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CHILD SUPPORT HARMING CHILDREN:  
SUBORDINATING THE BEST INTERESTS  
OF CHILDREN TO THE FISCAL  
INTERESTS OF THE STATE

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*This Article examines the government policy of seeking reimbursement of welfare costs through child support enforcement. Under our welfare program, Temporary Aid to Needy Families, custodial parents applying for benefits are required to establish child support obligations against the absent parents and to assign the resulting child support payments to the government. As a result, half of the \$105 billion in national child support debt is owed to the government rather than to children. The government's fiscal interests are in direct conflict with the best interests of the children—the controlling legal standard in child support matters. The conflict results in legal confusion, and the welfare cost recovery efforts harm children, families, and society. Children in welfare families struggling to become self-sufficient lose out as their support payments are redirected to the government. Fragile relationships between mothers, fathers, and children are often broken. The fiscal benefit to the government is minimal at best. And the social fabric is torn as significant numbers of welfare fathers retreat from the workforce and their families. This Article thoroughly examines the conflict and resulting legal and policy questions. The Article explores the history of the competing interests and purposes of child support in America, describes the framework and impact of the current*

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*government welfare cost recovery system, addresses the long ignored and unresolved legal questions that result from the conflicting missions, and concludes with suggestions for reform, including the Article's primary conclusion that welfare cost recovery is a failed effort—and should therefore end.*

#### INTRODUCTION

Welfare is not free. Out of the \$105 billion in child support debt nationwide, the government claims half so it can seek to recoup the costs of welfare benefits provided to low-income families.<sup>1</sup> Our current welfare program, called Temporary Aid to Needy Families (“TANF”), requires custodial parents applying for benefits to cooperate in establishing child support obligations against the absent parents and to simultaneously assign the resulting child support payments to the government.<sup>2</sup> Mothers, fathers, and children all become government debtors—the mothers and children owe their child support rights and the fathers owe the payments—until the welfare benefits are repaid in full.<sup>3</sup>

This system of welfare cost recovery is a side of child support that is largely unknown to the public.<sup>4</sup> Rather, child support is

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1. Total child support arrearages due as of 2006 was \$105,416,002,292. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT, FY 2006 PRELIMINARY REPORT tbl.5 (2007), [http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary\\_report/index.html](http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary_report/index.html) [hereinafter 2006 REPORT]. The Federal Office of Child Support Enforcement has previously estimated that half of all child support arrearages are owed to the government rather than to families. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT (CSE) FY 2002 PRELIMINARY DATA REPORT (2003), [http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim\\_datareport/](http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim_datareport/) [hereinafter 2002 REPORT].

2. 42 U.S.C. §§ 608(a)(2)–(3), 654(29) (2000). Child support cooperation and assignment requirements are also present in other public benefit programs, such as foster care assistance, Medicaid and the Food Stamp Program. See PAULA ROBERTS, CTR. FOR LAW & SOC. POLICY, CHILD SUPPORT COOPERATION REQUIREMENTS AND PUBLIC BENEFIT PROGRAMS: AN OVERVIEW OF ISSUES AND RECOMMENDATIONS FOR CHANGE (2005), available at [http://clasp.org/publications/cs\\_cooperation\\_requirements.pdf](http://clasp.org/publications/cs_cooperation_requirements.pdf). For example, when a child enters foster care, the child's rights to child support are assigned to reimburse the government's costs of providing foster care services. § 671(a)(17).

3. For simplicity, this Article refers to custodial parents as mothers and noncustodial parents as fathers, although certainly recognizing that the situation is often reversed. See Liliana Sousa & Elaine Sorensen, *The Economic Reality of Nonresident Mothers and Their Children*, NEW FEDERALISM: NAT'L SURV. AM.'S FAMILIES (The Urban Inst.), May 2006, at 1, available at <http://www.urban.org/publications/311342.html>.

4. Welfare cost recovery through the child support program is one of

generally perceived as a pure good: a benefit to children, families, and society, as well as a moral and legal obligation of absent parents. But for the millions of children whose child support has been assigned to the government,<sup>5</sup> the reality of child support is anything but pure or good. Poor mothers are forced to name absent fathers, and then sue them—and sue them again and again. Because the fathers are often also poor, the vast amount of assigned child support goes unpaid and insurmountable arrearages quickly result.<sup>6</sup> The fathers who try almost always fail as the automated enforcement mechanisms throttle endlessly: a trucker's license is suspended, so he cannot work; a laborer's wages are garnished at sixty-five percent, so he cannot afford to pay his own rent; a father obtains a new job and then loses it after being incarcerated for contempt because of his child support arrearages.<sup>7</sup> The relationships between the mothers and fathers, fragile at their beginnings, can be obliterated through the process. The hopes of children to have fathers who are supportive and involved in their lives are often dissolved.<sup>8</sup>

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several forms of government cost recovery efforts. For example, state governments also engage in the questionable practice of seeking foster children's Social Security benefits in order to reimburse the cost of foster care. For a discussion of this practice and other government revenue maximization efforts, see generally Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797 (2006).

5. As of 2005, there were 8,303,946 cases in the IV-D child support system with assigned child support because the families currently or formerly received welfare assistance. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT, FY 2005 PRELIMINARY REPORT tbl.2 (2006), [http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/preliminary\\_report/table\\_2.html](http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/preliminary_report/table_2.html) [hereinafter 2005 REPORT].

6. See, e.g., David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2594 (1995) ("Not surprisingly, a high proportion of the poorest children in this country also have poor fathers."). By 2003, unpaid child support arrearages reached over ninety billion dollars, and almost two-thirds of the obligors had annual incomes of less than ten thousand dollars. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE STORY BEHIND THE NUMBERS: WHO OWES THE CHILD SUPPORT DEBT? 1 (2004), <http://www.acf.hhs.gov/programs/cse/pol/IM/2004/im-04-04.htm> [hereinafter STORY BEHIND THE NUMBERS].

7. These descriptions are aided by the author's past experiences in developing a child support project at the Maryland Legal Aid Bureau. See Daniel L. Hatcher & Hannah Lieberman, *Breaking the Cycle of Defeat for "Deadbroke" Noncustodial Parents Through Advocacy on Child Support Issues*, CLEARINGHOUSE REV., May-June 2003, at 5, 9.

8. See, e.g., Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 344 (2005) (explaining that the pursuit of increased child support

And there is little gain to counter the loss because welfare cost recovery is largely a fiscal failure. The goal is simple: reduce government spending by recouping welfare costs from the person who should have been providing such financial support in the first place, the absent parent. Yet, as this Article reveals, the net financial benefit to the government resulting from welfare cost recovery is minimal and may actually be negative.<sup>9</sup> Further, the small percentage of assigned support that is successfully collected is diverted from the children and their families when they most need it, decreasing their economic stability and increasing their likelihood of needing welfare again in the future.

Moreover, in addition to the family conflict and fiscal failings, welfare cost recovery also results in legal conflict. Reimbursing welfare costs directly conflicts with serving the best interests of the children, long recognized by the courts as the paramount purpose of child support. The two goals simply cannot coexist. Every dollar taken from a child in the name of welfare cost recovery is a dollar that does not serve the best interests of the child. Yet, despite the conflict, child support agencies attempt to serve both purposes simultaneously.<sup>10</sup> The result is a child support system with strands of legal reasoning and policy goals continuously twisted around themselves and hidden behind a wall of public relations. The two lines of purpose are pulled out and presented to the public as existing harmoniously side by side, yet behind them there is a tangled and nonsensical legal mess.

An understanding of the conflict is aided by a look to the past. The current child support system developed from competing interests and purposes, a mixture of common law, divorce codes, state poor laws, bastardy acts, and criminal nonsupport statutes.<sup>11</sup> From this history emerged the two primary interests in child support. While the government objective of reimbursing public assistance was often recognized in early case law, courts began simultaneously recognizing the best interests of children as the

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collections “[has] had a number of unintended consequences that have adversely impacted low-income families, particularly the relationship between fathers and children in those families”).

9. See *infra* Part III.B.1.

10. AM. PUB. HUMAN SERVS. ASS’N, CROSSROADS II: NEW DIRECTIONS IN SOCIAL POLICY 91 (2005), available at <http://www.aphsa.org/publications/doc/crossroads2/crossroads.pdf> (“Today, the [child support] program straddles two missions: retaining collections from and giving collections to families. . . . These two missions also differ in philosophy as well as the underlying structure of how the system is funded.”).

11. See *infra* Part I.A.

primary purpose of child support.<sup>12</sup> The historical tensions converged when Congress enacted Title IV-D of the Social Security Act in 1974, creating a federal and state partnership to collect child support and the beginnings of what is now simply known as the IV-D child support system.<sup>13</sup> Although the new child support system also began to provide services to families not on welfare, the primary purpose of the program at its inception was government revenue maximization via welfare cost recovery policies.<sup>14</sup>

Today, high-level government child support officials recognize the failings of welfare cost recovery, and they describe a shift in priorities. No longer is cost recoupment the primary aim of child support offices, explains the Federal Office of Child Support Enforcement.<sup>15</sup> Instead, the IV-D child support program is shifting its focus toward the purpose that most of society presumes: increasing financial support to children.<sup>16</sup> But although signs of the changing mission are evident, the shift is far from complete. Recent changes to the federal child support laws included in the Deficit Reduction Act of 2005 allow states increased opportunities and incentives to provide more collected child support payments to children rather than keeping the payments to reimburse welfare costs.<sup>17</sup> However, with an effective date of 2008 for the new state options, it is unclear how many states will implement the changes. And even if most states take advantage of the new options by “passing through” at least some assigned child support back to families, most assigned child support collections will likely still be retained by the government. The pressure on states to pursue long-standing revenue streams is simply too great.

The conflict between state and child has existed since child support’s beginnings and continues today. The conflict raises important legal and policy questions that go to the heart of what child support is or should be about. However, few scholars, advocates, or courts have thoroughly addressed the tension or the

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12. See *infra* notes 26–38 and accompanying text.

13. Social Services Amendments of 1974, Pub. L. No. 93-647, sec. 101(a), §§ 451–460, 88 Stat. 2337, 2351–58 (1975) (codified as amended at 42 U.S.C. §§ 651–660 (2000)).

14. See, e.g., HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 318 (1981).

15. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL CHILD SUPPORT ENFORCEMENT: STRATEGIC PLAN 1 (2004), available at [http://www.acf.dhhs.gov/programs/cse/pubs/2004/Strategic\\_Plan\\_FY2005-2009.pdf](http://www.acf.dhhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf) [hereinafter STRATEGIC PLAN].

16. *Id.*

17. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 141–45 (2006) (codified as amended in scattered sections of 42 U.S.C.).

legal morass that results.<sup>18</sup> The Federal Office of Child Support Enforcement describes the finding that half of all child support debt is owed to the government rather than to families as provocative, but largely ignored. The agency notes that “published reports about the enormity of child support debt don’t typically point out that half is owed to the government,” and questions “[h]ow would an increased understanding of this story behind the numbers affect policymaking?”<sup>19</sup> This Article seeks to tell the story. Part I sets out the history of the competing interests and purposes of child support in America, describes the framework of the current welfare cost recovery system, and considers whether a shift in agency mission from recouping welfare costs to supporting families is occurring. Part II addresses the long ignored and unresolved legal questions that result from the conflicting missions. Part III analyzes the economic and noneconomic impacts of welfare cost recovery. In Part IV, the Article concludes with suggestions for reform, including the Article’s primary conclusion that welfare cost recovery is a failed effort—and should therefore end.

### I. HISTORY OF UNRESOLVED TENSIONS

The child support obligation grew from diverse origins, including early common law, state poor laws, divorce codes, bastardy laws, and criminal nonsupport laws. The early purposes of child support were as varied as the origins: to discourage the birth of children out of wedlock, punish parents for failing to support their children, reimburse private third parties, reimburse local governments for public aid, protect the public from the risk of supporting indigent children, and finally, to provide financial

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18. See, e.g., Chambers, *supra* note 6; Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619 (1988). Also, Vicki Turetsky, an advocate and expert on child support policy at the Center for Law and Social Policy, has long described concerns with the child support system’s focus on cost recovery and has advocated the need to change missions toward supporting families. See, e.g., *Hearing on Fatherhood Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 106th Cong. 1 (1999) (statement of Vicki Turetsky, Senior Staff Attorney, Center for Law and Social Policy), available at <http://waysandmeans.house.gov/Legacy/humres/106cong/4-27-99/4-27ture.htm> (discussing welfare cost recovery and the need to redirect assigned child support back to children). See generally VICKI TURETSKY, CTR. FOR LAW & SOC. POLICY, YOU GET WHAT YOU PAY FOR: HOW FEDERAL AND STATE INVESTMENT DECISIONS AFFECT CHILD SUPPORT PERFORMANCE 1 (1998), available at [http://clasp.org/publications/you\\_get\\_what\\_you\\_pay.pdf](http://clasp.org/publications/you_get_what_you_pay.pdf) (explaining the tension between welfare cost recovery and providing child support directly to families and describing a needed mission shift from cost recovery to service delivery).

19. 2002 REPORT, *supra* note 1.

support directly to children and their mothers. As the various obligations developed, a tension emerged between the societal interest in supporting children and the simultaneous interest in protecting society from the burden of supporting children. For well over two hundred years, the conflict has continued.

A. *Early History: Supporting Children or Protecting Society*

The commentaries of Sir William Blackstone on the laws of England are often cited as providing one of the first known statements of the duty of parents to support their children.<sup>20</sup> Blackstone explained that the “duty of parents to provide for the *maintenance* of their children, is a principle of natural law.”<sup>21</sup> The obligation existed within a framework of three primary parental duties for the purpose of promoting their children’s welfare: providing for the children’s maintenance, protection, and education.<sup>22</sup> Regarding the duty to provide for children’s maintenance, Blackstone reasoned that the parents “would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish.”<sup>23</sup> Through the lens of Blackstone’s commentaries, the moral child support obligation clearly existed for the purpose of promoting the interests of children. But despite the children’s status as the obvious beneficiaries of this “natural law” parental obligation, the English common law did not provide children with a legal remedy to enforce this right.<sup>24</sup>

In contrast to the unenforceable natural law obligation owed for the benefit of children, an obligation for the benefit of protecting society also existed in England—and was enforceable. With an aim of indemnifying society from the burden of supporting indigent children, the Elizabethan Poor Laws provided local parishes with the right to seek support from absent fathers in order to reimburse public aid provided to single mothers and children.<sup>25</sup> Thus,

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20. See, e.g., Deborah H. Bell, *Child Support Orders: The Common Law Framework—Part II*, 69 MISS. L.J. 1063, 1064 (2000); Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 49 (1998); Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 6 (1990); Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1133–34 (1999).

21. WILLIAM BLACKSTONE, 1 COMMENTARIES \*446.

22. *Id.* at \*446–52.

23. *Id.* at \*447.

24. Garrison, *supra* note 20, at 49; Hansen, *supra* note 20, at 1133–34.

25. Hansen, *supra* note 20, at 1134.

competing purposes have existed since child support's English beginnings: the natural law obligation, while unenforceable, existed for the benefit of children, while the Elizabethan Poor Laws obligation existed for the benefit of indemnifying society from the cost of public aid for children.

In America, the child support obligation emerged in the nineteenth century as a creation of the courts.<sup>26</sup> While some courts followed the English rule and refused to provide a legal remedy, others followed the "more humane principle" that the duty of parents to support their children should create a legally enforceable obligation.<sup>27</sup> One line of early American cases limited enforcement to the reimbursement of "necessaries" provided by third parties.<sup>28</sup> The cases emphasized the rights of third parties seeking reimbursement, but were reluctant to find that children or their mothers could bring an action for child support directly.<sup>29</sup> However, another line of cases also emerged in the nineteenth century that recognized a support obligation owed to mothers and children. As early as 1808, courts began to order noncustodial parents to pay financial support for their children as a part of divorce proceedings,<sup>30</sup> and many states soon began formalizing such support obligations through divorce codes.<sup>31</sup> By the 1930s, almost all states had such child support statutes.<sup>32</sup>

The tension born in England thus continued in America. While the common law child support obligation was created to reimburse third parties for necessaries, the child support obligation created through divorce codes was for the benefit of the children. Language

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26. *See, e.g., id.* at 1134–35.

27. *Huke v. Huke*, 1891 WL 2545, at \*2 (Mo. Ct. App. 1891); *see also* Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 811–16 (1989) (explaining how some American courts agreed with Blackstone that child support was a moral obligation but not legally enforceable); Hansen, *supra* note 20, at 1134–35.

28. *See, e.g.,* *Pidgin v. Cram*, 1836 WL 1271, at \*3 (N.H. 1836); *Tomkins v. Tomkins*, 1858 WL 4975, at \*3 (N.J. Ch. 1858); *Van Valkinburgh v. Watson*, 13 Johns. 480, 480 (N.Y. Sup. Ct. 1816); *see also* Hansen, *supra* note 20, at 1134–37, 1139.

29. *Johnson v. Barnes*, 29 N.W. 759, 759–60 (Iowa 1886) (recognizing a father's child support obligation to third persons but not to wives); *Huke*, 1891 WL 2545, at \*2 (noting that some American courts had developed a child support obligation enforceable by third parties who provided necessaries for an abandoned child but concluding that minor children could not enforce a child support obligation directly).

30. Schuele, *supra* note 27, at 821 (discussing *Stanton v. Willson*, 1808 WL 85 (Conn. 1808)).

31. *Id.* at 825 & n.68.

32. *Id.* at 834–35.

regarding the interests of children emerged from the courts during this time, setting the stage for the well-known best interests of the child standard. In 1874, the Supreme Court of Indiana described a standard that focused on both the interests of the parents and the children.<sup>33</sup> Then, in 1916, the Supreme Court of South Dakota provided one of the earliest decisions finding the best interests of children to be paramount in matters regarding child support, a standard that could not be subordinated even to the interests or by the agreement of the parents.<sup>34</sup> Still, some courts spoke of the father's duty to support his children after divorce as a means of ensuring his children did not become public burdens, implying that serving the interests of children and protecting the public from the cost of indigent children went hand-in-hand.<sup>35</sup>

And as American child support obligations developed through common law and divorce codes, other statutory support obligations also emerged during the same time period, again with varied purposes. State laws modeled on the Elizabethan Poor Laws of 1601 authorized towns to sue nonsupporting fathers in order to reimburse public aid.<sup>36</sup> Also, states began enacting desertion and nonsupport statutes that made the failure of parents to support their children a criminal act.<sup>37</sup> Bringing the criminal law into child support proceedings served the goal of reimbursing public costs for indigent children. However, the criminal nonsupport statutes also allowed for child support payments directly to the mothers. Thus, the

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33. *Sullivan v. Learned*, 1874 WL 6165, at \*4 (Ind. 1874) (explaining that courts possessed the power to order child support as a part of divorce proceedings and that the support orders could be modified "as the best interests of the parents and children may render necessary and proper").

34. *Houghton v. Houghton*, 157 N.W. 316, 317 (S.D. 1916) ("It is the welfare of the children that the court is concerned with, not the wishes of either of the parents, and we do now declare that parents are powerless to provide by irrevocable contract what the future financial liability of either shall be with relation to the support, maintenance, and education of the children."); *see also* *White v. Shalit*, 1 A.2d 765, 767 (Me. 1938) (explaining that judgment on a petition to modify custody or support will be controlled by the best interests of the children, even if the parties join in the petition); *Mallina v. Mallina*, 4 N.Y.S.2d 27, 31 (N.Y. Fam. Ct. 1938) ("A child will not be permitted to be deprived of its [maintenance and support] rights even if the deprivation is at the hand of a parent or parents.").

35. *See, e.g.*, *Kell v. Kell*, 161 N.W. 634, 636 (Iowa 1917) ("This [divorce] statute is expressive of the policy of the state, which is interested in the relations of the parties, the care and training of the children, and the possibility of the latter becoming burdens on the public.").

36. *Jacobus tenBroek, California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 283-84 (1964) [hereinafter *tenBroek Part I*]; Hansen, *supra* note 20, at 1145-46.

37. Hansen, *supra* note 20, at 1145, 1149.

purposes of the early criminal nonsupport laws were mixed. The laws were designed to punish nonsupporting parents, protect society, and provide direct assistance to children and their custodial parents.<sup>38</sup>

Along with the poor laws and criminal nonsupport laws, states enacted bastardy statutes aimed at forcing putative fathers to support their illegitimate children.<sup>39</sup> The statutes were both criminal and civil in their focus and, like the nonsupport laws, their purposes were mixed. For example, a Maryland court explained that “[w]hile the prime object of the Maryland Bastardy Act is to protect the public from the burden of maintaining illegitimate children, it is so distinctly in the interest of the mother that she becomes the beneficiary of it.”<sup>40</sup> For children born out of wedlock, the bastardy acts essentially codified a conflict between state and child. The statutes established a criminal or criminal-like offense for the birth of illegitimate children and provided indemnity for the public through bond requirements to protect the public from the possibility of the children becoming public charges, yet also provided a means of seeking child support for the children. Wrapped up in the bastardy acts were the public’s own financial interests and interests in punishing the parents of children born out of wedlock, as well as the interests of the mothers and children in receiving support from the absent fathers.

Only a handful of courts grappled with the competing interests, and the 1855 case of *Perkins v. Mobley* provides an early example. In *Perkins*, a mother of a child born out of wedlock filed a complaint against the alleged father under the state’s bastardy act in order to seek maintenance and support for the child.<sup>41</sup> Before the scheduled trial, the alleged father reached an agreement with the mother to pay her one hundred dollars in consideration of the mother filing a notice of settlement and request to dismiss the complaint.<sup>42</sup> The trial court refused to accept the settlement, and upholding the decision, the Supreme Court of Ohio attempted to straddle the public’s interests and the interests of the child.<sup>43</sup> First, the “high moral duty” of the father to pay support was explained as existing for the purpose of protecting the public.<sup>44</sup> The court initially placed

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38. *Id.* at 1147–48.

39. *Id.* at 1144.

40. *Fiege v. Boehm*, 123 A.2d 316, 321 (Md. 1956) (“Prosecutions for bastardy are treated in Maryland as criminal proceedings, but they are actually civil in purpose.”).

41. *Perkins v. Mobley*, 4 Ohio St. 668, 669 (1855).

42. *Id.*

43. *Id.* at 672–73.

44. *Id.* at 673.

the greatest importance on the security that must be given to protect the public, explaining that allowing the complainant to prevent the recovery would eliminate the protection for the public and therefore “defeat the leading object of the whole statute.”<sup>45</sup> However, the court then explained that the discretion in setting child support awards under the statute should be controlled by what is in the best interests of the child with the protection of the public as “consequent.”<sup>46</sup> Thus, the court’s circular reasoning left unanswered whether protecting the public was really the “leading object of the whole statute” or whether the best interests of the child was the primary concern and the public interests only “consequent.”

In Kentucky, a much clearer resolution to the conflict emerged from a series of decisions holding that bastardy proceedings are not for county relief, but for the benefit of the mother and to enforce the natural duty a father owes to both the mother and child.<sup>47</sup> Similar to the facts in *Perkins*, the 1832 decision of the Court of Appeals of Kentucky in *Burgen v. Straughan* involved a mother’s complaint under the state’s bastardy act and the question of whether a promissory note between the alleged father and the mother for purposes of settling the complaint was enforceable.<sup>48</sup> Contrary to the bastardy act in Ohio, the Kentucky act provided the right to seek support and maintenance only to the mother, with no corresponding right provided to the town.<sup>49</sup> After explaining how the act’s purpose was to enforce a natural right of the mother and child and was not for the benefit of the county or to impose a criminal sanction, the court elaborated on why the choice of whether to pursue child support should belong to the mother:

[N]or can we perceive how it can be unlawful or immoral, or inconsistent with the policy of the law, for the mother of a bastard to agree with the father that, if he will co-operate in the maintainance [sic] of their child, she will not proceed under the bastardy act . . . . It should not be deemed injurious to the community or county. It is not the public duty of the mother of an illegitimate child to *assert* her statutory right. Her voluntary forbearance is no breach of any moral or civil obligation. Her child *may* become a burthen to her county; but this might happen, and

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45. *Id.* at 674.

46. *Id.*

47. See *Burgen v. Straughan*, 30 Ky. (7 J.J. Marsh.) 583, 584 (Ky. 1832); *Stafford v. Withers*, 20 Ky. (4 T.B. Mon.) 510, 511 (Ky. 1827); *Schooler v. Commonwealth*, 16 Ky. (1 Litt. Sel. Cas.) 88 (Ky. 1809).

48. *Burgen*, 30 Ky. (7 J.J. Marsh.) at 583.

49. *Id.* at 585.

would, perhaps, be more likely to occur, if such contracts as that we are now considering should be declared illegal and void. Many, in her condition, might prefer all the wretchedness of destitution and poverty, to a voluntary promulgation, in a county court, of all the circumstances necessary to coerce contributions under the bastardy act.<sup>50</sup>

Despite the outdated notions of the time regarding children born out of wedlock, the Kentucky court provided a view towards the purpose of child support that refused to discriminate between the rich and poor and would be considered enlightened today, let alone in 1832:

The act of 1795 was intended to benefit *her*. It does not apply to those only who are poor; but embraces the rich as well as the poor. It is not because the mother may be poor that the act of 1795 allows her to compel the father to contribute to the support of their spurious offspring; but it is because she *should* have the right to coerce such contribution against the father, whether she be rich or poor. For *his* duty to maintain his own child does not depend on *her* inability to do it, but on the natural relation which he sustains to a helpless being whom he contributed to bring into the world.<sup>51</sup>

The Kentucky view was a rarity and, as child support doctrine continued to develop, the conflict between competing interests became even more entrenched. In the courts, the trend continued towards explicitly recognizing the best interests of the child as the paramount concern in child support proceedings.<sup>52</sup> Simultaneously,

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50. *Id.* at 584–85.

51. *Id.* at 585–86.

52. *Supra* note 34; *see, e.g.*, *Reiter v. Reiter*, 278 S.W.2d 644, 645 (Ark. 1955) (noting that “a court of equity has the power to modify an award for child support when required by changed conditions and the best interests of the child”); *Kelleher v. Kelleher*, 214 N.E.2d 139, 142 (Ill. App. Ct. 1966) (explaining that trial court’s order refusing to increase child support “must be set aside on review where the record fails to show that the welfare and best interests of the children was the controlling consideration”); *Leeming v. Leeming*, 490 P.2d 342, 345 (Nev. 1971) (“[W]ife cannot enter into a stipulation or agreement that binds the court concerning child custody and support, for ‘it is not the rights of the parties which are to be determined, but the best interests of the child.’” (quoting *Atkins v. Atkins*, 259 P. 288, 289 (Nev. 1927))); *Conway v. Dana*, 318 A.2d 324, 326 (Pa. 1974) (“In the matter of child support we have always expressed as the primary purpose the best interest and welfare of the child.”); *Ex parte Lindeman*, 492 S.W.2d 599, 600 (Tex. Civ. App. 1973) (“Ordinarily in cases involving custody and child support cases, the best interest of the child or

the efforts of states and localities to seek child support as a means of reimbursing welfare costs increased dramatically as the federal government soon joined the pursuit.

*B. Emergence of Federal Control*

Congress first asserted its control over child support matters with the primary goal of reducing the cost of welfare to the government.<sup>53</sup> The federal role began in 1950 with an amendment to the Social Security Act requiring state welfare agencies to notify law enforcement officials when a family received Aid to Families with Dependent Children (“AFDC”) for a child who was abandoned or deserted.<sup>54</sup> Additional amendments in 1965 and 1967 increased the ability of state welfare agencies to obtain the address and employment information of noncustodial parents and required states to create single government units to pursue child support on behalf of children receiving AFDC.<sup>55</sup>

The initial federal requirements did not explicitly condition eligibility for AFDC upon any action by the applicant regarding child support.<sup>56</sup> State attempts to enforce cooperation requirements for AFDC were therefore struck down because of the absence of any federal authority or mandate.<sup>57</sup> Then, Congress enacted Title IV-D of the Social Security Act in 1974, which created a federal and state partnership to collect child support.<sup>58</sup> The legislation set out the welfare cost recovery framework that still exists today, including the requirement that welfare applicants cooperate with establishing and

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children is the primary concern.”).

53. Krause, *supra* note 20, at 6; Shannon Bettis Nakabayashi, A “Dual System” of Family Law Revisited: Current Inequities in California’s Child Support Law, 35 U.S.F. L. REV. 593, 602 (2001).

54. 42 U.S.C. § 602(a)(11) (1988) (repealed 1996); *see also* OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT A-1 app. A (2002), *available at* [http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/appendix\\_a.html](http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/appendix_a.html) [hereinafter ESSENTIALS FOR ATTORNEYS] (noting the legislative history of child support enforcement).

55. Social Security Amendments of 1965, Pub. L. No. 89-97, 1965 U.S.C.C.A.N. (79 Stat. 286) 305, 449–50; Social Security Amendments of 1967, Pub. L. No. 90-248, 1967 U.S.C.C.A.N. (81 Stat. 821) 923, 1017–19; *see also* ESSENTIALS FOR ATTORNEYS, *supra* note 54, at 9 (discussing the amendments).

56. *See* Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN’S L.J. 367, 370–71 (2000).

57. *Id.* at 371–72.

58. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 1974 U.S.C.C.A.N. (88 Stat. 2337) 2716, 2732–40; Fontana, *supra* note 56, at 372; Murphy, *supra* note 8, at 345 & n.85.

pursuing child support and assign the resulting child support rights to the government.<sup>59</sup>

The Senate Finance Committee report on the legislation illustrates the lawmakers' struggle to harmonize the government's fiscal interests with the interests of children. The report describes the legislation as championing the rights of children—that “all children have the right to receive support from their fathers” and that the legislation “is designed to help children attain this right.”<sup>60</sup> However, the main goal of the legislation was the opposite—requiring mothers and children to assign their child support rights in order to recoup the government costs of welfare assistance.<sup>61</sup> At one point, the report begins to honestly describe assigned child support obligations as simply “a debt owed by the absent father to the State.”<sup>62</sup> But the same paragraph then circles back to the children, attempting to persuade that the children's child support rights—although already assigned to the government—can still be protected: “a provision has been included to assure that the rights of the wife and child are not discharged in bankruptcy merely because the support obligation is a debt to the State.”<sup>63</sup> Then, almost as an afterthought, the legislation also tacked on the availability of enforcement services for parents not on AFDC and who were not required to assign the payments to the government.<sup>64</sup> Thus, the primary focus of the IV-D program in taking child support away from families on welfare developed simultaneously with a secondary effort to provide child support to the families not on welfare. The IV-D program was born in conflict.

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59. Social Services Amendments of 1974 § 101(a), 1974 U.S.C.C.A.N. at 2732–40 (relevant sections codified at 42 U.S.C. § 608(a)(2)–(3) (2000)).

60. S. REP. NO. 93-1356 (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8146.

61. STAFF OF H. COMM. ON WAYS AND MEANS, 108TH CONG., 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 8-67 (Comm. Print 2004), *available at* <http://www.gpoaccess.gov/wmprints/green/2004.html> [hereinafter GREEN BOOK] (“When Congress enacted the Child Support Enforcement program in 1975, the floor debate shows that members of the House and Senate supported the program primarily because retaining welfare collections would help offset welfare expenditures.”).

62. *See* S. REP. NO. 93-1356 (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8153.

63. *Id.*

64. *Id.* at 8158 (explaining that although the legislation's primary focus is “establishing paternity and collecting support for children getting AFDC payments,” the Committee recognized that providing support enforcement services might also help families “avoid the necessity of applying for welfare in the first place”).

C. *Dual Systems Merge*

In 1964, ten years before the creation of the IV-D child support program, Jacobus tenBroek described child support in California as a dual system.<sup>65</sup> One public system existed for poor families receiving AFDC benefits that was “administered through state and local agencies and subject to continuous legislative attention” and “deals with expenditure and conservation of public funds and is heavily political and measurably penal.”<sup>66</sup> The other system, tenBroek explained, was a private judicially administered system for the nonpoor focused “on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal.”<sup>67</sup>

The dual system described by tenBroek presents a stark portrayal of the historical biases and inequalities in the development of child support. The distinctions clarify the simplistic and widely held belief that child support is uniformly good and, if strictly enforced, equally beneficial to all children and families. As multiple scholars have noted, much of tenBroek’s description is still very accurate today.<sup>68</sup> However, given the historical development and converging interests within the various forms of child support, the “dual system” description is somewhat oversimplified. The reality of child support is a more complex and disorganized compilation of competing legal obligations. Although the primary inequalities lie between the child support obligations owed to the public to reimburse welfare assistance and the private child support obligations owed between parents, it is important to understand the several strands of support obligations that have been sewn together with a common label.<sup>69</sup>

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65. See generally tenBroek *Part I*, *supra* note 36; Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part II*, 16 STAN. L. REV. 900 (1964) [hereinafter *tenBroek Part II*]; Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part III*, 17 STAN. L. REV. 614 (1965) [hereinafter *tenBroek Part III*].

66. tenBroek *Part I*, *supra* note 36, at 257–58.

67. *Id.* at 258.

68. See, e.g., Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 237–41 (2000); Harris, *supra* note 18, at 630; Amy E. Hirsch, *Incoming Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713, 735 (1988); Nakabayashi, *supra* note 53, at 593–94.

69. In fact, tenBroek himself notes that his dual system description may be oversimplified at times. See tenBroek *Part I*, *supra* note 36, at 257 (describing how California family law dealing with children “derives from four principal sources: the Elizabethan Poor Law, the Aid to Families With Dependent Children Law (AFDC), the California codes of 1872, and the common law” (footnotes omitted)).

Moreover, the dual systems described by tenBroek have now merged under one roof. Since the enactment of the IV-D child support system in 1974, the federal and state agency partnership now “serves” both those families receiving welfare assistance and those who do not.<sup>70</sup> Child support still continues to exist outside of the IV-D system since individuals can decide to pursue child support through the courts without involvement from the IV-D child support offices. However, one of the clear divisions described by tenBroek no longer exists. Private child support obligations between parents were initially administered solely by the courts and with little legislative oversight, while the child support obligations to reimburse public aid were administered through state and local agencies with heavy legislative control. Although the different functions of the dual system still exist, both forms of child support are now administered under one heavily regulated, government-run system.

*D. Welfare Cost Recovery Today: The Conflict Continues*

Since the creation of the IV-D child support system, several additional modifications have been enacted with the goal of increasing child support collections.<sup>71</sup> Many of the most significant changes occurred in 1996 with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) and the replacement of the AFDC program with a new block grant program, TANF.<sup>72</sup> With some alterations, TANF continues the main framework of welfare cost recovery, the child support assignment and cooperation requirements. The Federal Office of Child Support Enforcement has recently described a shift in priorities from welfare cost recovery to providing more child support to families, and new provisions in the Deficit Reduction Act of 2005 allow states greater flexibility in serving that shifting mission. However, as this Section of the Article explains, the policy assertions do not yet match state practices—and a complete shift in

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Although in different times, subject matter areas, and degrees there has been, and still is, some intermingling of provisions and concepts among all four of these legal complexes, it is apparent that the major gap lies between the two public aid laws on one hand and the codes and common law on the other, rather than between the members of each of the pairs.

*Id.*

70. See *supra* notes 58–64 and accompanying text.

71. See ESSENTIALS FOR ATTORNEYS, *supra* note 54, at A-1 to A-13.

72. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101–116, 110 Stat. 2105, 2110–85 (1996); see Murphy, *supra* note 8, at 328 & n.14.

priorities is unlikely under the current framework.

1. *Current Framework*

Federal law requires states receiving TANF grants to deny applications for welfare assistance to families who do not assign their child support rights to the State.<sup>73</sup> Successful collections of the assigned child support are generally kept by the state and federal governments to reimburse the cost of providing welfare assistance. In order for the assignment requirement to be effective, welfare applicants are also required to cooperate in the establishment and enforcement of the assigned child support obligations.<sup>74</sup> Under prior AFDC rules, the failure to cooperate resulted in a reduction but not a complete loss of welfare assistance.<sup>75</sup> Under TANF, the sanction is harsher. Now, when an applicant fails to meet the child support cooperation requirements, the applicant and her family can lose all benefits.<sup>76</sup>

a. *Reasons for Noncooperation.* A mother applying for TANF assistance may have several reasons for desiring to avoid the establishment of paternity and enforcement of assigned child support obligations. She may simply not want her child to know the identity of the father or have the father be part of the child's life.<sup>77</sup> Additionally, she may fear retaliation in the form of domestic violence toward herself or her child or in the form of custody litigation where the absent parent seeks custody in order to avoid the child support obligation.<sup>78</sup> Most of the research and advocacy regarding the child support cooperation requirement has focused on the concerns with domestic violence,<sup>79</sup> and the concern obviously warrants the focus. But another reason for noncooperation, often ignored but warranting increased attention, is noncooperation based

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73. 42 U.S.C. § 608(a)(3) (2000).

74. *Id.* § 654(29). Also, a similar cost recoupment strategy exists to recover costs for children in foster care. *See* § 671(a)(17).

75. KRAUSE, *supra* note 14, at 356.

76. *See* 42 U.S.C. § 608(a)(2) (requiring that when a TANF applicant fails to cooperate with child support enforcement, the state must reduce the assistance grant by at least twenty-five percent and may deny all assistance to the family).

77. OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: CHALLENGES AND STRATEGIES TO IMPROVEMENT 6 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00041.pdf> [hereinafter CHALLENGES AND STRATEGIES].

78. *Id.*

79. *See, e.g.,* Fontana, *supra* note 56, at 369; Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L.J. 47, 59-60 (2003).

upon the mother and child's desired relationship with the father. Many mothers desire a positive relationship with the father and may already receive various forms of in-kind or informal support. Thus, they may seek to protect the father—and the relationship—from the child support obligation. In fact, both child support and welfare office caseworkers frequently report the mother's concern with losing informal support and the desire to protect the noncustodial parent as reasons for noncooperation, and those reasons are reported substantially more often than the fear of domestic violence.<sup>80</sup>

b. *Good Cause Exception.* Due to the many valid reasons for noncooperation, an exception to the child support cooperation requirement is provided. Under AFDC, a good cause exception to the child support cooperation requirement was mandated by federal law, and the specifics of the exception were spelled out in a subsequent regulation.<sup>81</sup> TANF retains the good cause exception but leaves it to the states to define the exceptions criteria as long as the best interests of the children are taken into account.<sup>82</sup> Despite discretion under TANF, most states have continued to simply follow the definitions of good cause previously provided under the AFDC regulations.<sup>83</sup> The definitions are narrow, focusing primarily on

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80. See CHALLENGES AND STRATEGIES, *supra* note 77, at 6 tbl.2. Of the possible reasons for noncooperation, 94% of surveyed child support caseworkers report the mother's desire to protect the noncustodial parent and 88% report the fear of losing informal support, compared to 63% reporting the fear of domestic violence. *Id.* For the surveyed welfare office caseworkers, the numbers are similar: 92% report the desire to protect the noncustodial parent and 88% report the fear of losing informal support, while 73% report the fear of domestic violence. *Id.*

81. Good Cause for Refusing to Cooperate, 43 Fed. Reg. 45,742 (Oct. 3, 1978); Fontana, *supra* note 56, at 373–74.

82. 42 U.S.C. § 654(29) (2000) (explaining that the cooperation requirements are “subject to good cause and other exceptions which . . . shall, at the option of the State, be defined, taking into account the best interests of the child, and applied in each case”). Similar to the good cause exception in TANF, states are provided with discretion in foster care cases. Federal law requires that “where appropriate, all steps will be taken . . . to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments.” *Id.* § 671(a)(17). “To determine if a case is ‘appropriate’ to refer to the title IV-D agency,” federal guidance explains, “the State should evaluate it on an individual basis, considering the best interests of the child and the circumstances of the family.” CHILDREN’S BUREAU, U.S. DEP’T. OF HEALTH & HUMAN SERVS., CHILD WELFARE POLICY MANUAL 377 (2007), available at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/pdf/cwpmall.pdf](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/pdf/cwpmall.pdf). Suggested factors to consider include whether reunification is a goal and whether the state-owed child support obligation would be a barrier. *Id.*

83. Fontana, *supra* note 56, at 375 (quoting Vicki Turetsky & Susan Notar,

threats to the safety of the custodial parent or child and circumstances where adoption is contemplated.<sup>84</sup>

With the transition from AFDC to TANF, the good cause exception was weakened through the elimination of notice requirements to the custodial parents and with a shift in the agency authority to decide whether good cause is present. Under AFDC, written notice regarding the good cause exception was required.<sup>85</sup> TANF includes no specific notice requirements or any standards whatsoever for the processing and consideration of good cause claims.<sup>86</sup> Also, TANF shifted responsibility for good cause determination from state welfare agencies to the child support agencies.<sup>87</sup> The transition is significant because the state welfare agencies—when operating well—have a more holistic view of the welfare applicants' circumstances. The agencies often assist the applicants through the process of applying for several types of benefits and inquire about the need for referrals to various community services. In contrast, child support offices are focused almost solely on the single goal of enforcing support obligations and are thus much further removed from the complexities and hardships of welfare applicants' lives.<sup>88</sup>

With the narrow definitions of good cause, the lack of notice requirements to inform applicants about their ability to request good cause exceptions, and the shift in agency authority to consider the claims, it is not surprising that the number of exceptions granted from the child support cooperation requirements are limited.<sup>89</sup> Yet while the exceptions are usually few, the numbers

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*Models for Safe Child Support Enforcement* (Ctr. for Law & Soc. Policy), Oct. 1999, at 13).

84. See OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: USE OF GOOD CAUSE EXCEPTIONS 4 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00043.pdf> [hereinafter GOOD CAUSE EXCEPTIONS] (explaining that the federal definitions of good cause include "cases of domestic violence, when conception was the result of forcible rape or incest, when adoption is pending, or when the client is consulting with a social service agency regarding the possibility of adoption").

85. Stern, *supra* note 79, at 56.

86. See *id.* at 57.

87. *Id.* at 52.

88. *Id.*

89. See GOOD CAUSE EXCEPTIONS, *supra* note 84, at 2 ("States report receiving very few requests for exceptions and granting even fewer."). Another possibility for avoiding the good cause requirements is also available under the federal Family Violence Option ("FVO"). See 42 U.S.C. § 602(a)(7) (2000). In addition to increasing screening, confidentiality, and referrals for domestic violence victims, the FVO provided under TANF allows states to waive certain

vary widely from state to state. For example, Michigan provided 5656 good cause exceptions in 2002, compared to 6875 determinations of noncooperation.<sup>90</sup> In contrast, Tennessee granted only twenty good cause exceptions while determining the noncooperation to be inexcusable in 17,180 cases.<sup>91</sup>

## 2. *Irreconcilable Missions: Talk of Shift*

The FY 2005–2009 National Child Support Enforcement Strategic Plan begins with a description of a changing mission, a shift in priority to supporting families: “Child Support is no longer primarily a welfare reimbursement, revenue-producing device for the Federal and State governments; it is a family-first program, intended to ensure families’ self-sufficiency by making child support a more reliable source of income.”<sup>92</sup> The strategic plan explains signs of success in the changing mission, noting that “[m]ore than ever, the money we collect on behalf of children actually goes to children.”<sup>93</sup> The American Public Human Services Association (“APHSA”), the association that represents the interests of state and local child support agencies across the country, lists the shifting mission as one of the primary challenges facing the child support program.<sup>94</sup> The challenge, according to APHSA, is that the two

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other TANF requirements, including child support cooperation. *See* Stern, *supra* note 79, at 57–58. However, similar to the good cause exception, effective utilization of the FVO waiver is limited. *See id.* at 58–60.

90. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS, OFFICE OF CHILD SUPPORT ENFORCEMENT FY 2002 AND FY 2003 ANNUAL REPORT TO CONGRESS tbls.69 & 70 (2005), *available at* [http://www.acf.hhs.gov/programs/cse/pubs/2005/reports/annual\\_report/index.html](http://www.acf.hhs.gov/programs/cse/pubs/2005/reports/annual_report/index.html) [hereinafter ANNUAL REPORT].

91. *Id.*

92. STRATEGIC PLAN, *supra* note 15, at 1.

93. *Id.*

94. AM. PUB. HUMAN SERV’S ASS’N, *supra* note 10, at 91.

Over the years, passing on child support collections and providing other services to families have been seen as increasingly important. Today, the program straddles two missions: retaining collections from and giving collections to families. . . . These two missions also differ in philosophy as well as the underlying structure of how the system is funded. Cost-recovery is based on automated responses while family support is grounded in client contact, collections directly to the family, and the provision of support services. Also, the fundamental funding source for the administration of the federal program was designed to be the state and federal share of collections made on behalf of current and former welfare families; the newer family support model means that the family receives the collections.

missions of “retaining collections from and giving collections to families” are directly at odds.<sup>95</sup> Such recognition of the conflict and need to realign the competing missions is encouraging. However, despite the described shift in government priorities and a long overdue recognition of the obvious—that child support is best used to help children and their families—welfare cost recovery continues to be a centerpiece of child support and welfare policy.

a. *Changing Mission?* After a long period of growth in child support cases with assigned support (“CSE TANF cases”), the number began to decline as stricter TANF eligibility rules were enacted in 1996.<sup>96</sup> But even with the decline in CSE TANF cases, strengthened enforcement tools initially resulted in increased welfare cost recovery collections.<sup>97</sup> Then, as the CSE TANF caseload continued to decline as fewer and fewer families continued to receive welfare, a slow decline in child support collections retained by the government began in 2003.<sup>98</sup> During the same time period, the proportion of child support collections distributed to families rather than retained by the government has significantly increased.<sup>99</sup>

Signs of a shifting mission are apparent in the numbers, yet how much of the shift is purposeful is unclear. For example, it is not clear whether the recent decrease in welfare cost recovery collections is primarily due to reduced welfare cost recovery efforts or simply the smaller pool of CSE TANF cases from which to collect the assigned support.<sup>100</sup> And the increase in collections in CSE non-TANF cases while welfare cost recovery collections decrease may have more to do with the demographics of the populations served and an increasing usage of child support services by nonwelfare families. In cases where custodial parents are current or former welfare recipients and therefore have very little or no income, the

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*Id.*

95. *Id.*

96. U.S. GEN. ACCOUNTING OFFICE, CHILD SUPPORT ENFORCEMENT: EFFECTS OF DECLINING WELFARE CASELOADS ARE BEGINNING TO EMERGE 5–7 (1999), available at <http://www.gao.gov/archive/1999/he99105.pdf>.

97. *Id.* at 9.

98. See 2005 REPORT, *supra* note 5, at fig.8.

99. *Id.*

100. During this time, a “families first” policy was also implemented that had an impact on distributing more collections to families. The policy changed distribution rules, providing that when child support was collected in cases with both assigned and nonassigned support obligations, the collections should be distributed toward the obligations owed to families before the State receives its share—but with a significant exception for collections through tax refund intercepts. 42 U.S.C. § 657(a) (2000); see U.S. GEN. ACCOUNTING OFFICE, *supra* note 96, at 21–22.

noncustodial parents are often also poor.<sup>101</sup> Welfare fathers are simply much less likely to have the ability to meet their child support obligations than fathers who are better off. Any payments that are received from welfare fathers tend to be smaller amounts. Further, when both parents are poor, the resulting monthly child support orders are very low compared to cases where the parents are better off.<sup>102</sup>

On a public relations level, some state child support offices apparently attempt to conceal the continued welfare recoupment mission from the public. For example, the North Carolina state child support agency leads its public description with a simple and singular mission to help children: "To consistently collect as much child support money as possible for the benefit of North Carolina's children."<sup>103</sup> Only upon digging deeper into the policy manual used by agency staff are the dual and competing missions of the state child support agency made clear.<sup>104</sup>

The current federal child support incentive system also provides insight and mixed signals regarding the changing mission. Ten years ago, Congress passed the Child Support Performance and Incentive Act of 1998, which included significant revisions to the past structure of federal child support incentive payments to states.<sup>105</sup> The legislation removed the prior caps on incentive payments for child support collections in non-TANF cases and, in doing so, increased the state incentives to collect child support payments owed to families.<sup>106</sup> However, the legislation also

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101. See *supra* note 6 and accompanying text.

102. See generally Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157 (1999).

103. N.C. Div. of Soc. Servs., N.C. Dep't of Health & Human Servs., Child Support Enforcement, <http://www.dhhs.state.nc.us/dss/cse/index.htm> (last visited Oct. 17, 2007).

104. The manual explains the reality that when "children are receiving Work First Family Assistance (WFFA), the debt of child support is owed to the state by virtue of the Assignment of Rights to Support" and "[c]hild support that is collected for WFFA children is retained by the state and treated as a reimbursement to WFFA funds." N.C. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT POLICY MANUAL, [http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcB-01.htm#P36\\_1335](http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcB-01.htm#P36_1335) (last visited Oct. 17, 2007). Thus, the agency is only helping the "children who are not receiving WFFA," for whom "the child support is paid to the client (custodial parent or caretaker)." *Id.*

105. Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645 (1998).

106. See Child Support Enforcement Program; Incentive Payments, Audit Penalties, 65 Fed. Reg. 82,178, 82,178 (Dec. 27, 2000) (to be codified at 45 C.F.R. pts. 302, 304-05). The final rule implements sections of the Child

continued a heightened focus on welfare cost recovery by the “double-weighting of collections in Current Assistance and Former Assistance cases when calculating the collection base.”<sup>107</sup> The Department of Health and Human Services explained multiple purposes behind the double weighting: “to assist TANF recipients to leave welfare and to help them achieve self sufficiency” because “collection in TANF and former TANF cases is generally more difficult than in non-TANF cases” and because “collections in TANF cases provides direct savings to the state and federal governments.”<sup>108</sup> As the explanation of the purposes of the legislation indicate, the changes to the incentive structure demonstrate a shift toward encouraging child support payments to families but simultaneously continue an ongoing focus on reimbursing welfare costs.

Thus, the signs of change in the mission of child support enforcement have been mixed. Soon, however, recently enacted federal legislative changes will provide increased opportunities for states to distribute more child support to families rather than keep the payments to reimburse welfare costs.

b. *Child Support Provisions in the Deficit Reduction Act of 2005.* When TANF replaced AFDC in 1996, the new welfare block grant program was set to expire, unless reauthorized, in 2002.<sup>109</sup> When the deadline arrived, the reauthorization process was jammed by contentious political debate.<sup>110</sup> Thus, the TANF program was simply extended year to year without substantial change.<sup>111</sup> But change has now come with the enactment of the Deficit Reduction Act of 2005 (“DRA”).<sup>112</sup>

The new law contains a tightening of the TANF rules, including increased work requirements for recipients and stricter rules for

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Support Performance and Incentive Act of 1998 and explains that under the prior incentive structure, “the amount of non-TANF incentives [was] capped at 115 percent of the TANF incentive earned.” *Id.*

107. *Id.* at 82,183.

108. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPT OF HEALTH & HUMAN SERVS., SECRETARY’S REPORT ON THE PRORACT (1997), <http://www.acf.hhs.gov/programs/cse/pol/DCL/1997/dcl9715.htm>.

109. Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 474 n.239 (2005).

110. See Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1166–73 (2006) (describing the political and policy debate).

111. Cossman, *supra* note 109, at 474 n.239.

112. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified as amended in scattered sections of 42 U.S.C.).

states to meet required work participation rates.<sup>113</sup> In addition to the more stringent TANF rules, the DRA also includes increased discretion for states regarding certain child support “pass through” and distribution rules.<sup>114</sup>

When child support is assigned to the government as a result of the welfare cost recovery rules, states must share a significant portion of the collections with the federal government.<sup>115</sup> Under AFDC, states were initially required to “pass through” the first fifty dollars of assigned child support collections back to the custodial families.<sup>116</sup> TANF eliminated this requirement but still allowed states the option to pass through part of the assigned child support owed to the states.<sup>117</sup> The states could not, however, pass through any of the portion of assigned support that was owed to the federal government.<sup>118</sup> After the mandatory pass through was changed to an option under TANF, more than half of the states stopped passing through any portion of assigned support back to families.<sup>119</sup>

Under the DRA, the mandate has not been reinstated, but states will be given increased incentives to pass through more assigned support. Once the law becomes effective, if a state elects to pass through assigned support and disregard the passed through support when determining TANF financial eligibility, the federal government will participate in the pass through by waiving a

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113. *Id.* at §§ 7101–7102, 120 Stat. 135–37; *see also* CTR. ON BUDGET & POLICY PRIORITIES & CTR. FOR LAW & SOC. POLICY, IMPLEMENTING THE TANF CHANGES IN THE DEFICIT REDUCTION ACT: “WIN-WIN” SOLUTIONS FOR FAMILIES AND STATES 7–14 (2006), *available at* <http://www.cbpp.org/5-9-06tanf.pdf> [hereinafter TANF CHANGES].

114. TANF CHANGES, *supra* note 113, at 65–70.

115. The percentage of assigned support collections a state must share with the federal government is determined by the state’s medical assistance federal matching rate. 42 U.S.C. § 657(c)(2)-(3) (2000).

116. Family Support Act of 1988, Pub. L. No. 100-485, § 102, 102 Stat. 2343, 2346 (1988); *see* Murphy, *supra* note 8, at 371 n.221.

117. 42 U.S.C. § 657(a)(1)(B).

118. *Id.* § 657(a)(1)(A).

119. PAULA ROBERTS & MICHELLE VINSON, CTR. FOR LAW & SOC. POLICY, STATE POLICY REGARDING PASS-THROUGH AND DISREGARD OF CURRENT MONTH’S CHILD SUPPORT COLLECTED FOR FAMILIES RECEIVING TANF-FUNDED CASH ASSISTANCE (2004), *available at* [http://www.clasp.org/publications/pass\\_thru3.pdf](http://www.clasp.org/publications/pass_thru3.pdf). However, a recent update to the Center for Law and Social Policy report indicates the number of states again starting to pass through some assigned child support to families has slowly started to increase. JAN JUSTICE, CTR. FOR LAW & SOC. POLICY, STATE POLICY REGARDING PASS-THROUGH AND DISREGARD OF CURRENT MONTH’S CHILD SUPPORT COLLECTED FOR FAMILIES RECEIVING TANF-FUNDED CASH ASSISTANCE (2007), *available at* [http://clasp.org/publications/pass\\_through\\_2007june01.pdf](http://clasp.org/publications/pass_through_2007june01.pdf).

portion of the federal share.<sup>120</sup> Thus, if a state is currently passing through fifty dollars of assigned child support back to families, the new law will allow the state to increase the pass-through amount at reduced state cost because a portion of the pass-through amount will come from the federal share.

In addition to the pass-through incentives, the DRA also includes an important change to the child support distribution rules.<sup>121</sup> Currently, when a family leaves welfare and a portion of child support arrearages are owed to the government and a portion of the arrearages and current support payments are owed to the family, the distribution rules generally require that any payments go to the family first.<sup>122</sup> However, a significant exception to the “families first” policy requires that child support arrearages collected through federal tax refund intercepts be directed to the government first.<sup>123</sup> This exception is significant because the tax refund intercepts have been the most effective enforcement tool for TANF families.<sup>124</sup> Under the DRA, the mandatory exception will change to a state option, allowing states the flexibility to also start paying families first out of tax refund intercepts.<sup>125</sup>

Thus, the DRA provides significant new flexibility for states to begin providing more child support to children rather than retaining the payments to reimburse welfare costs. However, when the changes become effective in 2008, the extent to which states will take advantage of the options is unclear. When flexibility was integrated into the program in the past—when the mandatory fifty-dollar pass through became a state option—most states stopped passing through any assigned support to families whatsoever.<sup>126</sup> Today, welfare cost recovery is entrenched in the state mindset of

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120. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7301, 120 Stat. 4, 143 (2006) (explaining that the federal government will waive the federal share up to one hundred dollars of passed through child support for one child and two hundred dollars for two or more children).

121. *Id.* § 7301, 120 Stat. at 141–45.

122. 42 U.S.C. § 657(a)(2)(B).

123. *Id.* § 657(a)(2)(B)(iv).

124. *Hearing on Child Support Enforcement Reforms Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 106th Cong. (2000) (statement of Wendell Primus, Director of Income Security., Center on Budget and Policy Priorities), <http://waysandmeans.house.gov/legacy/humres/106cong/5-18-00/5-18prim.htm> (explaining that in 2000, “[a]bout one-third of all arrears collections occur through the federal tax refund intercept, but two-thirds of arrears collections for families on welfare are collected through the federal tax refund intercept”).

125. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7301, 120 Stat. 4, 141–42 (2006).

126. *See supra* note 119 and accompanying text.

seeking to maximize revenues to reimburse state spending. The new incentives in the DRA will hopefully encourage more states to pass through at least some assigned support, but it is likely that the welfare cost recovery goals of most states will continue at or near full strength<sup>127</sup>—as will the resulting conflicts.

## II. QUESTIONS FROM THE CONFLICT

As long as children's interests in receiving child support are served by a system that simultaneously pursues the government's fiscal interests in enforcing child support obligations to reimburse welfare costs, inevitable conflict will continue. And as the same child support system strives to achieve missions that are directly at odds, legal confusion will result. Although the conflicting missions result in several significant legal questions that go to the core of child support's purpose, the questions have received little attention. This Part of the Article begins an exploration of some of the questions, to start uncovering the legal confusion and nonsensicalness that is present in a system where something called "child support" can cause harm to children.<sup>128</sup>

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127. However, a good sign for the changing mission is present in the recent report by the Center for Law and Social Policy, which illustrates an increasing number of states deciding (or contemplating) to pass through some assigned support back to the families. *See supra* note 119.

128. Several other legal questions result from the conflicting missions in addition to those addressed in this Part of the Article. For example, the attorneys representing the IV-D child support agencies face conflicts of interest. *See generally* Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 *FORDHAM L. REV.* 2155 (1999). Legal concerns may exist regarding state agency utilization of private for-profit contractors to pursue the competing goals. The increasing use of computer automated agency actions may conflict with necessary individualized discretion. Also, the statutory guidelines used to establish initial child support amounts generally do not contemplate the circumstances of assigned support, where the noncustodial parent will owe the support to the state rather than to the custodial parent. A conflict arises when applying the guidelines to assigned child support cases because the guidelines—and judicial discretion in the application of the guidelines—are supposed to be guided by the best interests of the child standard. Under federal law, the guideline amounts are presumed to be correct, but courts have discretion to deviate when the guideline's support amount would be "unjust or inappropriate" and contrary to the best interests of the child. 45 C.F.R. § 302.56(g) (2006). If the best interests of the children are the true guide, then every case with assigned child support would seem to require a downward deviation from the guidelines—if not an order amount set at zero—so that less money is taken from the children.

A. *Whose Interests are Paramount?*

Under welfare cost recovery, child support obligations are assigned to the State to reimburse welfare costs. The obvious purpose is to serve the State's fiscal interests. However, in case after case across the country, the best interests of the child standard is repeatedly touted as the controlling legal standard in all proceedings and questions regarding child support,<sup>129</sup> and the standard continues to be applied in cases with assigned support.<sup>130</sup> The question is therefore clear: when the State's fiscal interests conflict with the best interests of the child, whose interests are paramount? Despite the importance of the question and its persistent presence in every single case of assigned child support, few courts have addressed or even acknowledged the conflict.

1. *Continued Mixed Messages*

In *Department of Revenue v. Pealatore*, the Supreme Court of Alaska held that even when child support had been assigned to the State to pursue its interests in reimbursing welfare costs, the best interests of the children could still be considered.<sup>131</sup> Rather than addressing the overarching question of which interest is ultimately paramount, the court simply concluded that in cases with assigned child support the children's best interests can still be a factor to help guide the court in some circumstances.<sup>132</sup>

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129. See *supra* notes 34, 52.

130. See, e.g., *Wehunt v. Ledbetter*, 875 F.2d 1558, 1570 (11th Cir. 1989) (noting that the "state must undertake the establishment of paternity and the establishment and enforcement of support obligations for all AFDC children unless it is against the best interests of the child to do so"); *Green v. Sollenberger*, 656 A.2d 773, (Md. 1995) (noting that the court "cannot be handcuffed in the exercise of [its] duty to act in the best interests of a child by any understanding between parents") (quoting *Stancill v. Stancill*, 408 A.2d 1030, 1033 (Md. 1979)); *In re Joshua W.*, 617 A.2d 1154, 1161 (Md. Ct. Spec. App. 1993) (noting that child support owed to the State after children had been placed in foster care cannot be set higher than the guideline's amount without a finding as to why it would be in the children's best interests to do so); *Dep't of Revenue v. C.M.J.*, 731 N.E.2d 501, 510 (Mass. 2000) ("We agree that a child support order that further impoverishes the household of the children the order was meant to support cannot be in the best interests of those children.").

131. 996 P.2d 84, 86 (Alaska 2000).

132. *Id.* The parties in *Pealatore* divorced and agreed that the noncustodial mother would not be required to pay child support for the minor son, and she agreed to relinquish any claims to the custodial father's tools in return. *Id.* at 85. The trial judge ruled that the tools, valued at \$5,000 and which the father used in his trade as a skilled laborer, were a proper offset against the child support obligation the mother would otherwise owe of fifty dollars per month. *Id.* Three years later the father applied for welfare benefits and the state child

In Vermont, the state legislature has seemingly answered the question by statute, explaining that when child support has been assigned to the State, the state actions are still controlled by the best interests of the child standard and enforcement efforts should not be taken if they would result in harm to the children.<sup>133</sup> The clarity of the statute in protecting the best interests of children is striking: “When an assignment is in effect, the state shall be guided by the best interests of the child for whose benefit the action is taken,” and “[i]f, after reasonable inquiry into the circumstances of the family, it is determined by the office of child support that an action would not be in the best interests of the affected child, a support action should not be undertaken.”<sup>134</sup>

However, a 2002 decision by the Vermont Supreme Court leaves the clarity and effect of the statute in question. In *Powers v. Office of Child Support*, the court affirmed the dismissal of a custodial parent’s claims against the state child support agency (Office of Child Support, or “OCS”) for the failure to properly carry out its statutory child support enforcement obligations.<sup>135</sup> Despite the legislative requirement to protect the best interests of children, the court concluded that “Vermont’s statutory scheme was not intended to benefit individual children and custodial parents, but was intended to benefit Vermont society as a whole.”<sup>136</sup> The court recognized that the child support agency is statutorily required to “be guided by the best interests of the child,” that the best interests of the child are paramount, and even that “[t]he purpose of OCS does not change depending upon whether or not the petitioner is receiving public assistance or whether the petitioner has assigned his or her rights to the agency.”<sup>137</sup> Despite this recognition, the court

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support office became involved. The agency filed motions to increase the mother’s child support obligation and to receive reimbursement of the past and continuing public assistance provided to the father. *Id.* The trial court granted the motion to increase the ongoing monthly child support order but denied the motion for past reimbursement, reasoning that the mother was entitled to the agreed-upon \$5,000 offset against her past child support obligation. Upholding the trial court’s decision, the Supreme Court of Alaska explained that “situations may exist in which CSED’s direct and derivative rights to recoupment of public assistance payments should yield to equitable considerations” and that “one such circumstance would be a child support offset agreement that a court approved as serving a child’s best interests.” *Id.* at 86. By allowing the father to keep his tools, the father was better able to maintain his ability to provide for his son.

133. VT. STAT. ANN. tit. 33, § 4106(f) (2001).

134. *Id.* § 4106(f).

135. 795 A.2d 1259, 1261 (Vt. 2002).

136. *Id.* at 1265.

137. *Id.* (quoting VT. STAT. ANN. tit. 33, § 4106(f) (2001)).

concluded that the language does not create individual rights or any corresponding duty of OCS.<sup>138</sup> The court's language clouds the seeming clarity of the statutory language, which places the best interests of the children above all else, by describing the State's fiscal interests and the interests of children as blended or on an equal footing: "In neither case [whether child support is assigned to the State or owed to the family] does the service provided by OCS flow to an individual, but instead it flows to the welfare of the state, its children, and its fisc."<sup>139</sup>

The *Powers* case harkens back to the mixed messages in the 1855 case of *Perkins v. Mobley*, discussed in Part I.<sup>140</sup> Over 150 years later, the *Powers* decision leaves a similar legacy of legal uncertainty. When the State's fiscal interests come head-to-head with the interests of children in Vermont, it is unclear after *Powers* whether the state's courts will honor—and enforce—the statutory priority of the best interests of children.

## 2. Harvey v. Marshall

Not long after the *Powers* and *Pealatere* decisions avoided a clear resolution of the conflict between state and child, a single father struggling to raise his children presented an opportunity to the Maryland courts. But as this Section describes, clarity was again elusive.<sup>141</sup>

Derek Harvey had four children by two different mothers.<sup>142</sup> The children were initially in the mothers' custody and both mothers received welfare assistance, resulting in child support obligations against Mr. Harvey that were assigned to the State.<sup>143</sup> Then, Mr. Harvey took custody of all four children in 1996 when one of the mothers died and the other mother abandoned the children.<sup>144</sup> During this time, Mr. Harvey also began to care for a fifth child, the half sister to one of Mr. Harvey's daughters.<sup>145</sup> He raised all five children, as a single parent, on less than eleven dollars per hour working as a landscaper for the City of Baltimore.<sup>146</sup>

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138. *Id.* at 1265–66.

139. *Id.* at 1265.

140. *See supra* notes 41–46 and accompanying text.

141. *Harvey v. Marshall*, 884 A.2d 1171 (Md. 2005). The author of this Article was co-counsel for the appellant, Derek T. Harvey.

142. *Id.* at 1174–75.

143. *Id.* at 1175.

144. *Id.* at 1174–75.

145. *Id.* at 1175.

146. *Id.* at 1177. He eventually married in 2002, and his new wife joined his family along with a child of her own. *Harvey v. Marshall*, 857 A.2d 529, 533 (Md. Ct. Spec. App. 2004), *aff'd*, 884 A.2d 1171 (Md. 2005).

After Mr. Harvey had already taken custody of all his children, the Baltimore City Office of Child Support Enforcement, operated at the time by MAXIMUS, Inc., started its efforts to collect the past owed payments—asserting that Mr. Harvey owed approximately thirty-two thousand dollars in arrearages.<sup>147</sup> After successfully obtaining a custody order that was made effective from the date he took custody in 1996, Mr. Harvey's arrearages were reduced.<sup>148</sup> Nevertheless, MAXIMUS continued to pursue approximately ten thousand dollars in back payments that accrued prior to the change in custody, all of which were owed to the State.<sup>149</sup>

Mr. Harvey argued that the enforcement efforts to collect the arrearages harmed the very children on whose behalf the support orders were entered. The continued child support enforcement of state-owed arrearages damaged his credit rating, prevented his efforts to finance and purchase a family home, and reduced his ability to save for his children's hopes of attending college.<sup>150</sup> When the local child support office operated by MAXIMUS refused to stop enforcement of the past arrearages, Mr. Harvey turned to the state Child Support Enforcement Administration ("CSEA"). Mr. Harvey asked the agency to exercise its statutory discretion to abate the state-owed child support arrearages.<sup>151</sup> Initially, CSEA agreed. The executive director of the agency issued a memorandum to the project director of MAXIMUS indicating that it was in the children's best interests to halt all enforcement efforts against Mr. Harvey, other than collecting one dollar per year.<sup>152</sup> But MAXIMUS refused. The company expressed concern that taking such action would harm its collection rates and the company's financial interests and that the company's computer system was not programmed appropriately to allow compliance with the state agency directive.<sup>153</sup>

With no further response from CSEA or MAXIMUS, Mr. Harvey

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147. *Harvey*, 884 A.2d at 1175–76.

148. *Id.* at 1176.

149. *Id.* at 1176–77 & n.4.

150. *Id.* at 1177.

151. *Id.* at 1176.

152. *Id.*

153. *Id.* at 1177. At trial, a MAXIMUS employee testified:

We didn't agree with this proposal because: (1) our computer systems are not set up to read anything like this, which means that if you have \$5,000.00 on the system, we don't really have much of a way to monitor these cases to make sure his taxes are intercepted or not you know turned into the credit agency.

We have a lot of automated systems that are in place.

*Id.* The employee also explained that MAXIMUS did not like the proposal because it "would potentially harm the numbers that show the local enforcement office's collection rate." *Id.*

filed a motion seeking the set-aside of his child support orders.<sup>154</sup> He argued that the court had statutory discretion to set aside child support orders when in the best interests of the children.<sup>155</sup> Also, he asserted that the failure of CSEA to exercise its statutory discretion to abate the State-owed arrearages was arbitrary, capricious, and illegal because the agency failed to consider the best interests of his children and submitted to the private interests of MAXIMUS.<sup>156</sup> The trial court denied Mr. Harvey's motion, the decision was upheld on appeal by the Maryland Court of Special Appeals,<sup>157</sup> and then the decision was affirmed by the Maryland Court of Appeals.<sup>158</sup>

As Mr. Harvey's case percolated up through the Maryland courts, arguments circled around the overarching question: what is the primary purpose of child support? Despite the proclaimed mission shift of child support enforcement from welfare cost recovery to supporting children, Maryland's CSEA looked to the past. Citing to the Maryland Bastardy Act, the agency contended that the prime object of Maryland's child support and paternity statutes is to protect the public from the burden of supporting illegitimate children and to increase state revenues through welfare cost recovery.<sup>159</sup> Mr. Harvey, pointing out that the Maryland Bastardy Act was repealed long ago, contended that the primary purpose of child support and paternity proceedings are now to promote the best interests of children.<sup>160</sup>

The dispute brings to light the clash of goals that has existed since child support's beginnings but has essentially been ignored ever since. The desire to reduce the public's responsibility of supporting children and to recover welfare costs through assigned child support have long been significant goals of the child support program.<sup>161</sup> Likewise, since child support's beginnings, courts and state statutes have espoused the primacy of the best interests of

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154. *Id.*

155. Despite explicit statutory language allowing court discretion to set aside child support orders when in the best interests of the children, the Court of Appeals of Maryland concluded such action was barred by another statute prohibiting retroactive modifications of child support obligations. *Id.* at 1178, 1183.

156. *Id.* at 1208.

157. *Harvey v. Marshall*, 857 A.2d 529, 532 (Md. Ct. Spec. App. 2004), *aff'd*, 884 A.2d 1171 (Md. 2005).

158. *Harvey*, 884 A.2d at 1214.

159. Brief of Appellee at 26, *Harvey*, 884 A.2d 1171 (Md. 2005) (No. 109); Brief of Appellee at 22–23, *Harvey v. Marshall*, 857 A.2d 529 (Md. Ct. Spec. App. 2004) (No. 532).

160. Brief of Appellant at 12–13, *Harvey*, 884 A.2d 1171 (Md. 2005) (No. 109).

161. *See supra* notes 25, 36 and accompanying text.

children in *all* child support proceedings.<sup>162</sup>

The arguments—and current state of the law—quickly appear circular. The assignment of child support and resulting state fiscal interests in the support payments are statutorily created.<sup>163</sup> Therefore, pursuing the State's fiscal interests is, at least by statute, an appropriate goal. But pursuing the State's fiscal interests by taking child support payments away from children and their families is in direct conflict with the best interests of the children—the controlling legal standard applied to child support proceedings. One could assume, and in doing so explain away the seemingly unresolvable conflict, that the best interests standard only applies where the support is owed to the children rather than to the State. However, the primacy of the best interest of the child standard has never been unlinked from assigned child support, and courts continue to assert the standard as present regardless of the assigned or nonassigned status of the child support.<sup>164</sup>

Another possible answer could be that the fiscal interests of the State can be pursued only if not to the detriment of the best interests of the child. Both interests could be considered legitimate, but ranked. In fact, the Maryland Department of Human Resources explains such a ranking in its advertised mission and purposes for child support enforcement. The agency first explains the dual purposes of child support: “Child Support exists 1) to raise the standard of living for children by enforcing their right to support from both of their parents and 2) to reduce or recover welfare costs.”<sup>165</sup> Then, apparently recognizing the conflict, the agency clarifies: “Child Support Enforcement operates with these guiding principles: The best interest of the child is our highest priority.”<sup>166</sup> However, when the conflict was presented in the courts, the agency argued the reverse, contending that the welfare cost recovery goals have always been and continue to be the paramount concern of child support enforcement.<sup>167</sup>

And were a state child support agency true to such a statement of a ranking and priority of the best interests of the child, a practical problem exists. There is never a time when the State's fiscal interests in welfare cost recovery are not in direct conflict with the

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162. *See supra* notes 52, 130.

163. *See supra* notes 53–59 and accompanying text.

164. *See supra* notes 52, 130 and accompanying text.

165. Maryland Department of Human Resources, Maryland Child Support Enforcement Program: The Mission of Child Support Enforcement, <http://www.dhr.state.md.us/csea/mission.htm> (last visited Oct. 17, 2007).

166. *Id.*

167. *See supra* note 159 and accompanying text.

best interests of a child. The child's best interests will simply never be served by enforcing an obligation that results in child support being retained by the State rather than distributed to the child's family. Thus, any attempted ranking of the competing purposes results in a legal fiction. The two interests simply cannot harmoniously coexist.<sup>168</sup>

In *Harvey v. Marshall*, the Maryland Court of Appeals ultimately resolved the dispute in favor of the State's fiscal interests and even found it appropriate to prioritize the private interests of MAXIMUS over the interests of the children.<sup>169</sup> Mr. Harvey had requested the state child support agency to exercise its discretion, provided by statute, to abate the State-owed child support arrearages.<sup>170</sup> At the time of the decision, the relevant statute, section 10-112 of Maryland's Family Law Code, explained that the discretion to abate arrearages should be guided by the best interests of the State.<sup>171</sup> However, because another statute in the same subtitle, section 10-118, mandated that the child support agency "promote and serve the best interests of the child in carrying out their child support responsibilities under this subtitle," Mr. Harvey argued that the best interests of the State should be interpreted as aligned with the best interests of the children.<sup>172</sup> In other words, the best interests of the State must be to promote and serve the best interests of the state's children.

The Maryland Court of Appeals disagreed. Although the statute requiring the state agency to promote and serve the children's best interests explicitly applied to all child support responsibilities codified under the same subtitle and the statute providing discretion to abate state-owed arrearages was within that same subtitle, the court nonetheless refused to apply the best interests of the child mandate. Through its interpretation of statutory construction, the court refused to harmonize the multiple provisions within the same statutory scheme:

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168. This problem is therefore also present in the Vermont statute discussed in *Powers v. Office of Child Support*. See *supra* notes 135–36 and accompanying text.

169. The state child support agency had initially indicated agreement with Mr. Harvey's request and asked MAXIMUS, the private contractor operating the local child support office, to halt enforcement efforts against Mr. Harvey. *Harvey v. Marshall*, 884 A.2d 1171, 1176 (Md. 2005). However, when MAXIMUS refused due to concerns with its collection rate and computer system, the state agency deferred to the private interests. *Id.* at 1177.

170. *Id.* at 1178.

171. *Id.* at 1194–95.

172. *Id.* at 1195.

We conclude instead that the language of § 10-112 indicates that the Legislature intended a different standard, other than the “best interests of the child” standard, to govern the settlement of arrearages. Even though it may be a “child support responsibilit[y],” the Legislature made a conscious election that the forgiveness of arrearages was an action, separate and distinct from other “child support responsibilities,” that, because of its unique purpose, warranted a different standard. Although the “best interests of the child” standard is generally the standard that applies in paternity or other family law matters relating to child support, there are some situations in which the Legislature has mandated, and the courts apply, a different standard or have limited, or in some way precluded, the application of the “best interests of the child” standard.<sup>173</sup>

As for the concern Mr. Harvey raised regarding the State’s deferral to MAXIMUS’s private fiscal interests in enhancing its collection rates—and thereby receiving more money through the incentive structure established with the State—the Court of Appeals found such deference to a private company’s desire for profits to be appropriate.<sup>174</sup>

Thus, regarding the conflict between the State’s fiscal interests and the best interests of the children, the Maryland Court of Appeals leaves us with this: “the ‘best interests of the child’ standard is generally the standard that applies” but “there are some situations in which the Legislature has mandated” that a different standard applies or the best interest of child standard applies but is simply more limited.<sup>175</sup> According to the court, even the

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173. *Id.* at 1199–1200 (alteration in original).

174. *Id.* at 1213–14. This decision affirmed the conclusion of the Court of Special Appeals, which explained more directly that such deference to private fiscal interests can be appropriate even when detrimental to the best interests of the child. *See Harvey v. Marshall*, 857 A.2d 529, 547 (Md. Ct. Spec. App. 2004) (“We are persuaded that this motivation is a legitimate one in this context, because financial incentives for performance and achievement are an integral part of private enterprise. The legislature . . . undoubtedly understood that when a private company undertakes to collect monies owed to the State, its success in doing so may benefit both the company and the State. Although this financial incentive may work to the detriment of a debtor like Harvey, as well as his children, it also may work to the benefit of the State’s citizens as a whole. The financial health of the State affects almost every citizen, including children, whether he or she benefits from an increase in services offered, a decrease in taxes paid, or both.”).

175. *Harvey*, 884 A.2d at 1199.

prioritization of the interests of private industry over the interests of children is fine if in the pursuit of the State's fiscal interests.<sup>176</sup> But even with such blows to the best interests of the child standard, the court could not bring itself to resolve and clarify the conflict once and for all by explaining that the best interests of the child standard is simply irrelevant where the State's fiscal interests are statutorily indicated. Rather, in a footnote, the court returned to the legal uncertainty in which the case began: "This is not to say that the CSEA may not factor into its calculus the 'best interests of the child' when exercising its discretion whether to forgive child support arrearages. We hold, rather, that that standard is neither the sole nor paramount one controlling such decisions."<sup>177</sup>

*B. Is Assigned Child Support Still Child Support?*

If no legally sound resolution to the conflict between the competing purposes is available, the only logical alternative may simply be to redefine assigned child support so that the conflict no longer exists. If assigned child support is no longer child support, but merely a state debt, the children's interests become irrelevant. In fact, the Maryland Court of Special Appeals took this route in the first level of appeal in *Harvey*. Mr. Harvey argued that the child support agency must be guided by the best interests of the child in deciding whether to exercise the statutory discretion to abate state-owed arrearages, relying on the statute requiring that "the Administration and local support enforcement offices shall promote and serve the best interests of the child in carrying out their child support responsibilities under this subtitle."<sup>178</sup> The Court of Special Appeals disagreed, noting that the agency is "collecting money that will be returned to the state coffers" rather than "collecting support from one parent that will go to the other parent to benefit a child."<sup>179</sup> Thus, the court concluded the best interests of the child standard does not apply in considering whether to abate assigned support arrearages because "the Administration and local support enforcement offices are not 'carrying out a child support responsibilit[y] under [the] subtitle.'"<sup>180</sup>

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176. *Id.* at 1201–02.

177. *Id.* at 1202 n.30. After the decision in *Harvey*, legislation was introduced in the Maryland General Assembly to clarify that the best interests of the child standard should apply to the agency discretion. MD. CODE ANN., FAM. LAW § 10-112 (LexisNexis 2006); see H.B. 453, 2006 Gen. Assemb., 421st Sess. (Md. 2006). The legislation was passed and signed into law.

178. MD. CODE ANN., FAM. LAW § 10-118.

179. *Harvey v. Marshall*, 857 A.2d 529, 542 (Md. Ct. Spec. App. 2004).

180. *Id.* (alterations in original).

Under this reasoning, and as the child support agency argued in *Harvey*, the debt is no different from taxes or a debt owed to Sears for a refrigerator.<sup>181</sup> In other words, children would be better off if their parents could be relieved of all their tax debts, credit card debts, and home loans but such is not the reality of life or law. This reasoning makes some sense. Child support, after it is assigned to the State, exists for the benefit of reimbursing state costs and has nothing to do with helping children. Thus, the argument goes, assigned child support should no longer possess the special status linked to the best interests of the children.

For that logic to work, the transition must be legally possible. Child support is assigned to the State under the welfare cost recovery rules when a custodial parent applies for TANF welfare assistance.<sup>182</sup> The assignment occurs as part of the process of applying for benefits, generally through some sort of signed agreement or (hopefully) an informed understanding of the result of applying for benefits.<sup>183</sup>

The law has long recognized an assignment of rights as a valid form of contract with three parties: an assignor, assignee, and obligor.<sup>184</sup> In TANF cases, the custodial parent is generally the assignor of child support rights, the State is the assignee, and the absent parent is the obligor.<sup>185</sup> Within this context, for the assumption to hold that assigned child support is transformed into state debt and unlinked from the best interests of the child standard, the assignment must change the nature of the legal rights assigned. However, a basic principle of assignment law is that the assignee's rights cannot be greater or materially different than those of the assignor.<sup>186</sup> If an assignee's rights cannot be greater or different than those of the assignor, and the assignor's rights in child support are constrained by the child's best interests, then such constraint must follow with any assignment to the State. If not, then something other than a valid assignment is occurring.

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181. Brief of Appellee at 21–22, *Harvey v. Marshall*, 857 A.2d 529 (No. 532).

182. See 42 U.S.C. §§ 608(a)(2)–(3), 654(29) (2000).

183. In contrast, child support is generally assigned to the state in foster care cases simply by statute rather than through any voluntary or informed process. See 42 U.S.C. § 671(a)(17).

184. See Bryan D. Hull, *Harmonization of Rules Governing Assignments of Right to Payment*, 54 SMU L. REV. 473, 478–81 (2001) (discussing the history and law governing assignments).

185. Paula Roberts, *In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System*, 18 CLEARINGHOUSE REV. 1407, 1407–08 (1985).

186. Hull, *supra* note 184, at 480 (explaining that the “Restatement provides that contract rights can be assigned unless the assignment would . . . materially change the duty or materially increase the burden or risk of the obligor”).

Further, even if the underlying assignment is valid and can transform child support into mere state debt, additional side effects may result. For example, many of the specialized child support enforcement tools may no longer be available for a mere state debt. Federal law allows garnishments to enforce child support obligations up to sixty-five percent of wages,<sup>187</sup> but garnishments of wages to enforce mere state debts may be limited to the much lower caps for general debt obligations.<sup>188</sup> Similarly, whereas state constitutions generally prohibit incarceration for a debt, an exception has been applied to child support.<sup>189</sup> Such exceptions may no longer be available if assigned child support is no longer child support, and contempt proceedings across the country would need to be altered or disbanded in assigned child support cases so that incarceration would no longer be an available sanction.<sup>190</sup>

The Maryland Court of Appeals agreed with Mr. Harvey's arguments that if assigned child support is transformed into a mere state debt, then several of the specialized child support enforcement tools would no longer be available. The court therefore overturned the Maryland Court of Special Appeals' conclusion that assigned child support is no longer really child support.<sup>191</sup> However, while the Maryland Court of Appeals concluded that assigned child support is indeed still child support, the court nonetheless viewed and treated assigned support differently—not as a mere state debt, not as regular child support owed to children, but apparently as something different altogether.<sup>192</sup> The *Harvey* decision illustrates that as long

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187. 15 U.S.C. § 1673(b)(2) (2000).

188. See Richard M. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 625 (2006) (explaining that “[f]ederal law enacted in 1968 limits wage garnishment by general creditors to the lesser of twenty-five percent of the debtor’s take-home pay or the amount by which the debtor’s take-home pay exceeds thirty times the federal minimum wage” and that “[m]any states restrict wage garnishment further, and at least four states prohibit wage garnishment altogether”).

189. See, e.g., MD. CODE ANN., CONST. art. III, § 38 (West 2006) (“[S]upport of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony . . . shall not constitute a debt within the meaning of this section.”).

190. Further, federal and state laws prohibit retroactive modifications of child support orders. E.g., 42 U.S.C. § 666(a)(9)(C) (2000); MD. CODE ANN., FAM. LAW § 12-104 (West 2006). Such laws should no longer apply to a mere state debt. Even the usage of child support guidelines, which each state is required under federal law to establish to guide the determination of initial child support orders, would no longer seem applicable for the establishment of debts that are not considered child support.

191. *Harvey v. Marshall*, 884 A.2d 1171, 1195–96 (Md. 2005).

192. The court explained that the agency’s decision whether to eliminate

as welfare cost recovery efforts continue, so will the resulting legal morass. And the conflicts and resulting legal confusion do not exist solely in the realm of academics, but also in the reality facing welfare families and society.

### III. IMPACT OF WELFARE COST RECOVERY

Child support can provide much needed assistance when the payments are distributed to children and their families, and in millions of cases the child support program is now making tremendous strides toward doing just that. Although the primary purpose of creating the IV-D child support program was to collect government-owed child support in order to reimburse welfare costs, child support enforcement services have also been made available to individuals not receiving welfare benefits.<sup>193</sup> These CSE non-TANF collections are not used to reimburse government welfare costs but rather are provided directly to the individuals receiving child support enforcement services. Enforcement trends show that non-TANF collections have grown much faster than collections for the purpose of reimbursing welfare costs. From 2002 to 2006, total distributed CSE TANF collections decreased from \$2.9 to \$2.1 billion, whereas total distributed CSE non-TANF collections increased from \$17.2 to \$21.8 billion.<sup>194</sup> Thus, CSE non-TANF collections now account for over ninety-one percent of all child support collections.

While not the initial aim of the IV-D program, the impressive increase in child support collections for CSE non-TANF families provides a significant benefit to the families and to society. But the other side of child support enforcement—that which continues in the realm of welfare cost recovery efforts—is a different story.

#### A. *Family Economics*

*They don't want to cooperate, because it will only hurt their family. They don't want to have the State collect*

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arrearages “may at times be incongruent with the ‘best interests of the child,’ particularly when the State, in lieu of the delinquent, responsible parent’s payment of support, has advanced public funds to support the child.” *Id.* at 1200. Also, the court noted “there is a remarkable distinction between the judicial determination of child support, which certainly implicates the best interests of a child, and the forgiveness of arrearages that accrued through no fault of the child and are often due to a noncustodial parent’s financial problems or irresponsibility.” *Id.*

193. See *supra* notes 58–64 and accompanying text.

194. 2006 REPORT, *supra* note 1, at fig.7.

*their children's support, because it will hurt their children.*

– *Child Support Caseworker*<sup>195</sup>

Although families applying for TANF assistance must give up their rights to child support, proponents of welfare cost recovery contend that potential financial benefit to the families is present in the trade-off. In order to receive welfare assistance during a time of need, custodial parents must cooperate in establishing support obligations against the absent parents and then trade away their children's rights to receive the resulting child support payments.<sup>196</sup>

Arguably, the forced exchange might be considered a better than equal trade. The amount of child support assigned cannot exceed the amount of the welfare grant, so the transaction is equal because a dollar of welfare assistance is received in exchange for a dollar of child support assigned.<sup>197</sup> Also, an added benefit of receiving welfare assistance rather than child support is the regularity of payments. Welfare payments generally arrive in the same dollar amount at the same time every month. In contrast, child support payments for low-income families are irregular at best.<sup>198</sup> Because the noncustodial parents are often also poor, the families may go months without seeing a payment only to then receive sporadic and partial amounts. In addition to the regularity of payments, another benefit to families receiving TANF assistance is an increased likelihood of receiving Medicaid, child care, and a variety of other support services. Then, when the families are ready to leave TANF, they will leave with child support obligations intact, continued child support enforcement services, and the future support payments owed to the families.<sup>199</sup>

The benefits of the forced tradeoff are readily apparent, and low-income parents regularly make the decision to apply for TANF

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195. CHALLENGES AND STRATEGIES, *supra* note 77, at 7.

196. *See supra* notes 61–63, 73–74 and accompanying text.

197. 42 U.S.C. § 608(a)(3) (2000).

198. *See* MARIA CANCIAN & DANIEL R. MEYER, INST. FOR RESEARCH ON POVERTY, CHILD SUPPORT IN THE UNITED STATES: AN UNCERTAIN AND IRREGULAR INCOME SOURCE? 16 (2005), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp129805.pdf> (concluding that “the contribution of child support to many families’ economic well-being is reduced because of the instability of that support” and that this instability is greatest for low-income families).

199. Although payments on current child support obligations are distributed to the families after they leave welfare, significant percentages of the child support arrearages are often still owed to the government. When payments are made on the arrearages, the amounts are divided between the arrearages owed to the families and the government pursuant to complex distribution rules. *See* 42 U.S.C. § 657 (2000).

assistance precisely because of the benefits. However, stepping back to consider the broader view of the economic realities for families receiving TANF, the value of the tradeoff becomes much less clear.

First, the loss of assigned child support payments comes at a time when the families most need the additional financial support. A primary goal of the TANF program is to move recipients into the workplace and increase their chances of long-term economic self-reliance.<sup>200</sup> If families receiving welfare assistance were also able to receive child support payments, their chances for making ends meet and working towards economic stability would be greatly improved. Studies show that TANF families are the most economically fragile at the time of leaving welfare for work and that extra assistance from child support or other sources would significantly help prepare for the transition. For example, a 2005 study funded by the U.S. Department of Health and Human Services explains that “[c]hild support can represent an important income source for many low-income families, and the receipt of support may be most critical for women as they transition off welfare.”<sup>201</sup> Wisconsin received a federal waiver of the welfare cost recovery rules in 1997, allowing the State to pass through all child support payments directly to the families while simultaneously disregarding the income from counting toward welfare eligibility.<sup>202</sup> Studies examining the waiver program have indicated significant success, including “increased paternity establishment, increased child support collections, and little additional governmental cost.”<sup>203</sup>

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200. *See id.* § 601(a)(2) (stating that one of the primary TANF purposes is to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage”).

201. CYNTHIA MILLER ET AL., THE INTERACTION OF CHILD SUPPORT AND TANF: EVIDENCE FROM SAMPLES OF CURRENT AND FORMER WELFARE RECIPIENTS, at ES-1 (2005), available at <http://www.mdrc.org/publications/397/full.pdf>; *see also* OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., DISTRIBUTING COLLECTED CHILD SUPPORT TO FAMILIES EXITING TANF, at i (2001), available at <http://oig.hhs.gov/oei/reports/oei-05-01-00220.pdf> (“Families may be most vulnerable during the months before and immediately following the end of their receipt of TANF assistance. Payment of child support at this juncture is likely to have a great impact on the success of the transition from TANF to self-sufficiency.”).

202. *See generally* DANIEL R. MEYER ET AL., W-2 CHILD SUPPORT DEMONSTRATION EVALUATION PHASE 2: FINAL REPORT (2003), available at <http://www.irp.wisc.edu/research/childsup/csde/publications/phase2/phase2-final.pdf> (describing the results of Wisconsin’s full pass-through experiment).

203. *See* MARCIA CANCIAN ET AL., THE EFFECTS OF CHILD SUPPORT PASS-THROUGH AND DISREGARD POLICIES 4 (2006), available at <http://www.irp.wisc.edu/research/childsup/csde/publications/cancian-meyer-roff-d.pdf>.

In addition to the negative impact on families' economic stability by giving up child support payments to the government, families may also unwittingly give up other informal and in-kind support as a result of cooperating with child support enforcement. In 2000, the Department of Health and Human Services' Office of Inspector General ("OIG") completed a report regarding problems and needed improvements in the IV-D program's practices in enforcing the child support cooperation requirements.<sup>204</sup> An important finding of the report explains that "child support enforcement may actually make some TANF families worse off."<sup>205</sup> The main harm to families addressed by the OIG report is financial: some noncustodial parents may stop providing informal or in-kind support to custodial parents who cooperate in establishing and enforcing child support obligations.<sup>206</sup> To reduce the harm, the report recommends that states should take advantage of the broad flexibility provided through welfare reform and reconsider their current child support policies to ensure they are not "counter-productive to long-term goals of helping clients attain independence and self-sufficiency."<sup>207</sup>

Moreover, an examination of the available child support data exposes a possible trend that raises questions regarding the benefit perceived by families of leaving TANF with child support obligations intact. From 2001 to 2005, the total child support caseload declined from 17.1 million to 15.9 million.<sup>208</sup> All of the reduction came from the caseload of current and former TANF recipients.<sup>209</sup> The decline in current TANF recipients in the child support caseload is not surprising because states continue to tighten their enforcement of the TANF eligibility requirements and recipients have begun to

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204. CHALLENGES AND STRATEGIES, *supra* note 77.

205. *Id.* at 16.

206. *Id.* at 7 ("Even if no child support is collected, as staff report is often the case, the noncustodial parent may withhold informal or in-kind support if the client cooperates with authorities."); *see also* Karen Syma Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty*, 14 WM. & MARY BILL RTS. J. 943, 957 (2006) ("It also seems likely that informal economic and social support offered by many low-income fathers and their families is more important to their children than the small amounts of child support the fathers can pay, especially when the child support often goes to reimbursing the state for public benefits rather than to the child's household."); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1004-08 (2006) (discussing the benefits of informal and in-kind support provided by low-income, African-American fathers).

207. CHALLENGES AND STRATEGIES, *supra* note 77, at 16.

208. 2005 REPORT, *supra* note 5, at fig.1.

209. *Id.*

reach the five-year time limit on benefits.<sup>210</sup> However, the decline in former TANF assistance families in the child support caseload seems to conflict with the claims that TANF families will view the forced welfare cost recovery system as a benefit because they will be able to leave TANF with child support and child support enforcement services intact. If all former TANF families perceived the child support obligations and enforcement services as a benefit, a decrease in current TANF cases in the child support caseload, resulting from families leaving welfare, would seemingly result in a corresponding increase in former TANF families in the caseload. But according to the data, once families stop receiving TANF and are no longer obligated to cooperate with child support enforcement, the possibility is present that many of the families may be choosing to forgo ongoing child support services.

### B. *Public Economics*

At first glance, the cost effectiveness of the welfare cost recovery effort via the IV-D child support program appears to be excellent and improving every year. In 2006, total IV-D child support collections reached almost \$24 billion, an increase of over \$8 billion in total collections since 1999.<sup>211</sup> With total federal and state administrative costs at approximately \$5.6 billion in 2006, every combined federal and state dollar invested in administering the program resulted in over four dollars in child support collections.<sup>212</sup> However, what initially appears to be purely a success—a program that provides more than a four hundred percent return on investment—is in reality a divided story.

#### 1. *Government Finances*

Of the almost \$24 billion in child support collected at a combined federal and state administrative cost of \$5.6 billion in 2006, less than \$2 billion went towards reimbursing the federal and state costs of providing welfare assistance.<sup>213</sup> Thus, every \$5.6 of

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210. *See generally* U.S. GEN. ACCOUNTING OFFICE, *supra* note 96 (discussing effects of the declining TANF caseloads and corresponding decline in child support welfare cases).

211. 2006 REPORT, *supra* note 1, at tbl.1; OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., ANNUAL STATISTICAL REPORT FOR FISCAL YEARS 1999 AND 2000 tbl.1, *available at* [http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/datareport/table\\_1.html](http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/datareport/table_1.html) (last visited Oct. 17, 2007).

212. 2006 REPORT, *supra* note 1, at tbl.1.

213. *Id.* Total assistance reimbursement in 2006 was \$1,961,471,945. *Id.* at tbl.1, n.2 (“Total assistance reimbursement equals collections that will be divided between the State and Federal governments to reimburse their

administrative costs for the child support program results in less than \$2 of cost reimbursement. The big payoff from the administrative cost investment is the almost \$22 billion in support payments that are directed to children and their families.<sup>214</sup> But welfare cost recovery results in minimal benefit to the government's net finances and possibly even a loss.

Historically, the welfare recoupment efforts of the child support program resulted in a profit for state governments while the federal government operated at a loss.<sup>215</sup> Total state savings or profits were initially greater than the federal cost, which resulted in a net savings for taxpayers.<sup>216</sup> As the program grew, the public savings declined. The net savings went negative for the first time in 1989, and since that time, net losses have increased almost every year to the 2006 net loss of \$3.6 billion.<sup>217</sup> However, even when the combined federal and state program began operating at a net loss in 1989, most states were still making money on the program.<sup>218</sup> Then, in 2000, states also began to experience aggregate losses each year.<sup>219</sup> In 2004, only ten states were still making a profit on the child support program and states in the aggregate lost over \$515 million.<sup>220</sup>

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respective shares of either Title IV-A (TANF) payments or Title IV-E (Foster Care) maintenance payments.”).

214. *Id.* at tbl.1 (reciting that total collections distributed to children and families include approximately \$139 million for current assistance cases, \$8 billion for former assistance cases, \$10.9 billion for never assistance cases, and also \$2.7 billion for families on Medicaid who never received TANF).

215. *See* GREEN BOOK, *supra* note 61, at 8-65. Deborah Harris recognized the early financial deficits of the “welfare child support system” twenty years ago. Harris, *supra* note 18, at 635–39 (explaining that as of 1987, the federal government was losing money on the child support system, while states were making money); *see also* Chambers, *supra* note 6, at 2592 (“[A]fter twenty years of effort, the federal government collects much more than it once did in these cases, but still expends hundreds of millions more than it nets in return for the federal treasury.”) (footnote omitted).

216. *See* GREEN BOOK, *supra* note 61, at 8-65 (noting that net savings was \$201 million in 1979, the first year such data was available).

217. 2006 REPORT, *supra* note 1, at tbl.1 (listing values for total assistance reimbursement and total administrative expenditures, which when subtracted, indicate a net loss of approximately \$3.6 billion); GREEN BOOK, *supra* note 61, at 8-66.

218. *See* GREEN BOOK, *supra* note 61, at 8-66.

219. *Id.* at 8-65 to 8-66.

220. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPT OF HEALTH & HUMAN SERVS., FY 2004 ANNUAL REPORT TO CONGRESS tbl.39 (2007), [http://www.acf.hhs.gov/programs/cse/pubs/2007/reports/annual\\_report/#40](http://www.acf.hhs.gov/programs/cse/pubs/2007/reports/annual_report/#40). The numbers for 2004 continue the decline from only twelve states making a profit in 2003 and an aggregate loss of over \$461 million. *Id.*

The government is now well aware that the IV-D program operates at a loss, as is evident from analysis in the 2004 Green Book prepared by the House of Representatives Committee on Ways and Means.<sup>221</sup> However, the numbers do not tell the whole story. The side of child support enforcement that provides support payments to non-welfare families—but which does not result in welfare cost recovery—has been enormously successful. The \$5.6 billion administrative cost investment in the IV-D child support program in 2006 resulted in almost \$22 billion in child support payments received from noncustodial parents going to directly support families and children.<sup>222</sup> To put the social value of the payments in perspective, the amount of child support collected and provided to families in 2006 was \$5.5 billion greater than the \$16.5 billion in total federal spending on the nation's welfare program.<sup>223</sup> The support payments provided to families have a significant impact on the families' economic stability and are especially helpful for low-income families.<sup>224</sup> Also, when the support payments are provided to families, an additional "cost avoidance" benefit occurs in addition to the direct financial benefit to the families.<sup>225</sup> When families receive the child support payments, they are less likely to need help from welfare, food stamps, or other public assistance programs—resulting in savings to the public finances.<sup>226</sup>

Thus, whether the entire IV-D child support program costs more to administer than the resulting amount of welfare cost

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221. See GREEN BOOK, *supra* note 61, at 8-65 to 8-66.

222. 2006 REPORT, *supra* note 1, at tbl.1.

223. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FY 2007 BUDGET IN BRIEF: ADMINISTRATION FOR CHILDREN AND FAMILIES (2007), <http://www.hhs.gov/budget/07budget/acf.html> ("TANF provides approximately \$16.5 billion annually to States, Territories, and eligible Tribes for the design of creative programs to help families transition from welfare to self-sufficiency.").

224. See VICKI TURETSKY, CTR. FOR LAW & SOC. POLICY, THE CHILD SUPPORT PROGRAM: AN INVESTMENT THAT WORKS 1 (2005), *available at* [www.clasp.org/publications/cs\\_funding\\_072605.pdf](http://www.clasp.org/publications/cs_funding_072605.pdf) ("Next to the mothers' earnings, child support is the second largest income source for poor families receiving child support."); *id.* at 2 (noting that custodial parents receiving child support are more likely to find and keep jobs).

225. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPT OF HEALTH & HUMAN SERVS., CHILD SUPPORT COST AVOIDANCE IN 1999: FINAL REPORT (2003), [http://www.acf.dhhs.gov/programs/cse/pubs/2003/reports/cost\\_avoidance](http://www.acf.dhhs.gov/programs/cse/pubs/2003/reports/cost_avoidance).

226. *Id.* A study by the Urban Institute prepared for the Federal Office of Child Support Enforcement concluded that the increased family self-sufficiency resulting from child support payments provided to families resulted in \$2.6 billion in avoided costs in public assistance programs in FY 1999, including TANF, subsidized housing, Supplemental Security Income, food stamps, and Medicaid. *Id.*

recovery is not the important question because that measure does not take into account the successes and benefits of the child support program in vastly increasing child support payments to families. Rather, the important fiscal question, which is not considered in the Green Book report prepared by Congress, is whether the part of the IV-D child support program devoted solely to welfare cost recovery is cost effective. More data and a comprehensive study are needed to accurately answer the question, but the following preliminary examination of the available data illustrates that a positive answer may be in doubt.

The \$5.6 billion in total IV-D program administrative costs are not broken down by type of case.<sup>227</sup> Therefore, to estimate the cost of collecting the \$2 billion in welfare cost recovery, one can begin by simply assuming an equal administrative cost for enforcing each child support case. Under this assumption, the administrative costs of welfare cost recovery will be understated because it is well understood that child support cases with assigned support are generally more difficult and costly to enforce.<sup>228</sup> Setting that fact aside, the average annual administrative cost per child support case—calculated under the equal cost per case assumption—is approximately \$354.<sup>229</sup> Then, the analysis can continue by examining the cost effectiveness of collection efforts in current assistance cases where the bulk of collections are distributed to the government.<sup>230</sup> In 2006, enforcement efforts in the 2.3 million current assistance cases (families currently receiving welfare assistance) resulted in approximately \$985 million in collections or about \$428 per case with about \$363 per case retained by the

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227. See 2006 REPORT, *supra* note 1, at tbl.1.

228. See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO THE HOUSE OF REPRESENTATIVES COMMITTEE ON WAYS AND MEANS AND THE SENATE COMMITTEE OF FINANCE: CHILD SUPPORT ENFORCEMENT INCENTIVE FUNDING (1997), available at <http://www.acf.hhs.gov/programs/cse/rpt/secyrpt.htm> (explaining that "collection in TANF and former TANF cases is generally more difficult than in non-TANF cases").

229. Total administrative costs of about \$5.6 billion divided by total IV-D caseload of about 15.8 million equals approximately \$354 in administrative costs per child support case. 2006 REPORT, *supra* note 1, at fig.1, tbl.1.

230. Of the \$985 million in current assistance collections in 2006, approximately \$835 million, or eighty-five percent, was kept by the government as assistance reimbursement. *Id.* at tbl.1. By comparison, of the approximately \$9.2 billion in total former assistance collections in 2006, approximately \$8 billion was distributed directly to families rather than kept by the government. *Id.* Because most of the collections in former TANF cases are distributed to the families, it is more difficult to estimate the administrative cost of only those collections retained by the government.

government as welfare cost recovery.<sup>231</sup> Thus, without correcting for the understated assumption, the government spends only slightly less on administrative costs per current assistance case than the resulting collections retained by the government per case (\$354 per case in administrative costs compared with \$363 per case in welfare cost recovery collections). Even with very minor corrections for what are likely the greater administrative costs of current assistance cases, the resulting cost effectiveness of the welfare cost recovery efforts is possibly at or below the break-even point.<sup>232</sup> Moreover, these calculations do not take into account the lost “cost avoidance” benefits that lead to a reduction in government costs because families who receive child support payments are more likely to leave public assistance sooner and less likely to need the assistance in the future.<sup>233</sup> When families do not receive child support payments under the welfare cost recovery program, any cost avoidance benefits are lost.

## 2. *Societal Costs*

When families receive child support, the payments can help reduce the number of children living in poverty. Thus, the reverse must also be true: when child support payments are retained by the government, fewer children are lifted above the poverty line. The impact of child poverty is not felt by the families and children alone. A recent study concludes that the cost to the United States resulting from child poverty amounts to about five hundred billion dollars annually, or almost four percent of the GDP.<sup>234</sup>

Also, as child support enforcement efforts have strengthened, an

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231. *Id.* at tbls.1 & 2. First, divide the current assistance total, which was approximately \$985 million in 2006, by the total number of current assistance cases, which was approximately 2.3 million in 2006, to calculate the distribution of collections per assistance case—which was approximately \$428 in 2006. Then, divide the current assistance reimbursement, which was approximately \$835 million in 2006, by the total number of current assistance cases, which, again, was approximately 2.3 million in 2006, to calculate the total number of assistance the government actually retained—which was approximately \$363 million in 2006. *Id.*

232. However, the additional \$55 in collections per assistance case that are routed to families or for medical support (\$428 total collections per assistance case minus the \$363 per assistance case retained by the government) should not be discounted. *See supra* notes 230–31 and accompanying text.

233. *See supra* notes 204–07, 226 and accompanying text.

234. *Hearing on Economic and Societal Costs of Poverty Before the H. Comm. on Ways and Means*, 110th Cong. (2007) (statement of Harry J. Holzer, Professor, Georgetown University & Visiting Fellow at the Urban Institute, Georgetown University Public Policy Institute), <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5398>.

increasing concern has emerged regarding the possible effect on labor force participation among low-income noncustodial parents. In a recent book by Peter Edelman, Harry Holzer, and Paul Offner, the authors explain that child support enforcement disproportionately impacts young African-American men and has a contributing negative impact on their participation in the workforce.<sup>235</sup> Facing child support orders set at unrealistically high amounts, quickly accruing arrearages, and up to 65% of their wages being garnished to pay the obligation, many obligors simply opt out of the “above-ground” economy.<sup>236</sup> The negative impact on workforce participation may be particularly strong for welfare fathers: “Furthermore, much of [the] child support payments are not ‘passed through’ to families by the states, further lessening incentives for low-income men to work in the formal economy and meet these obligations.”<sup>237</sup> The numbers are not insignificant. From 1989 to 1999, the percentage of young African-American men in the workforce dropped from approximately 60% to 50%.<sup>238</sup> During the same time period—which included the beginning of the TANF program with strengthened child support enforcement efforts against absent parents and stricter work requirements for custodial parents—the workforce participation rate for young African-American women increased from approximately 40% to 52%.<sup>239</sup> The ripple effect when low-income noncustodial parents leave the formal economy is immediate. The obligors are more likely to engage in criminal activities, less likely to seek medical care without employer-sponsored health insurance, less likely to pay taxes, less likely to pay child support, and less likely to have a positive relationship with the custodial parents or their children.

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235. PETER EDELMAN ET AL., RECONNECTING DISADVANTAGED YOUNG MEN 129 (2006) (emphasizing that “by age 34, up to one-half of black men are noncustodial fathers”). The authors listed several other contributing factors to the decline in workforce participation among young African-American men including declining real wages, weak skills, discrimination, and criminal histories. *Id.* at 19. For a recent study reaching a different conclusion—that more strict child support enforcement does not cause noncustodial parents to leave the above ground economy, see Lauren M. Rich, Irwin Garfinkel, & Qin Gao, *Child Support Enforcement Policy and Unmarried Fathers’ Employment in the Underground Regular Economies*, 26 J. POL’Y ANALYSIS & MGMT. 791 (2007).

236. *Id.* at 129–30; see also Hatcher & Lieberman, *supra* note 7, at 5; Murphy, *supra* note 8, at 345.

237. EDELMAN ET AL., *supra* note 235, at 129–30.

238. *Id.* at 15 tbl.2.3.

239. *Id.*

C. *Noneconomic Impact: Theory v. Reality*

In addition to the governmental goal of reimbursing welfare costs and thereby reducing the burden on public finances, proponents of welfare cost recovery also contend that the program benefits families and society by increasing paternal responsibility, improving family relationships, and decreasing the number of children born out of wedlock. By forcing low-income mothers to identify fathers and cooperate in enforcing assigned child support obligations, the argument goes, more of the burden of supporting children will be shifted from government programs to the absent fathers and the fathers will be pulled back into the responsibility-based social fabric. Also, through an increasingly effective child support enforcement machine, the threat of child support may deter unplanned out-of-wedlock births from occurring in the first place. However, the possible deterrent effect is uncertain,<sup>240</sup> and the forced responsibility comes at the cost of conflict. Thus, the question considered in this Section is whether the potential social benefits of forcing paternal responsibility through the welfare cost recovery system are worth the corresponding costs.

1. *Benefits of Forced Paternal Responsibility?*

Although families and children generally receive no financial benefit from welfare cost recovery, the policy has been promoted as resulting in social benefits simply by increasing paternal responsibility.<sup>241</sup> Irwin Garfinkel argued that forcing low-income fathers to take financial responsibility for their children will lead to increased self-respect. If a poor father “is excused from contributing,” Garfinkel explained, “he gets the message that he has nothing of value to share with his child.”<sup>242</sup> But if the father is forced to pay child support, “he gets the message that, no matter how little he has, he still has something worthwhile to offer his child.”<sup>243</sup> Similarly, Harry Krause describes a danger in what he termed “subculture theories” that defend reduced responsibility for the low-income, primarily African-American fathers of children born

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240. See Robert D. Plotnik et al., *The Impact of Child Support Enforcement Policy on Nonmarital Childbearing*, 26 J. POL'Y ANALYSIS & MGMT. 79 (2006) (concluding that strong child support enforcement may result in fewer nonmarital births, but acknowledging several uncertainties and that more study is needed).

241. Roger J.R. Levesque, *Targeting “Deadbeat” Dads: The Problem With the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1, 36–37 (1994).

242. *Id.* at 42 (quoting IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY 133 (1992)).

243. *Id.*

out of wedlock:

In practice such theories help perpetuate the lack of self-sufficient family structures that has been the legacy of economic deprivation. To the extent non-responsibility is excused, even justified, rather than merely explained, these theories help perpetuate a *status quo* in which the black father is encouraged *not* to stand up for his child.<sup>244</sup>

The reasoning is simple: if a low-income absent father no longer lives in hiding but is forced to shoulder his familial responsibilities, the father will view himself with increased value and with less shame. The father should be able to engage in increased contact with his children without embarrassment, and a snowball effect will occur that continually encourages the father to improve his financial situation.

Although there is little research to support this social value theory of coerced paternal responsibility,<sup>245</sup> the logic is intuitive. However, the theory begins to break down once the reality of welfare fathers is realized. Beginning with the nature of the obligation, because the child support obligations of welfare fathers are generally owed to the government rather than to the children, the fathers are less likely to feel a parental responsibility, desire to pay, or feel a sense of pride and family attachment when they do pay. Moreover, like mothers applying for assistance, fathers of children on welfare are often poor themselves.<sup>246</sup> Child support obligations are frequently set at unrealistic levels and quickly become unmanageable, resulting in thousands of dollars owed in arrearages.<sup>247</sup> The total national child support debt reached

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244. KRAUSE, *supra* note 14, at 294.

245. Levesque, *supra* note 241, at 37 (explaining that there is no empirical support for the claims that tougher child support enforcement will lead to increased parental responsibility or improved family ties); *cf.* Chien-Chung Huang, *Child Support Enforcement and Father Involvement for Children in Never-Married Mother Families*, 4 FATHERING 97 (2006) (concluding that stricter child support enforcement may lead to greater father involvement with children, but recognizing that several variables raise doubts about the possible connection).

246. *See supra* note 6 and accompanying text.

247. *See supra* note 6 and accompanying text; *see also* EDELMAN ET AL., *supra* note 235, at 27; VICKI TURETSKY, CTR. FOR LAW & SOC. POLICY, REALISTIC CHILD SUPPORT POLICIES FOR LOW INCOME FATHERS 8–9 (2000), available at [http://www.clasp.org/publications/realistic\\_child\\_support\\_policies.htm](http://www.clasp.org/publications/realistic_child_support_policies.htm); Karen Syma Czapanskiy, *ALI Child Support Principles: A Lesson in Public Policy and Truth-Telling*, 8 DUKE J. GENDER L. & POL'Y 259, 264–65 (2001) (describing the potential impact of unrealistic child support orders on low-income obligors); Hatcher & Lieberman, *supra* note 7, at 10–11.

approximately \$105 billion in 2006.<sup>248</sup> Almost two-thirds of the obligors responsible for the debt had incomes of less than ten thousand dollars.<sup>249</sup> And almost seventy percent of the total arrearages accumulated from cases of current and former welfare families.<sup>250</sup> Because of the economic situation of welfare fathers, child support officials recognize that the arrearages are often uncollectible.<sup>251</sup> Yet the child support machine never slows. The fathers are repeatedly hauled into packed and chaotic courtrooms and berated by frustrated family court judges for their failings—often with the mothers and children present.<sup>252</sup> Many feelings are present during the child support docket, but self-respect and pride are usually not among them.

And the flip-side of forced paternal responsibility in the welfare cost recovery system is the corresponding paternalistic treatment of low-income mothers. Child support is often heralded by progressive advocates as a strong tool to enforce the rights of mothers and children against absent fathers. But in the welfare cost recovery side of child support, a mother's rights are diminished because her ability to choose the best course for her family is taken away.<sup>253</sup> An underlying but unstated rationale behind the coercion is likely a belief that poor mothers are not to be trusted with decisions regarding their children and that they should be deterred from having children in a world where they cannot afford to raise them. Thirty-six years ago, Krause convincingly argued for the rights and equal treatment of illegitimate children, but simultaneously

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248. See 2006 REPORT, *supra* note 1, at tbl.5.

249. See STORY BEHIND THE NUMBERS, *supra* note 6, at 1.

250. See ANNUAL REPORT, *supra* note 90, at tbl.65 (stating total debt for FY 2003 was \$95.8 billion, of which \$12.8 billion came from current assistance cases, \$53.9 billion came from former assistance cases, and \$29.1 billion came from never assistance cases).

251. See, e.g., OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE IV-D PROGRAM FLEXIBILITY WITH RESPECT TO LOW INCOME OBLIGORS (2000), available at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/2000/piq-00-03.htm> (encouraging programs to forgive uncollectible state-owed child support arrearages).

252. See Hatcher & Lieberman, *supra* note 7, at 7–8.

253. The number of custodial parents who, for various reasons, may desire not to pursue child support is likely substantial. A study conducted in 1986 indicates that of eligible mothers without child support awards, thirty-eight percent explained the reason they were without an award is that they did not want one. ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 20 (1993); see also Chien-Chung Huang & Hillard Pouncy, *Why Doesn't She Have a Child Support Order?: Personal Choice or Objective Constraint*, 54 FAM. REL. 547 (2005) (investigating the reasons why thirty-six percent of eligible mothers do not pursue child support orders).

supported the forced welfare cost recovery system that would ensure the continued unequal and paternalistic treatment of all mothers and children on welfare.<sup>254</sup> In a very real sense, the long outdated notions from the time of the bastardy acts—when women were treated as criminals and forced into court to protect society from the burden of their illegitimate children—are still very much alive within the policies of welfare cost recovery. And with the paternalistic treatment, as the next Section of the Article explains, conflict rather than strengthened family ties and increased paternal responsibility often results.

2. *Culture of Conflict: State vs. State vs. Mom vs. Dad vs. Child*

Another proposed social benefit of welfare cost recovery is a strengthening of family relationships.<sup>255</sup> During congressional debate over the pending creation of the IV-D program, a 1975 Senate Finance Committee Report explained that “as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.”<sup>256</sup> Again, the goal of strengthening families through deterrence makes some sense. But in practice, the opposite often occurs: increased turmoil between family members and even conflict between the State’s own competing interests.

Welfare cost recovery’s culture of conflict begins as the State’s own interests are aligned against each other. The self-interests of states in child support can be expressed in two categories: one looking forward and one looking back. Looking forward, states have an interest in supporting the future welfare and best interests of children and an interest in reducing the likelihood that single-parent households will need future public assistance. Looking back, once a family has received welfare assistance, states have a short-term interest in seeking reimbursement of the public costs of the welfare assistance already provided. The interests are in direct conflict. For a family who is currently on welfare but seeking to become self-sufficient, as the TANF program requires, child support payments provided directly to the family will serve the State interests in encouraging family economic stability and reducing the likelihood that the family will need welfare assistance in the future. However, every dollar of child support routed to serve this forward-

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254. See generally HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971).

255. Levesque, *supra* note 241, at 36–37.

256. S. REP. NO. 93-1356 (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8146; see Harris, *supra* note 18, at 635 n.88.

looking interest is a dollar taken away from the State's goal of reimbursing past welfare costs. Often, the state interests collide within a single case. For example, a custodial parent who has left welfare may have past child support arrearages owed to the State to reimburse the past assistance while the current on-going support obligation is owed to the parent. The child support office will be taking child support away from the family to pay the State-owed arrearages while simultaneously trying to give child support to the family through enforcement of the current support.

In addition to the internal state struggle, welfare cost recovery pits family members against each other.<sup>257</sup> Mothers in TANF cases are forced to repeatedly sue fathers to establish and then enforce child support orders, compounding the already enormous stresses on their fragile relationships.<sup>258</sup> In a narrative by Lisa Kelly describing a couple's experience in paternity court, the impact of welfare cost recovery on the relationship between young mothers and fathers is compellingly portrayed.<sup>259</sup> After describing the chaotic scene of the child support agency's lawyer yelling out the names of countless fathers appearing for paternity determinations or threatened with incarceration for contempt, a brief dialogue between mother and father occurs.<sup>260</sup> As the father pleads with the mother to drop the case and promises to provide her with financial support in lieu of the welfare benefit, the mother struggles with the decision.<sup>261</sup> She wants the father to be part of her and her child's life, but she desperately needs the guarantee of a regular welfare payment and the medical assistance card that comes with it:

She looked at him there in his t-shirt and jeans, his old raggedy shoes. She knew he wanted to do it, but he just couldn't. She had to think of Kiji now, what Kiji really needed. And the sad truth was James couldn't give it.

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257. Few studies have begun to examine the impact of child support enforcement, or more specifically welfare cost recovery, on the relationships between family members. See Royce A. Hutson, *Child Support and Parental Conflict in Low-income Families*, 29 CHILD. & YOUTH SERVICES REV. 1142 (2007) (examining the possible impact of child support enforcement upon parental contact and conflict and noting that little research has addressed the effect that strict child support enforcement may have on parental relations).

258. Maldonado, *supra* note 206, at 1015 (explaining how child support enforcement can cause increased conflict between mothers and fathers).

259. See Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's Story of the Duty to Establish Paternity*, 6 YALE J.L. & FEMINISM 297 (1994); see also Hatcher & Lieberman, *supra* note 7, at 7-8 (utilizing a similar narrative).

260. Kelly, *supra* note 259, at 302-03.

261. *Id.*

"I'm sorry James, I just can't. I need the money and the card. I just do."

"Well then, I guess you won't be needing me no more."<sup>262</sup>

Studies show that at the time of the birth of a new child, young unmarried parents in "fragile families" have the potential for a healthy relationship and even the possibility of marriage.<sup>263</sup> Most of the mothers want the fathers to have significant involvement in their children's lives and the fathers want to do right by their children.<sup>264</sup> The fragile families have hope. But rather than building on that hope with supportive services aimed at encouraging healthy relationships, welfare cost recovery adds turmoil.<sup>265</sup>

Moreover, in addition to the conflict between mothers and fathers, welfare cost recovery also adds conflict into the relationships between the parents and their children. Fathers can be further alienated from their children as they are unable to make payments and thus may reduce visitations out of embarrassment or simply the desire to hide from enforcement efforts. Even the relationship of mother and child can become adversarial. Most children hope for a relationship with their absent parents.<sup>266</sup> Unable to understand the forced system in which their parents find themselves, the children are witness to their mothers suing their fathers in court and may blame one or both parents when their fathers retreat further from family contact.

Thus, the potential for welfare cost recovery to increase paternal responsibility and deter out-of-wedlock births is uncertain at best, and the elusive quest comes at a high cost. Competing state interests collide and family relationships can be weakened. A core

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262. *Id.* at 303 (footnote omitted).

263. Sarah McLanahan et al., *Fragile Families, Welfare Reform, and Marriage* (Brookings Inst., D.C.), Nov. 2001, at 2, [http://brookings.edu/papers/2001/12childrenfamilies\\_mclanahan.aspx](http://brookings.edu/papers/2001/12childrenfamilies_mclanahan.aspx) (explaining that "[o]ne of the most striking findings from the Fragile Families Study thus far is the high rate of cohabitation among unmarried parents," that "[a]t the time of birth, half of unmarried mothers are living with the fathers of their children," and that the "majority of unwed parents are optimistic about their future together").

264. *Id.* ("Most fathers say they want to help raise their child, and the overwhelming majority of mothers say they want the fathers to be involved."); see also Chambers, *supra* note 6, at 2597 ("In addition, some of these unemployed and marginally employable men who are not supporting their children have informal relationships with their children that the mothers applaud and that might be lost if they are turned into fugitives.").

265. See Murphy, *supra* note 8, at 356, 373.

266. See Maldonado, *supra* note 206, at 998 ("Although millions of children grow up having little contact with their fathers, almost all express a desire for a father and feel rejected when their fathers are not involved in their lives.").

legislative purpose of the TANF program is to encourage the formation and maintenance of two parent families—to bring fragile families together.<sup>267</sup> Why then, is a policy continued whose conflicting interests often tear fragile families apart?

#### IV. SUGGESTED REFORMS

Child support enforcement actions should not work against the interests of children. This simple notion is echoed by courts across the country. Yet, as long as states continue their welfare cost recovery efforts, children's interests will conflict with the States' fiscal pursuits—and the children's interests will lose. This Part of the Article presents a resolution to the conflict that is long overdue.

##### A. *End Welfare Cost Recovery*

Welfare cost recovery is a failed effort. The policy harms children, harms society, and results in minimal, if any, net fiscal benefit to government. Child support officials have long talked of the need to shift priority from cost recovery to increasing support to families, but a sufficient shift has yet to occur. The recent child support changes in the Deficit Reduction Act of 2005 provide an important step in the right direction, allowing states increased discretion and incentives to pass through more assigned child support back to families. However, even if the legislation proves to be successful and many states take advantage of the new flexibility, welfare cost recovery efforts and the resulting harm will continue. The obvious solution to stop the harm and fix the legal morass resulting from the conflict is to simply end welfare cost recovery.<sup>268</sup>

##### 1. *Use Child Support to Support Children*

The first step in ending welfare cost recovery is to eliminate the child support assignment requirement in TANF so that all child support payments will be distributed to support children and families. With the assignment requirement eliminated, states will no longer have a fiscal interest in child support that conflicts with the best interests of the children. The legal confusion resulting from the conflict will be resolved and the redirected support payments will significantly assist families in their struggle for economic stability and self-sufficiency.<sup>269</sup>

Ideally, once distributed to children and their families, all or at least a significant amount of the child support should then be

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267. 42 U.S.C. § 601(a)(4) (2000).

268. See Murphy, *supra* note 8, at 370–71.

269. See KRAUSE, *supra* note 14, at 15 (describing the existing legal confusion).

disregarded from countable income for purposes of establishing eligibility for TANF or other public assistance programs. As the success of the Wisconsin waiver program has shown, a disregard policy will help lead to increased child support payments, increased family economic stability, and lower child poverty rates.<sup>270</sup>

## 2. *Value Choice*

Next, choice should replace coercion. By eliminating the child support cooperation requirement from TANF, mothers applying for welfare assistance will be able to decide whether or not to pursue child support against the absent fathers. Caseworkers should clearly notify welfare applicants of the services available from the child support offices and explain the benefits of receiving child support. However, a decision by the parent to decline child support services should not affect eligibility or result in any reduction of welfare benefits.

Eliminating the cooperation requirement will place the decision of whether to pursue child support with the person best able to assess the benefits and detriments.<sup>271</sup> A mother applying for welfare will be able to consider the relationship with the absent father and whether opening a child support case would harm the fragile relationship that often exists. Some parents may decide that forgoing child support services will allow the relationship to grow more amicably, encouraging more informal support and cooperative assistance in raising the child, and even possibly leading to cohabitation and marriage. Parents will also be able to assess whether the potential benefits of pursuing child support are outweighed by the risk of domestic violence from an abusive, absent parent.<sup>272</sup> As the Supreme Court of Kentucky had the foresight to recognize over 170 years ago, the pursuit of child support should be a choice, and the mothers—rich or poor—should possess that

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270. *See supra* notes 202–03 and accompanying text. A child support disregard policy has long been advocated. Harry Krause, one of the staunchest proponents of increasing child support enforcement efforts against low-income fathers, recommended that child support payments made by welfare fathers should benefit the children and should not result in lower welfare benefit payments. *See Krause, supra* note 20, at 15.

271. Czapanskiy, *supra* note 206, at 949.

272. *See Harris, supra* note 18, at 656 (“It seems reasonable to suppose that welfare mothers are just as able as nonwelfare mothers to decide whether the monetary benefits that do exist — including the advantage of having a support order in place when welfare ends — make it financially worthwhile to try to establish paternity and enforce support. Welfare mothers, like nonwelfare mothers, can also make rational decisions about whether or not the ‘social benefits’ of establishing paternity outweigh the disadvantages.”).

choice.<sup>273</sup>

Inevitably, replacing coercion with choice will result in fewer welfare families in the child support caseload. However, such a reduction can be an improvement through a well-informed process of self-selection. Those families who decide the benefits outweigh the costs will remain in the system, and those families who see no benefit or are concerned with the potential detriments will no longer seek the child support enforcement services. Then, as the national child support caseload declines through a reduction in the cases that may be the least likely to result in child support payments and generally have the highest administrative costs, program savings can be redirected to improve the efficiency and effectiveness of enforcement services for those families who truly need and desire the help.<sup>274</sup>

### *B. Steps in the Right Direction*

Until the welfare cost recovery requirements are eliminated in their entirety, several improvements are possible. First, states should immediately take advantage of the new options provided in the Deficit Reduction Act of 2005 by passing through more assigned child support back to families, disregarding the payments from the TANF eligibility calculations, and implementing the “families first” policy for tax refund intercepts.<sup>275</sup>

Then, states should take advantage of the flexibility to broadly define their good cause exceptions to the child support cooperation requirements and simultaneously improve the methods of ensuring that TANF applicants are aware of the process for requesting exceptions. The exceptions should include broader circumstances that protect the best interests of the children and support the relationships in fragile families. States might also experiment with exceptions that can encourage improved relationships between the parents. For example, in households where the parents are not cohabitating at the time of TANF application but a healthy relationship is possible, the custodial parent could be provided with a good cause exception to the child support cooperation requirement while the parents seek counseling, take parenting skills courses, or obtain job training.<sup>276</sup> In appropriate cases, the parents could then work towards reunification—or at least a healthy and collaborative relationship—without the added conflicts resulting from welfare cost

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273. See *supra* note 51 and accompanying text.

274. Harris, *supra* note 18, at 657.

275. See *supra* notes 120–25 and accompanying text.

276. Effective screening for potential domestic violence concerns would be necessary.

recovery through child support enforcement.<sup>277</sup>

Also, to begin addressing concerns with unmanageable, state-owed arrearages, Congress should consider revisiting the federal law commonly known as the Bradley amendment, which prohibits any retroactive modification of child support obligations.<sup>278</sup> An exception to the rule for government-owed arrearages would allow courts discretion to reduce arrearages in circumstances where continued collection efforts would result in significant hardship or detriment to the children's interests. And such an exception would only have the potential to eliminate past support obligations—likely uncollectible—that are owed to the government and thus would not result in a reduction of support owed to families.<sup>279</sup> Moreover, other options to address unmanageable arrearages are possible, such as debt leveraging programs where low-income obligors are encouraged to pay current support owed to the families while the government-owed arrearages are gradually forgiven in exchange.<sup>280</sup>

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277. As a complement to the broadened good cause exceptions, states might also experiment with increasing the awareness of two-parent benefits available under TANF and possibly broadening the definition of such two-parent assistance units to take into account circumstances where the parents are living apart but cohabitation is possible with appropriate supports. To implement such a strategy, a state may need to first seek a waiver from the existing federal TANF requirements.

278. See Levesque, *supra* note 241, at 34–35 (“[F]ederal law now prohibits retroactive modification of child support for children on AFDC. Despite its popularity, the rule is potentially devastating. Not only does it limit judicial discretion, it may inadvertently lead to unjust results . . . .”); see also KRAUSE, *supra* note 14, at 26 (“The important question of whether, in an appropriate case, modification should be allowed *retrospectively* (and thus wipe out or reduce accumulated arrearages) has been answered variously. While the finality of a judgment and accrued installments must be given due consideration, the better view permits the elimination of ‘impossible’ arrearages.”).

279. To implement such an exception, consideration would have to be given to the new options of states under the Deficit Reduction Act of 2005 to pass through assigned child support payments back to families to ensure the potential for such payments is not eliminated.

280. Such a program operated as a pilot project in Baltimore for one year, and state legislation introduced in 2007 by Delegate Kathleen M. Dumais to create a statewide “Child Support Payment Incentive Program” was signed into law. H.B. 263, 2007 Gen. Assemb., 423rd Sess. (Md. 2007) (The author of this Article collaborated in the development and support of the legislation.). The Federal Office of Child Support Enforcement supports such a strategy. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT FY 2003 PRELIMINARY DATA REPORT (2004), available at [http://www.acf.hhs.gov/programs/cse/pubs/2004/reports/preliminary\\_data/](http://www.acf.hhs.gov/programs/cse/pubs/2004/reports/preliminary_data/).

We know that about half of the debt is owed to the government, and not to the families. . . . We need to be more aggressive about leveraging older debt owed to the

## CONCLUSION

Two of the primary purposes of the TANF welfare program are encouraging the “formation and maintenance” of two-parent families and helping families to achieve economic self-sufficiency.<sup>281</sup> However, welfare cost recovery—also a centerpiece of welfare policy—undermines both TANF goals. The government’s effort to recoup welfare costs derives from the simple theory that the responsibility for supporting children should rest primarily with the parents rather than posing a burden upon society. As absent parents are forced to reclaim the responsibility, the reasoning continues, the social fabric will be strengthened. But as welfare cost recovery interacts with the economic reality of welfare parents’ lives, the theory falters. Children in welfare families lose out as their support payments are redirected to the government at the time when their families are most in need of the additional financial assistance. The fragile relationships between mothers, fathers, and children are often broken. The net fiscal benefit to the government is minimal, at best. And the social fabric is torn as significant numbers of welfare fathers retreat from the workforce and their families. The solution lies in the words of the obligation. Child support should only be pursued when providing support and benefit to the children. This Article does not seek to eliminate the child support obligation; it simply seeks clarification so that child support becomes pure in its purpose.

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government as an incentive to obtain more reliable payments of current support to families. If we do, I suggest that state and Federal governments will do better as families become more self-sufficient and less dependent on Medicaid and other public benefits than they have been doing in collecting old child support debt owed to those governments for long-ago welfare payments.

*Id.*

281. 42 U.S.C. § 601(a) (2000) (“The purpose of this part is to increase the flexibility of States in operating a program designed to—(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.”).