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Criminalizing (Poor) Fatherhood

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Cortney E. Lollar

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CRIMINALIZING (POOR) FATHERHOOD

Cortney E. Lollar*

States prosecute and incarcerate thousands of fathers every year for failing to pay their child support obligations. Ostensibly, these prosecutions aim to foster the health and well-being of children without requiring the child's mother to bear the costs of raising the child alone. What may appear on the surface to be a system that balances out inequities is actually a deeply flawed government program—one that promotes criminal recidivism and reinforces the poverty of indigent fathers. Contrary to the common image of a “deadbeat dad” raking in money and staying on the lam to avoid helping a mother raise their child, the vast majority of fathers who owe large amounts of child support make little to no income. These fathers do not pay their child support obligations because they are unable to. Once a state prosecutes and imprisons an indigent father, his odds of being able to pay that debt diminish even more. The criminalization of failing to pay child support is unconstitutional and revives prohibited debtors' prisons. Fathers of lesser means are being incarcerated for failing to pay a private debt owed to their child's mother or for not reimbursing the government for costs provided to the mother in the form of state assistance. In other words, an indigent father may be criminally sanctioned for not subsidizing the government's welfare programs. Relying on antiquated ideas about a father's role in the family, the child support system punishes poor fathers for their reproductive choices and morally condemns them for bringing a child into the world without being able to provide for her financially. This Article calls for an end to the criminalization of failing to pay child support and proposes several fiscally responsible changes to the current system that will improve the welfare of children whose parents are no longer together.

INTRODUCTION

On April 4, 2015, Walter Scott was pulled over in North Charleston, South Carolina, for driving with a broken taillight. As most people know by now, Mr. Scott fled on foot and was ultimately shot in the back by the police officer who pulled him over. Why did Mr. Scott run? According to

* James & Mary Lassiter Associate Professor of Law, University of Kentucky College of Law. My deep gratitude to Albertina Antognini and Susan Appleton for their thoughtful comments and insights on earlier drafts, all of which challenged and expanded my thinking about the issues discussed herein. Thank you also to Richard Ausness, Joshua Barnette, Scott Bauries, Alexander Boni-Saenz, Christopher Bradley, Michael Cahill, Jenny Carroll, Mihailis Diamantis, Deborah Dinner, Jim Donovan, Martha Albertson Fineman, Ann Freedman, Timothy Grall, Meredith Harbach, David Kwok, Kate Levine, Donald J. Lollar, Anna Lund, Andrea McArdle, Melody Morales, Paul Salamanca, Nirej Sekhon, Rebecca Zietlow, and participants of CrimFest/AALS Midyear Meeting 2017, A Workshop on Legal Transitions and the Vulnerable Subject: Fostering Resilience through Law's Dynamism, and the Developing Ideas conference for their invaluable feedback. And finally, thank you to Samuel Wilwerding and the editorial staff at the *Alabama Law Review* for their excellent editorial work.

his family, Mr. Scott owed over \$18,000 in child support.¹ He missed a court date related to his failure to pay the child support, and a warrant issued. His brother says he ran because he did not want to have to spend more time behind bars and face the loss of another job as a result of his failure to pay and the subsequent warrant.² “Every job he has had, he has gotten fired from because he went to jail because he was locked up for child support. . . . He got to the point where he felt like it defeated the purpose.”³

Subsequent to Mr. Scott’s death, the child support system stayed on the public radar for a short period of time.⁴ But the concerns about the system raised by Mr. Scott’s death have faded. Police departments have continued to make sweeps for “deadbeat” parents,⁵ and legislatures have pushed through new laws that further curtail the options available for a parent with outstanding child support obligations. Even nonlegislative agencies have promulgated punitive policies. For example, the Texas Attorney General recently implemented a new measure prohibiting a parent with a delinquent child support obligation from renewing his car registration.⁶ The ever-present threat of criminal prosecution and incarceration looms large for parents who simply cannot afford to pay their outstanding child support obligations, trapping men of little or no means “in a cycle of debt, unemployment, and imprisonment.”⁷

Increasing numbers of parents, primarily fathers, are prosecuted and incarcerated for failing to pay child support.⁸ Although national data is not

1. Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html>.

2. *Id.*

3. *Id.*

4. *See, e.g., id.*; Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, WASH. POST (Oct. 18, 2015), https://www.washingtonpost.com/politics/for-men-in-prison-child-support-becomes-a-crushing-debt/2015/10/18/e751a324-5bb7-11e5-b38e-06883aacba64_story.html?utm_term=.dda01d0cf936.

5. Joshua Sharpe, ‘Deadbeat’ Parents Arrested in DeKalb Sheriff’s Holiday Sweep, ATLANTA J.-CONST. (Dec. 22, 2016), <http://www.ajc.com/news/local/deadbeat-parents-arrested-dekalb-sheriff-holiday-sweep/8311xVHLYS4QLuDyVDZceK/>.

6. Madlin Mekelburg, *Texas to Tie Car Registration Renewal to Child Support*, TEX. TRIB. (June 14, 2016, 6:00 AM), www.texastribune.org/2016/06/14/child-support-evaders-vehicle-registration-renewal.

7. Robles & Dewan, *supra* note 1.

8. Another, likely larger, group of people are incarcerated on other charges but have an outstanding child support order. *See, e.g., Child Support and Incarceration*, NAT’L CONFERENCE OF STATE LEGISLATORS (June 6, 2018), <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx>. Some states do not currently allow parents to modify their child support obligations while incarcerated. *See id.*; U.S. DEP’T HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, OVERVIEW – FINAL RULE 2016 FLEXIBILITY, EFFICIENCY, AND MODERNIZATION IN CHILD SUPPORT

kept, at least one source asserts that about 50,000 people are incarcerated in the United States for this offense.⁹ Another study out of South Carolina found one in eight of those incarcerated in county jails were there for failure to pay.¹⁰ In Georgia, 3,500 parents were incarcerated for outstanding child support obligations in a single year.¹¹ An estimated one-quarter of inmates in federal or state prison have an open child support case.¹²

All states have civil mechanisms to enforce child support orders, but increasingly, states are relying on criminal sanctions to remedy a parent's failure to pay child support. This situation is untenable for several reasons, two of which are discussed in more detail in this Article. First, poor fathers are being incarcerated for not having the money to support their children. These prosecutions not only violate the Constitution but also contravene the prohibition on debtors' prisons. Poor fathers are being punished with incarceration for not having the money to support their children.

Second, and even more troubling from an institutional perspective, fathers with little to no income are helping finance the government's child support enforcement system. Federal law requires custodial parents who receive state assistance to assign their child support payments to the state.¹³ Thus, any child support payment by the noncustodial parent will go straight to the government as reimbursement for the state assistance it has provided to the custodial parent. If the father does not pay the child support as ordered, even when the failure is due to insufficient income on which to live and pay the debt, the government punishes the fathers with criminal charges or possible incarceration for not reimbursing the cost of the state assistance. In other words, poor fathers are being criminally sanctioned and incarcerated for failing to finance the government's welfare programs and child support system, despite their inability to do so.

Legislators and courts provide two primary justifications for a system

ENFORCEMENT PROGRAMS (2017), https://www.acf.hhs.gov/sites/default/files/programs/css/overview_child_support_final_rule.pdf.

9. CARMEN SOLOMON-FEARS, ALISON M. SMITH & CARLA BERRY, CONG. RESEARCH SERV., R42389, CHILD SUPPORT ENFORCEMENT: INCARCERATION AS THE LAST RESORT PENALTY FOR NONPAYMENT OF SUPPORT 2 (2012). A 2005 report surveyed newspaper articles and other data sources, seeking to compile as much information as possible about this type of case. That survey documented large numbers of arrests in each state for failure to pay child support. 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 (2005).

10. *Child Support and Incarceration*, NAT'L CONFERENCE OF STATE LEGISLATORS (June 6, 2018), <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx>; Robles & Dewan, *supra* note 1.

11. Robles & Dewan, *supra* note 1.

12. DANIEL R. MEYER & EMILY WARREN, CHILD SUPPORT ORDERS AND THE INCARCERATION OF NONCUSTODIAL PARENTS 2 (2011), <https://pdfs.semanticscholar.org/c130/5f6e35f52013e576abb7c9e363d66bc744e.pdf>.

13. 42 U.S.C. § 608(a)(3) (2012).

that prosecutes and incarcerates poor fathers who fail to pay a private debt owed to their child's mother or a public debt owed to the government as reimbursement for state assistance: child welfare and state fiscal well-being. The government desires to protect children by ensuring their basic needs are met, but it does not want to bear the financial costs of providing that support. A closer look at the current child support system, however, reveals that it does little to enhance a child's well-being or the government's coffer.

One of the most critical determinants of a child's well-being is having a healthy relationship with both parents. Our current child support system actively discourages paternal contact by imposing unrealistic expectations on a father to pay child support he often cannot afford. Thus, the government in essence pushes the father away from his child, punishing the father for having a child he is unable to financially support. Not only is a child's welfare diminished under the current system, but the economics underlying the system are both inefficient and morally troubling.

As already mentioned, a significant portion of the child support system is subsidized by the child support payments made by men of little or no means. Statistics show that the state spends significant resources to identify, pursue, and incarcerate fathers who have very little chance of ever being able to pay the amount of child support they owe. States also seem to ignore the reality that once a father is convicted and incarcerated, even if only for failing to pay a child support obligation, that conviction and period of incarceration substantially diminish the father's ability to obtain a steady job with reliable income in the future. Prosecutions of so-called "deadbeat dads" decrease the odds that those fathers will be able to pay both the child support initially owed and the considerable arrearage and interest that have accumulated, and which continue to accumulate, on that initial debt.

The Office of Child Support Enforcement (OCSE) trumpets its system as "cost-effective."¹⁴ But the cost-effectiveness calculations are somewhat misleading. Broadly related data is lumped together in the OCSE's analysis, making it difficult to truly ascertain how much child support money is going from noncustodial parents to custodial parents, and how much is simply going to the government for "reimbursement." A close look at the data suggests that the child support system is a cyclical system of federal subsidies and poor fathers' child support payments going in and out of state coffers to provide financial backing for the system. Somewhere in the middle are the child and her custodial parent, who often benefit minimally,

14. See, e.g., OFFICE OF CHILD SUPPORT ENF'T, ADMIN. FOR CHILDREN & FAMILIES, CHILD SUPPORT 2016: MORE MONEY FOR FAMILIES (2017), https://www.acf.hhs.gov/sites/default/files/programs/css/2016_preliminary_report_infographic.pdf.

if at all, from the noncustodial parent's payments. Additionally, because the OCSE does not supervise the prosecutorial arm of the child support enforcement system, the OCSE's cost-effectiveness analysis does not include the sizable costs the states bear for the prosecution and/or incarceration of noncustodial parents. Available information establishes that most of the outstanding child support debt in this country is owed by poor fathers who are unlikely to ever be able to pay what they owe. In light of such data, it is hard to overcome the presumption that a system relying on the financial contributions of these men is poor policy, financial or otherwise.

These troubling validations raise the question of how states can justify the prosecution and incarceration of fathers for failing to pay a child support debt. The only logical conclusion is that we are pursuing criminal sanctions to ensure that as a society we have vehemently communicated our moral condemnation of a father for bringing a child into this world who he is unable to financially support. We are punishing these fathers for their reproductive decisions, for having "irresponsible sex," and for not living up to our societal expectation of fatherhood. Criminal charges communicate moral condemnation for these sexual choices and, if a parent is convicted, carry an unshakeable, lifelong stigma. The stigma associated with having a criminal conviction is a punishment that usually lasts much longer than the more palpable deprivations of incarceration and state supervision in the form of probation or parole. Being branded a "criminal" carries broad, indefinite, and quantifiable ramifications.¹⁵ For most, these life-long deprivations are every bit as real a part of the punishment as the technical sentence imposed by a judge in a criminal case.¹⁶

Recent literature has recognized the increasingly problematic role that criminal justice fines, fees, and costs (also known as "legal financial obligations") play in the criminal justice system.¹⁷ But most of the criminal law scholarship has focused on the criminal justice debt that occurs after a finding of guilt or sometimes after arrest.¹⁸ On the family-law side, exten-

15. See, e.g., Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996); cf. John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1049–55 (2009) (discussing long-term effects of prison on well-being).

16. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 107–08 (2014).

17. See, e.g., Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014); ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; see also Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014); Lollar, *supra* note 16; Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57 (2013); cf. Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015).

18. See sources cited *supra* note 17.

sive literature discusses child support obligations through various lenses,¹⁹ but no family law scholar has approached the topic of child support obligations through a criminal law lens.²⁰ Scholars such as Melissa Murray, Andrea Dennis, Shani King, and Tracey Meares have joined Dorothy Roberts in drawing attention to the overlap between criminal law and family law.²¹ However, the topic of how the criminal system approaches child support has largely evaded consideration.²²

In light of the large number of people incarcerated after a conviction for failing to pay child support, this failure to evaluate the criminalization of child support obligations seems a substantial oversight. This Article seeks to fill that gap. The child support system falls in the nexus between the increasing focus on legal financial obligations on the criminal-law side and the focus on the treatment of fathers in the context of child support on the family-law side. It challenges the justifications for criminalizing the failure to pay child support and analyzes the impetus and impacts of making the failure to pay a crime. This Article challenges both the current manifestation of our child support laws and the underlying theoretical structure in which these laws are anchored. Not only are the laws implemented in a manner that disproportionately affects poor men, particularly poor men of color, but the very notion of criminalizing the failure to provide financially for one's biological child is grounded in moral judgments about sexual behavior and antiquated, structurally flawed ideas about fatherhood that no longer resemble reality.

Part I presents a brief overview of the child support system and provides information about the fathers largely affected by it. Part I also lays out how, contrary to popular belief, a small percentage of indigent fathers owe the bulk of the national child support debt. Part II identifies two particularly troubling aspects of the child support system. First, the manner in which our child support system operates violates the Fourteenth

19. See, e.g., Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER, RACE & JUST. 617, 622–33 (2012); Laurie S. Kohn, *Money Can't Buy You Love: Valuing Contributions by Nonresidential Fathers*, 81 BROOK. L. REV. 53, 63–64 (2015).

20. See Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285, 287–90, 296–98 (2017).

21. *Id.* at 287–88, 297; see also Elizabeth D. Katz, *Family Law as Criminal Law: The Forgotten Origins of Modern Family Laws and Courts*, 86 U. CHI. L. REV. (forthcoming 2019) (draft available at <https://ssrn.com/abstract=3168243>); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Constructions of Intimate Life*, 94 IOWA L. REV. 1253 (2009); Melissa Murray, *The Space Between: The Cooperative Regulation of Criminal Law and Family Law*, 44 FAM. L. Q. 227 (2010); cf. Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 ALA. L. REV. 169, 178 (2017) (challenging scholars' assertions that family and criminal law have little overlap).

22. *But see* Katz, *supra* note 21 (discussing history of the criminalization of nonsupport obligations).

Amendment and our country's prohibition on debtors' prisons. Fathers of little or no means are prosecuted and incarcerated for being unable to pay a private debt to the mother of their child. Likewise, if the state provides "welfare benefits" to the custodial mother, the law requires the non-custodial father to reimburse those benefits or face prosecution and incarceration for that failure. Second, the system operates on the backs of poor fathers. The child support system purportedly aims to ensure the health and well-being of children while simultaneously protecting the financial health of the state. Upon closer inspection, however, the system does not seem to do either of these things particularly well.

In light of these deficiencies, Part III addresses the question of why we would continue to utilize such a system. Part III concludes that states continue to criminally prosecute and incarcerate poor fathers for being unable to pay these debts because, as a society, we want to send a message of moral condemnation about fathers who have irresponsible sex and fail to live up to their roles as "providers." Our society has chosen to punish poor men for their reproductive choices and for bringing a child into the world and not financially providing for her. Part IV proposes some changes to the current system to address the problems identified throughout the Article.

I. A FUNDAMENTALLY FLAWED CHILD SUPPORT SYSTEM

The majority of men who reach adolescence will become fathers.²³ "The most enduring historical definition of a father has been as breadwinner"²⁴ or "provider and protector,"²⁵ with the emotional and nurturing role of fatherhood only recently beginning to take a stronger secondary role.²⁶ Many men, particularly those with little income, feel a significant obligation to fulfill these roles for their children, whether they are ultimately in a position to do so or not. The pressure some men feel to meet this expectation, especially when they know the expectation is one they are not financially or emotionally able to meet, can lead them to absent themselves from their children's lives.²⁷

23. NANCY E. DOWD, REDEFINING FATHERHOOD 22 (2000); Peter B. Gray, *On Non-Dads (Or Childless Men): How often do men become fathers and why?*, PSYCH. TODAY: THE EVOLVING FATHER (Nov. 7, 2013), <https://www.psychologytoday.com/blog/the-evolving-father/201311/non-dads-or-childless-men>.

24. DOWD, *supra* note 23, at 37.

25. Javiette VaShann Samuel, *Breaking the Cycle of Absent Fathers: Highly Involved African-American Nonresidential Fathers Describe Their Roles and Responsibilities Beyond Biological Paternity* 10 (May 2002) (unpublished Ph.D. dissertation, University of Tennessee) (on file with author).

26. DOWD, *supra* note 23, at 33–38.

27. *Cf. id.* at 23–24.

Yet the law has done little to acknowledge and respond to the vulnerabilities unearthed by fatherhood. Our current child support system highlights this failure. From as far back as the 1700s, and carrying through to today, states enacted punitive laws requiring a child's biological father to provide financial support for that child,²⁸ regardless of whether the father is or can be physically or emotionally present in the child's life. States enforce this requirement, especially when the custodial parent (usually the mother) receives state assistance, even if the noncustodial parent (usually the father) similarly makes little income. Child support laws place both "the burden and responsibility of poverty squarely on the backs of fathers."²⁹ These laws particularly affect fathers of color with low incomes.³⁰ Under our current legal structure, those men who may have had a precarious financial status prior to fatherhood often find their financial exposure deepened by their transition into fatherhood.

A. *The Structure of the Child Support System*

Whether a parent is married determines much about that parent's legal relationship with his or her child. When a child is born, if she is the child of dual-gender married parents, the law attributes paternity to the man married to the mother of the child.³¹ However, if the mother is unmarried, a state official usually comes to obtain a Voluntary Acknowledgment of Paternity (VAP) before the mother leaves the hospital with her child.³² The VAP is a signed affidavit from the mother (and father, if he is there) asserting the identity of the child's father.³³ This document is transmitted to the office of vital records and, if not rescinded within sixty days, becomes the final legal determination of paternity.³⁴

28. Katz, *supra* note 21, at 13–21; Kohn, *supra* note 19, at 63–64. Elizabeth Katz has a rich discussion of the history of how nonsupport became criminalized. "[I]n the late nineteenth and early twentieth centuries, charity leaders saw existing approaches to enforcing men's family support duties as inadequate and pushed for criminalization . . . [R]eformers initiated a century-long effort to categorize family support duties in whatever manner [criminal or civil] promised the most advantageous combination of high coercion and reach with low process and cost." Katz, *supra* note 21, at 9.

29. Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U.L. REV. 897, 907 (2013).

30. Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 147–51 (2016); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006).

31. See, e.g., Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 358 (2012); Katharine K. Baker, *The DNA Default and its Discontents: Establishing Modern Parenthood*, 96 B.U.L. REV. 2037, 2038 (2016).

32. 42 U.S.C. § 666(a)(5)(C)(ii) (2012); Baker, *supra* note 31, at 2048–49.

33. Baker, *supra* note 31, at 2048–49.

34. 42 U.S.C. § 666(a)(5)(D)(ii)(1); Baker, *supra* note 31, at 2049. This determination may be challenged later, but only on the grounds of fraud, duress, or material mistake of fact. 42 U.S.C. § 666(a)(5)(D)(iii); Baker, *supra* note 31, at 2049.

Regardless of how paternity is established—by marriage, a VAP, or some other route³⁵—the designation of legal fatherhood confers both rights and responsibilities.³⁶ As a father, a man is entitled to have contact with his child, and in the event of a custody dispute, he has standing to request greater custody rights.³⁷ However, an unmarried father has the burden of affirmatively asserting his paternal interest in the child in order to have a hearing on the matter.³⁸ Once paternity is established, a father also incurs the responsibility for child support.³⁹ If the father and mother remain together, these rights and responsibilities are divided up informally between the two parents within the parental relationship. In the event that the parents separate, the law often intervenes to determine the scope of these rights and responsibilities for each parent.

When married parents split up, the legal mechanisms are relatively clear. The parents file for divorce, and generally as a part of that proceeding, judges make or accept determinations about child custody, visitation, and child support. For divorcing parents, child support orders usually are only one aspect of a court order put into place at the dissolution of a marriage. Often the divorcing parents decide on the custody, visitation, and support arrangements on their own, prior to appearing before the court, and the judge simply signs off on their agreement.⁴⁰ Although the laws are technically gender neutral, statistics show that courts more often grant mothers sole physical custody or a substantial portion of the custody of a child and order noncustodial fathers to pay child support to the noncustodial mother on behalf of the child.⁴¹ In 2016, four of every five custodial parents were mothers.⁴² Most states do not require courts to grant a visitation order to the noncustodial parent, generally the father, as a precondition to that parent's obligation to pay child support.⁴³

The procedures are less clear when nonmarried parents split up.

35. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 203 (2015).

36. These rights and responsibilities are often more limited for nonmarried fathers than married ones, however. *See, e.g.*, Appleton, *supra* note 31.

37. *See* Baker, *supra* note 31, at 2049.

38. Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405, 416 (2013); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2334 (2016).

39. A mother also receives these rights and responsibilities.

40. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979).

41. Huntington, *supra* note 35, at 181–83.

42. TIMOTHY GRALL, U.S. CENSUS BUREAU, P60-262, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015, at 3 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/P60-262.pdf>.

43. Huntington, *supra* note 35, at 183.

Typically, similar to when married parents divorce, mothers in nonmarital relationships retain custody of the child. Although the noncustodial unmarried fathers could go to court to secure custody rights or visitation with their child, usually they do not.⁴⁴ Custodial time is usually worked out between the parents informally.⁴⁵ As a result, unmarried custodial mothers generally regulate the father's access to their child, essentially becoming "gatekeepers" to the father's ability to see and spend time with the child.⁴⁶ If the father maintains a good relationship with the mother, he is able to see his child; otherwise, he may be out of luck.⁴⁷ Because visitation or custody is not a prerequisite or corequisite to a child support order, the fact that a father may not be able to access or claim his rights does not affect his obligation to pay child support. If a mother remarries, the biological father's rights become more limited, as courts continue to privilege the marital relationship over biological fatherhood.⁴⁸

In the case of nonmarried parents, an informal system of custody, visitation, and support could be maintained indefinitely, but if the custodial parent sues for child support or requests "welfare" benefits from the state, such actions trigger state involvement.⁴⁹ If a custodial parent sues for child support and provides sufficient evidence of need and paternity, either a court or an administrative agency will issue a child support order to the noncustodial parent. Upon issuance of the order, the state becomes the enforcement arm should the noncustodial parent fail to comply with the order. If paternity has not already been legally established, via a VAP or some other mechanism, federal law requires the custodial parent to assist the state in locating the noncustodial parent and establishing paternity.⁵⁰ If a custodial parent fails to help the state establish legal paternity, the state can deny her child support altogether or deduct 25% or more of the payments she might otherwise receive.⁵¹

However, when the custodial parent files for state assistance, as opposed to requesting child support, the law is a little more complicated. Federal welfare law requires custodial parents who receive state assistance

44. Baker, *supra* note 31, at 2049; Huntington, *supra* note 35, at 194.

45. Baker, *supra* note 31, at 2050.

46. Huntington, *supra* note 35, at 194–95.

47. *Id.* at 195.

48. Mayeri, *supra* note 38, at 2372, 2379–80. Mayeri discusses the racial and class dynamics that influenced, and continue to influence, how the law has developed on this point. *Id.* at 2377 (“[N]onmarital fathers began their quest for rights burdened by deep-seated cultural images, inflected by race and class, branding them as derelicts and deadbeats.”).

49. Baker, *supra* note 31, at 2050. When that happens, some noncustodial unmarried parents then make a formal, legal claim for custody rights. *Id.*

50. See 42 U.S.C. § 608(a)(2) (2012); 45 C.F.R. § 302.31(b) (2017); cf. 45 C.F.R. § 302.17.

51. 42 U.S.C. § 608(a)(2).

to identify and locate the noncustodial parent (and if paternity is not established, to actively assist the government in legally establishing paternity⁵²) and then to assign their right to collect child support payments from that noncustodial parent to the state.⁵³ Even if the custodial parent has no interest in involving the noncustodial parent, federal law will not allow her to receive state welfare benefits without identifying the father of her child, establishing a child support order, and assigning any child support received over to the state. Under this system, the state and federal governments then retain any child support obligations paid by the noncustodial parent as reimbursement for the “welfare benefits” the state paid to the custodial parent.⁵⁴ Thus, if a custodial parent receives state assistance, the government will seek reimbursement of that state assistance from the noncustodial parent. As a result, the government is the beneficiary of many child support payments.⁵⁵

The law’s treatment of nonmarried, low-income parents has negative repercussions for both parents.⁵⁶ For custodial parents—primarily mothers—receiving state assistance, the financial support they receive each month is unrelated to whether the noncustodial parent pays child support; their financial picture remains the same either way.⁵⁷ Custodial parents receive the same amount of financial assistance from the government whether the noncustodial parent makes a child support payment or not, and any payment by the noncustodial parent goes straight to the government to pay it back.⁵⁸ As such, custodial parents do not directly benefit when the other parent of their child is able to contribute financially.

For a mother who does not receive state assistance, the act of suing for child support also can result in more limited financial contributions. Once a child support order is officially entered, the government can subject a father to prosecution and punishment, including incarceration, if he does not or cannot pay.⁵⁹ Either of these sanctions decreases the odds that the mother will receive additional income from the father of her child.

If a noncustodial father is prosecuted for failing to pay child support, he will have significant difficulty finding a stable, well-paying job due to

52. *Id.*; see also 45 C.F.R. § 302.31(b); cf. 45 C.F.R. § 302.17.

53. 42 U.S.C. § 608(a)(3); 45 C.F.R. § 302.50; see also Brito, *supra* note 19, at 625; Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 253 (2000).

54. 42 U.S.C. § 608(a)(3); 42 U.S.C. § 657(a)(1); Brito, *supra* note 53, at 253.

55. Brito, *supra* note 53, at 253 n.108.

56. See generally JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 195–220 (2014) (discussing the implications of the fact that “courts and lawmakers describing, explaining, enacting, and implementing family law systematically fail to consider the legal regulation of poor families”).

57. Brito, *supra* note 19, at 625.

58. *Id.* at 625–26.

59. See *id.* at 655.

having the conviction on his record. If he also is incarcerated due to his failure to pay child support, he will make little to no income during that period of incarceration, and when he is released, he will suffer the long-term ramifications of having a gap in his employment record, in addition to the criminal conviction.⁶⁰

Child support debt continues to accrue while a father is incarcerated and, in most states, continues to collect interest as well.⁶¹ As a result, when the father is released, he will have greater debt and less likelihood of being able to pay it. Unlike most other debts, child support debt is not dischargeable in bankruptcy.⁶² The consequence is that, like Walter Scott, a father convicted and incarcerated for failing to pay child support will likely cycle in and out of the criminal justice system over his lifetime, as the odds of him being able to pay that debt will only decrease with each conviction and period of incarceration. Obviously, this result is not beneficial for the father, the mother, or their child.

Regardless of how the child support order comes to be, the amount of the order is determined based on a formula.⁶³ In 1988, Congress imposed a requirement on states obliging them to set up child support guidelines.⁶⁴ Federal regulations establish minimum standards for such guidelines⁶⁵ and require that each state use “specific descriptive and numeric criteria” to calculate the child support obligation.⁶⁶ Each child support order must be “based on the noncustodial parent’s earnings, income, *and other evidence of ability to pay.*”⁶⁷ This “other evidence” must include, “at a minimum,”

the noncustodial parent’s assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.⁶⁸

60. A noncustodial parent incarcerated under a civil regime will suffer the same consequences from incarceration but without the stigma of a criminal conviction on his record.

61. See ELAINE SORENSEN, LILIANA SOUSA & SIMON SCHANER, *THE URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION* 8 (2007), <https://www.urban.org/sites/default/files/publication/29736/1001242-Assessing-Child-Support-Arrears-in-Nine-Large-States-and-the-Nation.PDF>.

62. 42 U.S.C. § 656(b) (2012).

63. See, e.g., MICH. COMP. LAWS ANN. § 552.605 (West 2005); NEV. REV. STAT. ANN. § 125B.070 (LexisNexis 2010).

64. Family Support Act of 1988, Pub. L. No. 100-485, § 103(a), 102 Stat. 2343, 2346 (1988) (codified as amended at 42 U.S.C. § 667(a)–(b) (2012)).

65. 45 C.F.R. § 302.56 (2017).

66. *Id.* § 302.56(c)(4).

67. *Id.* § 302.56(c)(1) (emphasis added).

68. *Id.* § 302.56(c)(1)(iii).

The regulation specifically provides that “incarceration may not be treated as voluntary unemployment in establishing or modifying support orders.”⁶⁹ Federal law requires states to impose a rebuttable presumption that any child support order based on a state’s child support formula is “the correct amount of child support to be awarded,”⁷⁰ although several courts have found the rebuttable presumption portion of the statute unconstitutional.⁷¹ The law also requires mandatory restitution in the amount of the unpaid support obligation.⁷²

In many states, the child support formula compels consideration of “potential” income, rather than actual income, if the parent is currently unemployed or “underemployed.”⁷³ Likewise, some child support guidelines require payment, albeit a minimal one, even if the parent has no income.⁷⁴ Judges have little discretion to deviate from the guidelines; rather, they are instructed just to apply the formula.

Any future adjustments to child support orders continue to rely on these same formulas.⁷⁵ The law requires states to review the child support determination at least every three years.⁷⁶ But a parent cannot deviate from the state-ordered obligation. If the parent’s income level changes, that parent can petition the court or administrative officer for a modification, but only in that circumstance. The law leaves no room for informal or variable arrangements, or modifications of child support orders in real time or retroactively;⁷⁷ those permutations simply are not permitted. At least one federal court has recognized that

the issuance of a support order by a Court does not establish beyond a reasonable doubt that the parent involved will have the ability to pay that obligation In many cases, the parent is not even before the Court to contest the order and his or her ability to make the payments is thus the result of an ex parte proceeding with little or no evidence presented on the issue.⁷⁸

69. *Id.* § 302.56(c)(3).

70. 42 U.S.C. § 667(b)(2) (2012); *see also* 45 C.F.R. § 302.56(f) (stating that the formula is “the correct amount of child support to be ordered”).

71. *See, e.g.*, *United States v. Pillor*, 387 F. Supp. 2d 1053, 1056–57 (N.D. Cal. 2005); *United States v. Morrow*, 368 F. Supp. 2d 863, 865–66 (C.D. Ill. 2005); *United States v. Grigsby*, 85 F. Supp. 2d 100, 107 (D.R.I. 2000).

72. *Deadbeat Parents Punishment Act of 1998*, Pub. L. No. 105-187, 112 Stat. 618 (codified at 18 U.S.C. § 228(d) (2012)).

73. *See, e.g.*, KY. REV. STAT. ANN. § 403.212(2)(a), (d) (LexisNexis 2010).

74. *See, e.g., id.*; KAN. CT. R.P., CHILD SUPPORT GUIDELINES app. II.

75. 45 C.F.R. § 303.8(b)(4)(ii)(A) (2017).

76. *Id.* § 303.8(b)(1).

77. *See* 42 U.S.C. § 666(a)(9)(C) (2012).

78. *United States v. Grigsby*, 85 F. Supp. 2d 100, 107 (D.R.I. 2000).

This inflexible system may work effectively for fathers of means, but as will be discussed below, most of the fathers delinquent on their child support payments are not people of means. The resulting system sets up fathers with little to no income for a perpetual cycle of poverty, incarceration, and stigma. This system diminishes the odds of the fathers ever paying off their child support obligations and does little to improve the financial circumstances of either the custodial mothers or the children for whose benefit this system is purportedly in place. The government is arguably the only party benefitting from this current set up, as it can require these indigent fathers to reimburse it for some of the costs of its welfare system. But even the government likely will not benefit financially from this system, as it will be out the costs of prosecution and incarceration when these fathers inevitably cannot make the payments as ordered.

B. *Debunking the Myth of the “Deadbeat Dad”*

Predictably, with such a strict system, noncustodial parents often are unable to comply with their court-ordered child support obligations. Yet, the view of fathers who cannot provide for their children as “lazy,” “loathsome,” “idle from choice,” and evasive of responsibility is pervasive and deep-seated.⁷⁹ Rather than recognizing that many fathers do not choose to fail to support their children, many lawmakers and much of the public continue to presume that fathers who do not support their children are intentionally avoiding their main parental obligation—that of providing money for their children. Recent changes in the law’s approach to child support obligations rely on the assumption that large numbers of fathers attempt to skirt their obligations voluntarily.

To be fair, this belief is not without some foundation. By 2010, the total amount of child support arrearage accumulated nationwide since the federal Office of Child Support Enforcement (OCSE) came into being in 1975 exceeded \$110 billion.⁸⁰ Although 43.5% of custodial parents received the full amount of child support due in 2015, 30.7% received no

79. Our country has a long history of legally condemning a father’s failure to financially support his children. See, e.g., DOWD, *supra* note 23, at 31; AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 102–40 (1998); Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Law*, 108 YALE L.J. 1123, 1145, 1147 (1999); Kohn, *supra* note 19, at 63–64; Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1654, 1659–61 (2005).

80. JESSICA PEARSON, NANCY THOENNES & RASA KAUNELIS, CTR. FOR POLICY RESEARCH, DEBT COMPROMISE PROGRAMS: PROGRAM DESIGN & CHILD SUPPORT OUTCOMES IN FIVE LOCATIONS 2 (2012); SORENSEN, SOUSA & SCHANER, *supra* note 61.

payment at all.⁸¹ In 2015, the year with the most recent available data, approximately \$13.6 billion of child support obligations did not get paid.⁸² The rate of nonpayment to custodial fathers was not statistically different from the rate of nonpayment to custodial mothers.⁸³ The poverty rate of all custodial families in 2015 was 26.8%, nearly 10% higher than the national average, and the poverty rate for families with the mother as custodial parent was 29.2%.⁸⁴ Factors indicative of whether a custodial parent will receive payments include the custodial parent's age, level of education, race, and marital relationships. Those who are under thirty, have less than a high school education, have no contact with the noncustodial parent, or have never been married are the least likely to receive child support payments.⁸⁵ Fathers who have never married are less likely to pay full child support than divorced fathers.⁸⁶

Yet, recent data and social science studies have shown that a small number of noncustodial parents owe most of the debt.⁸⁷ A study of nine states showed that 11% of the noncustodial parents with a child support obligation owed 54% of the debt; each of the individuals included in that 11% owed over \$30,000 in child support.⁸⁸ National levels mirror those nine states.⁸⁹

The general profile of the fathers who owe large amounts of child support debt does not match our stereotype of a well-funded father on the lam, trying to avoid financially helping a struggling mother who is raising their child and trying to make ends meet each month. About one-quarter of all noncustodial parents have incomes below the federal poverty level.⁹⁰

81. GRALL, *supra* note 42, at 12.

82. More than 40% of the \$33.7 billion in child support owed was not received by custodial parents; \$20.1 billion was received, indicating that \$13.6 billion was not. *Id.*

83. *Id.* at 6 tbl.2.

84. *Id.* at 8.

85. *Id.* at 12; TIMOTHY GRALL, U.S. CENSUS BUREAU, P60-255, NEW CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2013, at 10–11 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf>.

86. Huntington, *supra* note 35, at 190.

87. PEARSON, THOENNES & KAUNELIS, *supra* note 80, at 3; SORENSEN, SOUSA & SCHANER, *supra* note 61, at 1.

88. SORENSEN, SOUSA & SCHANER, *supra* note 61, at 1–2. By contrast, many of the other noncustodial parents subject to child support orders owed either no or relatively small amounts of child support debt. *Id.* at 2 (revealing that 15% of those with child support obligations in nine states owed no child support arrears at the time of the study, while another 16% owed less than \$500). National levels revealed similar numbers. *Id.*

89. *Id.* at 2 (showing that, as of April 2006, 43% of the country's child support arrears were owed by 10% of those with child support obligations, each owing \$40,000 or more).

90. ELAINE SORENSEN, OFFICE OF CHILD SUPPORT ENF'T, THE STORY BEHIND THE NUMBERS: A GOOD INVESTMENT 2 (2016), https://www.acf.hhs.gov/sites/default/files/programs/css/sbtn_csp_is_a_good_investment.pdf. In fact, Congress knew a substantial number of child support obligors fell below the poverty threshold when it passed PRWORA. Brito, *supra* note 19, at 632.

Almost 75% of parents owing large amounts of child support debt either had no reported income or reported incomes of \$10,000 a year or less.⁹¹ Many of their child support obligations have been in effect for at least ten years.⁹² The public's general assumption seems to be that these parents have some type of unreported income or assets that they are simply withholding or failing to disclose to the courts in order to avoid paying. Although this undoubtedly happens on occasion, only a small percentage of parents who have an ability to pay child support do not pay.⁹³ In at least one study, 93% of parents with child support obligations reporting income over \$10,000 had paid child support in the past year, whereas only 57% of parents with no or low reported income made payments during that same time period.⁹⁴ Approximately a quarter of parents who did not report consistent annual income were either incarcerated or disabled,⁹⁵ and 42% of them lacked a high school degree or GED.⁹⁶

Despite their minimal incomes, the majority of parents with no or low incomes pay something toward their outstanding support orders.⁹⁷ Not surprisingly, however, when parents with no or low incomes who are in arrears on child support obligations make payments, they pay only small percentages of the amounts they owe.⁹⁸ One significant factor as to why these fathers with low or no incomes pay so little is that they cannot afford to pay the monthly amounts they owe. Of those earning \$10,000 or less a year at the time of the study, the median amount of their child support orders represented 83% of their reported incomes.⁹⁹ A survey of ten states revealed that, for noncustodial parents with reported incomes below the poverty line, child support payments constituted 69% of their incomes.¹⁰⁰ Another study of five states found that noncustodial parents with reported incomes of \$500 or less per month had child support obligations averaging over 100% of that income, and for those earning \$500 to \$1,000 per month,

91. PEARSON, THOENNES & KAUNELIS, *supra* note 80, at 3; SORENSEN, SOUSA & SCHANER, *supra* note 61, at 3. Only 20% of those owing child support who had no debt reported incomes this low. *Id.*

92. SORENSEN, SOUSA & SCHANER, *supra* note 61, at 3.

93. *Id.* at 5.

94. *Id.* at 3.

95. *Id.* at 5; *see also* KAREN GARDINER, MIKE FISHMAN, SAM ELKIN & ASAPH GLOSSER, THE LEWIN GRP., ENHANCING CHILD SUPPORT ENFORCEMENT EFFORTS THROUGH IMPROVED USE OF INFORMATION ON DEBTOR INCOME, at iv, 17 (2006), <https://aspe.hhs.gov/system/files/pdf/74966/report.pdf>.

96. PEARSON, THOENNES & KAUNELIS, *supra* note 80, at 3.

97. SORENSEN, SOUSA & SCHANER, *supra* note 61, at 9.

98. *Id.*

99. *Id.*

100. PEARSON, THOENNES & KAUNELIS, *supra* note 80, at 3.

their support obligations ranged from 21% to 60% of their earnings.¹⁰¹

In many states, child support debt is increased by interest assessed on that outstanding debt, a consequence of a 1986 change in federal law wherein Congress enacted legislation requiring a parent's child support arrears to be considered a "judgment."¹⁰² The amount of money owed in child support has increased dramatically since that time, as most states began accruing interest on child support obligations.¹⁰³ Between 1987 and 2005, states that charged interest often experienced a tenfold increase in the amount of outstanding child support debt.¹⁰⁴

As a result of all of these factors, "relatively little of these arrears are likely to be collected."¹⁰⁵ In fact, one recent study suggests that only 40% of child support debt is likely to be collected within the next ten years, despite the panoply of penalties, punishments, and other enforcement measures states have at their disposal.¹⁰⁶ Parents with low reported incomes (under \$10,000 annually) are expected to pay approximately 27% of their arrearages over the next ten years, while parents with no reported income are expected to pay only 16%.¹⁰⁷

The misconceptions about who owes the child support debt in this country inevitably continue to shape our legal and societal response to the issue. Legislators, prosecutors, and courts assume, despite all evidence to the contrary, that punishment is an effective method of deterring nonpayment and incentivizing fathers with delinquent child support obligations to pay up. But if fathers do not have the money to do so, no threat of conviction and punishment is going to draw blood from that stone. The legal system's failure to recognize who owes the child support debt has led to a troubling and unconstitutional system of child support enforcement.

II. FAILURE TO PAY CHILD SUPPORT IS THE NEW DEBTORS' PRISON

If a noncustodial parent fails to pay the requisite child support as ordered, criminal prosecution is a tool in the arsenal of child support enforcement agencies in every state. Criminal prosecutions for failure to pay child support are supposed to be last-resort options, given the presence

101. *Id.* at 3–4. "Only at higher income levels exceeding \$2,000 per month did monthly child support obligations comprise more realistic percentages of incomes, ranging from 8 to 21 percent." *Id.* at 4.

102. SORENSEN, SOUSA & SCHANER, *supra* note 61, at 8.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 40.

107. *Id.* at 50.

of civil enforcement options also available in every state.¹⁰⁸ However, given the increasing number of men incarcerated for failing to pay, this option of “last resort” appears to be one used with staggering regularity. Although incarceration for contempt is also a regularly utilized civil sanction for nonpayment, states are employing criminal prosecutions in an unsuccessful attempt to deter parents from nonpayment, and more successfully, to aggravate the punitive impact of such nonpayment on delinquent parents.

The utilization of criminal prosecution as an enforcement tool has particularly troubling implications. The crime of failure to pay child support is unlike most other crimes at the state and federal level, as it is a crime based solely on one’s failure to pay a debt.¹⁰⁹ Although incarcerating someone for failing to pay a debt would seem to violate our oft-touted rejection of debtors’ prisons, the Supreme Court has sanctioned laws permitting a person’s incarceration for failing to pay a child support debt, so long as there is sufficient evidence that the failure to pay was “willful.”¹¹⁰ In a series of cases, the Supreme Court has held that incarcerating someone who *cannot afford* to pay postconviction criminal fines or fees—who is not “willfully” failing to pay—is a violation of the Constitution.¹¹¹

In criminal nonsupport cases, the Court has not established this same threshold. Under many state child support laws, judges are not required to determine whether a person alleged to be delinquent on child support payments has the ability to make those payments.¹¹² Either the fact of a

108. The Social Services Amendments of 1974 provided federal jurisdiction for courts to hear civil enforcement actions against a noncustodial parent for child support. Pub. L. No. 93-647, § 460, 88 Stat. 2337, 2358 (1975) (codified as amended at 42 U.S.C. § 660 (2012)).

109. The crime of willfully failing to pay one’s taxes, *see* 26 U.S.C. §§ 7201, 7203 (2012), is the only other crime of failure to pay of which this author is aware. This crime is more akin to a crime of fraud, as it generally involves some type of active misrepresentation or affirmative omission in a manner quite distinct from the issues in child support cases. Many states do incarcerate people for failing to pay traffic-related tickets or other citations, but I am referring to actual criminal offenses here. Likewise, those with a conviction are often incarcerated for failing to pay criminal justice fees or fines, but usually they are locked up pursuant to a revocation of probation or parole because their failure to pay is a violation of a condition of their probation or parole. Generally, those who fail to pay these criminal justice fees and fines are not charged with a new crime based solely on that failure to pay.

110. *See Bearden v. Georgia*, 461 U.S. 660, 668 (1983).

111. *See id.* at 668–69; *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970) (holding that incarcerating someone for involuntary nonpayment of a fine or court cost violates the Fourteenth Amendment’s Equal Protection Clause when the aggregate imprisonment exceeds the statutory maximum imprisonment for the crime); *cf. Turner v. Rogers*, 564 U.S. 431 (2011) (considering civil contempt sanctions for nonsupport); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624 (1988) (addressing criminal contempt sanctions for nonsupport); *Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that converting a fine-only punishment into a sentence of incarceration when someone is indigent violates the Equal Protection Clause).

112. *See infra* notes 136–37.

valid child support order or the noncustodial parent's knowledge of such an order is sufficient evidence for a judge to find criminal liability.

Although some may be troubled by the Supreme Court's willingness to uphold the constitutionality of sanctioning someone for failing to pay a debt, regardless of ability to pay, the prosecution and incarceration of someone *unable* to pay that debt should be deeply troubling even to the Court, as it certainly appears to be a violation of the Equal Protection and Due Process Clauses and the spirit of the Court's precedent in this area. The Court has been abundantly clear in case law that the "critical" due process issue is a defendant's ability to pay. Before incarcerating someone for failing to pay child support pursuant to a civil or criminal contempt order, or for failing to pay any other type of criminal justice fine, the law requires the court to determine whether the defendant is able to pay that financial obligation.¹¹³

Thus, despite consistent Supreme Court precedent, legislatures and courts seem to be skirting the Constitution based on the distinction that, in a child support case, the outstanding financial obligation is not a fine or fee, nor a contempt finding, but is the basis for the criminal charge itself. States are regularly prosecuting and incarcerating people for being unable to pay off private debts owed to the other parents of their children, or public debts owed to the state after the state fronted money for the support of their children. Each of these bases for criminal charges is deeply troubling and both should be found unconstitutional under the Fourteenth Amendment's Equal Protection–Due Process analysis.¹¹⁴

113. See *Turner*, 564 U.S. at 447–48 (holding that the state must provide procedural safeguards to ensure that due process is not violated by incarcerating someone who is unable to pay); *Feiock*, 485 U.S. at 637–38 (recognizing a defense of inability to pay in criminal contempt proceedings for failure to pay child support); *Bearden*, 461 U.S. at 668–69 (finding a violation of the Due Process Clause for the lower court not to inquire as to willfulness of failure to pay).

114. The Fourteenth Amendment is not the only constitutional provision violated by the current child support system. Although courts have not yet been persuaded by the Thirteenth Amendment argument and have failed to consider the Eighth Amendment argument, an argument that these constitutional provisions also are violated by our current child support system has substantial merit. Because they are beyond the scope of this Article, the arguments are mentioned only briefly below. (1) Thirteenth Amendment: Requiring a person to pay a debt he cannot afford to pay is a violation of the Thirteenth Amendment's prohibition against involuntary servitude and forced labor. See *United States v. Ballek*, 170 F.3d 871, 874 (9th Cir. 1999); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 948–55 (2016). At least one circuit court has acknowledged that "[i]mprisoning someone for failure to pay a debt can run afoul of the Thirteenth Amendment," *Ballek*, 170 F.3d at 874, as the way out of the debt could only be through a person's labor. However, that court ultimately concluded that "child-support awards fall within that narrow class of obligations that may be enforced by means of imprisonment without violating the constitutional prohibition against slavery." *Id.* According to the Ninth Circuit, the parent–child relationship is "much more than the ordinary relationship between debtor and creditor," and as such, the parent assumes a "moral obligation to provide the child with the necessities of life." *Id.* In other words, forcing a parent to work in order to support his child is not a constitutional violation, whether the parent wanted that role or not. Despite this circuit court's ruling on the issue, it is unclear

A. *An Exception to the Legal Prohibition Against Debtors' Prisons?*

Both the federal government and most states abolished debtors' prisons by the 1870s.¹¹⁵ Yet, despite this prohibition, most states do not ban imprisonment for "noncommercial debt" stemming from criminal court involvement or a failure to pay child support.¹¹⁶ In other words, a single exception appears to justify permitting both types of criminal debts—legal financial obligations *and* child support obligations—to fall outside most state prohibitions on debtors' prisons. This "exception" developed relatively recently when, in the 1970s and 1980s, an increasing number of states passed statutes allowing for the incarceration of a person who failed to pay his criminal debt.¹¹⁷ The only limitation became the constitutional strictures

why the parent-child relationship should be exceptional in this way. The court cites to the long history of the state using "coercive power" to enforce child support obligations, even stemming before the passage of the Thirteenth Amendment. *Id.* at 874 n.2, 875. But the fact that a practice is grounded in history does not compel the conclusion that it is constitutionally sound. (2) Eighth Amendment: Another compelling argument might be made under the Eighth Amendment's Excessive Fines Clause. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (emphasis omitted) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). According to the Supreme Court, "fines" refer to payments made to the state as punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 327 (1998). For noncustodial parents whose payments are going to reimburse the government for the state assistance it already has provided to the custodial parent, the payments are going to the state. Arguably, however, those payments are not punishment, placing them outside the category of fines contemplated by current Eighth Amendment jurisprudence. However, although the initial child support orders may not constitute fines, once a person has been charged with and convicted of the criminal offense of failing to pay child support, a strong argument can be made that the inevitable restitution order entered in the case—the one requiring the noncustodial parent defendant to pay the amount of child support owed pursuant to the restitution order in the criminal case to the government—violates the Eighth Amendment. *See Lollar*, *supra* note 16, at 148–49, 152–54 (arguing that criminal restitution orders are subject to the Eighth Amendment's Excessive Fines Clause); *supra* note 72 and accompanying text. As previously discussed, the amount of child support ordered by a court or administrative officer in a given case is based on a formula which often is not the appropriate one to use for determining how much a noncustodial parent realistically can afford to pay in child support. If the child support order, as incorporated into the restitution order, is for an amount that the noncustodial parent realistically cannot pay, the parent has a compelling Excessive Fines Clause argument, as the criminal restitution order is for that same amount. Thus, if the initial order is beyond a parent's ability to pay and that amount is incorporated into the criminal restitution order requiring the defendant to pay the state, this amount is excessive and a violation of the Eighth Amendment. *Lollar*, *supra* note 16, at 148–49, 152–54.

115. Birkhead, *supra* note 17, at 1628–29.

116. Appleman, *supra* note 17, at 1489–90; Birkhead, *supra* note 17, at 1629. This "non-commercial debt" stands in contrast to private debt, such as that resulting from unpaid credit card debt, so-called "payday loans," medical bills, and other debts owed to private companies. Birkhead, *supra* note 17, at 1626. Incarceration is still a possibility with private debt, as the creditor can sue the debtor in civil court to collect the debt, and if the court decides the debtor's failure to pay is "willful," or if the debtor fails to show otherwise, criminal contempt is a possible sanction. *Id.* Thus, private contractual debt also can subject someone to incarceration. *Id.* at 1629.

117. Birkhead, *supra* note 17, at 1629.

provided by the Supreme Court in a trio of cases culminating in *Bearden v. Georgia*.¹¹⁸

In *Bearden v. Georgia*, the Supreme Court addressed whether a state could automatically revoke a person's probation for failing to pay a fee or fine without any consideration of that person's ability to pay.¹¹⁹ Although the parties argued the issue on equal protection grounds, the Court found that "[d]ue process and equal protection principles converge in the Court's analysis."¹²⁰ As the Court articulated,

one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose."¹²¹

The Court found that "the reasons for nonpayment" were "of critical importance."¹²² If a probationer willfully fails to pay a fine, restitution, or fee when he has the means to pay, imprisonment is a permissible sanction.¹²³ Likewise, if a person has not made "bona fide efforts" to seek employment in order to pay off the criminal justice debt, imprisonment is justifiable.¹²⁴ But if someone has made reasonable efforts to pay off the debt and simply is unable to do so, "it is fundamentally unfair" for courts not to consider "whether adequate alternative methods of punishing the defendant are available."¹²⁵ If the court has determined that a fine or restitution is the "appropriate and adequate penalty for the crime," it cannot then convert that sentence into a sentence of incarceration solely because the person does not have the ability to pay that fine or restitution.¹²⁶ To do so is a violation of the Fourteenth Amendment.¹²⁷

In theory, *Bearden* should have significantly changed the criminal

118. *Id.* at 1629–33.

119. *Bearden v. Georgia*, 461 U.S. 660, 661 (1983).

120. *Id.* at 667.

121. *Id.* at 666–67 (alteration in original) (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

122. *Id.* at 668.

123. *Id.*

124. *Id.*

125. *Id.* at 668–69.

126. *Id.* at 667–68.

127. *Id.* at 673.

justice landscape. Yet, the number of people incarcerated for failing to fulfill their criminal justice obligations has exploded since *Bearden*. As of 2015, approximately ten million people owed more than fifty billion dollars in criminal debt.¹²⁸ Courts have come up with creative ways to technically comply with *Bearden* while simultaneously circumventing the spirit of the ruling. Some judges do not inform defendants of their right to have a hearing on their ability to pay outstanding criminal justice debt;¹²⁹ other courts operate a “fines or time” sentence, requiring defendants to choose between immediately paying the criminal justice debt or serving time in jail.¹³⁰ Some courts have implemented a system where a defendant agrees to pay the criminal justice debt as part of the plea agreement, making the failure to pay a violation of the plea agreement and skirting *Bearden*’s holding because *Bearden* himself went to trial.¹³¹ Still other courts have either directly flaunted *Bearden* or, at the very least, engaged in a broad interpretation of the term “willful.”¹³² State courts are in conflict as to whether the State or the defendant has the burden of proving whether the failure to pay was willful.¹³³

Although lower federal courts and some state courts have expansively interpreted the “willful failure-to-pay” standard,¹³⁴ this standard has been accepted as the applicable standard in determining whether a convicted defendant should have his probation or parole violated for failing to pay his criminal justice debt. By contrast, the Supreme Court has not established a due process threshold for the crime of failing to pay a debt. Rather, the standards courts use in determining whether someone’s failure to pay their child support obligations should lead to incarceration are inconsistent, often failing to rise to the “willful” standard required for revocation.

128. Appleman, *supra* note 17, at 1485 & n.17.

129. *Id.* at 1490.

130. *Id.*

131. *Id.* at 1491.

132. OFF. JUDICIAL SERV., SUP. CT. OHIO, COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (2014), <http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf>; Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1761 (2010) (“[W]arrants may be issued, and arrests and confinement may occur, solely due to nonpayment of legal debt.”); *Ohio High Court Offers Judges Fines, Fees Guidance*, AKRON BEACON J./OHIO.COM (Feb. 6, 2014, 9:16 AM) (on file with author); Editorial, *Return of Debtors’ Prisons*, N.Y. TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/14/opinion/return-of-debtors-prisons.html>; Editorial, *The New Debtors’ Prisons*, N.Y. TIMES (Apr. 5, 2009), <http://www.nytimes.com/2009/04/06/opinion/06mon4.html>; see also RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV’TS JUSTICE CTR., REPAYING DEBTS (2007), https://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying_debts_full_report.pdf?sfvrsn=2; Harris et al., *supra* note 132, at 1782–83 (reporting that “nearly one in four of our respondents reported having served time in jail as a sanction for nonpayment”).

133. Birckhead, *supra* note 17, at 1634.

134. See, e.g., Appleman, *supra* note 17, at 1490–91.

An obvious distinction exists between the legal standard required for revoking a person's probation or parole, or even pretrial release, after failure to pay a criminal justice obligation and the range of legal standards a state could set as the requisite mens rea for a criminal statute, such as for the "crime" of failing to pay child support. But what is required for incarceration if one commits the "crime" of failure to pay child support is often much less than what is required for incarceration due to a failure to pay a criminal justice debt, an incongruous result.

An examination of state statutes governing the crime of failing to pay child support reveals that states employ a range of mental states. Some states do require a "willful" failure to pay in order to justify a conviction,¹³⁵ but almost as many states have no mens rea requirement at all¹³⁶ or require that the parent's failure to pay be "knowing."¹³⁷ Both the strict liability standard and the "knowing" standard mean that a person can be convicted of failing to pay child support either without any consideration of the reasons for the person's inability to pay, in violation of the spirit and arguably the law of *Bearden*, or according to a standard far short of what states require to incarcerate someone for a simple failure to pay a criminal fine, fee, or other sentencing sanction postconviction.

To be clear, this author is not advocating for an approach that requires all states to analyze a noncustodial parent's ability to pay and allows a finding of criminal guilt or incarceration only if the noncustodial parent's inability to pay is found to be "willful." Even if all courts authorized a criminal conviction only upon a finding of a "willful" failure to pay child support, this practice would still seem to be in open violation of the fundamental principle that courts regularly espouse: we are not a nation

135. CAL. PENAL CODE § 270 (West 2014); COLO. REV. STAT. ANN. § 14-6-101 (West 2016); FLA. STAT. ANN. § 827.06 (West 2016); 750 ILL. COMP. STAT. ANN. 16/15 (West 2009); MD. CODE ANN., FAM. LAW § 10-203 (LexisNexis 2012); MISS. CODE ANN. § 97-5-3 (2014); N.J. STAT. ANN. § 2C:24-5 (West 2015); N.C. GEN. STAT. § 14-322 (2017); N.D. CENT. CODE § 14-07-15 (2017); OKLA. STAT. ANN. tit. 21, § 853 (West 2015); 11 R.I. GEN. LAWS § 11-2-1.1 (2002 & Supp. 2017); VT. STAT. ANN. tit. 15, § 202 (2010); VA. CODE ANN. § 20-61 (2016); WASH. REV. CODE ANN. § 26.20.035 (West 2016); W. VA. CODE ANN. § 61-5-29 (LexisNexis 2014). Some states require the parent's failure to be "intentional." ALA. CODE § 13A-13-4 (2015); LA. STAT. ANN. § 14:75 (2018); NEB. REV. STAT. § 28-706 (2016); S.D. CODIFIED LAWS § 25-7-16 (1999); WIS. STAT. ANN. § 948.22 (West 2005 & Supp. 2017); WYO. STAT. ANN. § 20-3-101 (2017).

136. ARK. CODE ANN. § 5-26-401 (2013); CONN. GEN. STAT. ANN. § 53-304 (West 2012); IOWA CODE ANN. § 726.5 (West 2013); MICH. COMP. LAWS ANN. § 750.165 (West 2004 & Supp. 2018); N.M. STAT. ANN. § 30-6-2 (2004); S.C. CODE ANN. § 63-5-20 (2010) ("without just cause or excuse"); OR. REV. STAT. § 163.555 (2003) ("without lawful excuse").

137. ALASKA STAT. § 11.51.120 (2016); IND. CODE ANN. § 35-46-1-5 (West 2012 & Supp. 2017); KY. REV. STAT. ANN. § 530.050 (LexisNexis 2014); ME. REV. STAT. ANN. tit. 17-A, § 552 (2006); MINN. STAT. ANN. § 609.375 (West 2018); MO. ANN. STAT. § 568.040 (West 2012 & Supp. 2018); NEV. REV. STAT. ANN. § 201.020 (LexisNexis 2012); N.H. REV. STAT. ANN. § 639:4 (LexisNexis 2015); TENN. CODE ANN. § 39-15-101 (2014); TEX. PENAL CODE ANN. § 25.05 (West 2011); UTAH CODE ANN. § 76-7-201 (LexisNexis 2017).

that incarcerates people for failing to pay their debts. But if the standard in *Bearden* were to apply to cases of criminal nonsupport and if courts did set “willfulness” as the requisite threshold, in light of how often courts manage to skirt their constitutional obligations under *Bearden*, the results likely would be no different in the context of the crime of nonsupport. “Willfulness” would be just a procedural hurdle to overcome through creative maneuvering or an expansive interpretation of what constitutes a “willful” failure to pay.

B. Criminal Prosecution as a Sanction for Poor Fatherhood

The creation of a new generation of fathers incarcerated in debtors’ prisons is only one troubling consequence of the law’s current approach to child support obligations. Another significant problem with the child support system is that it is funded on the backs of parents, primarily fathers, who are indigent and can barely support themselves. The system is set up so that fathers with little to no income are helping to finance the government’s child support enforcement system, due to the assignment of support payments that poor and working-class custodial parents are required to give. Thus, the government is seeking to collect child support debt owed by fathers with little to no income who cannot pay what they owe. If a father does not pay the debt, even when it is because he has insufficient income on which to live regardless of the debt, the government punishes him with criminal charges and likely incarceration, which often leads to greater debt. The result is both that the child support system will never be fully funded in a way that is beneficial for the custodial parent and child, *and* poor fathers end up criminally sanctioned solely for not being able to finance the government’s child support system.

Legislators tout, and society accepts, two primary motivations for our current child support system: ensuring the health and well-being of children and doing so without requiring the government to provide that financial support, which is often pitched as protecting the government’s fiscal health and well-being.¹³⁸ First, the state desires to protect children by ensuring their basic needs are met. A caretaker cannot purchase the basic necessities for a child without money, and the biological parents are the first place to which states look to provide those funds. Second, the state desires to protect its own fiscal well-being. The state does not want to bear the financial responsibility for raising children whose parents either cannot or will not provide for them financially. A closer examination of the federal child support law belies this two-fold purpose while simultaneously revealing

138. See, e.g., Kohn, *supra* note 19, at 67–68.

that neither aim is met by our current child support system. Children are not better off, and, as suggested earlier, the government is operating at a net loss.

1. *The Child Support System as Child-Protective*

Children are among the most vulnerable members of our society. An appeal to the legislative and public conscience to help protect children and ensure that they receive the most basic necessities is easy to make. Yet, despite the repeated assertions by legislators and policymakers that the child support system has a primary goal of protecting and supporting children, the on-the-ground reality is quite different. The factors that have been shown to make a significant difference in a child's development and achievement are multifaceted. Although those factors do include income level, the evidence to date does not suggest that child support laws change the income equation in a way that positively affects a child's well-being. Our current child support laws do not address or attempt to assist with all the other relevant factors of a child's well-being.

Among the most important determinants of a child's development are a combination of family structure, income level, and parental education.¹³⁹ Each of these factors has a reverberating impact. Family structure plays a key role in a child's development and well-being. Children raised by married parents have higher academic achievements; stay in school longer; are less likely to use illegal substances and have contact with the police; are less likely to have sex and bear children at an early age; have better physical and mental health outcomes as adults; and earn more as adults than children raised by either divorced parents¹⁴⁰ or unmarried parents.¹⁴¹ By contrast, children raised by unmarried parents are more likely to show negative behaviors, whether those parents are living together with the child or not.¹⁴² Importantly, the marital status of the parents plays a much larger role in determining the outcomes than whether the child is raised by a single parent or in a two-parent family.¹⁴³

Both income and parental education also play a significant role in a child's development, as these two factors tend to be related to family structure.¹⁴⁴ However, recent research suggests that income and parental

139. Huntington, *supra* note 35, at 196–202.

140. The data on outcomes for children of divorced parents is more nuanced than that for children of unmarried parents. *See id.* at 196 n.165.

141. *Id.* at 196–97.

142. *Id.*

143. *Id.* at 197.

144. *Id.*

education cannot account for all of the differences in outcomes between children of married and unmarried parents, even though these differences are significantly diminished when researchers control for poverty and parental resources.¹⁴⁵ On closer examination, other factors related to family structure make the critical difference in outcomes. Specifically, family instability and a parent having a child by a new partner both play influential roles in child outcomes.¹⁴⁶

Long-established research determined that children need a secure base from which to learn about and explore the world around them. Secure relationships in early childhood positively affect brain development and academic achievement¹⁴⁷ as well as behavior and emotional development. When the relationship between parents is unstable, the instability affects the parenting behavior of both parents, resulting in their child having more difficulty gaining the attention and attachment they need for healthy development.¹⁴⁸

In the event either parent ends up with a new partner, particularly if that parent and the new partner have a child together, that pairing again affects parenting. If the mother ends up with a new partner, the father's involvement in his child's life tends to diminish.¹⁴⁹ If the mother has a child by a new partner, she often experiences increased financial strain and less support from her family and social network.¹⁵⁰ If a father has a child by a new partner, numerous factors contribute to greater odds that he will disengage from his previous children.¹⁵¹ This withdrawal regularly leads to increased academic, emotional, and behavioral problems for the children from his previous relationship(s).¹⁵²

Paternal disengagement is a problem for children of divorced parents as well as for those whose parents never married. Almost 60% of children of divorced or separated parents see their fathers a few times a year or less, and children from nonmarital relationships see their fathers even more rarely.¹⁵³ Studies have found that a father's absence doubles the likelihood of a child's incarceration, even accounting for parental education, family income, race, and other factors.¹⁵⁴ Absent fathers can lead a child to have

145. *Id.* at 197–98.

146. *Id.* at 198–202.

147. *Id.* at 198–99.

148. *Id.* at 199–200.

149. *Id.*

150. *Id.* at 200–01

151. *Id.* at 201.

152. Maldonado, *supra* note 30, at 998–99.

153. Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAMILY L.Q. 191, 194 (2006).

154. *Id.* at 194–95.

increased mental health issues, diminished levels of school achievement, disproportionate representation in the juvenile justice system, and greater risk of adolescent pregnancy.¹⁵⁵ When fathers positively engage with their children, they can play important roles in the lives and successes of their children.¹⁵⁶ Children who have regular contact with their fathers have better academic, social, and emotional outcomes.¹⁵⁷

On the surface, child support payments made by the noncustodial parent to the custodial parent should help address one factor that significantly impacts child well-being: income. Yet, as we know from the previous Part, the fathers who owe the most child support to the mothers who most need it are the ones with the least ability to pay it. As a result, child support orders have the presumably unintended result of leading to increased paternal disengagement. Although child support laws operate relatively effectively for divorcing parents, as most divorced custodial parents receive full or partial payment of child support obligations,¹⁵⁸ for unmarried parents, child support often is “a source of tremendous acrimony and divisiveness.”¹⁵⁹ Divorcing parents who are “elite, college-educated couples seek relatively egalitarian partnerships and negotiate under a default rule of shared parenting.”¹⁶⁰ By contrast, 45% of unmarried fathers have dropped out of high school and 42% have been incarcerated at some point, both factors that decrease their ability to pay.¹⁶¹

The result is that “stringent child support enforcement” discourages poor fathers from being involved in their child’s life.¹⁶² As one scholar has noted, “the system imposes unrealistic expectations, angering mothers, who are annoyed that fathers are not meeting their obligations, and fathers, who are frustrated by the onerous debt.”¹⁶³ Rather than encouraging a father’s presence in his child’s life, child support enforcement pushes poor fathers away from their children.¹⁶⁴ Child support laws reinforce a message that a father’s only worth to his child is financial: “[D]efining nonresident

155. ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES 3 (2016); Kohn, *supra* note 19, at 85–86.

156. Kohn, *supra* note 19, at 86.

157. Maldonado, *supra* note 153, at 194.

158. Huntington, *supra* note 35, at 206.

159. *Id.* at 206–07; *see also* HASDAY, *supra* note 56, at 206–07 (“[Child support statutes] created reasons to stop paying child support . . . The law conclusively presumed that support paid for one child would also be used to support that child’s co-resident full or half-siblings, even if those siblings were biologically unrelated and legally unconnected to the person paying the support. A noncustodial parent who did not want to support someone else’s children might be disinclined to keep paying support.”).

160. Mayeri, *supra* note 38, at 2296.

161. Huntington, *supra* note 35, at 206–07.

162. Mayeri, *supra* note 38, at 2296; *see also* Maldonado, *supra* note 30, at 1012.

163. Huntington, *supra* note 35, at 206.

164. Maldonado, *supra* note 30, at 1014.

fathers' 'responsibility solely in terms of cash support . . . [makes] it more difficult for [them] to offer inputs of time or emotional effort in their place, contributing to paternal disengagement.'"¹⁶⁵ Not surprisingly, studies have found a correlation between the frequency of paternal contact and the payment of child support.¹⁶⁶

The relationship between children and their fathers becomes even more strained if they are incarcerated due to the failure to pay child support debt. Numerous studies document the myriad barriers children encounter in attempting to continue a relationship with an incarcerated parent. Many inmates are incarcerated at facilities far from home in locations largely inaccessible by public transportation.¹⁶⁷ If a child is able to arrange a visit, most visits are regulated. Other studies detail the negative effects of a parent's incarceration on a child's well-being.¹⁶⁸ "[A] study of fathers in prison" found "that almost 42% of [those] who [did] not live[] with their child[] prior to incarceration" only "had contact with their child[]" once a month or less while incarcerated.¹⁶⁹ For children who want a relationship with their father, paternal interactions have a "significant positive emotional impact."¹⁷⁰

If the welfare of children was truly the concern, the child support system would be designed to encourage paternal involvement, not just paternal income. To encourage parental involvement, a child-centered support system would place a value on the very important nonmonetary contributions a noncustodial parent can, and often does, make in a child's life.¹⁷¹ Laws and regulations would focus on helping those fathers who make below the poverty threshold attain job skills, education, and employment so they become better equipped to provide financial support.¹⁷² If the child support system were more flexible in looking at a noncustodial parent's contributions and providing methods of helping that parent obtain stable work, these two factors could go far toward eliminating

165. *Id.* at 1013 (alteration in original) (citing Paula England & Nance Folbre, *Involving Dads: Parental Bargaining and Family Well-Being*, in *HANDBOOK OF FATHER INVOLVEMENT* 387, 402 (Catherine S. Taims-LeMonda & Natasha Cabrera eds., 2002)).

166. *Id.* at 998.

167. Dennis, *supra* note 20, at 328.

168. *Id.* at 328–29; Kohn, *supra* note 19, at 77.

169. Kohn, *supra* note 19, at 77.

170. *Id.* at 85.

171. *Id.* at 53–54.

172. Brito, *supra* note 19, at 633; Maldonado, *supra* note 30, at 1019–20. Although programs aimed at increasing the amount of child support a father pays by helping them obtain job training and skills have not necessarily led to increases in employment rates or child support payments in the past, the failures have likely been linked to the program's focus. *Id.* at 1019–21. These programs have still been aimed at collecting child support, not encouraging and facilitating paternal involvement. *Id.* at 1021–22.

many of the barriers to paying child support.

2. *The Child Support System's Fiscal Responsibility?*

In addition to the welfare of children, legislatures have long touted the government's financial well-being as motivation for our current child support system's setup. Legislators desire to keep state and local governments from having to support children whose custodial parent is unable to support herself and her children. As a result, legislatures require noncustodial parents to reimburse the state for any "welfare" expenditures it makes to the custodial parent. If a custodial parent does not receive state assistance, the noncustodial parent's child support payment goes to the custodial parent. But if she does receive state assistance, the noncustodial parent's payment goes directly to the state and federal governments, who subsidize the state child support systems, as reimbursement. Accessible data establishing what percentage of noncustodial parents' payments go directly to the state and federal governments and what percentage is passed on to custodial parents is lacking.

On the surface, a recent infographic from the Office of Child Support Enforcement (OCSE) seems to provide this data.¹⁷³ According to that infographic, 95% of child support collected in fiscal year 2016 went directly to families, with 5% reimbursing public assistance dollars.¹⁷⁴ OCSE also highlights the cost-effectiveness of the child support program. According to the infographic, for every \$1 spent on administering the child support program, \$5.33 was collected.¹⁷⁵

On further examination, these statistics appear somewhat misleading. The way the data is presented makes it difficult to tell where a noncustodial parent's money paid as "child support" is actually going. The most recent OCSE annual report suggests that only a very small percentage—less than 5%—of child support and foster care payments is going to reimburse the state and federal government for the financial assistance they provide to those in need.¹⁷⁶ On closer inspection, and with the caveats mentioned in

173. OFFICE OF CHILD SUPPORT ENF'T, 2016 CHILD SUPPORT: MORE MONEY FOR FAMILIES (2017), https://www.acf.hhs.gov/sites/default/files/programs/css/2016_preliminary_report_infographic.pdf.

174. *Id.*

175. *Id.* Data from fiscal year 2017 has a slightly lower cost-effectiveness ratio of \$5.15. OFFICE OF CHILD SUPPORT ENF'T, PRELIMINARY REPORT FY 2017, at 6 tbl.P-1 (2018), https://www.acf.hhs.gov/sites/default/files/programs/css/fy_2017_preliminary_data_report.pdf.

176. OFFICE OF CHILD SUPPORT ENF'T, *supra* note 175, at 6 tbl.P-1 (dividing total assistance reimbursement from FY 2017—\$1,184,766,692—by the payments made to families or foster care that passed through to families during the same year—\$26,725,120,378); *id.* at 16 tbl.P-11 (noting total

previous paragraphs related to the difficulty of deciphering the data, the numbers suggest that 67% of collections disbursed on behalf of those children who are currently receiving child support assistance goes toward reimbursing the state and federal governments for the “welfare assistance” they have provided to those children.¹⁷⁷ A much smaller percentage—8%—of collections received and then disbursed on behalf of children who *formerly* received state assistance goes to reimburse the government,¹⁷⁸ thereby skewing the data, since these two categories are combined.¹⁷⁹ Approximately 55% of the collections goes to reimburse the federal government, and approximately 45% remains with the state.¹⁸⁰

The cost-effectiveness ratio is similarly problematic. The cost-effectiveness ratio of \$5.33 collected for every \$1 spent is reached by dividing collections by expenditures.¹⁸¹ But how OCSE defines “collec-

distributed TANF collections of \$1,348,334,734, which, according to an email to the author from OCSE, is the amount of reimbursement to the state and federal government).

177. *Id.* at 6 tbl.P-1 (dividing current assistance collections disbursed as assistance reimbursement from FY 2017—\$477,348,405—by the total current assistance collections disbursed from the same year—\$710,521,048). The caveat is that foster care collections and payments are not separated out, except in one stand-alone table, *see id.* at 17 tbl.P-12, making it unclear what percentage of these payments may be reimbursing states and the federal government for foster care maintenance payments, *see id.* at 6 tbl.P-1 & n.3. Total foster care collections distributed amounted to \$69,604,601. *Id.* at 17 tbl.P-12.

178. *Id.* at 6 tbl.P-1 (dividing assistance reimbursement of former assistance collections by classification from FY 2017—\$707,418,287—by the total former assistance collections from the same year—\$8,614,626,411).

179. The much smaller percentage of collections on behalf of children who formerly received assistance goes toward arrearages and seems largely to be distributed directly to the custodial parents. Why is not abundantly clear. The data is additionally skewed because it includes Medicaid payments and other payments made to families who never received state assistance at all. *See id.* It is still unclear to this author, however, how the authors of the report arrive at the conclusion that 95% of payments go to families in light of the 67% and 8% figures in the data found elsewhere in the table. OCSE indicated that it calculated the 5% by dividing the total payments to families (which includes child support, Medicaid, foster care, and medical support payments)—\$27,386,940,389—by the total distributed collections—\$28,625,294,083—to arrive at the conclusion that 95% of distributed child support payments go to families. *See id.* at 8 tbl.P-3. But some significant portion of the money that is going to families is for Medicaid, medical support, and foster care, not as child support in the sense discussed in this Article. *See id.* Additionally, almost 40% of the amount going to custodial parents as child support is money where the government has not ever provided welfare assistance to the parent or child. *Id.* at 6 tbl.P-1.

180. *Id.* (dividing state and federal shares by the amount of total assistance reimbursement from FY 2017).

181. *Id.* at 41 tbl.P-36 (noting in the sources section at the bottom of the page the formula used to calculate the cost-effectiveness ratio); *see also* U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-34, CHILD SUPPORT ENFORCEMENT PROGRAM QUARTERLY COLLECTION REPORT 4 (2018), https://www.acf.hhs.gov/sites/default/files/programs/css/form_ocse_34_final_instructions.pdf; U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-396, CHILD SUPPORT ENFORCEMENT PROGRAM QUARTERLY FINANCIAL REPORT 6–7 (2018), https://www.acf.hhs.gov/sites/default/files/programs/css/form_ocse_396_final_instructions.pdf. The ratio here is the 2016 ratio in order to stay consistent with the aforementioned infographic. The 2017 cost-effectiveness ratio is \$5.15. OFFICE CHILD SUPPORT ENF’T, *supra* note 174, at 41 tbl.P-36.

tions” and “expenditures” is critical. The “collections” figure includes collections that go to reimburse states and the federal government for the amount they are spending on TANF and foster care benefits;¹⁸² in other words, part of the collection is simply going back to the states and federal government to fund the child support program, not to the custodial parents as one might suppose. As already indicated, 55% of child support payments received as reimbursement goes to the federal government.

The “collections” figure also includes almost \$11 billion received and distributed on behalf of children who are not receiving and have not received any state assistance.¹⁸³ In other words, this \$11 billion might have been paid without the state ever getting involved. Assumedly, many of these payments were made by middle- and upper-class parents with steady income to a similarly situated former spouse pursuant to divorce-related custody and support agreements. Many of these contributions are voluntarily made.¹⁸⁴ As a result, at least some portion of these individuals does not benefit from the state-run child support program, as they may not need any involvement from the state to facilitate the making of these payments.

The “collections” number is also somewhat misleading as it does not include money received from the federal government that states use to help pay for the child support system: “[t]he child support [system] is a federal matching grant program under which state and local governments must spend money in order to receive federal funding.”¹⁸⁵ For every \$1 a state spends, it receives \$0.66 from the federal government.¹⁸⁶ The federal government pays a substantial share of the states’ administrative expen-

182. Part 1, line 8 of OCSE Form 34 adds up the total collections distributed in lines 7a through 7f, which includes, in line 7b, “[c]ollections [d]istributed [a]s [a]ssistance [r]eimbursement.” OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, at 41 tbl.P-36 (noting in the sources section at the bottom of the page that part 1, line 8, is part of the numerator in the equation); U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-34, *supra* note 181, at 9–10.

183. OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, at 6 tbl.P-1 (noting \$10,932,255,293 of distributed collections in the category of “never assistance,” defined as indicated); *id.* at 41 tbl.P-36 (indicating sources for collections numerator at the bottom of the page); U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-34, *supra* note 181, at 4 (giving definition of “never assistance”).

184. *See, e.g.*, U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-157: THE CHILD SUPPORT ENFORCEMENT ANNUAL DATA REPORT 20 (2016), https://www.acf.hhs.gov/sites/default/files/ocse/omb_0970_0177_instructions.pdf (noting in instruction for line 25 that “[v]oluntary payments are considered current support and must be reported here, even though there is no order to require payment”).

185. Elaine Sorensen & Melody Morales, *Child Support Funding: 2008–2016*, OFFICE OF CHILD SUPPORT ENF’T (May 2, 2017), <https://www.acf.hhs.gov/css/ocsedatablog/2017/05/child-support-program-funding-2008-2016>.

186. *Id.*

ditures—approximately \$3.5 billion annually.¹⁸⁷ But the money that the state collects from the federal government is not included in the “collections” part of the equation; the term only accounts for money collected from noncustodial parents.

The federal government operates an incentive system. Under Title IV-D of the Social Security Act, states can retain a portion of their child support collections (rather than returning them to the federal government) based on their performance in five areas: “establishment of paternit[y], establishment of child support orders, collections on current child support due, collection[s] on past child support due . . . and cost effectiveness.”¹⁸⁸ An annual determination is made based on each state’s performance in these areas.¹⁸⁹

Both states’ expenditures and the federal government’s expenditures are included in the “expenditure” denominator of the cost-effectiveness ratio.¹⁹⁰ The total “expenditures” in the ratio include funds the federal government provides directly to the states through this incentive-based program,¹⁹¹ even though the “collections” part of the ratio does not also factor in those payments. For FY 2016 and 2017, only “estimated” incentive payments are documented; for the three previous years—FY 2013 through FY 2015—the actual amount of the incentive payments the federal government made to the states is available.¹⁹² In FY 2017, the estimated federal incentive payments totaled more than \$490 million, with the amount per state ranging from \$0 in Hawaii, Nevada, District of Columbia, and Puerto Rico to \$72 million provided in Texas.¹⁹³ In the most recent

187. OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, at 48–50 tbls.P-43, P-44, P-45; U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-396, *supra* note 181, at 2 (definitions section).

188. U.S. DEP’T HEALTH & HUMAN SERVS., REPORT TO THE H. COMM. ON WAYS AND MEANS AND THE S. COMM. ON FINANCE (1997), <https://www.acf.hhs.gov/css/resource/child-support-incentive-funding>.

189. OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, app. at 120–26 (laying out the formulas for how incentive payments are determined).

190. *Id.* at 41 tbl.P-36 (noting the sources used in calculating the cost-effectiveness ratio, which only include line 7, columns A & C from OCSE form 396, which are the total expenditures); U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-396, *supra* note 181, at 4–7.

191. OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, at 41 tbl.P-36 (noting in the sources section at the bottom of the page that line 7 of OCSE Form 396 is the primary source of the denominator, which includes federal incentive payments); U.S. DEP’T HEALTH & HUMAN SERVS., INSTRUCTIONS FOR COMPLETION OF FORM OCSE-396, *supra* note 181, at 4–7. The expenditures denominator includes “IV-D Administrative Expenditures Made Using Funds Received as Incentive Payments.” *Id.* at 4. As OCSE’s instructions accompanying the form note, this category includes “[a]dministrative expenditures and estimates using incentive payment funds. Each State is required to spend the funds it received as annual incentive payments to carry out title IV-D program activities.” *Id.*

192. OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, at 42–43 tbl.P-37, tbl.P-38.

193. *Id.* at 42 tbl.P-37.

years, the federal government provided more money than anticipated in the estimates.¹⁹⁴ In 2013, for example, the estimated incentive payments amounted to about \$448 million, but the actual payments totaled \$538 million.¹⁹⁵ In FY 2015, the most recent year of available data, states anticipated receiving a little over \$481 million in federal incentive payments, but actually received \$556 million.¹⁹⁶ As a result, one has reason to believe that the actual incentive payments made in FY 2017 will be substantially above the \$492 million anticipated for that year.

As it stands, much of the child support system is circular, with the federal government providing funding, via the states, to poor custodial parents on behalf of their children, and poor noncustodial parents being ordered to reimburse the state and federal governments for those programs. If the custodial parents are unable to do so, the government then seeks to punish and possibly incarcerate them. That hardly seems to be a cost-efficient program, nor does it appear to be an effective one. The cost-effectiveness ratio would be quite different if one removed the federal government's substantial support from the equation and if one accounted specifically for the money that went directly to the custodial parents raising the children at issue. As it is, the cost-effectiveness ratio appears skewed. The ratio does not seem to adequately reflect either how much the state and federal governments are spending on the system or how much is actually going to the custodial parent rather than to the government to offset the costs of the state assistance it is providing.

Additionally, the cost of incarceration for those who are punished with jail or prison time for failing to pay is one extraordinary cost to states that is not accounted for in the cost-effectiveness ratio. The average annual cost of incarcerating someone in the federal system is \$31,977.65.¹⁹⁷ As with the amount spent on maintaining the child support system, the amount states spend on incarceration varies widely. The average state cost nationwide is \$33,274 annually, with "a low of \$14,780 in Alabama" and "a high of \$69,355 in New York."¹⁹⁸ California, at the high end, spends more than \$8 billion per year on prison costs, whereas North Dakota, at the low end,

194. Compare *id.*, with *id.* at 43 tbl.P-38.

195. Compare *id.* at 42 tbl.P-37, with *id.* at 43 tbl.P-38.

196. Compare *id.* at 42 tbl.P-37, with *id.* at 43 tbl.P-38.

197. Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957 (July 19, 2016). Those who have interstate child support orders can be charged federally now.

198. VERA INST. FOR JUSTICE, PRISON SPENDING IN 2015 (2017), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>. Eight states, primarily northeastern, had an annual average cost of more than \$50,000 per inmate, whereas eighteen states, primarily southern, spent less than \$25,000 a year. *Id.* Nineteen states averaged between \$25,000 and \$50,000 annually. *Id.*

spends \$65 million.¹⁹⁹ Obviously, these costs cover the incarceration of many individuals who are not detained on the basis of their failure to pay child support, but they include the approximately 25% of individuals incarcerated who have outstanding child support obligations at the time of their incarceration.²⁰⁰ Because accurate numbers regarding how many individuals are incarcerated solely for failing to pay child support are not available, assessing how much the average cost-effectiveness of the child support system would be, factoring in the annual costs of incarceration for those individuals, is impossible.²⁰¹

Legislators are no doubt sincere when they indicate a concern about the state having to support children whose parents are unable to do so. Notable scholars have documented this push toward privatizing family support.²⁰² But requiring men who make little or no income to subsidize the government's child support program—and face criminal charges and incarceration if they cannot do so—does not provide a cost-efficient or effective method for minimizing the government's costs.

III. CRIMINALIZING POOR FATHERHOOD

If the child support system fails to effectively enhance children's well-being and fails to do so in a cost-effective manner, what is the motivation for maintaining such a system? Why criminally sanction and incarcerate a man who makes little to no income for not being able to pay either a private or public debt? Our society seeks to deter "irresponsible sex" among heterosexuals who cannot afford to support children and to punish those who failed to be deterred. Moral condemnation of and a desire to stigmatize poor, and often minority, fathers for making that reproductive choice to bear children they cannot financially support is at the heart of the criminalization of a father's failure to pay child support. Although mothers are not immune, legally or otherwise, from this moral judgment and condemnation, the stigmatization of mothers manifests largely in other

199. *Id.*

200. *See supra* note 8.

201. Unfortunately, neither the federal nor state criminal justice systems seem to have information readily available regarding the cost-effectiveness of their prisons and jails, as many are just starting to gather the necessary data to conduct such analysis. *See, e.g.*, CHRISTIAN HENRICHSON & JOSHUA RINALDI, VERA INST. OF JUSTICE, COST-BENEFIT ANALYSIS AND JUSTICE POLICY TOOLKIT 2, 4 (2014); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-8, COST OF PRISONS: BUREAU OF PRISONS NEEDS BETTER DATA TO ASSESS ALTERNATIVES FOR ACQUIRING LOW AND MINIMUM SECURITY FACILITIES 10-18 (2007).

202. *See, e.g.*, Appleton, *supra* note 31, at 360-64; Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866-69 (2014). *See generally* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH (2004).

ways, some of which have been critically explored by distinguished scholars.²⁰³ The child support system is a primary area where this disdain of poor fathers is evident.²⁰⁴ Fatherhood is largely defined by a societal expectation of financial support—by an image of the father as “breadwinner.” If a father fails to live up to that expectation, our society punishes him for bringing a child into the world and being unable to financially support her.

A. *The Use of Criminal Enforcement Mechanisms*

In examining how we have come to rely on criminal law to address a father’s failure to pay his outstanding child support debt, whether owed to the child’s mother or to the state as reimbursement, one has to wonder why we do not simply use the civil law mechanisms that are available to address this dilemma. After all, the civil system usually is where parties litigate financial obligations, liabilities, and debts, generally without resort to incarceration.²⁰⁵ This is not to suggest that this author finds incarceration pursuant to a civil contempt remedy a satisfactory mechanism for addressing the needs of families with little to no income, but rather, to raise the question of why an additional layer of criminal processes is utilized at all when civil processes with similar sanctions are available. By invoking the criminal justice system, the state implicates an entirely different set of norms and emphases and raises a distinct set of questions, as will be discussed further below.

All states have civil enforcement mechanisms that they can and do use to encourage noncustodial parents to pay. No available data suggests that civil methods of enforcing child support obligations are any less effective than criminal mechanisms at protecting state coffers and looking after the well-being of a child. Perhaps if evidence showed that the use of criminal

203. See, e.g., KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) [hereinafter ROBERTS, *KILLING THE BLACK BODY*]; DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657 (2008); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997).

204. Other noteworthy scholars have explored additional manifestations of this judgment. See, e.g., Antognini, *supra* note 38; Maldonado, *supra* note 30; Mayeri, *supra* note 38.

205. The obvious exceptions here are detention pursuant to a civil contempt order or through nominally civil commitment. Although civil law allows for incarceration through civil contempt, its regular use in the child support context seems to be merely an end-run around providing the legal protections required before incarceration is permitted in the criminal context. See, e.g., *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972) (holding right to counsel required before someone could be imprisoned for an offense); cf. Kohn, *supra* note 19, at 70–72.

sanctions produced increased numbers of people paying child support obligations, the argument that states use criminal sanctions because they are more effective might be compelling. But because states and the federal government do not collect data documenting the effectiveness of either civil or criminal enforcement mechanisms in getting delinquent parents to pay,²⁰⁶ we have no evidence that subjecting a father who does not pay his child support obligations to the strictures of the criminal justice system is either effective as a general matter or more effective than the use of civil sanctions.²⁰⁷

In fact, the opposite appears to be true. Incarceration is a sanction available through civil contempt proceedings.²⁰⁸ However, if a parent is charged with the crime of failure to pay and the parent is deemed indigent, in most instances the state must provide counsel for the parent at an additional cost to the state.²⁰⁹ If the state brings a civil contempt action against the parent, no lawyer—and no additional cost—is required.²¹⁰

If criminal law is no more effective than civil law at getting fathers to pay their child support obligations, and if incarceration is available as a civil sanction with no additional cost for a lawyer, what is it that the criminal law provides to make it a worthwhile option for states? Criminal charges communicate a message of deterrence regarding unprotected heterosexual sex and moral condemnation for those who disregard that message. Regarding fathers, we signal quite clearly our moral condemnation of men who engage in unprotected sex, father a child, and then are unable to provide financially for that child.²¹¹ Criminalization allows us to

206. The Office of Child Support Enforcement documents how much is paid, how many people owe, and many other aspects of child support payments, *see supra* note 175, but this author has not found any source documenting to what degree and how often, and in what amounts, civil or criminal enforcement mechanisms lead noncustodial parents to pay when they previously did not. Likewise, she could find no data comparing the relative effectiveness of the two sanctions.

207. As previously mentioned, there is simply a lack of data on the number of people incarcerated for failure to pay child support, both on the civil and criminal sides. As a result, we likewise have no information about whether incarceration pursuant to civil contempt orders is effective in getting noncustodial parents to pay.

208. In at least one state, child support obligors incarcerated pursuant to civil contempt proceedings constitute between 13% and 16% of the jail population. Brito, *supra* note 19, at 618. Notably, however, when states seek to enforce child support obligations through the civil contempt system, the owing parent does not have the right to counsel, *see Turner v. Rogers*, 564 U.S. 431, 448–49 (2011), and the period of confinement is not limited by statute as it is on the criminal side.

209. In the states where failure to pay is a felony charge, indigent defendants always have the right to appointed counsel. *See Argersinger*, 407 U.S. at 37; *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963); *cf. Alabama v. Shelton*, 535 U.S. 654, 674 (2002). Although those facing misdemeanor charges only have the right to counsel if the judge is going to impose a period of incarceration, as a matter of course in most places, courts appoint counsel in misdemeanor cases as well.

210. *See Turner*, 564 U.S. at 448–49.

211. *See Harry D. Krause, Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 17 (1990).

mark poor fathers with the stigma of a criminal conviction for engaging in this behavior.

Deterrence is one of the primary theories on which criminal law relies to justify punishment—both general deterrence and specific deterrence. Although not usually acknowledged as a motivation for criminalizing the nonpayment of a child support obligation, deterring people with little to no income from engaging in (unprotected) heterosexual sex is an under-acknowledged driver of our current child support system. Legislators and judges seek to deter what they view as “irresponsible sex,” even if such sex is engaged in by two people who are in a committed relationship at the time, by regulating the consequences of unprotected sex among those with little to no income. Criminalizing the failure to pay child support aims to deter unmarried straight individuals with little income from having children by making the financial, liberty, and stigma costs of such conduct sufficiently high that potential parents will be dissuaded from engaging in the conduct altogether.

To be clear, this focus on deterrence is aimed at fathers who have little or no income, as lawmakers seem to presume that fathers with steady jobs and comfortable assets will more securely assume the risk of their sexual activity and the possible financial obligation of supporting a child that might come from such a risk. This “bifurcation between the legal treatment of poor families and other families”²¹² is not unique to the child support context.²¹³ Although “[c]ourts and legislatures regulating the rights and responsibilities of family members generally stress the government’s interests in protecting familial privacy, deferring to parental judgment, and reducing disruption of family relationships[,] . . . legal authorities embrace diametrically opposed norms in regulating poor families.”²¹⁴ Jill Hasday observes, “Family law for the poor is explicitly premised on scrutiny of family life, suspicion of parental judgment, and enthusiastic interference in family relations.”²¹⁵ Regulation and interference in the lives of parents of lesser economic means is not limited to the civil or family law context. In fact, as numerous scholars have observed, legislators and courts regularly

212. HASDAY, *supra* note 56, at 198.

213. *See, e.g.*, BRIDGES, *supra* note 203; ROBERTS, KILLING THE BLACK BODY, *supra* note 203; ROBERTS, SHATTERED BONDS, *supra* note 203; Wendy Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317 (2014); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 268 (2010).

214. HASDAY, *supra* note 56, at 196.

215. *Id.*; *see also* State v. Oakley, 629 N.W.2d 200, 216, 219 (Wis. 2001) (Bradley, J., dissenting) (“[T]he majority imbues a fundamental liberty interest [the right to have children] with a sliding scale of wealth.”); ROBERTS, SHATTERED BONDS, *supra* note 203.

engage in highly invasive regulation of poor individuals under the ambit of criminal law as well.²¹⁶

To the extent that one doubts the deterrence rationale invoked by criminalizing the failure to pay child support, a Wisconsin case epitomizes the lengths to which courts will go to deter reproduction by potential parents who may not have the money to support a child.²¹⁷ David Oakley was convicted of the crime of intentionally failing to pay child support for his nine children—although there was some dispute about whether he had the ability to pay, according to the dissent.²¹⁸ The court imposed as a condition of probation the requirement that he not have any other children “unless he demonstrate[d] that he had the ability to support them and that he [was] supporting the children he already had.”²¹⁹ Oakley appealed, but the Wisconsin Supreme Court upheld the condition because he “could have been imprisoned for six years, which would have eliminated his right to procreate altogether during those six years”; therefore, the court found, a probation condition that he “avoid having another child” did not infringe on his fundamental constitutional “right to procreate.”²²⁰ Rather, it facilitated probation’s goal of rehabilitating Mr. Oakley²²¹ and provided “his child victims and any future child victims with some measure of protection from any of Oakley’s future acts that may violate the law.”²²² In other words, legally prohibiting Mr. Oakley from engaging in unprotected sexual activity is a permissible method of specifically deterring Mr. Oakley from creating “any future child victims” that he might be unable to financially

216. See, e.g., BRIDGES, *supra* note 203; KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011); ROBERTS, KILLING THE BLACK BODY, *supra* note 203; ROBERTS, SHATTERED BONDS, *supra* note 203, at 200–20; Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013); Kaaryn Gustafson, *The Criminalization of Poverty*, *Criminal Law*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947 (2017); see also Kate Weisburd, *Sentenced to Surveillance* (Oct. 19, 2017) (unpublished manuscript) (on file with author).

217. See *Oakley*, 629 N.W.2d at 200.

218. *Id.* at 217–18 (Bradley, J., dissenting) (“The [circuit] court explained that ‘it would always be a struggle to support these children and in truth [Oakley] could not reasonably be expected to fully support them. . . . [Y]ou know and I know . . . [y]ou’re going to struggle to make 25 or 30 [thousand dollars a year]. And by the time you take care of your taxes and your social security, there isn’t a whole lot to go around, and then you’ve got to ship it out to various children.’”).

219. *Id.* at 203 (majority opinion).

220. *Id.* at 201–02.

221. *Id.* at 205–07.

222. *Id.* at 209.

support.²²³ This method of deterrence, the court seems to indicate, is the price of pleasure.²²⁴

As the dissent noted, “[t]he majority’s decision allows . . . the birth of a child to carry criminal sanctions,” making it “the only court in the country to declare constitutional a condition that limits a probationer’s right to procreate based on his financial ability to support his children.”²²⁵ Although the dissent is technically correct, the majority’s decision only goes a step beyond what most laws already encourage, merely taking our approach to child support obligations to its logical conclusion. Child support laws *discourage* people from procreating based on their financial ability to support their children; *Oakley* takes the further step of *prohibiting* a father from procreating based on his limited financial income. The outcome in *Oakley* can be justified and distinguished from what most other courts do because the prohibition was imposed as part of a criminal sentence: it was permissible because “convicted individuals do not enjoy the same degree of liberty as citizens who have not violated the law.”²²⁶ But despite its distinguishing features, the result in *Oakley* should not be a surprise, as it simply represents the ultimate realization of a criminal-law-based deterrent approach.

Oakley illustrates the type of deterrence permissible under a criminal regime, which would be unavailable under a civil system. The curtailment of rights seen in *Oakley* is permissible only after someone has been convicted of a crime, even the crime of failing to pay child support. The result we see in *Oakley* would be much harder, if not impossible, for courts to accept in a civil or family law setting. Likewise, the *Oakley* court relies on rehabilitation, another theory of punishment invoked primarily in the criminal context. Most of the reasons proffered by the majority in support of this ultimate form of deterrence rely on the sanction’s presence in the criminal system.

Deterrence is not the only motivation for placing child support enforcement under the ambit of criminal law. Criminal convictions are intended to convey moral condemnation and judgment. As a result, criminalizing the reproductive decisions of poor fathers carries significant consequences. If a poor father is convicted for engaging in careless sex that resulted in a child he is unable to financially support, he faces not only incarceration but also the fairly unshakeable lifelong stigma of a criminal

223. *See id.*

224. *See id.* Thank you to Susan Appleton for suggesting this word choice. Shari Motro has used the phrase to make a somewhat different point in her article by the same name. *See* Shari Motro, *The Price of Pleasure*, 104 NW. U. LAW. REV. 917 (2010). I wish to credit her also with this terminology.

225. *See Oakley*, 629 N.W.2d at 216 (Bradley, J., dissenting).

226. *Id.* at 208 (majority opinion).

conviction. We have deemed that to be an appropriate response because of our moral judgments and beliefs about sex and fatherhood.

As a result, fathers, whose only crime is failing to financially support the mother of their child or to reimburse the state for doing so, face lifelong condemnation. The stigma associated with having a criminal conviction is a punishment that usually lasts much longer than the more palpable deprivations of incarceration, parole, or probation. Being branded a “criminal” carries broad, indefinite, and quantifiable ramifications.²²⁷ Although judgment and commitment orders do not articulate this aspect of punishment in their official documentation of a person’s criminal sentence, a person with a criminal conviction continues to be both legally and practically “deprived of some of the normal rights of a citizen”²²⁸ long after his criminal sentence ends. Those additional, often life-long deprivations may be tangible deprivations, such as continued disenfranchisement and the removal of employment opportunities otherwise available,²²⁹ or intangible, such as the denial of marital relationships that otherwise might have been pursued but for the other’s views of the defendant’s criminal conviction,²³⁰ diminishment of a person’s mental and physical health because of the emotional and physical toll of incarceration, and the stigma of having been identified and sanctioned as a “criminal.”²³¹ For most, these life-long deprivations are every bit as real a part of the punishment as the technical sentence imposed by a judge in a criminal case.

Most fathers who are convicted and sentenced for failing to pay child

227. See, e.g., Rasmusen, *supra* note 15; cf. Bronsteen et al., *supra* note 15, at 1049–55 (discussing long-term effects of prison on well-being).

228. John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 10 (1955).

229. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 32–35 (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 120–25 (2006); Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 *CRIME & DELINQ.* 410, 412–13 (2001). Tennessee is the only state that continues to disenfranchise noncustodial parents who fail to pay their child support obligations. *Policy Briefing*, CTR. FOR FAM. POL’Y & PRAC., Oct. 2012, at 2.

230. WESTERN, *supra* note 229, at 146–47; Beth M. Huebner, *The Effect of Incarceration on Marriage and Work over the Life Course*, 22 *JUST. Q.* 281, 296 (2005); Leonard M. Lopoo & Bruce Western, *Incarceration and the Formation and Stability of Marital Unions*, 67 *J. MARRIAGE & FAM.* 721, 721 (2005); Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 *J. HEALTH & SOC. BEHAV.* 115, 117 (2007); see also VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 30 (2011) (“[Punishment] destroys and hinders the development of relationships between the offender and his family and friends, many of whom will feel ashamed and distressed at the punishment of the offender.”).

231. Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 *J. HEALTH & SOC. BEHAV.* 56, 57 (2008); Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 *L. & SOC’Y REV.* 275, 296 (2008); Schnittker & John, *supra* note 230, at 125. The decline in physical health begins once someone serves a period of incarceration of twelve months and continues beyond their release from prison. Massoglia, *Incarceration as Exposure*, *supra* note 231, at 67 app.

support are ordered to pay the outstanding debt as part of their criminal sentence. At this point, the father's obligation to pay child support stems from both an administrative or court order based on paternity and now a criminal court order requiring the father to pay the child support as a condition of his sentence. A restitution debt imposed as part of a criminal sentence is visibly marked as a criminal punishment by its presence on a judge's final disposition order, and it in turn continues to mark the person owing restitution as a "criminal." Both a child support order and a criminal restitution order can remain outstanding even after every other aspect of a criminal sentence has been completed. Additionally, either order alone can be the source of a person's continued disenfranchisement or failure to obtain certain employment opportunities. Both debts are life-long, as neither is dischargeable in bankruptcy.²³² A child support order is a continuing, weighty consequence bearing down on the convicted defendant and depriving him of "some of the normal rights of . . . citizen[s]."²³³

B. *The Crime of Being a Poor Father*

Once we realize that the only explanations for our current child support system are deterrence, moral condemnation, and stigma of the reproductive decisions of primarily poor fathers who fail to financially provide for their children or who fail to reimburse the state for doing so, the question becomes *how?* How did we get to a place as a society where not paying child support is worthy of this level of condemnation and sanction? The ostensible answer is always the child's welfare: we punish fathers because we care about the well-being of the child. Yet, as we have seen, if child welfare were truly the concern, our focus would not be on increasing child support payments but on facilitating the child's relationship with her father and increasing state support for all members of the child's family. Although child welfare *should* be at the heart of our concern, it is not. Rather, we punish fathers because they fail to fit the traditional, stereotypical image of a white, able-bodied, upper-middle-class father. Very few families conform to this image, yet our laws remain wedded to this deeply entrenched role—so much so that we are willing to punish men who do not conform.

Underlying our society's approach to child support obligations are strong gender-, class-, and race-based norms. As Laurie Kohn explains,

232. See A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, and Beyond*, 84 WASH. U.L. REV. 1861, 1881–83 (2006); see also, e.g., *Kelly v. Robinson*, 479 U.S. 36, 53 (1986) (holding that criminal restitution orders are not dischargeable in Chapter 7 bankruptcy proceedings); *In re Verola*, 336 B.R. 547, 550–52 (S.D. Fla. 2004) (same).

233. See Rawls, *supra* note 228, at 10.

“[t]he legal system expresses the clear message that the role of a father is to provide for his children financially, and in fulfilling or failing in that role, a father’s value to his children is determined.”²³⁴ When fathers fail to fulfill that role, they are portrayed as a “deadbeat dad” who is irresponsible at best, ill-intentioned and deserving of scorn at worst. If a father is too poor to pay, people say, “He should have thought about that before getting someone pregnant.” As with all criminal justice interventions in this era, men of color, particularly African-American men, are disproportionately affected by the decision to treat the failure to pay child support as a crime.

Throughout our country’s history, “welfare policy has distinguished between people presumed able to work, and those presumed unable.”²³⁵ As one state court said in reference to a defendant whose unemployment led to incarceration, he, like any able-bodied adult, should be able to “get a job flipping hamburgers at MacDonald’s [sic].”²³⁶ Able-bodied men are “treated as unworthy of assistance” and punished if they do not work.²³⁷ Able-bodied fathers of no and low income are not only seen as unworthy of public assistance, they are seen as the cause of the poverty experienced by women with children.²³⁸

The deep legacy of the belief that any man can pull himself up by his bootstraps in this country has led many to believe that an able-bodied man’s unemployment must be voluntary—some form of laziness.²³⁹ If able-bodied fathers of limited economic means are the cause of mass poverty, they also are the potential cure. If they only would go to work and provide for their families, poverty would be greatly reduced and child support debts would be eliminated. In short, the law places both “the burden and responsibility of poverty squarely on the backs of fathers.”²⁴⁰

Many men embrace this gender role and are ashamed of their seeming inability to rise out of their financial circumstances and “man up.” One study of low-income African-American men found a significant number believe “real men are responsible to provide for themselves and their families.”²⁴¹ Yet many of these men were unable to provide for their families.²⁴² “African American fathers who [do] not live with their children [are] more

234. Kohn, *supra* note 19, at 53.

235. Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 903 (2013) (quoting Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1252–53 (1983)).

236. *Moss v. Superior Court*, 950 P.2d 59, 63 (Cal. 1998).

237. Hatcher, *supra* note 235, at 902–03.

238. *Id.* at 905, 907.

239. *Id.* at 905.

240. *Id.* at 907.

241. Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 258 (2015).

242. *Id.*

likely to” be involved in their children’s lives than white or Latino fathers.²⁴³ But that role is underappreciated both by society and by the law.

In the conception of father as breadwinner and provider, there is no space for other aspects of fathering, such as caretaking; noncash support like helping maintain property; providing means for travel or making meals; or in-kind contributions in the form of food, clothing, toys, child care, or other assistance.²⁴⁴ Fathers are valued solely for their paycheck. Many fathers want to be able to contribute, and if they cannot contribute financially, they want to be present and make other contributions when they are able.²⁴⁵ In fact, many fathers do contribute to their children’s lives through the purchasing of goods and services for their children, and they prefer this type of contribution to just handing over money to the government or the custodial parent.²⁴⁶ The most recent available data shows that 61.3% of noncustodial parents provide at least some type of noncash support for their children.²⁴⁷ Custodial mothers generally are not opposed to these contributions, as especially low-income mothers “often conclude that they are more likely to receive money from struggling low-income fathers through informal payments.”²⁴⁸ Additionally, mothers often prefer to have their child’s father engaged in their child’s life.²⁴⁹ Fathers who provide in-kind contributions often deliver them in person, thereby facilitating contact between themselves and their children.²⁵⁰

Class plays a pivotal role in child support law as well. “Most families with incomes above \$50,000 do not participate in the [child support] program.”²⁵¹ Until the 1970s, child support was not a public issue.²⁵² “Absent parents were not pursued. . . . Paternity was rarely ascertained.”²⁵³ The primary reason for the shift in approach to child support was because Congress wanted to reduce the federal cost of the child welfare system.²⁵⁴ Prior to the Child Support Act of 1974, “since the Aid to Families with Dependent Children (AFDC) system was paying for the child, support enforcement seemed quite unnecessary.”²⁵⁵ Any attempts to get fathers to

243. Huntington, *supra* note 35, at 190.

244. Kohn, *supra* note 19, at 69, 90–91.

245. *Id.* at 91.

246. Kohn, *supra* note 19, at 91; Maldonado, *supra* note 30, at 1004–05.

247. GRALL, *supra* note 42, at 14.

248. Kohn, *supra* note 19, at 91.

249. *Id.* at 91–92.

250. Maldonado, *supra* note 30, at 1006.

251. SORENSEN, *supra* note 90, at 3.

252. Krause, *supra* note 211, at 4.

253. *Id.*

254. *Id.*

255. *Id.* at 4.

pay child support were quickly dropped as “the funds thus collected . . . would only be offset against AFDC entitlements,”²⁵⁶ and might harm family structures by driving fathers away.²⁵⁷

If people with wealth were failing to pay to support their children, the state would have little interest in getting involved. After all, courts and legislatures generally emphasize familial privacy and deference to parental judgment when the welfare system is not implicated.²⁵⁸ The motivating reason for the state’s involvement, both historically and in recent years, is a desire to reduce the number of people who rely on the state for support.²⁵⁹ The state has a fiscal interest in cabining the responsibility for a child’s well-being in the private sphere. Laura Rosenbury has articulated:

[T]he ultimate value underlying legal recognition of [the] family [is] the value of private family support. The government affirmatively recognizes certain intimate relationships . . . in order to incentivize individuals to privately address the dependencies that often arise when adults care for children Indeed, states originally recognized marriage and the parent-child relationship as a means to encourage men to assume responsibility for women’s and children’s dependencies. . . . The government therefore recognizes and bestows benefits on families so that they will serve a private welfare function, minimizing reliance on state and federal coffers. . . . Instead of bestowing positive rights “to cash welfare, to housing, or to education,” states bestow the status of spouse, parent, or child and attach limited benefits to them.²⁶⁰

Private solutions appeal not only to people who desire a fiscally conservative government but also to liberal feminists who have felt men should

256. *Id.* at 4–5.

257. *Id.* at 5.

258. See, e.g., HASDAY, *supra* note 56, at 196.

259. See, e.g., *Child Support Enforcement: Hearing Before the S. Comm. on Fin.*, 104th Cong. 2 (1995) (opening statement of Sen. Alan K. Simpson, member, S. Comm. On Fin.) (“Child support is important in the welfare debate because, if child support is collected, mothers obviously have a better chance of staying off welfare.”); STANLEY, *supra* note 79, at 116 (“There is, in just principle, . . . nothing which a government has more clearly the right to do than to compel the lazy to work.” (quoting 1 JOEL BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION* 273–74 (8th ed. 1892))); Alison Lefkowitz, *Men in the House: Race, Welfare, and the Regulation of Men’s Sexuality in the United States, 1961–1972*, 20 J. HIST. SEXUALITY 594, 610 (2011) (“Parental failure to support should be made a federal offense—because federal money is involved.” (quoting testimony of Stanford University economist Roger Freeman, presidential advisor to Presidents Eisenhower and Nixon)); Onwuachi-Willig, *supra* note 79, at 1654 (“The ultimate goal of these governmental efforts was . . . to force freed black people to comport with the heteronormative ideal of the nation’s perceived national familial identity—the self-sufficient American family with a working husband and a dependent wife and children—and to therefore absolve the government of responsibility for financially supporting needy black women and children.” (footnotes omitted)).

260. Rosenbury, *supra* note 202, at 1866–67 (footnotes omitted).

be required to financially support the children they chose to bring into the world.²⁶¹

As a result, legislatures and courts focus on “personal responsibility,” by which they “communicate that participating in heterosexual intercourse has consequences, at least the risk of legally imposed child support obligations.”²⁶² If families do not address their own needs as required under this legal regime, “the state often intervenes in a punitive fashion.”²⁶³ But if families have the resources to provide sufficient financial support for their dependents, the state grants those family members the benefits of limited intervention and disruption of the family relationships, heightened privacy, and deference to the family judgments.²⁶⁴ In short, the state defers to individual family members’ judgments when those families are middle- and upper-class. If the individuals involved in those relationships could provide private family support for their children, the state would only be minimally involved, if at all—ideal from the state’s perspective.

The implications of the class-centeredness of these laws cannot be overlooked. Fathers with little or no income are more likely to be incarcerated for failing to pay their child support obligations.²⁶⁵ The most effective mechanism for ensuring compliance with child support obligations is the garnishment of wages.²⁶⁶ In fact, recent data suggests that approximately 72%–75% of child support collections nationwide were attributable to the withholding of income from noncustodial parents’ paychecks.²⁶⁷ But for fathers with little or no income, wage garnishment is not an option, as most of these fathers do not have regular paychecks. As a result, noncustodial parents with resources can avoid more significant consequences, such as incarceration or a criminal conviction, whereas those for whom wage garnishment is not an option face stiffer penalties.²⁶⁸

Poor fathers are also more likely to be affected by the many collateral consequences that attach to child support arrears.²⁶⁹ These collateral consequences include withholding of a driver’s or other professional license;²⁷⁰ poor credit history; difficulty getting a bank account; and, in the

261. Appleton, *supra* note 31, at 363–64; Mayeri, *supra* note 38, at 2299–300.

262. Appleton, *supra* note 31, at 360.

263. Rosenbury, *supra* note 202, at 1867.

264. HASDAY, *supra* note 56, at 196.

265. Brito, *supra* note 19, at 619–20.

266. OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, at 34 tbl.P-29; SORENSEN, *supra* note 90, at 5.

267. OFFICE OF CHILD SUPPORT ENF’T, *supra* note 175, at 34 tbl.P-29 (approximating 72% of 2017 collections); SORENSEN, *supra* note 90, at 5.

268. SOLOMON-FEARS, SMITH & BERRY, *supra* note 9, at 13; Brito, *supra* note 19, at 619.

269. Hatcher, *supra* note 235, at 909–10.

270. *Id.* at 910; Kohn, *supra* note 19, at 70.

event one does get a job with a steady paycheck, garnishment of 65% of any wages.²⁷¹ These consequences often have a direct impact on an economically disadvantaged father's work opportunities and access to parenting time.²⁷² Whereas a father with sufficient financial means likely could work around these hurdles, for someone with little to no income, not being able to drive to work or get a professional license that would allow for a regular income can have devastating effects. These consequences are all in addition to the previously discussed burdens carried by someone with a criminal conviction.

As a result, "[t]he world of child support quickly suffocates poor fathers in a combination of deep frustration and apathy."²⁷³ Aggressive child support enforcement for those who cannot afford to pay is counter-productive. The consequence is likely to be reduced payments.²⁷⁴ Similarly, "[e]nforcement can alienate a father to the point that he can become unwilling to work with the mother to best support their child."²⁷⁵ These results are not beneficial for the child in the middle of this system, the custodial parent relying on this income, or the state seeking to receive reimbursement.

Because statistics are not kept, one can only rely on anecdotal evidence and inference to reach the inevitable conclusion that race interacts with gender and class in the child support system as well. Evidence suggests criminalizing the failure to pay child support disproportionately affects noncustodial African-American parents.²⁷⁶ More than half of the custodial parents who receive both state assistance and child support are people of color;²⁷⁷ 27% are African-American and 20% are Latino.²⁷⁸ Several studies suggest that arrests for nonpayment of child support occur far more often in minority communities.²⁷⁹ Certainly disparities in arrest, conviction, and incarceration rates between white and black men occur with regularity in other areas of the criminal justice system.²⁸⁰

The invocation of the criminal justice system to address issues of child support debt has contributed to the incarceration problem in this country.

271. Hatcher, *supra* note 235, at 909–10.

272. *Id.* at 910; Kohn, *supra* note 19, at 70–71.

273. Hatcher, *supra* note 235, at 910.

274. Kohn, *supra* note 19, at 83–84.

275. *Id.* at 82.

276. SOLOMON-FEARS, SMITH & BERRY, *supra* note 9, at 15.

277. KYE LIPPOLD & ELAINE SORENSEN, THE URBAN INST., CHARACTERISTICS OF FAMILIES SERVED BY THE CHILD SUPPORT (IV-D) PROGRAM: 2010 CENSUS SURVEY RESULTS 9 (2013).

278. *Id.* at 9.

279. REBECCA MAY, CTR. ON FATHERS, FAMILIES & PUB. POL'Y, THE EFFECT OF CHILD SUPPORT AND CRIMINAL JUSTICE SYSTEMS ON LOW-INCOME NONCUSTODIAL PARENTS 19 (2004).

280. *Id.* at 18–19.

Black men are disproportionately represented in the prison population. Many of them are incarcerated for their failure to pay child support; others have child support obligations that remain outstanding during their period of incarceration. More than half of all inmates have at least one child under the age of eighteen.²⁸¹ Approximately a quarter of all those incarcerated in the U.S. have a child support case.²⁸² These numbers do not account for those incarcerated in local jails.

As previously discussed, a father's incarceration has a negative effect not only on his ability to pay off any debts but also on his ability to support a child financially or otherwise.²⁸³ More than five million children have a parent who lived with them become incarcerated at some point in the child's life, and children of color again are disproportionately affected.²⁸⁴ Children with an incarcerated parent usually are living in low-income families of color, often with a young, single mother of limited education.²⁸⁵ "African-American and Latino [children] are over seven and two times more likely, respectively," than white children "to have a parent incarcerated."²⁸⁶

Children encounter numerous barriers to continuing a relationship with an incarcerated parent. In addition to the fact that fathers often are incarcerated at facilities in far away, inaccessible locations, the nature of a child's interactions with her father are greatly curtailed. Usually there is no direct physical contact permitted, conversations are monitored, and the length of time one can visit is limited and only permitted during certain windows of time.²⁸⁷ Phone calls, which are the most common form of communication with an incarcerated parent, are outrageously expensive and are monitored by corrections authorities.²⁸⁸ Letters are likewise monitored.²⁸⁹ In short, nothing about the set-up is conducive to encouraging a parental relationship.

Numerous studies document the negative effects of a parent's incarceration on a child's well-being.²⁹⁰ One recent study indicated that approximately two-thirds of fathers never received a visit from their child

281. *Child Support and Incarceration*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 6, 2018), <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx>.

282. *Id.*

283. *See, e.g.*, Dennis, *supra* note 20, at 327–29.

284. *Id.* at 328.

285. ANNIE E. CASEY FOUND., *supra* note 155, at 2.

286. *Id.*

287. Dennis, *supra* note 20, at 328.

288. *Id.*

289. *Id.*

290. *Id.* at 328–29; Kohn, *supra* note 19, at 85–86.

while incarcerated.²⁹¹ A study of fathers in prison found that almost 42% of fathers who did not live with their child prior to incarceration only had contact with their child once a month or less.²⁹² Absent fathers can lead to increased mental health issues, diminished levels of school achievement, disproportionate representation in the juvenile justice system, and greater risk of adolescent pregnancy.²⁹³ “[F]or children who seek relationships with their fathers, paternal interactions can have a significant positive emotional impact.”²⁹⁴ As already discussed, when fathers positively engage with their children, they can play important roles in the lives and successes of their children.²⁹⁵

The intersectionality of gender, class, and race undergird our child support system. Here, we see the well-documented move toward privatizing the family law system and the subsequent effect on poor families running headlong into the criminal justice system, with devastating and deeply troubling effects. The privatization of family law is used to justify criminal sanctions for a failure to pay a private debt or failure to reimburse the state so the privatization remains complete. As a result, many men are incarcerated in what amounts to a modern-day debtors’ prison. This system neither benefits children nor is an effective or cost-efficient system for the state.

IV. PROPOSED SOLUTIONS

Documenting concerns about the current child support system raises numerous questions regarding how best to address the concerns while also ensuring that children grow up with the resources and support they need.

A. *The Need for Better and More Transparent Data*

A close analysis of the system reveals just how little information is available. According to this author’s research, no state or federal agency documents or reports the number of people prosecuted or incarcerated for a criminal charge of failing to pay child support.²⁹⁶ Without such data, knowing the full extent of the problem is impossible. Any proposal for

291. MINDY HERMAN-STAHL, MARNI L. KAN & TASSELI MCKAY, INCARCERATION AND THE FAMILY: A REVIEW OF RESEARCH AND PROMISING APPROACHES FOR SERVING FATHERS AND FAMILIES § 4.2.1 (2008).

292. Kohn, *supra* note 19, at 77.

293. ANNIE E. CASEY FOUND., *supra* note 155, at 3; Kohn, *supra* note 19, at 85–86.

294. Kohn, *supra* note 19, at 85.

295. *Id.* at 85–86.

296. Similarly, no agency appears to be keeping data on how many people are civilly detained for failing to pay child support.

fixing the system must start with a requirement that states and the federal government collect that data.

Similarly, the data collected by the Office of Child Support Enforcement should be separated out in a clear and accessible manner, separate from data related to foster care and other programs. Information related to how much money is going to reimburse state and federal governments for state assistance programs should be distinct from that going toward the foster care system. Information about the fact that the government is both funding and getting reimbursed by the system should be clearly identified, and data looking at the system without that subsidy should be analyzed.

B. Changes to the Child Support Calculations

In order to avoid some of the current problems, the surface level fix would simply be to make several changes to the child support system to better ensure it protects a child's welfare. One could argue that we need to change the way child support obligations are calculated. Child support formulas should be adapted to ensure that the child support ordered actually correlates with the father's ability to pay. Part of this may entail removing "potential" income from the calculation, having a more realistic assessment of liquid assets in the child support formula, and allowing for easier modifications of child support orders if a parent's financial circumstance changes. Child support obligations should be suspended while a parent is incarcerated, and the law should be changed so interest no longer accrues on child support obligations.

Last year, the federal Office of Child Support Enforcement (OCSE), which works with state and tribal governments to enforce and facilitate consistent child support payments, modified the federal regulations governing child support orders to try and ensure that the amount of child support ordered more closely matches the noncustodial parent's actual income.²⁹⁷ For example, the Department of Health and Human Services (DHHS) recently promulgated a federal regulation entitled "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs," whose aim is to "give states needed flexibility to increase the accuracy and accountability of support orders."²⁹⁸ According to an overview released by DHHS, "[r]esearch finds that setting an accurate order based upon the noncustodial parent's ability to pay improves the chances that the parent will comply

297. See U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 8.

298. *Id.* at 1; see also Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492 (Dec. 20, 2016).

with the support order and continue to pay over time.”²⁹⁹

The recent changes also allow for new consideration of a parent’s incarceration. Prior to the passage of this regulation, most states barred noncustodial parents from seeking review and adjustment of their child support obligations if they were incarcerated, thus treating incarceration as “voluntary unemployment.” Recognizing that those who are incarcerated “usually have limited earnings ability while in prison,” leading to the accrual of “tens of thousands of dollars of child support debt that interfere with employment success, [and] resulting in higher rates of nonpayment upon release from prison,” the new regulation requires that a state “not exclude incarceration from consideration as a substantial change in circumstances, such as by treating incarceration as ‘voluntary unemployment.’”³⁰⁰ “[A]fter learning that a parent who owes support will be incarcerated for more than 180 calendar days, the state must either send a notice to both parents of the right to request a review and adjustment or automatically initiate a review and adjustment after notifying both parents.”³⁰¹

Similarly, in a promising move, the new regulation allows a custodial parent to seek help in establishing paternity through child support services without requiring the court to impose a child support obligation if paternity is ascertained and neither parent desires such an obligation.³⁰² It also allows for states to close cases if a court has determined that collection of the support obligation is “extremely unlikely based on the circumstances, such as very serious work-limiting disability of the noncustodial parent.”³⁰³

These new provisions went into effect in early 2017.³⁰⁴ As a result, it is too soon to tell whether they will be implemented in a manner that is effective in reducing child support debt and helping noncustodial parents and their children. By removing at least one obstacle toward cooperation between a child’s parents—namely the requirement that the court impose child support once paternity is ascertained, whether the custodial parent wants that or not—the new regulation opens the door to other legal changes that might help to strengthen the position of poor and working-class fathers.

C. Eliminating Debtors’ Prisons

A requisite first step in keeping people from being incarcerated for

299. U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 8, at 2.

300. *Id.* at 3.

301. *Id.*

302. *Id.*

303. *Id.*

304. 45 C.F.R. §§ 301–05, 307–09 (2016).

failing to pay child support is the decriminalization of the act. At the very least, removing criminal sanctions would lead to less incarceration for failing to pay than we currently have, and it would eliminate the stigma and the collateral consequences that attend a criminal conviction. Yet, as has been discussed at length in the context of the decriminalization of other misdemeanors, decriminalization can have significant downsides.

Professor Alexandra Natapoff has written extensively about the negative consequences that accompany decriminalization. Professor Natapoff explains,

[D]ecriminalization represents the next generation of the “net-widening” phenomenon. Net-widening refers to reforms that make it easier to sweep individuals into the criminal process, and decriminalization does so in sophisticated ways. . . . [It does so] by turning to supervision and fines as indirect, long-term constraints on defendant behavior, and by extending the informal consequences of a citation or conviction deep into offenders’ social and economic lives. . . .

. . . .
 . . . [Decriminalization] exemplifies a larger institutional and social compromise: the embrace of more diffuse and less formal modes of punishment as a way of adapting America’s massive criminal apparatus to a new age of resource scarcity and unease about mass incarceration.³⁰⁵

One can certainly envision how removing criminal sanctions from the child support system could still have the negative effects Professor Natapoff discusses. Already with civil enforcement procedures in place, a noncustodial parent delinquent on his child support obligations can be incarcerated for an unpredictable period of time without ever seeing a lawyer.³⁰⁶ Although the stigma and collateral consequences of a criminal conviction are absent, this option does not seem dramatically better for the father, the child, or the state. Incarceration through this type of “punitive injunction” will not make the father any more able to pay than he was prior to the incarceration.³⁰⁷ Rather, this approach becomes just another way of “manag[ing] the poor and socially marginal”³⁰⁸ and sending a message about the “moral depravity” of fathers who are in this position.³⁰⁹

Despite these apparent downsides, legislators should still decriminalize the failure to pay child support. But in addition, incarceration should be removed as a punishment for civil contempt, the charge states use to punish so-called “deadbeat dads” on the civil side. Legislatures should adopt the

305. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059, 1061 (2015).

306. See *Turner v. Rogers*, 564 U.S. 431, 448–49 (2011).

307. See Nirej S. Sekhon, *Punitive Injunctions*, 17 U. PA. J.L. & SOC. CHANGE 175, 178 (2014).

308. *Id.* at 192.

309. *Id.* at 215.

language proposed by Professor Natapoff: “No defendant shall be incarcerated for civil contempt or given extended supervision or probation solely because of a failure to make full payments of fees, fines, or costs under this provision.”³¹⁰ As Natapoff points out, this type of statutory language would “bring civil contempt into closer alignment with constitutional doctrine that constrains criminal law,” alluding to *Bearden* and its predecessor cases.³¹¹ Similarly, the law should make clear that civil offenses, such as civil contempt, “do not give rise to a criminal record or other collateral consequences.”³¹²

Legislators should also remove the federal requirement that custodial parents “assign” their child support income to the government when they seek state assistance. Poor fathers should not be financing the state’s “welfare” program or facing any sort of sanction if they are unable to do so. States should budget their state assistance programs without counting on this income.

Although they number fewer than most people think, parents who have the ability to pay but are not actually paying child support do exist. As previously indicated, however, those with the ability to pay are usually not the ones who end up with a criminal record or sanctions. Wage garnishment and tax refund offsets are effective ways of getting payments from those more well-to-do individuals.

D. Define “Child Support” More Broadly

In recognition of the current practice in many families and the desires of many custodial and noncustodial parents, the child support system should recognize and value a noncustodial parent’s nonfinancial contributions equal to the financial ones. If having the father present in his child’s life is most important for the child’s development and well-being, the law should recognize as much and facilitate, rather than impede, these interactions. If criminal sanctions and incarceration are removed as barriers to a father’s interactions with his child, those changes, in conjunction with a legal recognition of a father’s full range of parenting skills, will go a long way toward encouraging a father’s presence in his child’s life.

Changing the law to permit in-kind contributions would help remove some of the barriers to father–child engagement, as evidence has shown that in-kind contributions encourage paternal involvement.³¹³ Many Afri-

310. Natapoff, *supra* note 305, at 1112.

311. *Id.*

312. *Id.* at 1113.

313. Maldonado, *supra* note 30, at 1005.

can-American fathers with little to no income regularly make in-kind contributions.³¹⁴ In fact, fathers with little to no income often prefer to make in-kind contributions, viewing the purchase of a few “symbolically important items” such as diapers, baby formula, and shoes as of “greater value and significance” than making cash payments.³¹⁵ These contributions can feel more visible and enduring than cash contributions.³¹⁶

As Laurie Kohn has suggested, noncash support could be utilized in a manner similar to that provided by the guidelines regulating child support on Native-American land.³¹⁷ Federal regulations permit Native American tribes to allow “noncash payments” to satisfy child support obligations.³¹⁸ The child support order outlines the specific dollar amount of the child support obligation and what type of noncash support will be permitted to satisfy that particular dollar amount.³¹⁹ An OCSE publication provides an example:

[A] [t]ribal support order could provide that an obligor owes \$200 a month in current support, which may be satisfied with the provision of firewood suitable for home heating and cooling to the custodial parent and child. The order could provide that a cord of firewood has a specific dollar value of \$100 based on the prevailing market. Therefore, the obligor would satisfy his support obligation by providing two cords of firewood every month.³²⁰

Fathers also should be encouraged to be both caregivers and breadwinners.³²¹ Many fathers want to spend time with their children but feel they should only do so if they have money to spend on them.³²² The law should aid fathers in engaging in caretaking responsibilities, thereby increasing their involvement in their children’s lives. In fact, many African-American fathers with little income see their children regularly.³²³ These fathers “take their children to and from school, help [their children] with . . . homework, take them to the doctor, and [spend time with] them

314. *Id.* at 1004–05.

315. *Id.* at 1005.

316. *Id.*

317. Kohn, *supra* note 19, at 90 & n.164; *see also* 45 C.F.R. § 309.105 (2016).

318. 45 C.F.R. § 309.105(a)(3).

319. 45 C.F.R. § 309.105(a)(3)(i)–(ii). The current federal guidelines do not permit payments that custodial parents have assigned to the state to be satisfied by noncash payments. 45 C.F.R. § 309.105(a)(3)(iii).

320. OFFICE OF CHILD SUPPORT ENFORCEMENT, TRIBAL AND STATE JURISDICTION TO ESTABLISH AND ENFORCE CHILD SUPPORT 74 (2007), <https://www.acf.hhs.gov/css/resource/tribal-and-state-jurisdiction-to-establish-and-enforce-child-support>.

321. Huntington, *supra* note 35, at 234.

322. *Id.* at 211.

323. Maldonado, *supra* note 30, at 1006.

while their mothers [are at] work or run[ning] errands.”³²⁴ As with in-kind contributions, the law should find a way to value these interactions and take them into consideration as part of the father’s support obligation.

Of course, there may be times when encouraging a child’s “high-quality relationship with each parent”³²⁵ is not feasible. For example, if a father has been abusive to the child, fostering a relationship with him simply may not be a good option. As others have recognized, “it is essential that the reforms not compromise safety.”³²⁶ Likewise, there may be times when one parent is not particularly interested in having a relationship with his or her child. The changes proposed here are not intended to *require* a parent’s involvement in his or her child’s life; rather, they are meant to facilitate the child’s relationship with each parent to the extent that relationship is desired by both parties. Unfortunately, nothing the law can do will cause a parent to have a change of heart regarding the desire to participate in the life of his or her child. But the law can remove obstacles in a manner that encourages parents who want that relationship to be able to have it.

E. Establishing Support Services for Poor Fathers

A family’s resources can affect a child’s development. As a result, at the time when a court enters a child support order, a realistic assessment of the father’s earning potential should be established. Currently, not all states require a noncustodial parent to be present when a child support order is entered. As a result, the noncustodial parent cannot advocate for himself and inform the court or administrative hearing officer of his income status. Instead, courts and administrative officers are dependent on the custodial parent’s assessment of her coparent’s resources. The law should prohibit courts and administrative officers from entering child support orders *in absentia*. Otherwise, courts will have a difficult time accurately assessing a father’s earning potential.

Once that change is made, an additional part of the process should include identifying those fathers who are lacking in education or vocational training or who are suffering from some type of disability that might prevent them from contributing financially to their children’s upbringing. Each state already has a variety of resources in place through the Department of Education to work with people who need rehabilitation and job training. A mechanism should be put in place to connect these particularly vulnerable fathers with the already-existing state Divisions of Vocational

324. *Id.*

325. Huntington, *supra* note 35, at 236.

326. *Id.* at 237.

Services and Rehabilitation Services Administrations who can help them with job training and vocational rehabilitative services. Because these programs already exist, this proposal would be a cost-effective method of helping these fathers expand their options and increase the chances that they might be able to financially contribute to their children's upbringing.

F. Re-envisioning the Child Support System?

Although the changes discussed in the previous parts might make our current child support system better, simply amending the current system does not address the deeper question of whether the current child support system is so fundamentally broken that we should abandon it in favor of a new approach. One issue raised by this Article is whether the child support system should be regulated by states at all. In almost no other area do states regulate the enforcement of debts between two private parties. With child support obligations, not only do states heavily regulate the enforcement of those debts, but federal and state laws also prohibit a noncustodial parent from discharging the debt in bankruptcy proceedings. In other words, if a noncustodial parent incurs child support debt, he will be stuck with that debt and the interest it accrues for life.

For that portion of child support debt that a noncustodial parent owes to the state to reimburse it and the federal government for the costs of state assistance provided to the custodial parent, the set-up is equally, if not more, problematic. Although the government has long been reluctant to provide financial assistance to those who are poor and struggling to make ends meet, the reality is that every state and the federal government continue to have some version of state assistance. Many find the argument that the state should step in and ensure that everyone has some minimal level of provisions persuasive: "If fathers do not pay child support, then the state pays what the mother is owed."³²⁷ Most do not realize that the state is expecting noncustodial parents with little to no income to reimburse the state for those obligations. Certainly for noncustodial parents who are in a position to do so, that reimbursement might be appropriate. But most of the custodial parents who are requesting and receiving state assistance do not share a child with a noncustodial parent of such means. The state's expectation of reimbursement from these fathers of no and low income seems unrealistic.

Yet the state goes beyond simply expecting a poor father to reimburse the costs of state assistance. The state expends additional resources to

327. See, e.g., Huntington, *supra* note 35, at 235 (discussing how many European countries have such a child support guarantee, despite its political infeasibility in the U.S.).

enforce this financial obligation. In fact, the Office of Child Support Enforcement's very name exemplifies this focus. The government spends money to track down the noncustodial parent and take them to court in order to try to get money from parents who usually do not have any, or very little, to give. Every year, the government spends money trying to establish paternity in approximately one and a half million cases in order to get these fathers under supervision of the child support system.³²⁸ In 2016, over 1.7 million cases "[r]equir[ed] [s]ervices to [e]stablish a [s]upport [o]rder."³²⁹ In the event a father does not pay, additional state money is spent incarcerating him to try to obtain payment. This is not a cost-effective system, and it certainly does nothing to help the welfare of the child or the fiscal well-being of the state, as has already been discussed.

This Article could take the position that the current child support system should be entirely dismantled and replaced with a different method of helping children grow and flourish despite coming from a family with little or no income. The odds of such a dramatic change occurring are slim, however, and despite the strong appeal of this proposal, this author has chosen to consider more realistic options that might actually have a chance of successfully being implemented. Many of the changes outlined above could go far toward making the child support system a very different and better functioning system.

CONCLUSION

The child support system "perpetuates the traditional gender norm that fathers are valuable only as breadwinners."³³⁰ Ultimately, only if we are able to unmoor our deeply class- and race-based ideas about gender roles will we be in a position to effectively change our laws to encourage fathers to realize their full potential, which will in turn allow their children and their children's mothers to fully embrace their own paths.

For now, the child support system remains yet another government program that reinforces cycles of poverty and criminal justice involvement for poor fathers. Criminal law should not play a role in sanctioning people for failing to pay either a private debt or a public debt incurred because the person's former partner sought state assistance. Instead, legislators and courts should make changes to the child support system so that it more effectively promotes and protects a child's well-being.

328. OFFICE OF CHILD SUPPORT ENF'T, *supra* note 175, at 76 tbl.P-71.

329. *Id.* at 83 tbl.P-78.

330. Huntington, *supra* note 35, at 233.