THE SHADOW LAW OF CHILD SUPPORT

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ABSTRACT

Contemporary child support law in the United States is not a single system designed for the material improvement of children's lives. Rather, child support jurisprudence has devolved into multiple legal systems, each designed for entirely different social policy purposes. The traditional family law system, as a means of allocating resources for children after parental separation, may work well for the affluent who retain economic autonomy, but not so well for poor families who rely on government financial support and who must subject themselves to state intervention and regulation. More egregiously, incarcerated parents as a group are legally governed by what I call the "Shadow Law of Child Support"—which has emerged alongside punitive welfare reform and mass criminalization. As a matter of law and policy, incarcerated parents are routinely subjected to a suffocating matrix of punitive federal and state laws, criminal enforcement, criminal-system financial obligations, and civil collateral consequences that together serve to transfer unmanageable debt to parents, paradoxically rendering them less able to provide consistent support.

This Article seeks to make visible the structural paradigm that governs the child support law and subordinates parents involved with the criminal system. Incarcerated parents are disproportionately Black and already lag far behind others in key economic indicators, including the racial wealth gap. I argue that child support policy for these families is driven by the racialized carceral logic of mass criminalization—which seeks to punish parents for criminal system involvement rather than focus on the goal of securing ongoing financial and familial well-being for their children.

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Punishment is everywhere and criminal justice debt can confine individuals to a liminal space where prison is never a thing of the past.

—Mitali Nagrecha, Mary Fainsod Katzenstein & Estelle Davis[1]

INTRODUCTION

As a practical matter, child support is an important source of income for many children and the custodial parents who receive the payments. However, as a flawed system intended to steward child well-being, it stands at a crossroads and must be reimagined. Policymakers have known for decades that the child support system may work adequately for middle-class families with resources but much less so for the poor.[2] In 2006, an exhaustive research study concluded that seventy percent of the more than then $105 billion in child support debt was owed by men with incomes under $10,000,[3] and therefore the debt was likely uncollectible. The prognosis is even more dire for the incarcerated, who are parents to more than five million children,[4] and who are mired in a legal and

[1] MITALI NAGRECHA, MARY FAINSOD KATZENSTEIN & ESTELLE DAVIS, CTR. FOR CMTY. ALTS., WHEN ALL ELSE FAILS, FINING THE FAMILY: FIRST PERSON ACCOUNTS OF CRIMINAL JUSTICE DEBT 3 (2013), https://www.prisonpolicy.org/scans/communityalternatives/criminal_justice_debt.pdf [https://perma.cc/6UKN-HQXA].

[2] *See* J. Thomas Oldham & Marygold S. Melli, *Preface* to CHILD SUPPORT: THE NEXT FRONTIER ix-xiii (J. Thomas Oldham & Marygold S. Melli eds., 2000) (reviewing recent research on impact of child support reforms and finding that "reforms have failed to accomplish one of the most important objectives of child support, that of reducing child poverty"); *see also* LYNNE HANEY & MARIE-DUMESLE MERCIER, NAT'L INST. OF JUST., CHILD SUPPORT AND REENTRY 9 (2021), https://www.ojp.gov/pdffiles1/nij/300780.pdf [https://perma.cc/JM7S-CQ8S] ("Most research indicates that the expanded child support system has worked well for divorced parents with moderate or regular sources of income; in 2016, it collected over $33 billion for custodial parents . . . .").

[3] *See* ELAINE SORENSEN, LILIANA SOUSA & SIMON SCHANER, URB. INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 1, 3 (2007), https://www.urban.org/sites/default/files/publication/29736/1001242-Assessing-Child-Support-Arrears-in-Nine-Large-States-and-the-Nation.PDF [https://perma.cc/YG4S-LHMQ] ("In September 2006, the federal Office of Child Support Enforcement (OCSE) reported that the total amount of child support arrears that had accumulated nationwide since the program began in 1975 had reached $105.4 billion. . . . Nearly three quarters of high debtors had no reported income or reported income of $10,000 a year or less."); *see also* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, JUDGES' J., Winter 2004, at 5, 5 ("A Department of Health and Human Services report issued in February 2002 stated that child support orders for noncustodial parents with earnings below the poverty line averaged 69 percent of reported earnings . . . .").

[4] *Child Support and Incarceration*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 1, 2022), https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx [https://perma.cc/DYS5-2J7D] ("As of 2018, approximately 2.2 million people were in jails and prisons throughout the United States. According to the Bureau of Justice Statistics, 47% of state prisoners and 58% of federal prisoners have at least one child under the age of 18. In the U.S., over 5 million (7%) of children in the U.S. have a parent who is or was incarcerated.").

social landscape where mass criminalization constrains their ability to become functional economic actors after reentry.

Few discussions of public policy and practice in family law are as difficult as those related to child support. Child support legal discourse exposes deeply held notions about gender roles and the normative construction of family that guide our understanding of what behavior is appropriate when parents live apart from children. For the layperson, the topic can also trigger complex feelings from childhood, where child support serves as a proxy for being valued and cared for depending upon the parental resources available. Further, children are sometimes privy to painful parental disputes that are framed aloud as support issues, but actually reflect deeper animosities between parents arising from separation. In this context, legislators, judges, and other policymakers go about the business of making law and transmitting deeply ingrained conscious or unconscious beliefs and cultural mores onto the public domain. Through their pronouncements, they suggest that the family values they have etched into legislation are neutral, inevitable, and somehow sanctioned by natural law. However, like everyone else, those who legislate are deeply influenced by race and class bias, especially when systems are designed to be responsive to a norm that reflects an idealized family in the public imagination. What should be self-evident is that all families are not the same—and also not equal—even under a neutral application of the law.

At a time when two-parent, white, middle-class families with economic resources are increasingly anachronistic,[5] we continue to structure social policy that targets the specific needs of this normative family.[6] Despite all of the evidence that the child support system has not worked to meet the needs of low-income children, society has failed to construct an approach that is more responsive[7] and simply does not allow for a particularized approach to account

[5] *See* June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1185 (stating that family structures have changed over past fifty years, and "paradigmatic marital family with children" now accounts for "less than one-half of all households").

[6] This normative vision still guides family law. *See, e.g.*, Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 690-91 (1998). Murphy notes that "[c]onversations with [child protective services] workers reveal a deep bias about bad mothering based on race, class, and poverty." *Id.* at 707.

[7] *See* Branden A. McLeod & Aaron Gottlieb, *Examining the Relationship Between Incarceration and Child Support Arrears Among Low-Income Fathers*, 94 CHILD. & YOUTH SERVS. REV. 1, 1 (2018) ("Despite its ambitious mission . . . the [public child support] program counteracts its poverty-reduction aspirations. For noncustodial parents who have experienced incarceration, the accrual of child support arrears may cause a barrier for parents to pay down the debt. Thus, the program contradicts its stated goals in this regard." (citation omitted)).

for the economic and social realities of poor families.[8] This willful blindness deeply undermines the effectiveness of the national program.[9]

The study and reassessment of child support doctrine is important. In many ways it represents the proverbial "canary in the coal mine" when examining the broader problem of government intervention into family life. For example, acknowledging the history and purpose of the child support program allows us to understand the punitive trajectory of its lawmaking and its deep-seated animosity toward the poor and those with nonnormative family structures. In the 1970s, the federal child support apparatus was created to target the unmarried parents of poor children in order to recoup welfare payments at a time when marriages generally were in steep decline and a growing number of unmarried fathers were poor and Black.[10] Not coincidentally, the discourse about race and parenting took center stage in the national struggle over welfare entitlements, especially around the question of who was primarily responsible for the support of poor children.[11] It is important to note that many eligible Black mothers were just beginning to receive welfare benefits which they had been largely excluded from since the 1930s New Deal era, when welfare was reserved for mainly white mothers through law and custom.[12] As Black mothers were beginning to realize

[8] *See* Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 668-69 (2012) [hereinafter Brito, *Fathers Behind Bars*] (explaining that widespread recognition of "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" has not yet transformed how child support systems operate).

[9] *See* McCleod & Gottlieb, *supra* note 7, at 1 ("Extant research finds that when noncustodial parents are unemployed, underemployed, incarcerated, or have a criminal record they accrue child support arrears, (i.e. debt) and a seemingly never ending downward economic spiral can occur. These circumstances may undermine the effectiveness of the child support enforcement program." (citations omitted)).

[10] *See* Kyle Ross, *Learning from the United States' Painful History of Child Support*, CTR. FOR AM. PROGRESS (June 17, 2022), https://www.americanprogress.org/article/learning-from-the-united-states-painful-history-of-child-support/ [https://perma.cc/2VGT-M6C6] (providing overview of inception of child support program in 1975 and describing how program has been closely intertwined with America's views on public assistance and race).

[11] *See id.* ("With the federal government and popular culture explicitly linking poverty, the need for federal economic support, and the structure of Black families, the term 'welfare' became racialized.").

[12] *See* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 104 (1991) (explaining that women defined as socially deviant—divorced, deserted, and never-married women and women of color—were not considered part of organized welfare, and, instead, "they and their children were lumped with the general mass of undifferentiated undeserving poor"); *see also* Carbone & Cahn, *supra* note 5, at 1215 (noting that under Aid to Families with Dependent Children ("AFDC"), a New Deal program, "'[m]orals' restrictions imposed by the states limited [the AFDC] to the 'deserving' poor (unmarried mothers need not apply) and included criteria making those who worked in agricultural or domestic service ineligible, disproportionately excluding African-Americans").

their rights to access public benefits,[13] policymakers were already initiating a decades-long push for legislation to curtail the *entire notion of entitlements*. The drive to "end welfare as we know it" and to privatize dependency ultimately culminated in the enactment of the 1996 Personal Responsibility and Work Reconciliation and Opportunity Act ("PRWORA")[14]—also known as welfare reform. PRWORA eliminated the federal government entitlement to subsistence welfare, replaced it with meager discretionary block grants administered by the state, and wrote increasingly punitive child support enforcement into law in an effort to transfer support of children entirely to "absent" parents.[15] Despite the fact that the welfare program primarily served white families, racial rhetoric intended to stir resistance to the program came to dominate the discourse of child support. Legislators across the political spectrum used stigmatizing racial stereotypes, including "Welfare Queens" and "Deadbeat Dads," to persuade the body politic to accept both severe restrictions of public resources and enhanced criminal enforcement to punish those who did not pay.[16] Moreover, the logic of policing nonnormative or the metaphorical "broken" family continues to dominate the social policy goals of not just the entire child support program but also other state programs such as child welfare, which is primarily focused on the regulation of Black families.[17] In the ensuing years, the increasingly quasi-

[13] *See* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 51-52 (2017) ("In the 1960s, black women began agitating for access to these public assistance programs that historically had refused to serve them. Their efforts were quite successful on many fronts. In contrast to the 1930s, when the beneficiaries of cash assistance programs for mothers were predominately white, by 1975 black women made up 44 percent of the beneficiaries of . . . Aid for Families with Dependent Children (AFDC) . . . ." (citations omitted)).

[14] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 601-19). PRWORA overhauled the fundamental structure of the welfare system, abolishing AFDC and replacing it with the new block-grant program Temporary Assistance for Needy Families ("TANF"). *See* § 103(a)(1), 110 Stat. at 2112-61.

[15] *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 601-19).

[16] *See* Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 238 (2014) [hereinafter Cammett, *Deadbeat Dads & Welfare Queens*] (noting that concept of "broken" family and "absent" father is "powerful cultural narrative informing the social construction of poor Black families"); *see also* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 281-82 (explaining characterizations of "good" and "bad" mothers); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 300 (2013) ("Economic policies regulating the poor are fraught with stereotypes about low-income people, particularly low-income mothers of color."); BRIDGES, *supra* note 13, at 51 (describing narrative of "undeservingness" of nonworking poor mother).

[17] For an excellent analysis of the racial dynamics of the child welfare system, see generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001). *See also* Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. FOOTNOTE F. 68, 69 (2016) ("The bonds of Black children to their families are routinely and needlessly demolished in the name of child protection, even

criminal approach to enforcement of child support has been carried out fervently under the auspices of protection for children. This is not coincidental. Policies that invoke child protection are unlikely to engender resistance or even a searching inquiry about whether these punitive policies effectively translate into the support of children.

Revisioning the purpose and function of the child support system is critical now for another reason. The number of parents who have been incarcerated since the 1970s has grown exponentially,[18] making the United States the world's most prolific jailer.[19] Whether unintended or not, mass criminalization has created a class of parents who are differently situated—economically, socially, and racially—than their more elite peers for whom the child support system was designed. This is partly because the law treats parents who cannot pay financial support due to entrenched poverty the same as those who will not—regardless of whether those individuals would be characterized as "deadbeats" or as "deadbrokes."[20]

But that is not the whole story. As the number of incarcerated parents has grown, so has the vast apparatus surrounding punishment for crime generally. These include myriad ways to exclude people with criminal records from civic participation through civil collateral consequences[21] and financial recoupment for the administration of the criminal system, which are referred to as legal financial obligations ("LFOs").[22] Not coincidentally, these additional penalties expanded during the "tough on crime" era of the 1980s and beyond.[23] In conjunction with the many repercussions negatively affecting successful reentry

when the majority of allegations leading to the removal of Black children from their homes do not involve child abuse, but instead arise from neglect conditions related to poverty or from discriminatory child welfare practices.").

[18] *See* HANEY & MERCIER, *supra* note 2, at 9 ("In the past 40 years, the United States has experienced an expansion in two of its largest state systems: the criminal justice system and the public child support system. Since 1980, the incarceration rate has increased by 500%."); McLeod & Gottlieb, *supra* note 7, at 1 (noting that over fifty percent of people in federal and state correctional facilities have children under age eighteen); Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 179 (2009) ("The massive levels of imprisonment in American society stand out both cross-nationally and historically. The United States is a world leader, for example, with per capita incarceration levels six to ten times higher than in Europe.").

[19] *See United States Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/US.html [https://perma.cc/9S6D-5H9Y] (last visited Dec. 7, 2022).

[20] *See generally* Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127 (2011) [hereinafter Cammett, *Deadbeats, Deadbrokes, and Prisoners*].

[21] *See infra* Section II.C.2.

[22] *See infra* Section II.C.1.

[23] *See* Fox Butterfield, *Freed from Prison, but Still Paying a Penalty*, N.Y. TIMES (Dec. 29, 2002), https://www.nytimes.com/2002/12/29/us/freed-from-prison-but-still-paying-a-penalty.html (discussing penalties "passed by Congress and state legislatures in 1990s to get tough on crime").

into society, punitive child support enforcement has been devastating for incarcerated parents and, by extension, their children.

For many years, poverty law scholars and social scientists have sounded the alarm about the dangers of punitive enforcement that creates unmanageable debt for incarcerated parents who are unable to pay support.[24] Social science research and recent data have borne out their concerns, verifying the onerous impact that child support and other debts have had on incarcerated parents—particularly Black parents. For example, one group of researchers found that "incarceration is a *predictor* of fathers' accruing child support debt and fathers who have experienced incarceration tend to have higher child support arrears than fathers who have not experienced incarceration."[25] They go on to state that they "found that fathers who experienced both recent and less recent incarceration had nearly 2 times higher odds of owing arrears than fathers who have not been incarcerated."[26] A recently conducted scoping review of studies related to the impact of debt also sets forth some troubling facts. The review sought to "identify what is known about the debt burden on those who have been incarcerated and their families and how this impacts their lives."[27] They found that "an estimated 3% of the total U.S. adult population and 15% of the African American adult male population will be incarcerated over their life course,"[28] and concluded that "[s]tudies of all types found that between 66%-92% of people who have been incarcerated have child support debt."[29] Moreover, the study found that "people who have been incarcerated are significantly burdened by *multiple* types of debt, with a disproportionate burden on African Americans."[30] In addition to child support debt, Black people are more likely to have LFOs from the criminal system and are also more likely to have their debt reported to collections agencies.[31]

Finally, researchers at the National Institute of Justice completed an in-depth report in 2021 on the impact of this debt.[32] Among other important findings, they concluded that "[o]ne of the biggest obstacles to reentry is the size of a parent's child support debt, which averages $20,000 to $36,000, depending on the state

[24] *See, e.g.*, Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313, 315 (2006) [hereinafter Cammett, *Expanding Collateral Sanctions*] (making claim that child support accrued by incarcerated obligors was additional civil collateral consequence of criminal convictions that served as barrier to successful reentry).

[25] McLeod & Gottlieb, *supra* note 7, at 6 (emphasis added).

[26] *Id.*

[27] Annie Harper, Callie Ginapp, Tommaso Bardelli, Alyssa Grimshaw, Marissa Justen, Alaa Mohamedali, Isaiah Thomas & Lisa Puglisi, *Debt, Incarceration, and Re-Entry: A Scoping Review*, 46 AM. J. CRIM. JUST. 250, 250 (2021).

[28] *Id.*

[29] *Id.* at 267.

[30] *Id.* at 268 (emphasis added).

[31] *Id.* at 261.

[32] *See* HANEY & MERCIER, *supra* note 2, at 1-5.

and the data used."[33] They confirmed that the debt of incarcerated parents is "two to three times more than the average support debt of other low-income parents and three to four times the average criminal justice debt of other reentering citizens."[34] All of these studies noted the economic harm to these families and the difficulties that this debt presents for successful reentry, which directly bears on children's well-being. The recent findings of these researchers should be cause for alarm, as the concerns of those who have written about incarcerated parents have bloomed into a full-blown social welfare crisis. Yet, child support agencies have not responded to this crisis with the sense of urgency that it demands. The question is why? This Article will show that the state's key policy directive for incarcerated parents appears to be criminal enforcement—and punishment—driven by entrenched racial bias and moral condemnation masquerading as public policy.

Part I of this Article situates the Shadow Law of Child Support in the historical development of punitive welfare law, analyzing the moral construction of poverty as a theoretical basis for the development of punitive sanctions against poor people. It revisits Jacobus tenBroek's theory of the "dual systems" of family law to examine the transformation of his precepts in light of the emerging criminalization of families, especially Black families.[35] This Part also tracks the punitive development of welfare reform as a path to direct criminalization that informs child support enforcement.

Part II of this Article sets forth the jurisprudential elements and contextual components that structure the Shadow Law of Child Support. First, it examines the emergence of child support law as a criminal enforcement mechanism, despite its official designation as civil law. It also looks at the ways gender engages with and reinforces the punitive nature of family support and serves as a bellwether of coercive gendered norms. Second, it assesses how state and federal law, through both facially neutral application and direct targeting, conspire to punish parents engaged in the criminal system by making them responsible for significant debt, often to the detriment of the children they are trying to support. Third, this Part brings to the surface the particular problems of criminal LFOs that dovetail with child support debt to create unmanageable debt loads for the incarcerated parent. This Part also looks at the social, legal, and political context of civil collateral consequences as a deeply troubled reintegration environment for parents already encumbered with debt.

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[33] *Id.* at 2. Other researchers have found the range to be even higher. *See* Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 977 (2019) [hereinafter Brito, *Debt Bubble*] ("The data from one study, which drew from interviews with almost three dozen incarcerated fathers in 10 states, showed a wide range of child support debt upon release from prison: between $10,000 and $110,000.").

[34] HANEY & MERCIER, *supra* note 2, at 2. The authors also note that by some estimates "the number of indebted parents with criminal justice backgrounds is estimated to be over one million." *Id.* at 3.

[35] *See infra* note 43.

Part III reimagines what a truly child-supportive praxis could look like. It serves as a reminder that the reason this matrix of disempowering laws and practices that affects incarcerated parents must be dismantled is that it runs counter to the ultimate purpose of the child support program: child support and well-being. It also further exacerbates the American racial wealth gap by diminishing incarcerated parents' economic viability through the imposition of debt on a large scale. This Part proceeds in three sections. First, it provides a series of immediate interventions, based on the work of leading policy analysts, to address the existential crisis of incarcerated parents subject to debt that puts them and their families at risk. Second, this Part suggests a direct way that the Office of Child Support Enforcement ("OCSE") can affirmatively engage the child support debt issue as we, hopefully, move toward a more generative approach to addressing child poverty. Third, this Part calls for a broader social welfare intervention in the form of a national child allowance that will benefit all poor children, but especially the children of the incarcerated.

I. SOCIAL WELFARE LAW AND THE MORAL CONSTRUCTION OF POVERTY

In the late twentieth century, welfare and child support enforcement became inextricably linked. Specifically, the enactment of PRWORA transformed welfare benefits from a federally supported legal entitlement to Temporary Assistance for Needy Families ("TANF"), meager discretionary block grants distributed by the states.[36] Less well-known is how completely PRWORA transformed child support into an aggressive and more punitive enforcement system for families receiving welfare. This change in federal policy was not the first designed to transfer the financial burden of support from the government to nonresident parents, but it was the most comprehensive. By the time PRWORA was enacted, the infamous Welfare Queen metaphor had been rhetorically fashioned by opponents of welfare to denigrate Black women in the public imagination.[37] However, her nefarious corollary was the Deadbeat Dad, the figure responsible for her impoverishment.[38] These powerful images dovetailed with many Americans' negative views of the poor—especially Black people—as lazy, living off the public dole, and therefore undeserving of the most minimal support.[39] Thus, welfare reform can be seen as the predictable end result of

[36] *See supra* note 14 and accompanying text.

[37] *See* Cammett, *Deadbeat Dads & Welfare Queens*, *supra* note 16, at 237.

[38] *See* Cammett, *Deadbeats, Deadbrokes, and Prisoners*, *supra* note 20, at 136.

[39] *See* ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 21-22 (2004). To establish these claims, Hancock uses a broad array of methods, including historical analysis, qualitative and quantitative content analysis, and in-depth interviewing. *See generally id.* Hancock's analysis shows that the welfare reform debate lacked the voices of poor women, dichotomized work and nonwork, hardly ever mentioned welfare recipients as "good mothers," and only invoked compassion for children rather than mothers themselves. *See id.* at 71-72, 81, 86, 136; *see also* Brittany Pearl Battle, *Deservingness, Deadbeat Dads, and Responsible Fatherhood: Child Support Policy and Rhetorical Conceptualizations of Poverty, Welfare, and the Family*, 41 SYMBOLIC

decades of poisonous political posturing across the spectrum to determine whether the state should have any part in supporting America's poor, including its children. Despite decades of child-centered political rhetoric,[40] calculated efforts to stir up resentment against the recipients of public aid served to usher in the elimination of Aid to Families with Dependent Children ("AFDC"), a child-focused antipoverty program that had been in place since the New Deal.[41] By the 1960s, welfare program recipients were already being funneled into an interventionist family law system more akin to a social welfare administration. This was far more invasive than the state courts' approach utilized for more elite families for whom the presumption of privacy attaches.[42] The passage of PRWORA ensured that child support laws for families on public assistance would be subject to even more aggressive state regulation moving forward.

A. *Dual Systems of Family Law and Beyond*

Well over a half century ago, in 1964, visionary Jacobus tenBroek offered this foundational insight into the differences in goals and functions of two existing systems of family law:

> [W]e have two systems of family law . . . different in origin, different in history, different in substantive provisions, different in administration, different in orientation and outlook. One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably *penal*. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.[43]

INTERACTION 443, 448 (2018) ("[A]s perceptions of these [welfare] mothers shifted to 'undeserving,' the state sought ways to ameliorate the burden of financially supporting them. Changing approaches to child support policy, which expanded the ways that noncustodial fathers were made to financially support their children, was one way to achieve this goal, injecting the federal government into an area of family policy with which it had been previously uninvolved.").

[40] *See* Battle, *supra* note 39, at 448.

[41] *See 1996 Welfare Amendments*, SOC. SEC. ADMIN.: VOTE TALLIES, https://www.ssa.gov/history/tally1996.html [https://perma.cc/5S9G-V78P] (last visited Dec. 7, 2022) (discussing repeal of AFDC in 1996).

[42] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (recognizing parent's right to raise her children as she sees fit as "perhaps the oldest of the fundamental liberty interests").

[43] Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 257-58 (1964) (emphasis added). Interestingly, tenBroek opines that,

> In the context of family law, no less than in school racial segregation, one might ask whether "separate" is not "inherently unequal," generating among aid recipients "a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely ever to be undone."

Id. at 258 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

At its core, tenBroek's description of a two-track system is a reflection of the disdain that many legislators have for poor people. The moral construction of poverty[44] is a theory embraced by many Americans, and it posits that the cause of poverty rests with deficiencies in the individual rather than external forces that create oppressive conditions for poor people. Khiara M. Bridges reminds us that "[v]oices throughout history have insisted that the poor person's poverty necessarily demonstrates his behavioral and ethical deficiencies."[45] Additionally, America's problematic origin story of rugged individualism and self-sufficiency feeds into this interpretation and has profound public policy implications, which allows for more persistent state intervention against the poor. Further, the law determines who is worthy of public support by defining groups as either the "deserving" or "undeserving" poor,[46] with those deemed "undeserving" funneled into programs with more oversight and regulation. Discursively, the public conversation invariably focuses on individual flaws and "culture" rather than any number of well-reasoned external factors that offer a cogent explanation for widespread poverty—or more effective solutions to address such poverty.[47] Moreover, when the discourse turns to problems of the "inner city" the meaning is clear: pundits often are speaking in coded language to describe deficiencies they believe inherent in Black people and Black culture—rather than persistent racism—to explain the problem of longstanding disproportional poverty.[48]

In policymaking, family law also has an expressive function: "to support social institutions thought to be desirable, to enforce individual obligations and responsibilities, and [in theory] to foster the well-being of children."[49] However, family law for the poor also assumes a distinctly ideological function: to "other" those that do not fit into this acceptable model of behavior, relationships, or ways of being—and render them "outsiders" vulnerable to public scorn and

[44] *See* HANDLER & HASENFELD, *supra* note 12, at 17 (using phrase "moral construction of poverty").

[45] BRIDGES, *supra* note 13, at 37.

[46] *See* MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY 167 (2d ed. 2013) (discussing how this terminology solidifies popular ideas of undeserving poor); *see also* Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 121 (2013).

[47] *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 171-82 (1996) (discussing bipartisan focus on individuals rather than environment and systemic restraints); *see also* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 63-92 (2d ed. 2012) (analyzing problems experienced by inner-city African American communities by discussing disappearance of industrial jobs in cities).

[48] *See* BRIDGES, *supra* note 13, at 39. Bridges discusses examples including former House Speaker Paul Ryan observing that "[w]e have got this tailspin of culture, in our inner cities in particular, of men not working and just generations of men not even thinking about working or learning the value and the culture of work." *Id.*

[49] David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583, 584 (2009).

undeserving of public sympathy.[50] Those "who would denigrate the [poor] could speak not only through conventional political speeches and writings but also through law, religion, philosophy, and even aesthetics"[51] in order to demonize "outsiders," whether they be poor, people of color, or queer. In a legal system where marginalized communities depend on the vindication of rights to secure social status, this demonization creates a dilemma for poor families who are constructed as inherently problematic. If these families are undeserving to begin with, then they have no rights to speak of and all benefits that flow from the state to them are conditioned on ceding privacy and other rights in exchange for critical state support.[52] Therefore, an empathy gap for welfare recipients is created at the outset; it matters not whether the ultimate victims of indifference and scorn are children, who constitute the highest percentage of poor people in America.[53]

B. *Welfare "Reform": The Shadow Path to Criminalization*

Welfare reform, in addition to changing the structure of public benefits, intensified family regulation of poor families. In her article, *The Welfarization of Family Law*, Tonya L. Brito made an important observation soon after the enactment of welfare reform in the late 1990s.[54] She argues that "the wall that separated the family law of welfare and general family law in tenBroek's time is starting to crumble because these two bodies of family law are converging with welfare law taking the dominant role."[55] She further states that "[i]n the area of child support law, welfarization has been *direct* because welfare lawmakers have taken the lead in regulating in this area."[56] In fact, lawmakers also revised paternity law "to mandate efforts to secure a paternity determination in *all* nonmarital births" in the system—which had not previously been the

[50] *See id.* at 609.

[51] *Id.* at 589.

[52] *See* BRIDGES, *supra* note 13, at 10-11. In her compelling book, *The Poverty of Privacy*, Bridges makes a moderate claim and a strong claim on why poor mothers may be devoid of privacy rights. *See id.* The former posits that "describing poor mothers as having 'no privacy rights' is a rhetorical flourish—meant to underscore the impotence of the privacy rights that they do indeed possess." *Id.* at 11. This claim contends that poor mothers do have privacy rights, albeit ineffective ones. *Id.* On the other hand, the strong claim that "poor mothers have been deprived of privacy rights" is an analytical argument, which "asserts that poor mothers actually *do not* possess privacy rights." *Id.* Accordingly, this claim contends that "wealth is a condition for privacy rights and that, lacking wealth, poor mothers do not have any privacy rights." *Id.* at 12.

[53] *See* Bryce Covert, *We Pay to Keep the Old Out of Poverty. Why Won't We Do the Same for the Young?*, N.Y. TIMES (May 7, 2022), https://www.nytimes.com/2022/05/07/opinion/sunday/child-tax-credit-social-security.html ("Nearly one in seven children lives in a poor family.").

[54] *See* Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 231 (2000).

[55] *Id.*

[56] *Id.*

case—reasoning that the state will later be "better positioned in its effort to obtain child support payments from the father as reimbursement for public benefits provided to the family."[57] While the child support apparatus was initially created to recoup welfare benefits for children receiving government assistance, it expanded to capture everyone who uses it for child support—except for the private arrangements negotiated between parents with the economic means to do so. In this vast system, nonresident parents of children who do not use public assistance can still use the child support enforcement program to collect payments.[58]

For custodial parents who do receive TANF, the use of the system for collection is not voluntary.[59] They are required to assign their right to child support to the government before cash assistance is received and often must pursue child support from the noncustodial parent in court.[60] Since 1986, there was a tenfold increase in child support debt owed to the government under this recoupment system.[61] According to sociologists Lynn Haney and Marie-Dumesle Mercier, the amount owed jumped to $114.7 billion in 2017, an amount "more than federal expenditures on public assistance and food stamps combined."[62] A significant portion of this debt is owed to the state under cost recovery principles (in order to repay the cost of public benefits), and not to parents.[63] For poor parents, especially the incarcerated, strict enforcement is potentially disastrous due to the likelihood of debt accumulation that can probably never be paid based on the earning capacity of parents with criminal records.[64] At the very least, the system is extremely counterproductive because some of these sanctions have an enhanced negative impact on future earning potential to pay child support.[65] This directly contradicts the goals of the program, which are to encourage financial support for children and to foster positive relationships within the family.

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[57] *Id.* at 251. Brito observes that "this change in the paternity law has not come about because of a well-reasoned judgment that paternity determinations in out-of-wedlock births are good for families." *Id.* In fact, she notes that "for many single mothers, establishing the paternity of a nonmarital child presents significant risks." *Id.*

[58] *See* Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 310 (2020).

[59] *See generally* 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 (2007).

[60] *See id.* at 1030.

[61] HANEY & MERCIER, *supra* note 2, at 9.

[62] *Id.*

[63] *Id.* at 15 (explaining that in 2018, twenty-one percent of all child support debt nationally was TANF arrears, but noting that in some states, like California and Arizona, the percentage of TANF debt remains close to fifty percent).

[64] *See id.* at 3 (analyzing how debt accumulation affects incarcerated parents).

[65] *See id.* at 4.

PRWORA created another lesser-known dynamic as well. Child support cooperation requirements for *custodial* parents receiving welfare led, in turn, to work requirements for *noncustodial* parents, most of whom have limited employment prospects to begin with.[66] Accordingly, state child support enforcement programs directly demand that parents work and evaluate work effort in an attempt to make greater earnings available for payment.[67]

According to Noah Zatz:

> [PRWORA] . . . contains a little-studied provision requiring that state child support authorities be empowered to "issue an order that requires" noncustodial parents to participate in "work activities"; these are defined by cross-reference to the provision establishing PRWORA's better-known work requirements for custodial parents receiving cash assistance. . . . When a court directly orders an obligor to obtain work or participate in a "work activity," noncompliance can be enforced with contempt sanctions, including incarceration. Unlike welfare, in child support enforcement there are no payments *from* the state to cut off as leverage; instead, the state seeks to extract money from the noncustodial parent.[68]

The work requirements, under threat of sanctions such as incarceration, are one significant feature of child support enforcement that have previously been underexplored.[69] Moreover, Zatz suggests that the pressures of engagement to work, under threat of incarceration, depress labor standards and wages in general by leaving the state or employers to determine what is appropriate work.[70] He also notes that, based on a study of fathers subjected to incarceration for noncompliance with work mandates, the threat of incarceration is real and is disproportionately applied to Black fathers.[71] Further, a study by Zatz and

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[66] *See* Zatz, *supra* note 58, at 310.

[67] *Id.*

[68] *Id.* (citation omitted). Zatz observes, "Carceral child support enforcement thus runs on the same analytical engine that has long driven the welfare state: distinguishing voluntary from involuntary unemployment, the undeserving from the deserving poor. Here, however, the baseline is lower: deservingness offers freedom from prison, not freedom from destitution." *Id.* at 311 (citation omitted).

[69] *Id.*

[70] *See id.* at 320. Zatz explains:

> Conventional employment law sets labor standards by establishing a floor beneath which employers may not go. The purpose and, where enforced, effect is to raise working conditions at least to that floor. Work requirements also set labor standards and shape conditions but in a different way. Most simply, they penalize nonwork. For some people who would not work absent the threat of penalty, the threat pushes them to work instead. Schematically, the threat lowers reservation wages. Likewise, bargaining power is lost among workers who absent the carceral danger could credibly threaten to quit if the employer cut (or refused to raise) wages. For both reasons, wages decline.

Id.

[71] *See id.* at 311-12 (explaining that "astounding 15 percent of all Black fathers" in study were incarcerated for noncompliance with work mandates).

Michael A. Stoll found that child support enforcement is among several contexts in which work requirements are enforced by incarceration for noncompliance and that "heavier reliance on incarceration sanctions is associated with more hours of work and lower wages among noncustodial fathers most vulnerable to incarceration."[72] What Zatz refers to as "carceral work mandates"[73] regulate child support obligors, and for that matter, TANF custodial parent recipients, and skew labor force participation among this vulnerable group in profound, often invisible ways.

There are other related examples of the transformation of social welfare policies to conflate public assistance with criminogenic rhetoric and policy. As welfare began to merge with an increasingly aggressive enforcement system, the language began to reflect the logic of a carceral state. Kaaryn Gustafson argues that, after the Republican Congress and the Clinton Administration "reformed" welfare in 1996, the federal and state governments "wove the criminal justice system into the welfare system."[74] In one particularly revealing example, she states that:

> The influence of criminology on welfare policy is evident not only in the specific policies of welfare reform but also in the rhetoric used in policy development. For example, in the early 1990s the routine experience of a family's leaving the welfare system for work and then returning to the system later on was commonly described as "cycling" by welfare researchers. By the early 2000s, however, this experience had been relabeled "recidivism" by the Department of Health and Human Services and was being adopted by social scientists. The term *recidivism*, of course, is pejorative and borrowed from criminology, where it is used to describe repeated engagement in crime.[75]

Finally, PRWORA also significantly ramped up its enforcement arm for all obligors, instituting a broad array of measures, including driver's license suspensions, liens, and income withholding.[76] However, strict enforcement was based on the flawed premise that all nonpayers were similarly situated in their ability to pay and their *unwillingness* to do so. This type of enforcement might have been appropriate for parents with resources but it "did not take account of

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[72] Noah D. Zatz & Michael A. Stoll, *Working to Avoid Incarceration: Jail Threat and Labor Market Outcomes for Noncustodial Fathers Facing Child Support Enforcement*, 6 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 55, 55 (2020).

[73] Zatz, *supra* note 58, at 306.

[74] *See* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 51 (2011).

[75] *Id.* at 52 (citation omitted).

[76] For a comprehensive look at the federalization of child support, see Laura W. Morgan, *The Federalization of Child Support: A Shift in the Ruling Paradigm*, 16 J. AM. ACAD. MATRIM. LAWS. 195, 210-11 (1999).

the twenty-six percent of noncustodial fathers who were themselves poor"[77]—even though the relative poverty of this group of parents was well-known at the time.[78] Some of these enforcement issues are particularly onerous to poor parents. For example, the use of driver's license suspensions to enforce child support arrears disproportionately affects the poor[79] and is counterproductive to the employment goals of child support.

As the enforcement system continues to expand in punitive ways in purpose and effect, the biggest negative impact has been on Black people. When tenBroek referred to the public system as "measurably penal" in the 1960s,[80] he was making this observation during the civil rights era, a time when rights for poor people, especially Black people, were actually on the ascent. Soon thereafter, however, the swift backlash against entitlements (associated by political implication with Black people) and the simultaneous emergence of mass incarceration did significant harm to the Black community. But the logic of policing and its effects continues to extend beyond prison walls.

It is important to envision the expansion of state civil regulatory systems more broadly as policing agents of the poor. Since he first proffered it in 1964, tenBroek's dual regime analysis has been revisited by many scholars[81] who seek to expand on his view of normative state-sanctioned rights versus nonnormative family policing intended to either protect public resources from "the undeserving" or exert control over poor families who run afoul of parenting norms.[82] This paradigm has emerged in a number of social welfare systems that

[77] Brito, *Fathers Behind Bars*, *supra* note 8, at 632; *see also* Cammett, *Deadbeats, Deadbrokes, and Prisoners*, *supra* note 20, at 138 (noting early problems with AFDC indicated issue with uniform enforcement against all parents, including poor parents).

[78] *See* Brito, *Fathers Behind Bars*, *supra* note 8, at 632-33.

[79] Vicki Turetsky & Maureen R. Waller, *Piling on Debt: The Intersections Between Child Support Arrears and Legal Financial Obligations*, 4 UCLA CRIM. JUST. L. REV. 117, 135 (2020) ("Data show that driver's license suspensions affect the poor to a much greater extent than other income groups. Having a suspended driver's license reduces the ability of already economically destabilized parents to work, pay child support, and maintain parent-child relationships, all key goals of the child support program."); *see also* Cammett, *Expanding Collateral Sanctions*, *supra* note 24, at 326 ("Provisions such as license suspension for non-payment of support can make getting to work to earn money for support more difficult or even impossible, a result that appears to run counter to the goals of the child support program.").

[80] tenBroek, *supra* note 43, at 258.

[81] *See, e.g.*, Shannon Bettis Nakabayashi, Comment, *A "Dual System" of Family Law Revisited: Current Inequities in California's Child Support Law*, 35 U.S.F. L. REV. 593, 594 (2001) (revisiting tenBroek's analysis in California after welfare reform); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 304-06 (2002) (referencing tenBroek's work while analyzing bifurcation of legal treatment of parenthood); Godsoe, *supra* note 46, at 118 (analyzing two tiers of parenthood in child welfare context).

[82] *See generally* Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363 (2016) [hereinafter Cammett, *Welfare Queens Redux*] (discussing criminalization of women related to conflicts between child care and work obligations, among other issues that create tensions in neoliberal

routinely engage poor families. These systems have played out specifically at the intersection of the family and race, poverty, and government oversight—often in noncriminal, but still punitive, civil courts and administrative agencies. Among these are not just TANF,[83] but Medicaid benefits for low-income pregnant women;[84] the child welfare system;[85] drug testing on Black pregnant women;[86] criminal prosecutions for "theft of services" for enrolling children in public education systems in more affluent school districts;[87] and, of course, child support enforcement. These systems have an outsized impact on the lives of low-income Black families in particular: they live under the gaze of the government because many need to access state benefits, making these families a critical site for the study of government intervention. Stated differently, poor Black families are regulated with increasingly punitive measures through oversight that constitutes a kind of "carceral family law" for the poor. Welfare reform ushered in punitive and inflexible policies to force compliance with so-called normative family values, but has had severe consequences. As Brittany Pearl Battle's research on rhetoric and poverty has revealed:

> Creating a perception of "deadbeat dads" as an enemy to be combated, establishing a cognitive link between the failings of "deadbeat dads" and the hardships of single mothers and their children, and subsequently focusing on the moral and financial burden this situation created for the nation, allowed presidents [to use their bully pulpit] to legitimize a legislative agenda that criminalized noncustodial fathers.[88]

The dual system of family law thesis and its progeny explain how the law has developed to reinforce negative outcomes depending upon the level of state intervention with which families must contend.

June Carbone and Naomi Cahn are among the scholars who have engaged meaningfully with tenBroek's dual system analyses. In their article, *The Triple*

economy).

[83] *See* GUSTAFSON, *supra* note 74, at 45-46 (observing that TANF aid in California was conditioned on various requirements, including participation in work activities, and failure to comply with those requirements "could lead to benefit sanctions or to a denial of aid altogether").

[84] *See* BRIDGES, *supra* note 13, at 57 (referencing Supreme Court cases*Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), in which the Court upheld constitutionality of prohibitions on use of Medicaid funds to pay for costs of indigent beneficiaries' abortions).

[85] *See* ROBERTS, *supra* note 17, at 224, 274 (observing "child welfare system hurts Black children" and critiquing child welfare system's punitive function).

[86] *See* Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 340-66 (2014) (discussing disproportionate impact of drug testing of pregnant women on Black women).

[87] *See, e.g.*, Kyle Spencer, *Can You Steal an Education?*, HECHINGER REP. (May 18, 2015), https://hechingerreport.org/can-you-steal-an-education/ [https://perma.cc/DM72-HMW6] (describing example of wealthy school districts "cracking down on 'education thieves'").

[88] Battle, *supra* note 39, at 460.

System of Family Law, they argue that there are actually three systems that constitute family law practice.[89] The first group is for elite families for whom marriage is common and who can engage in the private ordering of their financial affairs within family law practice after marriage dissolution.[90] The second, similar to tenBroek's telling, consists of poor families under the yoke of interventionist governmental and welfare systems.[91] Carbone and Cahn argue for the need to acknowledge the emergence of a third group that is often overlooked.[92] For this group, as much as these families may identify with the values of the elite, they are unable to "buy into" those norms, due to a more precarious economic footing.[93] Further, they posit that "the existing law may not necessarily recognize or affirm the understood terms underlying these family relationships."[94] Finally, "members of the group may not necessarily have access to counsel or the sophistication to negotiate private bargains."[95] Carbone and Cahn opine that "[t]heir families (and often their bargains) operate in the 'shadows' of the law, neither receiving official ratification nor being subject to explicit disapproval."[96] Thus, "[t]hese families achieve agency in family affairs primarily by staying out of court."[97] Carbone and Cahn add that these families, although lacking the resources of elite families, are not subject to the state intervention of welfare families, and thus constitute a third group.[98]

This articulation of a third group represents an important observation about families who operate at the interstices of the law as growing inequality and lack of access has skewed the traditional paradigm of family law practice. However, the second group of families—often poor and dependent on state resources—may be undertheorized. It may be an analytical error to collapse all marginalized families living under state intervention in this way. It is true that state regulation in the wake of welfare reform has an unmistakable carceral veneer that manifests as it routinely engages with poor people, especially Black people. However, one important distinction is that within that group are subgroups, like incarcerated parents, who are engaged by the state in a more profoundly interventionist way. With respect to child support enforcement, the laws and policies that have emerged from welfare reform and mass incarceration aimed at the poor have actually created a body of shadow jurisprudence that has a particular economic effect on these parents—one that has outsized consequences, including potential reincarceration. The law has been shaped, through direct criminal law

[89] *See* Carbone & Cahn, *supra* note 5, at 1189.
[90] *Id.* at 1186.
[91] *Id.* at 1186-87.
[92] *Id.* at 1189.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

enforcement and state policy, to punish parents by requiring them to assume debt *because* of their criminal justice involvement. Therefore, the effect of criminalization is to transfer them to a legal category that transcends simple marginalization. Rather, laws and practices have conspired to extract financial punishments from this subgroup that can have long-term repercussions for their ability to transcend poverty and remain free.

For incarcerated parents in the child support system, what has emerged through this racialized logic of mass criminalization is an effort to regulate families through debt. They are now trapped in a matrix of debt arising from federal law and divergent state laws, financial obligations from the criminal justice system, and an inhospitable civil reentry environment. These factors constitute the Shadow Law of Child Support.

II. THE INCARCERATED FAMILY: CHILD SUPPORT IN THE SHADOW OF THE LAW

Context is everything. The matrix of shadow laws and policies that governs incarcerated parents' child support obligations creates unmanageable debt, stress, and economic challenges for the entire family and renders them "the incarcerated family." Moreover, child support law unfolds in the broader context of mass criminalization and interlocking systems of subordination regularly faced by poor families, especially Black families. "Punitive administrative structures govern the lives of low-income [families and] communities across most systems with which they interact."[99] These include welfare agencies, the immigration system, foster care, public housing, public schools, other financial obligations, and civil collateral consequences from having a criminal record. Thus, the Shadow Law of Child Support plays out alongside a broader array of policing institutions that make the management of debt and reentry even more challenging.

Notwithstanding this broader context, I argue that this contemporary child support jurisprudence that governs incarcerated parents has a number of distinct features. First, although child support is considered an area of family law—and is thus categorized as civil law—it is increasingly driven by a quasi-criminal law enforcement scheme. The threat of reincarceration for child support debt is ever present and can have a terrorizing effect on obligor parents trying to disengage from the criminal system. Moreover, the child support system is a gendered construct in and of itself, with enforcement manifesting as gender regulation cloaked in patriarchal garb. Second, federal law generally dictates policy for child support, particularly at the intersection of welfare. Some federal policy mandates, such as the infamous Bradley Amendment,[100] have an especially onerous impact on incarcerated parents because they are a prime driver of debt that is directly related to incarceration or institutionalization itself. Third, because child support program implementation is operationalized under the

[99] Cammett, *Welfare Queens Redux*, *supra* note 82, at 363.

[100] 42 U.S.C. § 666(a)(9).

jurisdiction of the states, divergent state policies on how to treat incarcerated parents' child support orders have exacerbated problems with reentry and created issues with debt management. Finally, child support debt, civil collateral consequences, and criminal system LFOs are compounded to have a negative impact on families seeking financial stability in a difficult environment for reintegration. Taken together, these particular intersections related to child support have had a disparate impact on the incarcerated parent and, more specifically, directly govern the outcomes of incarcerated parents' reintegration in a way that is different from low-income parents who are not affected by the criminal system.[101] The Shadow Law of Child Support operates primarily to punish incarcerated parents—not to create financial well-being for their children.

A. *Child Support Enforcement as Quasi-Criminal Law*

In 2015, a Black U.S. Coast Guard veteran named Walter Scott was shot in the back while running away from a police officer in North Charleston, South Carolina. While at first glance the story presented itself as another senseless police killing, a different narrative unfolded in the aftermath of his murder. According to his family, Scott, who had four children, was afraid of the police because he owed back child support that he struggled to pay.[102] Scott owed over $18,000 in child support.[103] "On three previous occasions, Scott was jailed for falling behind on his child support payments. His family members were convinced it was fear of another child support jailing that led Scott to run from the police."[104] What this story surfaces is the ubiquitous problem that stems from child support debt: the threat of incarceration for nonpayment of support or civil contempt orders to coerce compliance with a support order. This concern looms over the many obligors who are behind in payments and subject to enforcement. For example, in Scott's home state of South Carolina, child support obligors

[101] *See* HANEY & MERCIER, *supra* note 2, at 2. These researchers have concluded that:

> There are several institutional barriers that complicate parents' economic security and familial well-being—challenges to formal sector employment, familial conflict, and cycles of recidivism. Child support debt also acts as its own barrier, particularly if support and arrears payments are set too high for parents to manage. . . . Several state and federal policies exacerbate the reentry challenges of parents with child support debt. To the extent that policies accelerate the accumulation of debt, restrict the modification of debt, and punish indebted parents with reincarceration, they impede reentry and contribute to negative family outcomes.

Id.

[102] *See* Irin Carmon, *How Falling Behind on Child Support Can End in Jail*, MSNBC (Apr. 9, 2015, 6:54 AM), https://www.msnbc.com/msnbc/how-falling-behind-child-support-can-end-jail-msna569311 [https://perma.cc/YTK6-8R3D] ("Two surveys of county jails in the South Carolina conducted in the last decade found that at least one out of every eight incarcerated people were there because they had been held in contempt of court for not paying child support.").

[103] *See* Brito, *Debt Bubble*, *supra* note 33, at 967.

[104] *Id.* (footnote omitted).

imprisoned for civil contempt account for approximately thirteen to sixteen percent of the entire jail population.[105]

1. Child Support Enforcement Under the Criminal Gaze

Enforcement methods developed under PRWORA that are used to extract payments from unwilling obligors who have steady employment and who owe child support are often ineffective for securing payments from low-income parents or parents without steady employment—regardless of how punitive the sanctions are.[106] In those cases, "[c]ivil incarceration pursuant to an order of contempt is commonly used as a remedy to enforce child support orders against indigent noncustodial parents, many of whom lack attorney representation."[107] The reason that so few obligors facing incarceration in contempt proceedings are represented is that—as the Supreme Court has confirmed in *Turner v. Rogers*[108]—child support contempt hearings are civil in nature and therefore not covered by the protections guaranteed by the Sixth Amendment right to counsel.[109] Thus, the *Turner* Court held that a father jailed for a year by a family court judge for nonpayment of child support was not entitled to counsel.[110] The Court applied a balancing test and determined that the Due Process Clause of the Fourteenth Amendment required only alternative "procedural safeguards,"[111] which would theoretically offer some protection for obligors who are not "willfully" disregarding child support orders.[112] "Willfulness" is a

[105] Brito, *Fathers Behind Bars*, *supra* note 8, at 618.

[106] *See* Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3035 (2015) ("For a noncustodial parent without a job or assets, measures like wage assignments, tax intercepts, or property liens are completely ineffective.").

[107] *Id.*; *see also* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 115-18 (2008) ("[I]indigent obligors [are] jailed for civil contempt with little attention to the economic circumstances underlying their noncompliance.").

[108] 564 U.S. 431 (2011).

[109] *See id.* at 435, 441, 444. The Sixth Amendment, which is the basis for a right to state-appointed counsel for indigent defendants in criminal cases, as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), does not apply to civil cases. *See Turner*, 564 U.S. at 441. Accordingly, there is no constitutionally guaranteed right to counsel in civil proceedings, including those that may lead to incarceration. *See id.* at 448 (holding that Fourteenth Amendment's Due Process Clause "does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if the individual faces incarceration").

[110] *Turner*, 564 U.S. at 448.

[111] *Id.* at 444-45 (first citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976); and then citing Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 27-31 (1981)).

[112] Under established Supreme Court principles, "[a] court may not impose punishment 'in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.'" *Turner*, 564 U.S. at 442 (quoting Hicks v. Feiock, 485 U.S. 624, 638 n.9 (1988)).

term of art, and the absence of willful intent should mitigate sanctions (including jail) based on an obligor's inability rather than unwillingness to pay. A court inquiry should provide poor and unemployed obligors protection from the threat of prison, but these procedural safeguards are not foolproof. In any event, the widespread understanding that enforcement is civil rather than criminal in nature runs counter to common sense when so many low-income obligors continue to be subject to incarceration. Judges retain a great deal of discretion when determining whether an obligor's failure to pay is willful or not.

Despite the Court's opinion in *Turner* affirming the civil nature of contempt, the assumption that incarceration for child support obligors is civil in nature has recently been challenged. For example, Elizabeth D. Katz has described child support enforcement as "*criminal law in a civil guise*."[113] She supports this claim by offering copious historical research that demonstrates that although the number of civil child support cases surpassed criminal nonsupport cases, the "influence and involvement of the state . . . was preserved in the 'civil' family courts."[114] In the 1930s, "the costs and stigma" associated with criminal law led legislators to relabel family courts and support enforcement as "civil," even while preserving procedures and personnel drawn from the criminal context.[115] Stated differently, the domestic relations courts did the work of enforcement under a civil label but used the available criminal apparatus to punish offenders. This observation is an important intervention to analyze in the civil-criminal context because it critiques the Supreme Court's strong deference to legislative labels.[116] Instead, Katz proposes greater consideration of actual enforcement methods to argue for elimination of most child support incarceration.[117] She explains that "[i]f the Court were persuaded to categorize child support proceedings like Turner's as criminal, state lawmakers would need to change either procedures or punishments to align with [criminal] constitutional constraints."[118] She further opines, and I agree, that "[b]ecause of the particularly counterproductive consequences of incarcerating parents who owe child support, the better approach would be to decriminalize most child support proceedings through elimination of incarceration."[119] Other scholars and policy analysts share this view.[120]

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[113] *See* Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1295 (2019) (emphasis added).

[114] *See id.* at 1279.

[115] *Id.* at 1245.

[116] *See id.* at 1304.

[117] *See id.* at 1304-06.

[118] *Id.* at 1297.

[119] *Id.*

[120] *See, e.g.*, Cortney E. Lollar*, Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 176 (2018) ("Removing criminal sanctions would lead to less incarceration . . . and it would eliminate the stigma and the collateral consequences that attend a criminal conviction."); Lynne Haney, *Op-Ed: Dads with Child Support Debt Should Not Be Imprisoned—Especially on Father's Day*, L.A. TIMES (June 15, 2018, 4:05 AM), https://www.latimes.com/opinion

As a practical matter, the lack of efficacy in jailing child support obligors is an equally important consideration: "One study found that [the imposition of criminal] sanctions 'account[s] for only 4% of child support collections.'"[121] Another study suggested that "probably less than 2% of child support collections can be associated with the threat of incarceration."[122] Incarcerating obligors for money that they cannot reasonably pay reflects an attempt at retribution and punishment rather than an attempt to actually compel obligors into making payments. Moreover, the general effect of incarcerating obligors is to remove them from employment, to the extent that they have been able to secure work at all. This defeats the purpose of child support because obligors are no longer in the position to earn income. Parents like Walter Scott would rightly fear not only incarceration, but also losing employment that was hard won, given the obstacle of a preexisting criminal record. Overall, this paradigm demonstrates that the purpose of these rules is to punish parents for criminal system involvement more than to support children, which is the stated goal of the child support program.

Finally, contemporary child support enforcement is animated by a wholly performative aspect of criminalization and policing: enforcement sweeps that are public spectacles, often advertised in newspapers. Law enforcement officials make a show of arresting groups of parents for whom a child support arrest warrant is issued.[123] "[S]heriff's departments across the country . . . conduct what they call 'deadbeat raids' or 'man up and pay roundups,'" sometimes arresting parents, usually fathers, in midnight raids or even at events where their children and others are watching.[124] These raids sometimes capture child support obligors along with others accused of violent crimes, such as drug or weapons charges.[125] On their face, these are grotesque displays of criminal enforcement

/op-ed/la-oe-haney-fathers-day-child-support-20180615-story.html ("[C]hild support and criminal justice should be separated from one another . . . .").

[121] Katz, *supra* note 113, at 1298 (quoting Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124 AM. J. SOCIO. 1, 27 (2018)).

[122] Katz, *supra* note 113, at 1298 (quoting CARMEN SOLOMON-FEARS, ALISON M. SMITH & CARLA BERRY, CONG. RSCH. SERV., R42389, CHILD SUPPORT ENFORCEMENT: INCARCERATION AS THE LAST RESORT PENALTY FOR NONPAYMENT OF SUPPORT 3 (2012)).

[123] *See, e.g.*, Joshua Sharpe, *'Deadbeat' Parents Arrested in DeKalb Sheriff's Holiday Sweep*, 95.5 WSB: ATLANTA'S NEWS & TALK (Dec. 22, 2016, 4:18 PM), https://www.wsbradio.com/news/local/deadbeat-parents-arrested-dekalb-sheriff-holiday-sweep/3WFiiJD7swQtZ2tJoV6XRM/ [https://perma.cc/PA9C-ZX83]; Samantha Melamed, *Sheriffs Target 'Deadbeat Dads' with Midnight Raids, Debtor's Prison. But Does It Help the Kids?*, PHILA. INQUIRER (Sept. 11, 2018), https://www.inquirer.com/philly/news/child-support-arrests-deadbeat-dads-pennsylvania-20180911.html; Margaret Gibbons, *Deadbeat Parents Get Cuffs, Not Candy for Valentine's Day*, INTELLIGENCER (Feb. 11, 2015, 6:00 PM), https://www.theintell.com/story/news/crime/2015/02/11/deadbeat-parents-get-cuffs-not/17783563007/.

[124] *See* Haney, *supra* note 120.

[125] *See, e.g.*, Michelle Caffrey, *Child Support Raids in Camden County Nets 103 Arrests, Assault Rifle, Cocaine*, NJ.COM (July 24, 2015, 9:57 PM), https://www.nj.com/camden/2015

and overpolicing gone awry. But on a deeper level, these serve an important symbolic function: to build social solidarity against "deadbeats" as a public threat and by "labeling deviant those behaviors considered unacceptable threats to [social] cohesion."[126] Gustafson shrewdly observes that "[w]hat makes the degradation of the poor in the United States ceremonious is the formal and public nature of the degradation, a formality lent to the degradation through the involvement of, or association with, the criminal justice system."[127] To that end, these "degradation ceremonies"[128] do not only play out in enforcement raids, but also in courtrooms throughout the United States, where parents who owe child support are locked up like hardened criminals. Judges with the imprimatur of state power routinely refer to them as "losers, liars and scumbags"[129] to shame them into paying when many clearly cannot. The public reaction to a parent's failure to pay child support is not proportional to the offense, unless you consider the sociopolitical importance of reinforcing the majority group's solidarity around "values" buttressed by the symbolic presence of the police state.

Criminal law is woven into the framework of child support enforcement quite thoroughly—through criminal nonsupport laws, through incarceration as a sanction authorized under PRWORA, or directly through civil contempt for failure to pay child support debt—in a way that is infused with race and class stigma. Approximately fifteen percent of all Black fathers have done jail time for failing to pay child support debt.[130] In addition, child support debtors constitute twenty percent of the jail population in certain states.[131] Public, formal expressions of disgrace, including public arrest raids, serve to stigmatize parents further and rally the public in ways that perpetuate social inequality. Moreover, even when child support is not the basis for incarceration or a criminal conviction, using incarceration as an enforcement tool presents an ongoing problem for parents involved in the criminal system. Often included among the conditions for release on probation or parole is a requirement to remain free of criminal system involvement.[132] This is no small task in this social environment.

/07/child_support_raid_in_camden_county_nets_103_arres.html [https://perma.cc/54D9-NFT3].

[126] *See* Gustafson, *supra* note 16, at 301.

[127] *Id.* at 302. According to Gustafson, "Degradation ceremonies tend to differ for different groups, with the degradation ceremonies often specific for marginalized groups based on their gender, age, race, and ethnicity. For young African American and Latino men, police stops, frisks, and automobile searches are common degradation ceremonies." *Id.* at 302-03 (footnote omitted). To this list I would add child support enforcement sweeps.

[128] *See id.* at 301-02 (defining "ceremonial degradation").

[129] *See* Haney, *supra* note 120.

[130] *Id.*

[131] *Id.*

[132] *See* Benjamin Wiggins, Edward E. Rhine, Bree Crye, Robin Tu & Kelly Lyn Mitchell, *Parole Rules in the United States: Conditions of Parole in Historical Perspective, 1956-2020*, 47 CRIM. JUST. REV. 185, 200 (2022) ("The most common conditions of parole in our 2020 census related to 'comply with law.'").

The ever-present risk of incarceration for failure to pay child support is a barrier to successful reintegration.

2. Unmasking Gender in the Criminalization of Child Support

In analyzing the effect of criminalization on child support, it is important to foreground how essentialist notions of gender have shaped the discourse and development of child support doctrine. Currently, an overwhelming proportion of the research and legal literature on child support, including the many problems that are analyzed in this Article, focuses on fathers to the exclusion of mothers—specifically Black men and/or incarcerated fathers.[133] That work is important, and there are many reasons to feature fathers as the focus of the inquiry related to child support. In terms of the sheer number of child support orders and relative levels of incarceration, men occupy a disproportionate percentage of these obligors,[134] while mothers continue to make up a large majority of custodial parents. However, it is a mistake to ignore that the child support system itself has always been a gendered construct, including the ideology of the male breadwinner at the core of the family support paradigm. If we continue to blindly adhere to unexamined norms, we fail to see the ways that the system of rights and responsibilities inherent in family support law has continued to exert disciplinary power over all of us, regardless of status or gender, by controlling what normative features are acceptable for everyone—and which are acceptable to punish. This is particularly the case when examining the acceptance of blanket norms that allow or even encourage the policing of poor families and obscure the important ways that gender is implicated in the criminalization of child support.

Criminalizing behavior, even in the realm of child support enforcement, is not new. Criminal law and family law are considered different spheres, but they have reinforced and worked in tandem with each other for some time.[135] For example,

[133] *See, e.g.*, Lollar, *supra* note 120, at 159-77 (using example of poor fathers to call for ending criminalization of failing to pay child support).

[134] *See* Battle, *supra* note 39, at 443 ("Such policies have significant implications for the approximately 6.5 million custodial parents with support orders (in 2013) as well as for noncustodial parents—typically fathers as more than 85% of custodial parents are women.").

[135] *See* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1255-56 (2009); *see also* Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 ALA. L. REV. 169, 177-78 (2017) ("The family has always been a robust site of criminal regulation. Historically, seduction, adultery, and sodomy laws criminalized non-normative sex while marriage brought immunity from criminal liability for assault. The criminal law continues, albeit in a more limited fashion, to police the boundaries of family and to mediate intra-familial harms and interactions. It does so via a network of laws regulating marriage (bigamy), adult intimate interaction (intimate partner violence), the financial care of dependents (child support laws), and . . . the scope of permissible conduct within the parent-child relationship, as delineated by corporal punishment and adult incest laws." (footnotes omitted)).

before there were "Deadbeat Dads" there were "Home Slackers."[136] Historian Michael Willrich describes the heightened public concern in the early twentieth century "about 'home slacker' husbands, wage earners who failed to support their families, [which] gave rise to new forms of social regulation that have left a lasting imprint on welfare policy."[137] Willrich opines that we have "an incomplete understanding of welfare's gendered past."[138] He shows how "a court-centered regime for policing delinquent wage-earning husbands emerged alongside the better-known American welfare innovations of the early twentieth century: state-administered workmen's compensation systems and state-funded 'pensions' to mother-headed households."[139] Mother's pensions, from the outset, were paltry when compared to male forms of social insurance and contained moralist eligibility criteria.[140] Moreover, from the beginning, the criteria excluded many women of color.[141] Importantly, Willrich contends that a third policy track emerged that advocated for "the criminalization, regulation, and punishment of able-bodied male breadwinners who failed to support their families."[142] He states that the "powerful cultural and legal [male breadwinner] norm governed masculinity itself."[143] As a result, exercising "[t]he male prerogatives authorized by [this] breadwinner norm [was] made conditional upon men fulfilling their assigned roles" as breadwinners—and it "[held] them liable, to their wives and the state, for family poverty in industrial America."[144] By 1916, every state in the union had enacted laws making desertion or nonsupport a crime.[145] Willrich suggests that the gendered nature of these processes is to exert disciplinary power over men as well, "reproduce[ing] relations of male dominance and female dependency," ultimately as a devil's bargain for patriarchy.[146] He makes the claim that the "court-centered regime of male breadwinner regulation emerged at a moment when the facts of modern social life . . . seemed dangerously corrosive to traditional family bonds," including the legal duties governing relations between husband and wife, parent and child.[147] He argues that "breadwinner regulation was vital to the ideological and political development of modern welfare governance in its formative era."[148]

[136] Michael Willrich, *Home Slackers: Men, the State, and Welfare in Modern America*, 87 J. AM. HIST. 460, 460 (2000).

[137] *Id.*

[138] *Id.* at 461.

[139] *Id.*

[140] *See id.* at 461-62.

[141] *See id.* at 461.

[142] *Id.* at 462.

[143] *Id.*

[144] *Id.* at 462-63.

[145] *Id.* at 472.

[146] *Id.* at 462.

[147] *Id.* at 460.

[148] *Id.* at 461.

The gender framework for welfare was well established by the early part of the century.

The path of modern child support enforcement reflects Willrich's contention that "enforcing male responsibility was . . . central to the broader, regulatory enterprise of welfare *as a mode of governance*,"[149] but also as reinforcement for appropriate gender relations. In 1996, PRWORA focused on two primary goals: child support enforcement (coupled with related work requirements for both parents) and the advent of marriage promotion as social policy. Child support for TANF families arose from some politicians' so-called "family values" philosophy,[150] which proffers the notion that single-parent families and the decline of traditional family structures contribute to the "feminization of poverty."[151] While it is undoubtedly true that women and children have fared worse than men after divorce, the reasons for this likely stem from a variety of structural reasons related to gender discrimination in the workplace and in society generally.[152] However, regardless of the origins of relative female poverty, the language of PRWORA assumes that marriage is the panacea to all poor women's financial ills. Marriage promotion[153] was the cornerstone of its antipoverty program and the goal of regulating poor families' behavior through social engineering. This is quite obvious through the legislative findings of PRWORA, which frame the Act's purpose.[154] In pertinent part, the findings dictate that:

> Marriage is the foundation of a successful society. . . . Marriage is an essential institution of a successful society which promotes the interests of children. . . . Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children . . . .[155]

"Marriage promotion" became ensconced in welfare reform legislation as a reflection of the broader culture wars around what families would be deemed legitimate, including the battle over rights of same-sex couples.[156] Marriage could remain an expressive function for heterosexual couples outside of the welfare system, but for families who were poor, the need for public assistance required them to be funneled into eligibility criteria that dictated a direct form

[149] *Id.* at 463.

[150] *See* Nakabayashi, *supra* note 81, at 614.

[151] *See* Diane Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28, 28 (1978).

[152] *See* Johanna Brenner, *Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth*, 1 GENDER & SOC'Y 447, 454 (1987).

[153] *See* 42 U.S.C. § 601.

[154] *Id.*

[155] *Id.*

[156] *See, e.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7; 28 U.S.C. § 1738C), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013), *and* Obergefell v. Hodges, 576 U.S. 644 (2015).

of heteronormative social engineering.[157] Other marriage promotion policy dictates followed.[158]

The rationale for marriage promotion as a social policy for alleviating poverty was dubious at best. The assumption was that two-parent households would automatically lift single mothers out of poverty. Of course, in the event that you cannot coerce marriage, the fallback position would be aggressive support enforcement of non-resident fathers to simulate comparable household income after dissolution of parental ties. Both of these notions are flawed. Because people tend to marry within the same class, the marriage of people who are both poor will not, in and of itself, improve their economic prospects enough to lift them out of poverty.[159] Marriage may be an important value and desirable for some, but the benefits of marriage for the purpose of economic empowerment under these circumstances are greatly overstated.[160] In the end, marriage promotion failed spectacularly as an antipoverty program, but it allowed conservatives to instantiate a prioritized social agenda on the group of people least able to resist because of their economic need.

Poverty programs often operate on an essentialist, and frankly, racist and sexist, model that deeply informs social welfare policy. Daniel L. Hatcher observes that the "conservative anti-welfare movement and accompanying racialized stereotypes of the 1980s and 90s" combine to create "an essentialist and often harmful response to women's poverty,"[161] especially in the realm of welfare. By ignoring the fact that all families have different circumstances, needs, and strengths, policymakers have chosen to relegate families on TANF to public stereotypes, like Welfare Queens and Deadbeat Dads, who must be policed in order to address women's relative poverty.[162] But creating villains out

[157] *See* Barbara Ehrenreich, *TANF, or "Torture and Abuse of Needy Families": Top Ten Misconceptions About TANF*, 1 SEATTLE J. FOR SOC. JUST. 419, 423 (2002) ("Many saw (and still do see) welfare reform as part of a moral crusade; a moral crusade against those evils of promiscuity, 'illegitimacy,' single mother-headed households, and so on.").

[158] *See* Papke, *supra* note 49, at 593 (citing Deficit Reduction Act of 2005, Pub. L. No. 109-171, 104 Stat. 4 (2006) (codified as amended at 42 U.S.C. § 603(a)(2)(D))) ("The Deficit Reduction Act of 2005 created 'The Healthy Marriage Initiative' and made funding of $150 million available for each of the fiscal years 2006 through 2010 for marriage promotion programs and activities.").

[159] *See* Shawn Fremstad, *Partnered but Poor*, CTR. FOR AM. PROGRESS (Mar. 11, 2016), https://www.americanprogress.org/article/partnered-but-poor/ [https://perma.cc/JX4X-GBND] ("Economic insecurity and low incomes among married and partnered families undermine the myth of marriage being the fix for poverty.").

[160] *See id.* (finding majority of people living in low-income families with children live in married-couple family).

[161] Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL'Y & L. 775, 777 (2012).

[162] Keesha Middlemass & Jyl Josephson, *Child Support Enforcement, Poverty, and the Creation of the New Debtor's Prison*, 33 FEMINIST FORMATIONS 96, 97 (2021) ("Welfare practices produce and reproduce social constructions of the poor, women, and racial and

of men does not create freedom for women. In coopting the term "feminization of poverty," antiwelfare activists used the very real relative financial disparities between men and women that arise from a multitude of structural forces to ingrain the notion that poor men—Deadbeat Dads—are responsible for the poverty of poor women and children. Apart from being a terribly ineffective way to generate resources for women in need, it has helped to reinforce similarly negative stereotypes against mothers as well. Thus, this narrative criminalizes the same women that these policies purport to help. For example, the Deadbeat Dad image as shirker of responsibility gives credibility to the false notion that poor mothers are Welfare Queens who are irresponsible in their decisions to have children while poor. This has led to an onslaught of welfare-related regulations that limit women's procreative choices and exclude them from normative constitutional protections that are designed to protect reproductive autonomy.[163] Moreover, Gustafson notes that poor women of color are treated as deviant and marginal and, like men in child support enforcement sweeps, "are subject to degradation ceremonies."[164] These degradation ceremonies include

> excessive penalties and extrajudicial public shaming for women convicted of welfare fraud; mandatory drug testing of welfare recipients; high-publicity criminal prosecutions of mothers who violate school district residency requirements to enroll their children in more affluent schools; and tough criminal penalties for those who possess stolen infant formula or other necessities low-income Americans have difficulty obtaining.[165]

"For women . . . the negative stereotypes and the behaviors labeled deviant . . . often revolve around motherhood."[166] These stereotypes about inadequate mothering animate social policy for poor women and the degradation ceremony is actually embedded in the PRWORA legislation itself. It surfaces as the rhetorical framework written into the findings of the legislation that necessitate coercion toward marriage as a method of fixing inherently "broken" (or nonnormative) families through state intervention.[167]

Gender norms and stereotypes also render invisible the criminalization of others that live in poverty and are affected by punitive child support enforcement, including incarcerated mothers who get far less attention. Child support laws are gender neutral and can impact many of the eighty percent of

ethnic minorities, which have long-term implications for poor families, particularly as they relate to gendered patterns of incarceration and gendered norms of economic insecurity.").

[163] *See, e.g.*, Vicki Lens, *Welfare Reform and the Family Cap: Rhetoric Versus Reality*, 4 J. CHILD. & POVERTY 19, 26-30 (1998) (examining theory behind family cap and claims that reducing benefits will deter women on welfare from having more children).

[164] Gustafson, *supra* note 16, at 304.

[165] *Id.* at 297, 307-08, 315-22, 332-36.

[166] *Id.* at 304.

[167] *See supra* notes 153-55 and accompanying text.

incarcerated women who are mothers.[168] Therefore, while fathers are far more likely to be noncustodial parents and liable for child support, noncustodial mothers are not exempt. In addition, because many of these mothers were custodial parents before incarceration, they may become subject to child support enforcement as *noncustodial* parents after incarceration when the caretakers for children of these mothers might have sought TANF benefits or Medicaid to help during the period of parental confinement.[169] These mothers are also rhetorically transformed into "perpetrators" after criminal system involvement, and therefore are subject to a different type of bad mother stereotype, equally unworthy of empathy. Consequently, the historical failure to recognize the more complex gender dynamics in child support enforcement flattens the discourse of family support in a way that redounds to the detriment of poor families when seeking more effective policy solutions.

B. *The Problems with Federal and State Child Support Law*

Federal and state law have operated jointly in a complex interplay of law and practice that has created wildly divergent outcomes for child support obligors. One thing is for certain: the interaction between these converging legal systems, in tandem with a persistent "tough on crime" punitive mindset, has created an environment where many poor parents—especially parents who are incarcerated—have amassed large amounts of child support debt.[170]

1. Federal Law

Federal law has had a major impact on the child support system. In the second half of the twentieth century, federal lawmakers sought to exert their policy influence to rein in the spending costs of the federal welfare program. Congress does not typically intervene in family law issues of local concern,[171] but does so selectively, dictating overall policy for issues it deems of national importance. As a reflection of legislators' widely held views that the federal government should shift the cost burden of AFDC to nonresident parents, Congress passed the Family Support Act ("FSA")[172] in 1974. For the first time, the federal government required states receiving federal funds to establish and enforce child

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[168] *See* Nazish Dholakia, *Women's Incarceration Rates Are Skyrocketing. These Advocates Are Trying To Change That.*, VERA INST. OF JUST. (May 17, 2021), https://www.vera.org/news/womens-voices/womens-incarceration-rates-are-skyrocketing [https://perma.cc/5KKP-F58L].

[169] *See* Turetsky & Waller, *supra* note 79, at 121 ("Parents may also be subject to state cost recovery efforts if their children receive Medicaid or foster care payments.").

[170] *See* HANEY & MERCIER, *supra* note 2, at 2 ("One of the biggest obstacles to reentry [for formerly incarcerated individuals] is the size of a parent's child support debt, which averages $20,000 to $36,000 . . . .").

[171] *See* Morgan, *supra* note 76, at 195-96.

[172] Social Security Amendments of 1974, 42 U.S.C. §§ 651-60 (requiring states to meet standards promulgated by newly established federal OCSE, a division of Department of Health and Human Services).

support obligations, offering funding inducements for state programs.[173] Codified as Title IV-D of the Social Security Act, it required states to designate "IV-D" programs for child support collection.[174] The FSA enforcement provisions applied to any family regardless of whether they were receiving AFDC, but nonwelfare families received all of the money paid by noncustodial parents, which transformed the government into a convenient collection agency for child support.[175] From the beginning, more affluent families using the system voluntarily have received the greatest benefit from the program. But the "privatization" of support—transferring the cost of child support to nonresident parents—has done little to lift welfare families out of poverty.[176] To receive benefits, welfare recipients were relegated to tenBroek's second track of the "dual system," which was more onerous and administratively burdensome.[177] In addition to being *required* to let the government sue noncustodial parents for support in order to receive AFDC, the parent receiving benefits was able to keep very little of the money (called a "pass-through") because the primary purpose of the Act was recoupment for the state.[178] This controversial aspect of welfare-based child support still exists today and is the source of much tension because noncustodial parents do not see support payments going to their children, as those payments are in large part diverted to the state.[179]

In the decades after Congress enacted the FSA, it passed a wide range of child support legislation in an attempt to standardize child support programs in the states and, of course, for enforcement purposes. For example, in 1992 politicians on both sides of the aisle enacted the Child Support Recovery Act ("CSRA"),[180] making it a federal crime to willfully fail to pay support for a child living in another state. As already noted, a dizzying array of civil enforcement tools were also adopted with the enactment of PRWORA a few years later in 1996.[181] However, legislators were not content to rely only on those tools, which were intended to make the collection of child support "automatic and inescapable."[182]

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[173] *See* Cammett, *Expanding Collateral Sanctions*, *supra* note 24, at 324.

[174] *See id.*

[175] *See* Cammett, *Deadbeats, Deadbrokes, and Prisoners*, *supra* note 20, at 138-39.

[176] *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 562-63 (1996) (noting that increased child support collections disproportionately benefit families above poverty line).

[177] *See* tenBroek, *supra* note 43, at 257-58.

[178] *See* Hatcher, *supra* note 59, at 1052-53.

[179] *See id.*

[180] Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified as amended at 18 U.S.C. § 228).

[181] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 601-19).

[182] Legler, *supra* note 176, at 538; *see also* Papke, *supra* note 49, at 601 ("[PRWORA included a] mandate that states take measures to increase child support collection in order to qualify for federal block grants. The measures include, but are not limited to, in-hospital paternity determination, faster courtroom paternity proceedings, state-wide registration of

In 1998, lawmakers amended the CSRA, enacting the ominously titled Deadbeat Parents Punishment Act ("DPPA").[183] The DPPA reformulated CSRA offenses as felonies and imposed harsher penalties.[184] It "also created the rather remarkable presumption, at least for members of the underclass, that a delinquent payor is able to pay child support."[185]

Nevertheless, in my view, the most consequential piece of legislation contributing to the accrual of large child support arrears is the Bradley Amendment,[186] which is not even a standalone child support bill. It is a 1986 amendment to Title IV of the Social Security Act that required states to adopt certain procedures in order to be in compliance with the federal child support program.[187] It sets forth three distinct provisions: (1) that once entered as final, any payment or installment of support due under a child support order is an enforceable money judgment by operation of law; (2) that such a judgment is entitled to full faith and credit within and across state boundaries; and (3) in its most cited provision, that the judgment cannot be retroactively modified by any state, except for pending petitions, but can be *prospectively* modified.[188] Simply put, the Bradley Amendment rendered courts powerless to reduce or suspend arrears retroactively once they have accrued.

To put it in historical context, the Bradley Amendment was adopted at a time when "it was a common practice for obligors to amass large child support debt, only to have the amount owed reduced or eliminated by providing 'good cause' and invoking judicial discretion to obtain the reduction."[189] Accordingly, many families, especially women, were receiving a dismal percentage of support owed. However, Congress has passed many support enforcement statutes since that time, and we no longer need to maintain the inflexibility inherent in the Bradley Amendment as a way to secure support from those who are able to pay.

delinquent payors, and the denial of licenses to drive, hunt, and engage in assorted occupations and professional practices.").

[183] Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified as amended at 18 U.S.C. § 228).

[184] *See* §2, 112 Stat. at 618-19.

[185] Papke, *supra* note 49, at 600 (citing 18 U.S.C. § 228(b)).

[186] Bradley Amendment, Pub. L. No. 99-509, 100 Stat. 1973 (1986) (codified as amended at 42 U.S.C § 666(a)(9)). The Bradley Amendment is the subject of much criticism, given the impact it has on the accrual of debt. *See, e.g.*, SORENSEN ET AL., *supra* note 3, at 8 (referencing Bradley Amendment as factor contributing to dramatic growth of child support arrears); Middlemass & Josephson, *supra* note 162, at 107 ("The Bradley Amendment may have been directed at preventing noncustodial parents from obtaining judicial relief after amassing large amounts of child support debt, but the amendment had unintended consequences, including a negative impact on poor, incarcerated fathers who have standing child support orders."); Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124 AM. J. SOCIO. 1, 18 (2018) (explaining Bradley Amendment's role in levels of arrears soaring in certain states).

[187] *See* Cammett, *Deadbeats, Deadbrokes, and Prisoners*, *supra* note 20, at 148.

[188] *Id.* (citing provisions of 42 U.S.C. § 666(a)(9)).

[189] *See* Cammett, *Expanding Collateral Sanctions*, *supra* note 24, at 325.

The significant flaw of the Bradley Amendment is that it never contemplated incarcerated (or other institutionalized parents) who have limited access to or knowledge of modification resources for child support.[190] In 1986, when the Bradley Amendment was signed into law, mass incarceration in the United States was on the rise but had not yet captured millions.[191] At best, the unintended consequences of the Bradley Amendment have been severe. In addition to unpaid support accrued while incarcerated, states are allowed to charge interest on that debt—and more than half do at a rate of up to twelve percent.[192] In conjunction with other processing fees, paternity testing, court fees, and income withholding fees, child support debt owed by incarcerated parents has exploded.[193]

There are currently some limited exceptions to the Bradley Amendment's blanket prohibition on retroactive arrears. Under the well-established federal interpretation of the Bradley Amendment, states do have the authority to cancel child support debt, but only that which is owed to the government as recovered welfare costs.[194] Some analysts note that states are not fully exploiting these exceptions to provide relief and explain that "[the] law is applied unevenly: some courts use Bradley to reject all modification requests; others use it to restrict modifications to public arrears; and still others use it as a bargaining tool in legal proceedings."[195] Moreover, because "most modification reviews remain judicial processes, the incarcerated are disadvantaged . . . since they tend to have little knowledge of their rights or the ability to litigate their cases from afar,"[196] including while in prison. Despite decades of incalculable child support arrears owed by prisoners unable to pay, Congress has so far failed to amend the statute to prevent the buildup of unpayable arrears. The only way to ensure that the Bradley Amendment ceases to inflict pain and suffering on families is to amend it to create a meaningful exemption for incarceration. A proposed reform could entail "[w]aiv[ing] institutionalized parents from restrictions on retroactive modification" and "[e]nsur[ing] this exemption is consistent across states and no

[190] *See* Middlemass & Josephson, *supra* note 162, at 107.

[191] *See* Cammett, *Deadbeats, Deadbrokes and Prisoners*, *supra* note 20, at 153 n.129 ("Since 1975, when Congress first started to address the issue of support from nonresident parents, the number of incarcerated parents has grown exponentially."). It is not only incarcerated parents who are at risk, but others who are confined. *See id.* at 150 (citing CONG. RSCH. SERV., RS20642, THE BRADLEY AMENDMENT: PROHIBITION AGAINST RETROACTIVE MODIFICATION OF CHILD SUPPORT ARREARAGES 3-4 (2000)).

[192] *See* Haney, *supra* note 186, at 18.

[193] *See id.*

[194] Turetsky & Waller, *supra* note 79, at 136; *see also State IV-D Program Flexibility with Respect to Low Income Obligors*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF CHILD SUPPORT ENF'T (Sept. 14, 2000), https://www.acf.hhs.gov/css/policy-guidance/state-iv-d-program-flexibility-respect-low-income-obligors [https://perma.cc/M75V-YRA8] ("States may not retroactively modify arrearages, but have discretion to compromise arrearages owed to the State.").

[195] Haney, *supra* note 186, at 23.

[196] *Id.*

longer subject to local discretion."[197] Unfortunately, because incarcerated parents do not represent a powerful constituency—as they are highly populated by poor, minority communities[198]—it is unlikely that Congress will be moved to address this problem despite its obvious public policy benefits. The Bradley Amendment, decades after its passage, remains a pillar in the matrix of laws and practices that make up the Shadow Law of Child Support.

2. State Law

State laws and practices also significantly contribute to the problem of prisoner child support debt, but in hidden ways. Under principles of federalism, states are responsible for designing and implementing child support programs, though constrained by the policy dictates of the federal government.[199] That means that more than fifty jurisdictions are deciding how to initially process child support orders and how to modify them, including if and when to modify a child support order when a parent is incarcerated. The divergence of state laws produces one curious result in what should be a unified nationwide system: whether or how much child support an incarcerated obligor accrues is largely determined by the politics of where they live and state law.

Even for low-income obligors who are not burdened by criminal system involvement, state practices affect child support debt significantly. As former child support commissioner, Vicki Turetsky, and Maureen Waller indicate:

> In many states, low-income parents are routinely issued standard minimum wage orders. These orders are based on imputed, or assumed, income rather than a factual determination of a specific parent's income and ability to pay. Courts often impute income when nonresident parents are unemployed, employed part-time, or fail to come to court, or when income documentation is missing. Imputed income exaggerates actual earnings.[200]

Further, in addition to "inflated orders resulting from imputed income and minimum awards, [noncustodial parents] of children receiving welfare are often required to reimburse states for additional welfare costs the states incurred before courts established the initial child support orders" including "the imposition of retroactive child support that dates as far back as the birth of the

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[197] *See* HANEY & MERCIER, *supra* note 2, at 43.

[198] *See* Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/ [https://perma.cc/T896-63T9] (explaining that poverty "contribute[s] significantly to the United States' high rate of imprisonment, which has disproportionately affected low-income and minority populations").

[199] *See State Agencies*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF CHILD SUPPORT ENF'T, https://www.acf.hhs.gov/css/child-support-professionals/state-agencies [https://perma.cc/VHG7-45FH] (last updated Sept. 8, 2022).

[200] *See* Turetsky & Waller, *supra* note 79, at 130.

child in some states."[201] That poor obligors rack up huge debt under these circumstances should come as no surprise.

For incarcerated parents, perhaps the most frustrating problem is the process of modifying an order while incarcerated in order to reduce the potential debt load during incarceration.[202] As I have discussed in previous work, under most child support guidelines, the usual "modification process can be engaged when a parent experiences a substantial change of financial circumstances."[203] However, the reduction of income will not be granted by the courts if the drop in income is through the fault of the parent requesting the modification.[204] "Articulated through . . . case law or child support statutes, some states dictate that incarceration is 'voluntary unemployment' when declining to grant a suspension of arrears during a term of confinement."[205] This policy reflects the viewpoint "that a prisoner's criminal acts should not warrant consideration when evaluating an obligation to provide for a child."[206] However, it is quite a leap to assume that one voluntarily risks incarceration for the sole purpose of circumventing a child support order. Therefore, jurisdictions that hold this view are actually punishing parents for what they deem willful criminal acts rather than analyzing what effect the accrual of debt will have on the ability to support children moving forward. It is a salient example of how certain states are more focused on retribution against incarcerated parents for criminal activity than implementing a reasoned policy analysis focused on how best to engender child well-being.

Before 2016, one-third of states "defined imprisonment as 'voluntary unemployment' and excluded it outright as grounds for modification."[207] However, in 2016, President Barack Obama issued Executive Order 13752,[208] which altered the legal landscape by promulgating new rules that were adopted by the national OCSE.[209] The federal rules were intended to "increase child support payments to children while reducing the accumulation of uncollectible debt owed to the state in cases where the parents have low incomes."[210] Under these rules, states are required to implement various changes to existing state laws and procedures. Among other changes, states must amend their child support guidelines to provide that child support orders are "based on the

[201] Brito, *Fathers Behind Bars*, *supra* note 8, at 642.

[202] *See* Brito, *Debt Bubble*, *supra* note 33, at 976.

[203] Cammett, *Deadbeats, Deadbrokes, and Prisoners*, *supra* note 20, at 150.

[204] *See id.*; *see also id.* at 150-51 ("Quitting a job, or being willfully or 'voluntarily unemployed' or underemployed are examples of situations where a court will find it inappropriate to reduce the amount of a child support obligation.").

[205] *Id.* at 151.

[206] *Id.*

[207] *See* Haney, *supra* note 186, at 10, 21.

[208] Exec. Order No. 13,752, 81 Fed. Reg. 90181, 90181 (Dec. 8, 2016).

[209] *See* Child Support Enforcement Rules, 45 C.F.R. §§ 300-09 (2021).

[210] Turetsky & Waller, *supra* note 79, at 137-38.

noncustodial parent's earnings, income, and other evidence of ability to pay;"[211] provide notice to incarcerated parents who will be incarcerated for more than 180 days of their right to request a review of their orders;[212] and establish guidelines for the use of civil contempt[213] (ostensibly to implement due process safeguards required by the Supreme Court in *Turner v. Rogers*).[214] Additionally, state guidelines are now, at least in theory, *prohibited from treating incarceration as voluntary unemployment*.[215] These changes are important and represent an example of positive rulemaking to attempt to address a social policy crisis.

No matter how well-intentioned, keen observers of child support processes have expressed some skepticism about the rule's efficacy and scope, particularly when it comes to designations of what is considered "voluntary unemployment." For example, Brito observes, "The new rules primarily set forth preferred standards and criteria to guide state decision making, not firm directives. Thus, states retain nearly all of their existing discretion to decide how to handle cases involving unemployed and underemployed noncustodial parents who are behind in their child support payments."[216]

Similarly, others have noted that "because the Final Rule did not mandate what a new modification procedure must look like, there is considerable variation in [state] modification practices."[217] Because of President Obama's Executive Order, states that still treat incarceration as voluntary unemployment will likely join the others that are currently complying.[218] However, Haney notes that doing so typically "involves a judicial process that inmates must initiate before their arrears accumulate" which entails "petitioning the court upon entering prison to request that a support order be lowered or held in abeyance for later review."[219] She also observes that "this process implies that parents know about their options and have the legal wherewithal to pursue them—at the exact time they are adjusting to prison life."[220] In this context, Haney and Mercier argue that since 2016, "the modification issue has shifted from one of formal eligibility to one of accessibility."[221] Moreover, judges will continue to be at the crux of decision-making, as "the new rules do not prohibit judges from reaching judgments that emphasize blame for criminal behavior and disregard

[211] 45 C.F.R. § 302.56(c)(1).

[212] 45 C.F.R. § 303.8(b)(2).

[213] 45 C.F.R. § 303.6(c)(4).

[214] *See* Turner v. Rogers, 564 U.S. 431, 447 (2011).

[215] 45 C.F.R. § 302.56(c)(3).

[216] Brito, *Debt Bubble*, *supra* note 33, at 969.

[217] HANEY & MERCIER, *supra* note 2, at 18.

[218] *See* HANEY & MERCIER, *supra* note 2, at 18 (noting that as of 2019, four years after implementation of Final Rule, thirty-six states still defined incarceration as voluntary unemployment, but that may change as Final Rule is fully implemented).

[219] Haney, *supra* note 186, at 22.

[220] *Id.*

[221] HANEY & MERCIER, *supra* note 2, at 26 (emphasis removed).

the undisputed fact that low-income incarcerated parents lack the financial wherewithal to pay their child support obligations while serving time."[222]

Finally, a major omission of the Final Rule is that it does nothing to address the outstanding arrears that so many incarcerated parents have already accrued before President Obama's 2016 Executive Order. Consequently, the rule changes do not directly address the needs of these parents, and broad remedies are left to the discretion of the states in a way that does not augur well for the prospects of these parents or their children.

The Shadow Law of Child Support reveals that federal and state law have merged to place additional debt burdens on incarcerated parents. Consider how the historical development of child support law demonstrates an unmistakable tendency to address the important public policy issue of rights and responsibilities through the punitive lens of judgment and recrimination, owing to society's objectification of the poor and the rhetorical race bias that infects our public discourse. It is apparent that welfare law has created a punitive apparatus for dealing with the poor, which assumes, with gendered presumptions, that regulating and monitoring is the only way to make child support obligors engage with the system and their families. The federal government has fashioned rigorous enforcement mechanisms, and many states have designated incarceration as voluntary unemployment as a way of legally punishing parents for criminal system involvement, with no reasoned analysis of how such a policy path engenders support for their children, which is the ostensible goal of child support jurisprudence. Despite the carceral logic that informs our child support discourse, we cannot police our way out of poverty. The totalizing effect of these systems on the poor and incarcerated have exacerbated an already difficult economic dilemma for parents seeking to reestablish themselves after criminal system involvement.

C. *Perpetual Punishment: Carceral Debt and Civil Collateral Consequences*

The laws and practices at the federal and state levels have unleashed a torrent of child support debt faced by incarcerated obligors that must be immediately addressed by those in debt.

Imagine that you are an incarcerated parent who enters prison with a child support order. The court has refused to modify your order when you are incarcerated because your incarceration doesn't meet the state's definition of a substantial change in circumstances. While you are incarcerated, the debt is accruing interest daily, not to mention other child support-related fees, yet you are making less than two dollars per day to contribute toward them.[223] Alternatively, you live in a state that allows for downward modification of your order, but you have no idea that you should do so immediately, or even how to go about it. When you are released, your child support debt has doubled, and, if

[222] *See* Brito, *Debt Bubble*, *supra* note 33, at 974.

[223] *See* Brito, *Debt Bubble*, *supra* note 33, at 976 (noting that prison wages average eighty-six cents per hour).

you are like the average parent being released back into society, your debt is greater than $20,000.[224] The Bradley Amendment prohibits the reduction of arrears, so you have no hope of reducing a debt that will follow you for years, if not for the rest of your life. You have marginal wage-earning ability, especially now that you have a criminal record, but your parole or probation officer warns you that you must stay clear of any entanglements with the criminal system. Your number one priority is to find work to survive, but you also want to reengage with your family and community and pay ongoing child support—lest you be reincarcerated for civil contempt.[225]

Under these conditions, child support debt alone would be enough to create significant obstacles to successful community reintegration, especially for the formerly incarcerated with marginal earning capacity.[226] But unfortunately most of these parents—as well as parents who have had contact with the criminal system but have not been confined to prison—also find themselves confronting an entirely different kind of criminal financial obligation of which they may have been totally unaware. Additionally, they are met with hidden civil collateral consequences that arise from their engagement with the criminal system. Taken together, these hidden burdens compound their already significant child support debt and add to the expanding matrix of laws and policies, constituting the Shadow Law of Child Support governing the lives of incarcerated parents.

1. Carceral Debt: The Expanding World of Criminal System Legal Financial Obligations

Like the murder of Walter Scott, the 2014 shooting death of teenager Michael Brown in Ferguson, Missouri, initially presents as the story of another killing of a Black person by law enforcement, this time sparking an uproar that centered on the community's reaction to ongoing police abuse.[227] The genesis, however, of community anger and mistrust was actually grounded in state action of another kind—police involvement in the longstanding and "relentless pursuit of revenue collection,"[228] which targets an overwhelmingly Black population.[229]

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[224] *See* HANEY & MERCIER, *supra* note 2, at 2 (finding average child support debt on reentry is between $20,000 and $36,000, depending on state and methodology).

[225] This is a fictionalized account, but one that is definitely in keeping with the experience of many child support obligors in prison. For real, harrowing accounts of the experiences of incarcerated parents, see, for example, NAGRECHA ET AL., *supra* note 1, at 11-26.

[226] *See* Brito, *Fathers Behind Bars*, *supra* note 8, at 633 ("About thirty percent of poor fathers who do not pay child support are incarcerated and the remainder experience some or all of the following barriers to employment: limited education, limited work experience, health problems, transportation barriers, and/or housing instability.").

[227] *See Shooting Death of Michael Brown—Ferguson, MO*, U.S. DEP'T OF JUST., https://www.justice.gov/crs/timeline-event/shooting-death-michael-brown-ferguson-mo [https://perma.cc/F4SJ-TJJC] (last updated Aug. 9, 2019).

[228] *See* Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 293, 295 (2015).

[229] *See id.* at 300 ("Ferguson's focus on the collection of revenue reportedly 'reflects and

Traffic stops, multiple citations, overcharging, and the collection of associated fines and court fees had long frustrated community members.[230] Additionally, "while penalties for underlying violations were typically limited to fines, defendants were often arrested and incarcerated based on failure to pay the fines."[231] A report by Attorney General Eric Holder after the Ferguson insurrection concluded that the city's estimated and actual revenues collected reflect a significant and increasing reliance on fines and fees from enforcement of municipal code violations.[232] This reliance resulted directly from a policy that pervaded governmental, judicial, and policing powers as "[c]ity, police, and court officials for years [had] worked in concert to maximize revenue at every stage of the enforcement process."[233] The report's "review of the police department paints a disturbing picture of public officials more concerned with collecting revenue than protecting public safety."[234]

This reference to the City of Ferguson's insidious debt collection scheme highlights one aspect of criminal system debt that manifests quietly throughout the country: debt that is associated with the criminal justice system, or what I call "carceral debt."[235] Carceral debt results from the many LFOs that people face after involvement with the criminal justice system.[236] As I describe in

exacerbates existing racial bias, including racial stereotypes.' . . . African Americans received disparate treatment at virtually every phase of the law enforcement process, and such treatment included intentional discrimination in violation of equal protection rights under the Constitution." (footnote omitted) (quoting U.S. DOJ, C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 62 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/9XDP-ZYYV])).

[230] *See* Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ's Scathing Ferguson Report*, WASH. POST (Mar. 4, 2015, 3:11 PM), https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-dojs-scathing-ferguson-report/.

[231] Sobol, *supra* note 228, at 299. For more examples of how criminal justice fees and fines result in the incarceration of poor people, see generally Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016).

[232] *See* FERGUSON REPORT, *supra* note 229, at 9-10; *see also* Sobol, *supra* note 228, at 298 ("Actual fines and fees collected between the fiscal years 2010 and 2013 increased each year with $1.38 million collected in 2010 and $2.46 million collected in 2013. . . . The $1.38 million collected in 2010 represented about 12.5% of the general revenues for 2010, while the $3.09 million budgeted in 2015 represents over 23% of the budgeted general revenues for 2015.").

[233] FERGUSON REPORT, *supra* note 229, at 10; *see also* Sobol, *supra* note 228, at 297.

[234] Sobol, *supra* note 228, at 294.

[235] *See generally* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349 (2012) [hereinafter Cammett, *Shadow Citizens*].

[236] *See* Breanne Pleggenkuhle, *The Financial Cost of a Criminal Conviction: Context and Consequences*, 45 CRIM. JUST. & BEHAV. 121, 122 (2018) (describing LFOs as "encompass[ing] the cumulative monetary assessments charged over various points of a

previous work, LFOs are of two distinct variants, both of which emanate from involvement with the justice system.[237] The first variant includes criminal financial penalties, such as fines, restitution, court costs, and other fees that are directly associated with criminal convictions.[238] The second variant includes lingering debt accumulated during or as a result of incarceration—including child support debt—which often acts as a gateway to reincarceration.[239] Criminal system-related debts are levied on people in three main ways. First, fines are levied to punish the offender.[240] Second, penalties are levied for restitution to victims.[241] Finally, and more controversially, assessments are levied with the goal of public cost-recovery,[242] such as those practiced in Ferguson, but significantly more widespread. For example, municipalities across the nation use criminal system-related fees to balance budgets as a cost-shifting measure,[243] and these costs are disproportionately borne by low-income families.[244]

Euphemistically called "user fees," cost shifting has emerged as a way that municipalities transfer the cost of operating the criminal systems to the "offenders" and away from taxpayers.[245] "'Unlike fines, whose purpose is to punish, and restitution, whose purpose is to compensate victims, user fees are designed to raise revenue' for state coffers."[246] Imposed at every stage of the criminal justice system, "invisible surcharges" add up to big debt in the

criminal sentence" including fines, restitution, supervision fees, and accrued child support).

[237] *See* Cammett, *Shadow Citizens*, *supra* note 235, at 378.

[238] *Id.*

[239] *Id.*; *see also* Pleggenkuhle, *supra* note 236, at 123 ("The current research includes measures of child support in estimating monthly obligations and overall legal debts, because many offenders are noncustodial parents and maintain legal financial responsibility for their children.").

[240] *See* Cammett, *Shadow Citizens*, *supra* note 235, at 378.

[241] *See id.* at 378-79 ("Restitution is court ordered payment by the offender directly to the victim to compensate for financial losses.").

[242] *See id.* ("[P]ublic cost-recovery fees reflect the efforts of states to pass the costs of criminal justice and other state deficits onto prisoners.").

[243] *See* John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 571 (2019) (observing user fee systems often enacted in response to budget cuts by state legislatures).

[244] *See id.* at 588 ("The impact of à la carte procedural fees disproportionately affects poor people and people of color, leading to functionally different criminal adjudication systems based on access to money.").

[245] *See* Kirsten D. Levingston, *Making the Bad Guy Pay: The Growing Use of Cost Shifting as an Economic Sanction*, PRISON LEGAL NEWS (Apr. 15, 2008), https://www.prisonlegalnews.org/news/2008/apr/15/making-the-bad-guy-pay-the-growing-use-of-cost-shifting-as-an-economic-sanction/ ("[W]here compelled to pay book-in fees or a per diem for room and board in pre-trial detention, one is paying fees before being convicted of any offense. Probationers, for whom employment is often a condition of release, pay taxes but are still charged fees for probation services.").

[246] Cammett, *Shadow Citizens*, *supra* note 235, at 379 (quoting ALICIA BANNON, MITALI NEGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010)).

aggregate, though they are perhaps inconsequential on their own.[247] In some ways, the reasoning behind this system is similar to the cost shifting rationale in child support enforcement for welfare recipients, where the government has privatized support so that the burden has shifted to noncustodial parents. Here, the government is shifting the cost of the criminal system to those ensnared by it, which creates a host of thorny issues about transparency and exploitation.

As Kirsten Levingston has indicated, "[c]oncern over shielding 'hardworking tax payers' from the costs of getting the 'bad guy' figures prominently in cost-shifting rationales."[248] She explains:

> [T]he distinction between "taxpayers" and "bad guys" may be an illusory one. Someone may be holding down a tax-paying job one day and behind bars the next. . . . Family members, who pay into commissary or personal accounts for a detained or incarcerated loved one, only to have those dollars intercepted by prison and jail officials to cover prisoner room and board, are often tax payers.[249]

Additionally, as Breanna Pleggenkuhle has explained:

> The scope of LFOs is difficult to approximate on a broad scale, as the many sources of financial obligations are tracked by various criminal justice agencies at different stages of the system. Further, types and amounts vary between jurisdictions and may be either mandatory or discretionary in imposition. Despite these limitations, research consistently shows that in any form, LFOs have increased in past decades, becoming a normative part of a criminal conviction.[250]

In 2007, the Center for Community Alternatives issued a report entitled *Sentencing for Dollars: The Financial Consequences of a Criminal Conviction*.[251] In the report, the authors note that "these financial penalties are created and imposed in a vacuum with each new fee viewed as a solitary cost" and "[t]he cumulative impact of piling on each new financial penalty is ignored and the roadblocks to reintegration are often unrecognized."[252] The report examines these penalties in the state of New York and provides examples of how these costs accumulate for individuals "who are unlikely to have the resources

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[247] *See* Cammett, *Shadow Citizens*, *supra* note 235, at 379-80.

[248] Levingston, *supra* note 245.

[249] *Id.*

[250] Pleggenkuhle, *supra* note 236, at 123 (footnote omitted) (citation omitted).

[251] *See* ALAN ROSENTHAL & MARSHA WEISSMAN, CTR. FOR CMTY. ALTS., SENTENCING FOR DOLLARS: THE FINANCIAL CONSEQUENCES OF A CRIMINAL CONVICTION 17 (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Sentencing-for-Dollars.pdf [https://perma.cc/4ZQL-3KMW]. The report analyzed the financial consequences of two common felony convictions and found that someone convicted in New York in 2007 of driving while intoxicated (a felony) and operating a motor vehicle with no insurance (a misdemeanor) could end up facing a bill of almost $7,670.00 upon leaving the system. *See id.*

[252] *Id.* at 2.

to pay these debts."[253] In one example, the report shows "how the various fines, fees and surcharges for a person convicted of a class E felony DWI can add up to more than $7,500."[254] In another example, the report explains that "someone convicted of a drug offense can face more than $33,000 in surcharges, fees and child support upon their release from prison."[255] For example, there is a wide range of statutorily authorized fees in New York including the "crime victims' assistance fee, DNA Bank Fee, Sex Offender Registration Fee, termination of license revocation fee, termination of suspension fee, parole supervision fee, probation supervision fee for DWI offenses, supplemental sex offender victim fee, and incarceration fee."[256] Moreover, these fees are distinct from any fines imposed by the court.[257]

Notwithstanding state justification for cost shifting, there is general agreement that "LFOs contribute to a cycle of indebtedness, constrained decisions and stress, which may impact the risk of recidivism in the future, and certainly contributes to deepening impoverishment."[258] In conjunction with LFOs, child support debt "can hinder efforts to find employment and rebuild financial security and social networks."[259] It is not surprising that these debts in the aggregate have prompted scholars and activists alike to characterize the costs and the mechanisms that propel people to suffer reincarceration as the new debtor's prison.[260] Debtor's prisons for civil debts have existed in the United States in the past.[261] "Individual states began to repeal these laws in the nineteenth century."[262] "Incarceration of civil debtors was later abolished under federal law as well."[263] However, debtors' prisons persisted in other ways, and are often based on race and class.[264] For example, "[a]fter the Civil War, many Southern states used criminal justice debt collection 'as a means of effectively re-enslaving African Americans, allowing landowners and companies to "lease" black convicts by paying off criminal justice debt that they were too poor to pay

[253] *Id.* at 3.

[254] *Id.*

[255] *Id.*

[256] *Id.* at 10.

[257] *Id.*

[258] *See* Harper et al., *supra* note 27, at 268.

[259] *Id.*

[260] *See, e.g.*, Lollar, *supra* note 120, at 142-49 (arguing that increasing regularity of incarceration for failing to pay child support debts is new debtors' prison); *see also* Elizabeth L. MacDowell, *Reimagining Access to Justice in Poor People's Courts*, 22 GEO. J.L. & PUB. POL'Y, 473, 496 (2015) ("Although incarceration is supposed to be limited to cases where the child-support obligor has the current ability to pay the support owed, judicial disregard of legal standards results in what amounts to debtors' prison for some low-income obligors.").

[261] *See* Cammett, *Shadow Citizens*, *supra* note 235, at 381.

[262] *Id.*

[263] *Id.*

[264] *See id.*

on their own.'"[265] Similarly, "[t]oday, despite contrary Supreme Court precedent constraining a state's ability to incarcerate poor obligors and constitutional provisions explicitly forbidding imprisonment for civil debts [(like LFOs and child support)] in most states, *de facto* debtors' prisons persist."[266] Although a thorough exploration of this issue is beyond the scope of this Article, it is worth noting that the same carceral logic that has operated to rationalize policing poor families has driven the uptick of passing the burden of the costs of the criminal system to primarily poor participants in that system. In this mindset, the incarcerated have no defense to taking on the burdensome costs, having contributed to the system by being criminalized in the first place. However, the spiraling costs of LFOs, in conjunction with child support debt, have unintended consequences for society: "[u]ltimately, LFOs add to cumulative disadvantage by destabilizing precarious financial states, further limiting employment and housing opportunities, and cementing felon identity."[267] Moreover, studies show that "economic debt contributes to greater depression and hopelessness."[268] Given the debt load that many formerly incarcerated people carry, it is rather remarkable that there are so many stories of successful reintegration.[269] Nevertheless, this recurring scaffolding of debts, which are part of the Shadow Law of Child Support, cannot persist indefinitely as more and more people cycle through the criminal system.

2. Civil Collateral Consequences for a Lifetime

Many people with criminal records quickly discover that all criminal convictions can amount to a life sentence because ongoing collateral sanctions can create civil barriers that persist indefinitely. Those who have served time or accepted a plea agreement should not be faulted for believing that they have fully satisfied the requirements of their conviction and "paid their debt to society." However, similar to discovering that LFOs attach to a conviction, they are quickly confronted with civil disabilities after release. Collateral consequences are civil barriers to reintegration after a person is released from criminal justice supervision.[270] Many are not fully aware of the civil

[265] *Id.* (quoting ALICIA BANNON, MITALI NAGRECHA, REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 19 (2010)).

[266] *Id.*

[267] *See* Pleggenkuhle, *supra* note 236, at 125.

[268] *Id.*

[269] *See, e.g.*, NANCY G. LA VIGNE, TRACEY L. SHOLLENBERGER & SARA A. DEBUS, URB. INST.: JUST. POL'Y CTR., ONE YEAR OUT: TRACKING THE EXPERIENCES OF MALE PRISONERS RETURNING TO HOUSTON, TEXAS 11 (2009), https://www.urban.org/sites/default/files/publication/30436/411911-One-Year-Out-The-Experiences-of-Male-Returning-Prisoners-in-Houston-Texas.PDF [https://perma.cc/7T5E-47QC] (finding that among formerly incarcerated men studied owing some form of criminal justice debt, three in five secured employment eight to ten months after release).

[270] *See* SARALE SEWELL & ELIZABETH PAUKSTIS, U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON

repercussions of a conviction.[271] It would not be hyperbolic to say that civil collateral consequences are breathtaking in scope. According to the National Institute of Justice database, more than 44,000 civil collateral consequences exist.[272] Civil collateral consequences include:

> [C]ivil law sanctions, restrictions, or disqualifications that attach to a person because of the person's criminal history and can affect the person's ability to function and participate in society. For example, individuals with criminal histories can face barriers to voting, serving on a jury, holding public office, securing employment, obtaining housing, receiving public assistance, owning a firearm, getting a driver's license, qualifying for financial aid and college admission, qualifying for military service, and deportation (for noncitizens).[273]

As reentry scholar Michael Pinard has observed, "the United States has a uniquely extensive and debilitating web of collateral consequences that continue to punish and stigmatize individuals with criminal records long after the completion of their sentences."[274] However, according to a report by the U.S. Commission on Civil Rights, "[t]here is scant evidence that collateral consequences act as a deterrent; however, the evidence shows harsh collateral consequences unrelated to public safety increase recidivism."[275] This increase stems from "limiting or by completely barring formerly incarcerated persons' access to personal and family support."[276] In other words, barring people from important civil support without a reason grounded in public safety is counterproductive because it stymies successful reintegration. Child support debts incurred as a result of incarceration and criminal LFOs have also been identified as civil collateral consequences arising from criminal conviction.[277]

Civil collateral consequences are important to explore in the context of the Shadow Law of Child Support. First and foremost, they highlight the important reentry context where parents are seeking to cope with debt, stigma, and belonging for the future. A criminal conviction jeopardizes the ability of convicted individuals to meet basic needs, as collateral consequences often impose barriers to employment, affordable housing, and public assistance.[278] If at every turn you are reminded that you are a second-class citizen, then collateral

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COMMUNITIES 9 (2019), https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf [https://perma.cc/669L-3ZJV] ("Collateral consequences are sanctions, restrictions, or disqualifications that stem from a person's criminal history.").

[271] *See id.* at 133.

[272] *Id.* at 13.

[273] *Id.* at 1-2 (footnotes omitted).

[274] Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 524 (2010).

[275] SEWELL & PAUKSTIS, *supra* note 270, at 133.

[276] *Id.*

[277] *See* Cammett, *Expanding Collateral Sanctions*, *supra* note 24, at 313-14.

[278] *See* SEWELL & PAUKSTIS, *supra* note 270, at 9.

consequences primarily serve to reinforce your outsider status as you try to engage with systems that define your citizenship. Thus, collateral consequences function as an "instrument of social exclusion"[279] and are an integral part of the systems that reinforce criminalization rather than assist with strengthening families.

Second, collateral consequences reflect the logic of mass incarceration in that they present another example of the uneasy conflating of criminal and civil law. Pinard asserts, "[Collateral] consequences are considered to be the 'indirect' ramifications of criminal convictions, as they impose 'civil' rather than 'criminal' penalties. . . . Moreover, these distinctions shield trial judges from having to inform defendants of collateral consequences when accepting guilty pleas or pronouncing sentences."[280] Just as in the specious designation of civil contempt for incarcerations stemming from support enforcement, the merging of civil and criminal distinctions gives cover to authorities and minimizes protections for defendants.[281] Collateral consequences exist in a wide range of environments: on state and federal platforms; in policy and practice; and in mandatory and discretionary forms throughout the country.[282] The sheer breadth of consequences makes it extremely difficult to track or anticipate their impact for any given defendant. Only recently has a national database been established for collecting information to assist in identifying and/or mitigating the effects of these civil disabilities, when possible.[283]

Third, in keeping with the central idea of a hidden (or shadow) body of law that exerts influence indirectly but powerfully over incarcerated people, collateral consequences have been characterized as "'invisible' punishments, because they restrict freedom and opportunity for people with criminal convictions but operate outside of the formal sentencing framework and beyond

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[279] Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 19 (Marc Mauer & Meda Chesney-Lind eds., 2002).

[280] Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 643-44 (2006). *But see* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that counsel must inform a client whether a guilty plea may result in deportation). Courts have not required that counsel or the courts inform defendants of the repercussions of civil collateral consequences other than in the immigration context.

[281] *See* Pinard, *supra* note 280, at 644 ("Courts routinely rely on these civil/criminal or direct/indirect distinctions to interpret and limit the constitutional parameters of the attorney-client relationship, holding that attorneys are not constitutionally obligated to give clients information regarding collateral consequences when advising them about the ramifications of pleading guilty.").

[282] *See id.* at 634 (explaining how collateral consequences involve federal, state, and local laws and policies).

[283] *See What Are Collateral Consequences?*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org [https://perma.cc/6JKL-2ERX] (last visited Dec. 7, 2022).

the public view."[284] Stated differently, collateral consequences impact people with criminal records but are often generated by unrelated laws that create barriers for people with criminal records. Collateral consequences were adopted as part of the "get tough on crime" mindset that prevailed in the 1980s and 1990s, setting the stage for the carceral state.[285] But some collateral consequences are harmful and counterproductive to the people they purport to serve. For example, "[a] little-noticed provision . . . of the 1996 federal welfare reform legislation was a permanent prohibition on receipt of welfare benefits and food stamps for anyone with a felony drug conviction."[286] Marc Mauer, the former Executive Director and current Senior Advisor of the Sentencing Project, contended that "[d]rug-related collateral consequences are particularly unfair and counterproductive."[287] He stated that "[p]resumably, members of Congress believed that this measure represented one more means of 'sending a message' about the harms of drug use and drug selling, although curiously the ban does not apply to far more serious crimes such as murder or armed robbery."[288] He explained that "[the] ban disproportionately affects women and children, by far the overwhelming proportion of recipients of such benefits."[289] Therefore, the regulation and exclusion of people with drug convictions, by its own rationale, overrides the need to render the support of vulnerable families on public assistance.

Finally, collateral consequences have profound significance for racial discrimination, especially in employment. It has been demonstrated in myriad ways that the criminal system itself has a disproportionate impact on Black people, given the outsized percentage of Black people in the system.[290] However, civil barriers exacerbate the problems that already exist vis-à-vis restricted access to civil society. Owing to ubiquitous society-wide discrimination, the breadth of civil sanctions reinforces racial discrimination in a number of ways. First, collateral consequences, by virtue of their function of excluding people with criminal records, provide a convenient legal hook for the already pervasive racial discrimination. For example, if a Black person with a

[284] SEWELL & PAUKSTIS, *supra* note 270, at 11. For further discussion of collateral consequences as "invisible punishment," see Travis, *supra* note 279, at 15-16.

[285] *See* Butterfield, *supra* note 23.

[286] TESTIMONY OF MARC MAUER, EXECUTIVE DIRECTOR, SENTENCING PROJECT, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: BARRIERS TO REENTRY FOR THE FORMERLY INCARCERATED 6 (2010), https://republicans-judiciary.house.gov/wp-content/uploads/2010/06/Mauer100609.pdf [https://perma.cc/3ZJ6-26VH].

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] BRUCE WESTERN & BECKY PETTIT, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [https://perma.cc/2HSP-CALP] ("One in 87 working-aged white men is in prison or jail, compared with 1 in 36 Hispanic men and 1 in 12 African American men.").

criminal record is excluded from housing,[291] a legitimately enacted civil sanction gives the discriminating party legal cover to exclude the person and insulates the discriminating party from discrimination law. This also limits the pool of applicants given the outsized impact of the criminal system on Black communities.

As another example, roughly seventy percent of federal and state collateral consequences relate to employment, while "thousands of additional local ordinances also restrict employment opportunities for people with criminal convictions."[292] An audit study that measured the negative impact of criminal records on employment found that applicants with a criminal record are fifty percent less likely to receive a callback or job offer than applicants without criminal records.[293] Not surprisingly, the study's findings were more pronounced for Black applicants: about sixty percent of all Black applicants with criminal records did not receive callbacks or job offers, compared to thirty percent of all white applicants with criminal records.[294] In fact, one study indicated that white people with criminal records are treated more favorably by employers than Black people without criminal records.[295] Because criminality and anti-Black discrimination both have a funneling effect, these dynamics are reinforced when encountering civil barriers after incarceration.

Incarceration carries significant and enduring economic repercussions for the remainder of a parent's working years. One report finds that "former inmates work fewer weeks each year, earn less money and have limited upward mobility."[296] Furthermore, "[i]ncarceration contributes to deepening existing social and racial inequalities as people who have been incarcerated and their families face serious financial hardship . . . and a decreased ability to build or maintain wealth."[297] The disproportionate burden of this debt layers on an already enormous racial wealth gap: Black people have only ten percent of the wealth of white people as mass incarceration has contributed to an enormous

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[291] EQUAL RTS. CTR., UNLOCKING DISCRIMINATION 20-26 (2016), https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf [https://perma.cc/9MX2-CJDM] (finding that fair housing testing revealed that in approximately forty-seven percent of tests, agents "engaged in differential treatment that favored the white tester").

[292] SEWELL & PAUKSTIS, *supra* note 270, at 35.

[293] Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

[294] *Id.*

[295] Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 645. The study suggests that "[n]ot only are blacks disproportionately affected by the much higher *rate* of incarceration, they may also be substantially more disadvantaged by its *effect*." *Id.* at 643-44.

[296] WESTERN & PETTIT, *supra* note 290, at 3.

[297] Harper et al., *supra* note 27, at 251.

reduction of community wealth.[298] These costs are borne by families and communities and reverberate across generations.[299] This is significant because for parents involved in the criminal system, engagement with family after incarceration has been shown to be a major factor in avoiding recidivism, not to mention stronger communities.[300]

Civil collateral consequences are not just the last factors in a matrix of intersecting subordinations that represents the Shadow Law of Child Support. It is the inhospitable milieu that incarcerated parents and their families must navigate after criminal enforcement that has defined the parameters of what reintegration looks like for them. It could be described as exchanging one carceral state for another. Such is the state of affairs that urgently needs to be addressed if we are to avoid continuing intergenerational suffering.

III. IMAGINING CHILD-SUPPORTIVE PRAXIS

Let's begin with first principles. Supporting the well-being of children should be the primary goal of any country worth living in. And there is reason to think that *most* parents do their best, given their circumstances, to provide financial and emotional support to their children. However, we are in the midst of an existential crisis in the United States. Social scientists and advocates have warned us for decades that the children of very poor parents—especially those with incarcerated parents—have not been well-served under the current child support system. On the other hand, child support offices operate as collection agencies for middle-class parents who do not rely on the state for economic survival but who are also not in the position to negotiate their own intrafamily financial agreements. However, decades of stigmatizing rhetoric of cultural representations of poverty, welfare, and race have helped to legitimize punitive changes to federal child support policies that have done more harm than good for poor children. Welfare and other child support laws have criminalized poor parents, paradoxically making it harder to provide for their children. If we are to take child well-being seriously as a society, we have to imagine a different way to support *all* children. We cannot continue to do nothing while a shadow jurisprudence relegates incarcerated families to second-class citizenship by operation of law. But that is exactly what we have let happen for at least two generations.

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[298] ANGELA HANKS, DANYELLE SOLOMON & CHRISTIAN E. WELLER, SYSTEMATIC INEQUALITY: HOW AMERICA'S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP 2 (2018), https://www.americanprogress.org/wp-content/uploads/2018/02/RacialWealthGap-report.pdf [https://perma.cc/F3Y4-3W6K].

[299] *See* WESTERN & PETTIT, *supra* note 290, at 3; *see also* Dylan Cohen & Dexter Peters, *Is Every Sentence a Life Sentence?*, NATION (May 23, 2022), https://www.thenation.com/article/society/sentencing-disparity-incarceration/ [https://perma.cc/A6NJ-8G5G].

[300] *See generally* Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POL'Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ [https://perma.cc/6MST-XGE2].

Imagining child-supportive praxis involves embracing family-supportive praxis. Welfare law writes punitive policy into family law, but the American legal system is itself unsuited to helping resolve familial problems. Even traditional family law practice operates on an adversarial model, pitting one party against the other to air disputes. But families often do not operate in that way, and the adversarial model fits poorly as a model to address intrafamily problems. Further, it presumes that the interests of individuals within families are mutually exclusive. This perspective can create harm, polarizing parents rather than allowing space in the welfare policy framework for problem-solving to benefit their children. Hatcher observes that "[w]hen fathers have been considered in social policy addressing women's poverty, they have too often been considered primarily as an enemy to be pursued rather than a fellow victim of poverty's wrath, and potential partner towards the cure."[301] It is true that parents who are not living together operate toward their children in a wide range of ways—from completely cooperative to estranged and hostile—but TANF cost recovery rules force custodial parents to sue nonresident parents and participate in enforcement activities that may not serve all, or even most, families.[302]

The notion of an oppositional relationship between parents that is created by the TANF agenda suggests that mothers, when they are custodial parents, routinely support the idea of treating noncustodial parents as the enemy. But that is not necessarily the case, and parents are in the best position to understand the needs of their individual families. An antiessentialist model that recognizes differences would serve to create better outcomes for children. Those outcomes are lost when the state imposes inflexible rules to police custodial parents in exchange for meager TANF survival benefits. As such, the current framework does not provide space to imagine alternative child-supportive practices. Unexamined, punitive practices have contributed to family disempowerment. On the other hand, feminist scholars have long noted that "the care work of mass incarceration has been feminized, placing pressure on women who are already overburdened financially and straining kin relationships."[303] Welfare's gendered rhetoric is premised on the state forcing absent fathers to pay, ostensibly in support of mothers. But in actuality, the system functions as a criminal enforcement instrument of the state that tarnishes everyone; custodial parents also live with the costs of criminalization directly. For example, they suffer from the loss of actual support because incarcerated parents earn little or nothing.[304] Custodial parents also tend to give up personal and professional development and the loss of social capital in order to keep incarcerated parents engaged with children, send subsistence resources to incarcerated parents' prison accounts, and otherwise support parents on the inside, all while making do in the world.

[301] *See* Hatcher, *supra* note 161, at 775-76.

[302] *See id.* at 776.

[303] *See* Haney, *supra* note 186, at 7.

[304] *See* Brito, *Debt Bubble*, *supra* note 33, at 976.

Even when parents are alienated from each other, the loss of potential support to children diminishes financial stability for the custodial parent and potentially exacerbates the racial wealth gap for generations to come.

Due to the racial impact of mass criminalization, a disproportionate percentage of affected children are Black. The racial wealth gap is an issue that scholars are examining closely, but, despite the close relationship between mass incarceration and the racial wealth gap, only a few have really examined the long-term consequences of criminal system contact on the Black-white wealth gap in the United States.[305] Studies find that the racial wealth gap in the United States continues to grow and "is the most acute indicator of racial inequality."[306] Further, studies find that "racial discrimination in the justice system compounds the wealth disadvantage that blacks and Hispanics already face."[307] More work needs to be done on the precise effect of debt owed by incarcerated obligors and its contribution to intergenerational poverty. However, we can extrapolate from these studies that, at the very least, reduced income from incarceration does contribute in an immediate sense to the racial wealth gap. Moreover, the accrual of debt contributes to a significant risk of reincarceration after release from prison when child support is not paid.[308] This compounds the issue of racial wealth gap consequences, due to repeated incarcerations, diminished employability, and the effect of social exclusion through ongoing collateral consequences. The debt question may be one of the least explored aspects of mass incarceration and its harsh impact on Black people. In this framework, by burdening families with the cost of child support that is not based on real earnings, in addition to imposing other criminal financial obligations in order to balance state budgets, states are essentially stealing resources from poor families under the guise of promoting personal responsibility. Having conditioned the public to devalue Black families for decades, a context of relative political powerlessness, policymakers can continue to do so with impunity. While reparations are beyond the scope of this particular paper, the overwhelming evidence of the disproportionate impact of debt arising from the mass criminalization of Black families must be further explored.

As an immediate measure, we need to take steps to ameliorate the suffering of families who are being driven further into intergenerational poverty because of crushing debt that our child support system has perpetuated for the

[305] *See, e.g.*, Bryan L. Sykes & Michelle Maroto, *A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth, 1996 to 2011*, 2 RUSSELL SAGE FOUND. J. SOC. SCIS. 129, 130 (2016) ("[N]egative effects of incarceration can infect households through economic disadvantage in the form of declining wealth."); McLeod & Gottlieb, *supra* note 7, at 3 ("Experiencing incarceration reduces an individual's earnings by ten to 40% over one's lifetime.").

[306] *See* Khaing Zaw, Darrick Hamilton & William Darity Jr., *Race, Wealth and Incarceration: Results from the National Longitudinal Survey of Youth*, 8 RACE & SOC. PROBS. 103, 103 (2016) (providing overview of scholarship illustrating racial wealth gap).

[307] *Id.* (citation omitted).

[308] *See* McLeod & Gottlieb, *supra* note 7, at 2-3.

incarcerated. In my view, there are several ways to talk about how to remediate a failing system, if remediation is possible. First, my suggestions go to critical interventions that will have some positive effect on the many families who find themselves at the receiving end of the Shadow Law of Child Support. They include recommendations that experts have long proposed, which can be implemented within the system that exists. Making incremental changes does not foreclose a more transformative approach. Indeed, small changes can be a first step toward a more liberatory vision where a problem is formally acknowledged rather than hidden. Second, I propose another systemic intervention that seeks to bring specific attention to the debt burden within the existing child support system. A useful intermediate approach could be some form of affirmative mitigation through the child support agency that takes into account the potential effects of debt and is helpful in drawing attention to the consequences upfront while anticipating a reentry. Finally, I imagine a praxis that might be truly child supportive. The provision of a minimum child allowance for all families is not at all controversial in other countries where national budgets reflect a commitment to raising healthy families. Although it is still unlikely to quickly take root in a country that has committed itself to a solely privatized vision of child support, it can be a bulwark against growing inequality. Moreover, we have flirted with this notion before with child antipoverty legislation; it would be a failure of imagination to not vigorously advocate for a long-lasting child-centered framework that has produced far better indicators for child well-being in other countries.

A. *Immediate Interventions*

The goals of the federal OCSE have not actually changed much since the office's inception in 1975—though it emphasizes different aspects of the program. At its founding, it was primarily dedicated to cost-recovery for the federal government, but it is somewhat less focused on that now. However, OCSE, in part as a reflection of our society's focus on individual responsibility, is still focused on privatizing child support through paternity establishment and transferring financial responsibility to the nonresident parent. This focus is in lieu of broader child-supportive goals for the many poor children for whom private support is decidedly not enough to thrive on. For example, the OCSE mission states that it is "dedicated to establishing paternity and obtaining child support in order to encourage responsible parenting, family self-sufficiency and child well-being and to recognize the essential role of both parents in supporting their children."[309] To some degree, this is at odds with the shadowy mechanics

[309] *See Office of Child Support Enforcement*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF CHILD SUPPORT ENF'T, https://www.acf.hhs.gov/css/comms-fact-sheet/office-child-support-enforcement [https://perma.cc/T5Q7-6ES4] (last visited Dec. 7, 2022) ("The national child support program assures that assistance in obtaining support is available to children, through locating parents, establishing paternity, establishing and modifying support obligations, and monitoring and enforcing those obligations.").

of criminalization and punitive enforcement, which animate the regulatory engine of child support. Criminalization is ostensibly the last available resort when other enforcement mechanisms established through PRWORA do not work, but it is usually deployed because parents are too poor to pay. Therefore, extreme punitive enforcement can negate a parent's potential economic viability when civil contempt is found and incarceration ensues. Moreover, incarceration also removes parents from their children's lives, sometimes in a traumatic way. Even on its own terms, this appears to defeat the purpose of OCSE's mission, especially as it relates to poor parents. This is the dialectical problem that underscores why OCSE has difficulty reconciling its policy goals with parents who cannot pay, even though it wants them to also parent. Economic support, according to the state's child support formula, is the primary goal; without parents coming up with cash, the agency cannot fulfill its mission. Despite this conundrum, there are a number of changes that child support agencies can undertake to begin to address some of the harm from debt accrued by incarcerated obligors.

Policymakers concerned about the issue of obligor debt tend to focus on changing state practices to avoid setting child support orders that are too large to begin with. This is a worthy goal, but it does little for those parents who have amassed arrears over the years. Specifically, the Bradley Amendment[310] still wreaks havoc on those who have accrued massive debt with no hope of discharging it. Unfortunately, the Bradley Amendment can only be overturned by congressional action or successful litigation.[311] Still, some analysts believe that the states are not making full use of the narrow exceptions that are available to them in order to discharge debt that can likely never be paid. Further, there should be a concerted effort to expand the scope of those exemptions.

Another federal reform that can be accomplished is to waive public assistance payback, perhaps through executive action. Welfare cost recovery was the primary driver for the creation of the OCSE, and it is central to the mission. However, the recoupment of public assistance funds continues to be a controversial issue in the child support community. Many parents are demoralized when they do not see their support payments going to their children, but rather being diverted to the government. As a practical matter, Turetsky and Waller have pointed out that "when [child support] debt is owed to the government to repay cash assistance, it resembles other legal financial obligations and loses its character as support for children."[312]

As noted previously, the states' practice of levying interest on unpaid child support has contributed significantly to the growth of arrears in the United States.[313] The executive branch should consider issuing an order that caps

[310] *See supra* Section I.B.1.

[311] *See* CONG. RSCH. SERV., *supra* note 191, at 5 (discussing legislative proposals that would modify Bradley Amendment).

[312] Turetsky & Waller, *supra* note 79, at 141.

[313] *See* Brito, *Debt Bubble*, *supra* note 33, at 978.

interest accrual on child support debt. Currently, interest makes up a significant amount of the overall debt with which parents are saddled. A cap or elimination of interest by executive order would help keep the debt minimized.

Although the rule changes established guidelines for the use of civil contempt for child support obligors, more can be done to strengthen that requirement. *Turner v. Rogers* held that a child support obligor was not entitled to counsel,[314] but it does not *require* states to lock up those who are delinquent on payments.[315] Given the high number of defendants in state jails for civil contempt—and the counterproductive effect incarceration has on employability, earning capacity, and family relationships—we should be heading in the direction of eliminating civil contempt for failure to pay child support entirely.

As noted, the states can do much more to ameliorate the negative effects of child support on incarcerated and low-income parents through their own processes.[316] For example, states should be encouraged to automatically suspend orders when a parent is incarcerated or otherwise institutionalized, rather than requiring parents to formally request modifications, as supported by mainstream child advocacy organizations such as the Annie E. Casey Foundation.[317] Putting the onus on prisoners in states that allow modifications is impractical because of limitations on information and resources while incarcerated.

Suspending driver's licenses for parents who owe child support is absurd, as it diminishes an obligor's employability in many states.[318] License suspension also has been shown to have a disproportionate negative impact on low-income parents.[319] This is an example of a policy that is designed to extract support from parents that *can* pay but *choose* not to because it provides an enforcement incentive that is quite compelling. However, for the poor, it is extremely

[314] *See supra* notes 108-12 and accompanying text.

[315] *See* Turner v. Rogers, 564 U.S. 431, 435 (2011).

[316] *See* Brito, *Debt Bubble*, *supra* note 33, at 983 ("Child support debt continues to climb even though states have a remarkable amount of influence on how or whether it is generated.").

[317] ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 12 (2016), https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf [https://perma.cc/8853-NKF4] ("States should suspend child support orders while parents are in prison so they don't accumulate crippling debt that they must start paying upon release. The District of Columbia and several dozen states, including Arizona and Michigan, allow incarcerated fathers to have their payments reduced or halted during their time in prison. California goes further, suspending child support orders if a parent is incarcerated for more than three months and unable to make payments. Every state should offer to suspend such payments and proactively make parents aware of this option." (footnote omitted)); *see also* Harper et al., *supra* note 27, at 269 ("Child support policies must be reformed, including implementing automatic freezing of obligations during incarceration and integrating payment assistance into reentry programs including employment support.").

[318] *See* Turetsky & Waller, *supra* note 79, at 135; Cammett, *Expanding Collateral Sanctions*, *supra* note 24, at 326.

[319] *See* Turetsky & Waller, *supra* note 79, at 135.

counterproductive because there is no way to discharge a debt you cannot pay, and the state will have removed access to a vehicle most likely linked to employment. Moreover, when exemptions to the policy exist, obligors spend much wasted time and energy to secure them, thus foregoing valuable time when they could be employed.

Finally, poor parents in the child support system already have heavily regulated and overpoliced lives. Further, welfare law, as it has developed, assumes that parents are in an adversarial posture with each other.[320] To be sure, that is sometimes the case—as with many parents outside of the system. Nevertheless, poor, noncustodial parents manage, in many instances, to provide important informal support to their children and the custodial parent. Known as "in-kind"[321] contributions, a parent's non-monetary caretaking, informal monetary contributions, and other support receive no credit toward formal support obligations. Such a ban on formally acknowledging these contributions "degrades the value of nonmonetary contributions"[322] of a nonresident parent. Moreover, when fathers are nonresident parents, Laurie Kohn observes that "[t]he law's unwavering focus on a father's monetary support without regard to the importance of nonmonetary paternal caretaking betrays the entrenchment of gender norms."[323] It is long past time for states to credit in-kind support to parents in the child support system. This antiessentialist posture would better serve families who are doing the best they can with their resources.

B. *Systemic Intervention*

The pressing issue of high debt loads affecting incarcerated parents and their families requires a response and a sense of urgency that has not been demonstrated up to this point. In the United States, over five million children (seven percent) have a parent who is or was incarcerated.[324] As a result of this ongoing cyclical dilemma, it is important to not only recognize the totalizing effect of debt on the economic prospects of formerly incarcerated parents, but to also stage an intervention before civil consequences and other debt problems emerge at reintegration. To effect systemic change, we should begin with the federal OCSE, which should be required to develop protocols that systematically analyze the potential debt load of incarcerated obligors before release. Currently, although aware of the problem, the federal agency has taken a hands-off approach to addressing the impact of debt in any systematic way, leaving

[320] *See* Hatcher, *supra* note 161, at 1079-81.

[321] *See generally* Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006) (proposing that law should recognize all contributions that poor nonresident fathers make to their children and credit them against formal child support obligations).

[322] Laurie S. Kohn, *Money Can't Buy You Love: Valuing Contributions by Nonresidential Fathers*, 81 BROOK. L. REV. 53, 69 (2015).

[323] *Id.*

[324] *See Child Support and Incarceration*, *supra* note 4.

individuals and their families to fend for themselves. Whether compelled by executive order or through visionary leadership, the agency could both stage an intervention and offer protocols for managing debt toward the goal of successful reentry. This would utilize the research done by policy analysts studying these problems. There is currently enough evidence to conclude that the particular combination of carceral debt—including child support debt (including interest and other fees), criminal LFOs, commercial debt, and ongoing child support—creates a range of obligations that has become unmanageable for most. We must seek formal acknowledgment that squarely addresses what is to be done with this debt.

OCSE can affirmatively seek authority through rulemaking to support the reduction or elimination of debt where possible and work with other state and federal agencies in mitigation. It could expand the parameters for debt forgiveness for money owed to the federal government. It can also incentivize narrowing the states' criteria for practices that result in improper orders to begin with. In instances where elimination or reduction of debt is not possible, it can develop protocols to coordinate efforts to streamline management of debt by designating specific criteria for repayment, including engagement with other institutions to hold off sanctions for not satisfying obligations in a timely manner. Perhaps the most important intervention is to use its influence to interrupt sanctions while parents engage with family and community reintegration in a meaningful way. Parental engagement with such a plan could serve as evidence in future court hearings for civil contempt in order to forestall incarceration while the parent is working toward community integration and focused on the needs of the family. This would operate to formally recognize the debt dilemma experienced in reentry and provide the imprimatur of the federal government, including financial incentives for states that opt-in to implementation of these procedures within state offices. At the very least, such a process could offer clarity to parents who are trying to manage an overwhelming panoply of obligations upon release in a meaningful way. Most importantly, it would further the core goals of the agency by shifting the practical focus off of punitive sanctions and setting them squarely on the course of contributing more definitively to child well-being.

C. *Broader Interventions*

While immediate and systemic changes to the federal and state laws contributing to the buildup of debt for incarcerated parents should be implemented, they will do little to dismantle the problem of child poverty in the United States. From the beginning of the federal government's foray into the child support business in 1975, analysts were concerned that transferring support obligations to "absent" parents would not achieve an important goal: lifting children out of poverty.[325] Poverty is a complex problem that will certainly not

[325] *See* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 13 (1990) ("Looking carefully at statistics and reality, one

be solved by punitive enforcement against parents who are also poor. In fact, what has been demonstrated over time is that criminalized enforcement actually reduces the economic prospects of parents and thus, has a deeply counterproductive impact for children in the long term. What is to be done? Perhaps a better question is what role should society play in the nurturing and care of its children?

In general, the United States does far less to reduce its child poverty rate than some of its foreign peers.[326] "Most other countries give parents more money when their children are young, many of them through direct child allowances."[327] Some social scientists have long suggested that the United States adopt some form of social insurance for children, or a "minimum support guarantee," "child allowance," or "child support assurance"[328] for families. As a policy prerogative, this approach, which provides a minimum standard of living for families with children that comes directly from the government, is commonplace in many European countries.[329] As Drew Hansen has pointed out, "[i]n most industrialized nations, private child support payments are not a central way in which the community makes sure that children are adequately supported."[330] Rather, "most industrialized nations have some kind of child allowances financed by the public or by employers that go to all families."[331] In fact, there are a number of models that appear to be integrated into the fabric of other countries without significant controversy. It has been said that budgets are values documents; the overarching value adopted by these countries and expressed through their budgetary allocations is providing a universal threshold allowance for children to thrive, regardless of their parents' economic condition.

For example, the United Kingdom has a means-tested child benefit for middle-class and upper-income households, a program paid every four weeks with no limit to the number of children that can be claimed.[332] In Australia, child benefit payments are currently called Family Tax Benefits and are linked to the

may reasonably conclude that many fathers are unable to provide the support their children need to get a decent start in life, even if many try.").

[326] *See* Covert, *supra* note 53.

[327] *Id.* ("The evidence is overwhelming that child allowances are the single most important policy for preventing child poverty . . . .").

[328] *See* Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2532 (1995) (recommending some sort of "child support assurance" scheme and proposing an expanded role for U.S. Social Security system).

[329] *See, e.g.*, Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE. L.J. 1123, 1152 (1999) ("In England . . . families receive a universal 'Child Benefit' to defray the costs of raising children . . . .").

[330] *Id.*

[331] *Id.* at 1152-53 ("[A]lthough the United States has generous, publicly funded benefits such as Social Security and Medicare for elderly Americans, no comparable program exists for children.").

[332] *See Child Benefit*, GOV.UK, https://www.gov.uk/child-benefit [https://perma.cc/UQ6E-V3ZF] (last visited Dec. 7, 2022).

Australian income tax system.[333] Denmark has some of the most generous universal child allowance benefits. Interestingly, the country provides a special allowance if the father is unknown or if the child is conceived through a donor.[334] These are just a few examples of countries where social welfare policies reflect a goal of child well-being that is statutory and built into budgets. Most of them are universal benefits, rather than means-tested.[335]

Notwithstanding the widespread adoption of a child benefit abroad, the gendered family wage model of support in the U.S.—committed to in the early twentieth century—all but guaranteed that there would be resistance to expanding the social benefits program to children. This privatized model of family support was further instantiated with federal involvement in child support policy and later on in the punitive restructuring of welfare. PRWORA gave conservative politicians an opportunity to ensconce marriage promotion and other nuclear family-focused priorities into legislation moving forward.

A national family allowance program would face an uphill battle today in Congress. Politicians, even progressive ones, are uniquely cowed by any threat of being labeled socialist. Further, Congress has not evidenced any intention to work together to see such legislation accomplished. However, the growth of mass incarceration and the resulting debt crisis faced by poor families with an incarcerated parent has created support for such a bill from surprising quarters. A recent report from the National Institute of Justice entitled *Child Support and Reentry* recommends that the federal government "[i]ntroduce a minimum support guarantee for all children and commit to us[ing] public resources to meet this minimum when parents cannot do so (due to institutionalization)."[336] This constitutes an important recommendation from a federal agency in recognition of the financial circumstances of poor incarcerated parents. All low-income American children can benefit from our government providing them a baseline measure of income support.

President Joseph Biden, in an attempt to address widespread child poverty in the United States, advocated for and narrowly pushed through the temporary 2021 Child Tax Credit as part of the American Rescue Plan.[337] The bill provided crucial support, helping families afford basic needs like food, clothing, and

[333] *See Family Tax Benefit*, SERVS. AUSTL., https://www.servicesaustralia.gov.au/family-tax-benefit [https://perma.cc/8KZ4-V57A] (last visited Dec. 7, 2022).

[334] *See Child Allowance*, LIFEINDENMARK.DK, https://lifeindenmark.borger.dk/family-and-children/family-benefits/child-allowance [https://perma.cc/9VRU-RKGG] (last visited Dec. 7, 2022).

[335] *See* Dylan Matthews, *Sweden Pays Parents for Having Kids—and It Reaps Huge Benefits. Why Doesn't the US?*, VOX (May 23, 2016, 9:00 AM), https://www.vox.com/2016/5/23/11440638/child-benefit-child-allowance [https://perma.cc/NPM3-UCJE].

[336] HANEY & MERCIER, *supra* note 2, at 7.

[337] American Family Act of 2021, H.R. 928, 117th Cong. (2021) (amending Internal Revenue Code to make child tax credit refundable in full and establish higher child tax credit for young children).

housing for the almost ten million children in poverty.[338] Unfortunately, this historic policy achievement that immediately reduced child poverty was fleeting.[339] Six months after the first distribution, families were right back to where they started because the policy was allowed to sunset.[340] It remains to be seen whether the Child Tax Credit will be revived and extended, and, if so, to what extent that affects the structure of the national child support program. It showed, however, that universal family support was in the realm of the possibility if animated by political will.

There is much that can be done to begin to address the debt crisis suffered by incarcerated parents. Taken together, all of these interventions—immediate, systemic, and broad-based—would help to draw attention to the dilemma of parental incarceration and alleviate some of the worst consequences of that debt for families.

CONCLUSION

Child support is undoubtedly important for children, but ours is not a system that has been administered to benefit all children equally. In fact, quite the opposite: Americans' disdain for poor families, susceptibility to racist demagoguery, and continued neoliberal approach to privatized child support—rather than universal state support—have inhibited the development of truly child-supportive practices that would be responsive to the needs of poor children. This is especially true for Black families who are disproportionately affected by mass criminalization, a phenomenon that has exacted a huge financial toll on the Black community and contributed to the persistent racial wealth gap. The emergence of this Shadow Law of Child Support reflects a separate jurisprudence governing the child support outcomes of incarcerated parents in a way that punishes them by forcing the accrual of often unmanageable debt, buttressed by the ongoing threat of reincarceration. For many, this directly hinders their ability to provide ongoing support for their children. It is long past time to reimagine a system that perpetuates such inequality in American families.

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[338] *See* Monica Hobbs Vinluan, *Four Reasons the Expanded Child Tax Credit Should Be Permanent*, ROBERT WOOD JOHNSON FOUND.: CULTURE OF HEALTH BLOG (Apr. 18, 2022, 8:45 AM), https://www.rwjf.org/en/blog/2022/04/four-reasons-the-expanded-child-tax-credit-should-be-permanent.html [https://perma.cc/RJ86-XQPX].

[339] *Id.*

[340] *Id.*; *see also* Megan A. Curran, *Research Roundup of the Expanded Child Tax Credit: The First 6 Months*, POVERTY & SOC. POL'Y REP., Dec. 22, 2021, at 1, 18, https://static1.squarespace.com/static/610831a16c95260dbd68934a/t/61f946b1cb0bb75fd2ca03ad/1643726515657/Child-Tax-Credit-Research-Roundup-CPSP-2021.pdf [https://perma.cc/9UP5-R7KW] (stating that making Child Tax Credit fully refundable on permanent basis would permanently close gap between number of Black and Latinx children living in poverty who receive aid and the white children who receive aid).