders.⁴²⁸

The difficulties catalogued above challenge the normative ideal: financial responsibilities to and for poor children can be privatized without undue material hardship.⁴²⁹ Although child support has a role to play in the universe of programs for poor children, reconsideration of its prominence in family policy is warranted. In cases of serious social and economic disadvantage, even full and timely child support payments are unlikely to lift children out of poverty.⁴³⁰ Given that reality, policymakers need to examine alternative models that would provide needy children with a more stable public source of resources to ensure their economic security. In particular, it is time to reconsider the utility of assured child support benefits as a safety net in poor families. A child support benefit system⁴³¹ that both enforces the

424. *Id.*

425. *See* Holzer et al., *supra* note 320, at 330–33.

426. *See, e.g., id.* at 343–47.

427. Young Black men are more likely than other men to be (or have been) incarcerated and to be noncustodial fathers. *Id.* at 333–34.

428. *Id.* at 334. “[O]ne fourth of less-educated Black women aged 16–24 and one-half of those aged 25–34 are custodial mothers of children with a father living elsewhere; these rates are much higher than for any other demographic group and suggest that a high percentage of young Black men are noncustodial fathers.” *Id.*

429. *See* Garrison, *supra* note 234, at 17–24, 31 (explaining the limits of government child support policy, which has failed to alleviate child poverty, and arguing that “[p]olicymakers simply must accept the fact that child support policy cannot substitute for an antipoverty program”).

430. *See* Carbone, *supra* note 47, at 22–25; Garrison, *supra* note 234, at 31–32.

431. Other academics, most notably Professor Irwin Garfinkel, have proposed the development of a child support assurance system. *See, e.g.,* Irwin Garfinkel, *The Limits of Private Child Support and the Role of an Assured Benefit*, in *CHILD SUPPORT: THE NEXT FRONTIER*, *supra* note 18. According to Professor Garfinkel, a child support assurance system

has three components: (1) child support awards are set by a legislated formula based on a percentage of the nonresident parent’s income; (2) payments are deducted from the absent parent’s earnings, just like Social Security deductions; and (3) the government

Fathers Behind Bars

673

obligation of noncustodial parents to provide financial support to their children and supplements that private support with a public benefit providing a minimum level of cash assistance would ensure that the basic needs of poor children are met. Establishing a child support floor—a publicly funded benefit that, coupled with court-ordered child support payments, ensures a minimum safety net—would substantially reduce poverty and the economic insecurity of single mothers and their children.

guarantees a minimum level of child support to all children legally entitled to private child support – an assured benefit.

Id. at 184. Although this Article similarly proposes increased government support for poor children and their families, it does not go so far as to either endorse or reject the other proposals.