

### C. Enforcing Child Support Orders Against Low-Income Fathers

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

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

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

265. See Vicki Turetsky, *Commissioner's Voice: 'Bubble Chart' Mirrors Child Support Nationwide*, CHILD SUPPORT REPORT (Office of Child Support Enforcement, Wash., D.C.), Nov. 2010, at 2 [hereinafter Turetsky, *Commissioner's Voice*], available at <http://www.acf.hhs.acf.hhs.gov/programs/cse/pubs/2010/csr/csr1011.pdf>.

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

267. See Turetsky, *Commissioner's Voice*, *supra* note 265.

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

269. *Id.*

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



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

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

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

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

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

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

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

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

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

278. *Id.*



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

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

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

280. *Id.*

281. *Id.* at 7–8.

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

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

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

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

286. See *id.*

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



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

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

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

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

289. *Id.*

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

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

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

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

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

295. *Id.* at 7–11.



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

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

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

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296. *See id.* at 8–9.

297. *Id.* at 9.

298. *Id.*

299. *See id.*

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

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

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

303. *Id.* at 11.

304. *Id.* at 11–13.



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

#### D. Questioning the Efficacy of the Prevailing Approach

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

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

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

306. *Id.* at 11–13.

307. *Id.* at 11–12.

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

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

310. *See supra* pp. 626–28.

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

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

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



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

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

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

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

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

317. See *supra* pp. 646–48.

318. See *supra* pp. 647–49.

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

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



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

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

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

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

322. *Id.*

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

324. *Id.*

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

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

327. *Id.*



garnishment, the child support system takes up to sixty-five percent of the parent's net income to satisfy the child support debt.<sup>328</sup>

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

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

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

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

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

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

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

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

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

335. *Unwed Fathers, the Underground Economy, and Child Support Policy*, FRAGILE FAMILIES RES. BRIEF (Bendheim-Thoman Ctr. for Research on Child Wellbeing, Princeton Univ. & Soc. Indicators Survey Ctr., Columbia Univ.), Jan. 2001, at 2, available at <http://www.fragilefamilies.princeton.edu/briefs/researchbrief3.pdf>.



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

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

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

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

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

337. See Pate, *An Ethnographic Inquiry*, *supra* note 188, at 59–62; *Unwed Fathers, the Underground Economy, and Child Support Policy*, *supra* note 335, at 2.

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

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

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

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

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



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

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

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

344. *Id.*

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

346. See ADMIN. FOR CHILDREN & FAMILIES, FY 2008 ANNUAL REPORT TO CONGRESS (2008), available at [http://www.acf.hhs.gov/programs/cse/pubs/2011/reports/fy2008\\_annual\\_report/](http://www.acf.hhs.gov/programs/cse/pubs/2011/reports/fy2008_annual_report/).

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

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

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

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

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



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

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

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

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

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

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

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



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

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

The elimination or reduction of large child support debts is an important first step. There is growing acknowledgement in the field that, as a practical matter, low-income fathers will never be able to pay the enormous child

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

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

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

357. See Turetsky, *Commissioner’s Voice*, *supra* note 265, at 2.

358. See *id.*



support debts they have accumulated and that, as a consequence, the very existence of the debt can discourage some fathers from even trying to repay it.<sup>359</sup> Indeed, “the federal Office of Child Support Enforcement recently reissued a policy statement clearly stating that states have the authority to compromise unpaid welfare arrears owed to the government.”<sup>360</sup> The federal government permits states to compromise child support arrearages when the debt is owed to the state.<sup>361</sup> Some state and localities are taking a close look at the large arrearages that have built up for low-income fathers.<sup>362</sup> The methods used to manage uncollectible arrears include amnesty (debt forgiveness) programs for arrearages owed to states and the automatic suspension of orders when fathers are in jail or participating in job programs.<sup>363</sup> So far, however, movement on this front has been piecemeal, and a more systematic and comprehensive effort is needed.<sup>364</sup>

Furthermore, there is growing recognition that the arrearage problem is best handled through prevention.<sup>365</sup> States are thus reconsidering the practice of routinely imputing income, setting large retroactive orders based on

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

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

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

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

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

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

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



welfare debt and other costs that bear no relationship to fathers' abilities to pay, and keeping orders current by implementing procedures to facilitate prompt review and adjustment of orders when appropriate.<sup>366</sup> As with arrearages, additional efforts must be made in order to have a meaningful impact.

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

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

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

367. See *supra* pp. 645-47.

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

369. See Turetsky, *Commissioner's Voice*, *supra* note 265, at 2.



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

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

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

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

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

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

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

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



employment system.<sup>377</sup>

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

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

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377. *Id.* at 364–65.

378. ADMIN. FOR YOUTH & FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE FATHERHOOD, MARRIAGE AND FAMILY INNOVATION FUND* (2010) (on file with author).

379. *Id.*

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

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

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

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



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

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

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

385. *Id.*

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

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

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

389. *Id.*

390. *Id.*

391. See S.C. DEP'T OF CORR., FREQUENTLY ASKED QUESTIONS (FAQS), <http://www.doc.sc.gov/faqs.jsp> (last visited May 23, 2012). In South Carolina, the yearly operational costs per inmate were \$14,409 (or \$39.48 per day) during the 2006 fiscal year. *Id.*

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

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



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

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

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

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

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

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

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

398. See *supra* pp. 648–49.

399. See *supra* notes 375–79 and accompanying text.

400. *Id.*

401. See *infra* pp. 670–71.



(particularly at the local and individual levels).<sup>402</sup> Change will likely be slow because perceptions and basic attitudes also need to be changed.<sup>403</sup> The myth of the deadbeat dad poses a considerable obstacle to implementing change. For example, even during the current economic downturn, which has been described by many as “the Great Recession,”<sup>404</sup> child support officials and courts persist in the practice of setting minimum orders and imputing income to fathers who lack jobs.<sup>405</sup> A recent study by the Institute for Research on Poverty reported on the effect of the recession on child support operations in five Wisconsin counties.<sup>406</sup> The five counties included in the study represent a range of population sizes, and researchers selected them for inclusion in the study because they had high unemployment rates that rose sharply in 2009.<sup>407</sup> The study examined how child support and court staff set original orders when the noncustodial parent was unemployed.<sup>408</sup> It also assessed whether, in response to the recession, child support agencies and courts changed their practices.<sup>409</sup>

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

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

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

404. See Michael W.L. Elsby et al., *The Labor Market in the Great Recession*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2010, at 1, 2, available at [www.brookings.edu/~smedia/Files/Programs/ES/BPEA/2010\\_spring\\_bpea\\_papers/2010a\\_bpea\\_elsby.pdf](http://www.brookings.edu/~smedia/Files/Programs/ES/BPEA/2010_spring_bpea_papers/2010a_bpea_elsby.pdf).

405. See *infra* pp. 670–71; see also Yoonsook Ha et al., *supra* note 210.

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

407. *Id.*

408. *Id.*

409. *Id.*



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

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

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410. *Id.* at 3–4.

411. *Id.* at 4.

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

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

414. *Id.* at 11.

415. *Id.* at 3–6.

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

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



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

Thus, in addition to addressing the problems posed by institutional resistance to reform, efforts to improve low-income fathers' job prospects must not fail to take account of several systemic factors hindering possible success in the labor market, namely pervasive racial discrimination in employment, the difficulty that former inmates have in securing employment, and the current dismal economic climate, which has made jobs scarce and eroded upward mobility.<sup>419</sup> Even though the recession in the United States officially ended over two years ago, the recovery has been sluggish and the unemployment crisis persists.<sup>420</sup> As of November 2011, the national unemployment rate was 8.6%.<sup>421</sup> The Great Recession has hit Black workers particularly hard.<sup>422</sup> During 2010, the unemployment rate among Black workers was two to nearly three times greater than that of White workers in some states.<sup>423</sup> For example, unemployment among Black workers in Mississippi peaked at 20% in the first quarter of 2010, a rate that

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

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

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

421. See *The Employment Situation – November 2011*, BUREAU OF LABOR STATISTICS, U.S. DEP'T LABOR 5 (2011), <http://www.bls.gov/news.release/pdf/empsit.pdf>. The Bureau of Labor Statistics later revised that figure to 8.7%. *Id.*

422. See *Black Unemployment Two to Nearly Three Times Higher Than White Unemployment in Some Southern States*, POL'Y BRIEFING (Ctr. for Family Policy and Practice, Madison, Wis.), July 2011, at 3, available at [http://www.cffpp.org/publications/PB\\_July\\_2011.pdf](http://www.cffpp.org/publications/PB_July_2011.pdf).

423. *Id.*



was more than three times the 6% rate of White workers.<sup>424</sup> The employment and labor force participation for less-educated Black men between the ages of sixteen and thirty-four has been on a steady decline over the last two decades, continuing even through the strong economic years of the 1990s.<sup>425</sup> Studies examining the decline attribute most of it to the negative impact that past incarceration and strict child support enforcement has on the labor force participation of young Black men.<sup>426</sup> Notably, the period of declining employment coincides with the growth in incarceration rates and reforms to strengthen child support enforcement, both of which disproportionately impacted young Black men.<sup>427</sup> As of 2002, the incarceration rate for Black men was five percent, and for young Black men it was twelve percent; additionally, approximately twenty-two percent of all Black men were ex-offenders.<sup>428</sup>

The difficulties catalogued above challenge the normative ideal that financial responsibilities to and for poor children can be privatized without undue material hardship.<sup>429</sup> Although child support has a role to play in the universe of programs for poor children, reconsideration of its prominence in family policy is warranted. In cases of serious social and economic disadvantage, even full and timely child support payments are unlikely to lift children out of poverty.<sup>430</sup> Given that reality, policymakers need to examine alternative models that would provide needy children with a more stable public source of resources to ensure their economic security. In particular, it is time to reconsider the utility of assured child support benefits as a safety net in poor families. A child support benefit system<sup>431</sup> that both enforces the

424. *Id.*

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

426. See, e.g., *id.* at 343–47.

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

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

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

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

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

has three components: (1) child support awards are set by a legislated formula based on a percentage of the nonresident parent’s income; (2) payments are deducted from the



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

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absent parent's earnings, just like Social Security deductions; and (3) the government guarantees a minimum level of child support to all children legally entitled to private child support – an assured benefit.

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