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Money Can't Buy You Love

VALUING CONTRIBUTIONS BY NONRESIDENTIAL FATHERS

Laurie S. Kohn[†]

INTRODUCTION

Family law in the United States reflects and reinforces expectations about how fathers should interact with their children. Those expectations betray the legal system's valuation of paternal financial contributions above other types of caretaking. This differential valuation, though advantageous to the overall well-being of some children, negatively affects low-income families, exacerbates cultural and societal pressures that deter men from being engaged parents, and compels mothers who seek paternal engagement to parent alone. As the populations of absent fathers and fathers who are unable to meet their child support obligations grow, it is worth reevaluating the relative value the legal system assigns to paternal financial contributions and to caretaking. By recalibrating their relative worth so that the legal system holds the value of both paternal roles in equipoise, child support and paternal engagement could mutually reinforce each other and together enhance opportunities for fathers, mothers, and children.

The legal system expresses the clear message that the role of a father is to provide for his children financially, and in fulfilling or failing in that role, a father's value to his children is determined.¹ By failing to support or assign credit for caring for

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¹ See generally Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511 (2013) (discussing the barriers to father engagement and the law's role in perpetuating those

children in nonfinancial ways, the legal system denigrates the value of caretaking. Financial support is, of course, critical to the well-being of children and custodial parents—for the most part mothers²—who are primarily responsible for those children. Yet in valuing fathers only for their breadwinning capacities, especially when those capacities are entirely or severely circumscribed, children may be harmed, and mothers are thrust, at times unwillingly, into their gender-prescribed role of sole nurturer and caretaker.³

The relationship between fathers and the legal system has garnered increased attention in recent years. Kathryn Edin and Timothy J. Nelson's 2013 book, *Doing the Best I Can*, chronicles their study of low-income inner city fathers and their children.⁴ While the book explores the myriad social forces, narratives, and pressures that result in fathers disappearing from the lives of their children, one broadly applicable conclusion is that many of these fathers feel a strong emotional pull to engage with their children⁵ and at the same time feel underinspired to make significant financial contributions to support their offspring.⁶ The authors observe that fathers "recoil at the notion that they are just a paycheck."⁷ They further conclude that our legal structure reinforces this conception, observing that "[a]t every turn an unmarried man who seeks to be a father, not just a daddy, is rebuffed by a system that pushes him aside with one hand while reaching into his pocket with the other."⁸

obstacles). This article builds on my recent scholarship focused on the barriers to paternal engagement exacerbated and created by the legal system. *Id.* This article moves beyond the descriptive thrust of the earlier article and considers the legal system's historic characterization of the value of noncustodial fathers and analyzes how that characterization can disserve children, mothers, the state, and fathers themselves.

² The vast majority of custodial parents to whom child support is owed are women. TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2011, at 7 (2013).

³ Feminist scholars have argued for the disruption of gender norms to move toward increased sexual equality. *See, e.g.*, MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 272 (1999) (arguing that involving men in caretaking will allow them to develop capacities necessary for a democratic society); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 175-76 (1989) (arguing that public policy should support equal shared parenting to allow women to reach their potential); Sara Ruddick, *Thinking About Fathers*, in CONFLICTS IN FEMINISM 222, 230 (Marianne Hirsch & Evelyn Fox Keller eds., 1990) (stating that conceiving of fathers as the sole source of financial support distorts society's understanding of mothers).

⁴ KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013).

⁵ *Id.* at 18.

⁶ *Id.* at 119.

⁷ *Id.* at 18.

⁸ *Id.* at 216.

On an episode of *Oprah*, the talk show host took on the issue of absent fathers and the perennial question posed by their children: “Why did he leave?” One expert explained, “I have found [that] the kryptonite for men is inadequacy.”⁹ The talk show guests agreed that for low-income fathers, the paternal role is riddled with opportunities to feel inadequate.¹⁰ An expert from the National Fatherhood Initiative ultimately traced the causes of paternal perceptions of inadequacy back to the government, explaining:

We almost talk about fathers . . . solely as providers. If you look at the way the government [sort of] treats fathers[,] we have the child support system for dads who aren't married to mom . . . There aren't programs that really focus on the other aspects [of fathering,] which [are] nurturing, connecting heart to heart with your kids, the emotional well being of your kids, and guiding, which is instilling values . . .¹¹

The effects of the legal system's emphasis on paternal breadwinning are nowhere more evident than among the cohort of low-income parents who are in court to address custody, parenting time, and child support. In family court and through the operation of child support laws, a father's caretaking is treated as discretionary; however, his financial obligations—which may be impossible to meet—are aggressively imposed and enforced without nuance.

In the end, the perspectives reflected in the comments by the fathers in Edin and Nelson's study and in the opinions of *Oprah's* guests are worth considering because they profoundly affect the behavior of low-income fathers and the lives of children and their mothers. This article asserts that a recalibration of how to ascribe value to paternal roles has the potential to not only provide different incentives for fathers, but to convey a greater sense of hopefulness for them. This shift would also support mothers in their efforts to care for and support their children, maximizing the potential for parents to provide holistically for their children.

In Part I, this article examines the roots of the disproportionate values the legal system assigns to paternal roles

⁹ *Absent Fathers: An Absentee Dad Explains Why Men Leave Their Children (VIDEO)*, HUFFINGTON POST (May 8, 2013, 9:47 AM), http://www.huffingtonpost.com/2013/05/08/absent-fathers-dad-why-men-leave-children_n_3231932.html [<http://perma.cc/M9T7-KZVV>].

¹⁰ *Id.* (quoting an absent father explaining that he left his children because he was unable to be the father that he wanted to be, and quoting an expert who explained that such feelings of imperfection stem from a misunderstanding about the role of fathers).

¹¹ *Oprah's Lifeclass: The Secret Pain of Single Mothers* (OWN television broadcast May 12, 2013).

in the family law and child support system, looking to social norms, traditional family law, and the state's interests in the well-being of children. In Part II, this article analyzes how this hierarchy of values reveals itself in the current structure of child support laws and in the enforcement of parenting-time orders on the one hand and child support obligations on the other. In Part III, the article considers the effect of disproportionate values on low-income fathers, mothers, children, and the state.

Finally, in Part IV, this article envisions ways in which the family law system could implement changes that would inevitably reapportion value to these two paternal roles, recasting both child support and caretaking, when appropriate, as mutually important to children. This Part explores changes to child support law and alternative approaches to the enforcement of custody, parenting time, and child support orders that would assist in equalizing the legal system's interest in the two paternal roles and ultimately, in stabilizing families. While equalizing the valuation of paternal roles could have a salutary effect on all families, this article focuses on changes to the system that would address the particular situation of low-income, noncustodial parents, since those parents are the least able, even in the face of coercion, to fulfill their breadwinner roles.¹² In considering such initiatives, the article analyzes the collateral consequences of these changes and the possible benefits and detriments to mothers.

The dramatic rise of single parent families¹³ headed by women also suggests that our legal system needs to reconsider how to make more robust and relevant the role of the noncustodial parent. Such a shift in perspective could allow the breadwinner and caretaker roles to mutually reinforce one another, reduce barriers to low-income paternal engagement, liberate mothers from their sole caretaking role when desirable and positive for children, influence social norms that exacerbate father absence, and allow the state to better meet its goals of supporting children's well-being without excessive state

¹² Poor fathers constitute 25% of the total population of nonresidential fathers, which is a significant minority of the nonresidential population. Elaine Sorensen & Chava Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?*, URB. INST., Apr. 2001. For every poor father who doesn't pay child support, there are nearly two nonpoor fathers. *Id.* Therefore, it stands to reason that policies tend to be developed to address the nonpoor father community.

¹³ See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 29 (2014) (setting forth statistics that show increasing trends in single parent households, particularly in the low-income community, and ultimately illustrating that 27% of children in the United States currently live in single-parent homes compared with the 10% of children who did so in 1965).

expenditure. The article concludes that the legal system, as well as low-income mothers, fathers, and children, all stand to reap significant benefits from recalibrating these paternal values and adopting higher expectations for the noncustodial parent.¹⁴

I. THE ROOTS OF THE PATERNAL ROLE'S HIERARCHY IN THE LEGAL SYSTEM

The legal system's current valuation of the paternal breadwinning role as preeminent to any other parental function—particularly a father's role as caregiver—has deep roots in social norms, traditional family law doctrine, and practical concerns about child well-being and the role of the state. Though contemporary family law is formally gender neutral,¹⁵ these origins highly influence both the application of the law and the operation of the court system.

A. *Social Norms*

Despite some destabilization in the traditional gender assignment of household and childcare work, historic social norms provide the roots of the hierarchy of paternal values, and contemporary social norms perpetuate the hierarchy. Traditional familial gender roles cast men as breadwinners and women as nurturers.¹⁶ Both the paternal breadwinning role and the

¹⁴ This article analyzes and proposes transitions in the legal system as a way to support children and create healthier non-intact, low-income families. Other scholars have suggested that adapting our current legal system may not be the most effective way to respond to family conflict, especially given the changing nature of the family and relationships. They argue for more transformative changes. See, e.g., NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 164 (1997) (arguing for a “reorientation of the state’s relationship to families,” especially regarding the “concepts of equality and children’s rights”); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015) (arguing that the radical changes in family structure require new theories of state regulation, doctrines, institutions, and norms or practice and suggesting nonlegal responses).

¹⁵ See, e.g., Naomi Mezey & Cornelia T. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 230 (2012) (“Even while the law of parenting is formally sex-neutral, the culture and actual practices of parenting are anything but.”).

¹⁶ See June Carbone & Naomi Cahn, *Is Marriage for Rich Men?*, 13 NEV. L.J. 386, 397 (2013) (stating that “[t]he male-breadwinner role continues to define male success, and the loss of both status and income that comes with lesser employment causes many men who cannot meet the expectations associated with the breadwinner role” to be considered failures); Andrea Doucet, *Gender Roles and Fathering*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 297-99 (Natasha J. Cabrera & Catherine S. Tamis-LeMonda eds., 2d ed. 2013) (providing an overview of the history of the father-as-breadwinner and mother-as-caregiver dichotomy over the last century); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1892 (2000) (“[W]omen are first and foremost committed to domesticity—as wives, mothers, daughters, sisters, general nurturers, and providers of care and cleanup.”).

maternal nurturing role date far back in our nation's history,¹⁷ and social norms enforce and perpetuate these roles to this day, even in the face of modern family law.¹⁸

While men are taking on an increasing amount of domestic work,¹⁹ homemaking and caretaking have remained predominantly female activities. Data compiled by the American Time Use Survey illustrate that men still lag far behind women in contributing to the household and to childcare.²⁰ Overall, based on a 2010 study, mothers living in homes with children under the age of 18 devoted an average of 31 hours per week to housework and childcare combined, whereas fathers in those households spent only 17 hours per week on the same activities.²¹

If one looks specifically at childcare, mothers and fathers continue to dedicate disproportionate amounts of time to this parental role. While according to a 2010 study, the time men devoted to childcare was marginally more substantial than that reported in a similar study in 2003,²² and certainly more

¹⁷ See Michael Lamb, *How Do Fathers Influence Children's Development? Let Me Count the Ways*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 3-4* (Michael Lamb ed., 5th ed. 2010) (tying the breadwinning role back to the Industrial Revolution and asserting the continuing pervasiveness of that role).

¹⁸ Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV., 1901, 1915 (2000); see PAUL RAEBURN, *DO FATHERS MATTER?: WHAT SCIENCE IS TELLING US ABOUT THE PARENT WE'VE OVERLOOKED* 217 (2014) (discussing contemporary studies and concluding "[t]he stereotypes remain; the first thing fathers have to do is to prove they can support the family financially").

¹⁹ JO JONES & WILLIAM D. MOSHER, U.S. DEPT OF HEALTH AND HUMAN SERVS., *FATHERS' INVOLVEMENT WITH THEIR CHILDREN: UNITED STATES, 2006-2010*, at 1 (2013); Gretchen Livingston & Kim Parker, *A Tale of Two Fathers: More Are Active but More Are Absent*, PEWRESEARCHCENTER (June 15, 2011), <http://www.pewsocialtrends.org/2011/06/15/a-tale-of-two-fathers/> [<http://perma.cc/MEZ5-5M73>].

²⁰ See Naomi R. Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 182 n.21 (2000) (citing various studies of gender differentiation in childcare illustrating that women perform more childcare than men); Nancy E. Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI-KENT L. REV. 785, 791 (2003) [hereinafter Dowd, *Law, Culture and Family*] ("[T]he pattern of custody and care of children remains sharply skewed by gender." (footnote omitted)); Charity M. Brown, *Women Are More Likely Than Men to Give Up Sleep to Care for Children and Others*, WASH. POST (Feb. 15, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/14/AR2011021405833.html> [<http://perma.cc/L7M3-4U8D>] (describing a 2011 study finding that women are more likely than men to care for their children at night); see also Cahn, *supra* note 20, at 188-92 (discussing women's circumscribed choices about whether or not to take on a disproportionate share of caretaking tasks in the family).

²¹ Wendy Wang, *Parents' Time with Kids More Rewarding than Paid Work—and More Exhausting*, PEWRESEARCHCENTER (Oct. 8, 2013), <http://www.pewsocialtrends.org/2013/10/08/parents-time-with-kids-more-rewarding-than-paid-work-and-more-exhausting/> [<http://perma.cc/RZ5F-YLAD>] (interpreting the American Time Use Survey of 2010).

²² Compare BUREAU OF LABOR STATISTICS, *AMERICAN TIME USE SURVEY 2003* tbl.7 (2004) (reporting that men over 18 living in a household with children under 18 spent an average of .81 hours per day performing childcare activities), with BUREAU OF LABOR STATISTICS, *AMERICAN TIME USE SURVEY 2012* tbl.9 (2013) (reporting that men

substantial than in 1965,²³ men are still devoting significantly less time per day to childcare than women. According to the survey, fathers engaged in a mere 55% of the childcare that women undertook.²⁴

Even the recent recession and increased unemployment have failed to equalize the time investment men and women make in childcare. In 2012, unemployed men living in a household with children under the age of six reported spending an average of 1.82 hours per day caring for children.²⁵ During the same period, similarly situated unemployed women reported devoting an average of 2.82 hours per day to childcare.²⁶ But these statistics assess caretaking in homes with residential fathers. Fathers who live apart from their children devote far less time to caretaking than residential fathers.²⁷

While the stigma associated with men performing childcare tasks has certainly lessened in the last several decades, its salience endures in our culture, both revealing and perpetuating gendered parenting norms.²⁸ For example, in 2011, the *New York*

over 18 living in a household with children under 18 spent an average of .91 hours per day performing childcare activities).

²³ Liana C. Sayer et al., *Are Parents Investing Less in Children? Trends in Mothers' and Fathers' Time with Children*, 110 AM. J. SOC. 1, 21, tbl.2 (2004) (illustrating that men spent an average of 17 minutes per day on childcare in 1965).

²⁴ In households in which the youngest child was under six, in 2008-2012, for example, men devoted an average of 1.37 hours per day to childcare as a primary activity. Similarly situated women, by contrast, spent an average of 2.47 hours per day on childcare as a primary activity. See BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY 2012 tbl.9 (2013).

²⁵ *Id.* at tbl. 8. It is also interesting to note that despite statistics that show a growing number of at-home, primary caregiver fathers, one commentator studying news accounts of at-home fathers asserts that a larger proportion of those fathers were caring for children because they had lost their job rather than because they affirmatively wanted to care for their offspring. See Beth A. Burkstrand-Reid, *Dirty Harry Meets Dirty Diapers: Masculinities, At-Home Fathers, and Making the Law Work for Families*, 22 TEX. J. WOMEN & L. 1, 16-17 (2012).

²⁶ AMERICAN TIME USE SURVEY 2012, *supra* note 22, at tbl.8.

²⁷ Livingston & Parker, *supra* note 19, at 3 ("When it comes to spending time with a child, being in the same home makes a huge difference."). Only 10% of nonresidential fathers reported helping their children with homework several times a week or more, and only 11% transport their children to activities. *Id.* at 5.

²⁸ Even contemporary studies assessing the public's value of fathers, which illustrate that fathers are now appreciated for more than just breadwinning, reveal that the public continues to see financial support to be predominantly a male responsibility and emotional support a mother's responsibility. For example, a recent study conducted by the Pew Research Center illustrated that fathers are not valued by the public as providers of emotional support. *The New American Father*, PEWRESEARCHCENTER (June 14, 2013), <http://www.pewsocialtrends.org/2013/06/14/the-new-american-father/> [<http://perma.cc/5M5M-4LWC>]. Yet multiple studies have shown that even for fathers who are primary caregivers and no longer work full time outside of the home, they "still feel judged as primary breadwinners." Doucet, *supra* note 16, at 306 (citing multiple studies as support); see also Burkstrand-Reid, *supra* note 25, at 22. One at-home father stated: "If I'm a man and I'm not earning a living, I'm not being productive

Times ran a front-page article entitled: “Fatherhood Cuts Testosterone, Study Finds, for the Good of the Family.” The article reported on a study in which fathers who cared for their children were found to have a more significant decrease in their testosterone level than their childless peers.²⁹ Though the article touted the testosterone change as a welcome and biologically understandable phenomenon, the study also reinforced men’s concerns about the “unmanly”³⁰ nature of childcare.³¹ Recent media coverage of at-home fathers who are motivated by caretaking discussed the father accepting “female” tasks and referred repeatedly to fathers who perform such tasks as “Mr. Mom.”³²

A recent Pew Center study further revealed that the public still characterizes caretaking as a predominantly maternal role despite an increased number of fathers staying home to care for children. In a 2013 study, the Pew Center reported that only 8% of respondents in a large-scale study felt that children are better off if a father stays home rather than works outside the home.³³ By contrast, 51% of survey respondents believed that children are better off if their mother doesn’t work outside the home.³⁴ Significantly, despite the data showing that fathers are currently more engaged with their children than in the past, the public doesn’t necessarily recognize that shift. A Pew Center study reported that today, the public is “evenly split” over the question of fathers’ relative involvement with their children as compared to 20 or 30 years ago, noting that 46% of those surveyed stated that fathers play a greater role now, and 45% reported that they play less of a role.³⁵ Commentators have argued that traditional notions of masculinity, which have cast the father as

in a traditional way, I may feel that people look down on me. Other men may look at what I’m doing. You’re a stay-at-home what? And that’s hard.” *Id.*

²⁹ Pam Belluck, *Fatherhood Cuts Testosterone, Study Finds, for the Good of the Family*, N.Y. TIMES, Sept. 13, 2011, at A1.

³⁰ Dave Golokhov, *Fatherhood and Testosterone, Scientific Fact: Kids Make You Less Manly*, ASKMEN, http://www.askmen.com/sports/health/515_fatherhood-and-testosterone.html [perma.cc/C37G-27VG] (last visited Dec. 14, 2015).

³¹ See Nancy E. Dowd, *Sperm, Testosterone, Masculinities and Fatherhood*, 13 NEV. L.J. 438, 449-51 (2013) (discussing the news coverage of at-home fathers, the threat to traditional macho notions of masculinity, and the underlying current of reporters’ efforts to reassure men that “this data was not necessarily bad news”).

³² Burkstrand-Reid, *supra* note 25, at 18.

³³ Gretchen Livingston, *Growing Number of Dads Home with the Kids: Biggest Increase Among Those Caring for Family*, PEWRESEARCHCENTER (June 5, 2014), <http://www.pewsocialtrends.org/2014/06/05/growing-number-of-dads-home-with-the-kids/> [http://perma.cc/WZ3M-ASZQ].

³⁴ *Id.*

³⁵ Livingston & Parker, *supra* note 19, at 7.

the financial provider,³⁶ have been partially responsible for the sluggishness of the transformation of parenting gender norms.³⁷ While paternal breadwinning and maternal caretaking can no longer be accurately described as the exclusive roles of fathers and mothers, these norms influence and describe the predominant model of role distribution in the modern family.³⁸

Because social norms fail to demand nurturing from a father, his failure to provide it is not attended by social reprobation.³⁹ By contrast, society has long expressed its disapproval of a father who fails to financially support his children. The social narrative of the “deadbeat dad” who fails to contribute financially is familiar in media and public awareness campaigns alike.⁴⁰ That deadbeat dad is condemned not for his

³⁶ See Caryn E. Medved, *Fathering, Caregiving, Masculinity: Stay-at-Home Fathers and Family Communication*, in WIDENING THE FAMILY CIRCLE 115, 119 (Kory Floyd & Mark T. Morman eds., 2014) (“Primary family breadwinning has remained an obligatory, pervasive, critical element of hegemonic definitions of masculinity and fathering in the United States since the industrial revolution; breadwinning has been emblematic of men’s power in marital relations and parenting.” (internal citation omitted)).

³⁷ See, e.g., Dowd, *supra* note 31, at 441-42 (analyzing the salience of masculinities theory and fatherhood, arguing that a shift toward a norm of fathers as caregivers has been slow, and advocating ways to change the norms by changing our expectations and vision of fatherhood). Scholars have called for new notions of masculinity to include nurturing and supportive parenthood. *See id.* at 441 (calling for changes to policies and laws to dismantle cultural barriers and support a new norm of father nurture and egalitarian parenting); *see also* Louise B. Silverstein, *Fathering is a Feminist Issue*, 20 PSYCHOL. OF WOMEN Q. 3, 30-31 (1996) (discussing new conceptions of fatherhood). *See generally* Carbone, *supra* note 16, at 388 (noting that masculinities theory has “taken on the construction of gender within marriage, centering in large part on the assumptions about, and reinforcement of the male role as breadwinner”).

³⁸ Professor Clare Huntington, in noting the enduring power of the breadwinner/caretaking dichotomy, points out that “we are in a period of flux, with the old model of breadwinning no longer applicable but no new model yet readily available.” Huntington, *supra* note 14, at 233.

³⁹ See Jessica L. Roberts, *Conclusions from the Body: Coerced Fatherhood and Caregiving as Child Support*, 17 YALE J.L. & FEMINISM 501, 509 (2005) (“Because being a father is almost exclusively associated with being an economic provider, a father’s disengaging from his children does not violate social norms of fathering.”).

⁴⁰ See Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 353-54 (2005) (describing the “Deadbeat Dad” stereotype as “well entrenched in American culture”); *see also* Julie Bosman, *Obama Sharply Assails Absent Black Fathers*, N.Y. TIMES (June 16, 2008), <http://www.nytimes.com/2008/06/16/us/politics/15cnd-obama.html> [<http://perma.cc/9DHA-VRGV>] (describing then-Senator Obama’s speech encouraging fathers to take an active role in child rearing); Priyanka Tilve, *Ex-Yankee Danny Tartabull Top LA Deadbeat Dad*, ABC NEWS (July 10, 2013), <http://abcnews.go.com/blogs/headlines/2013/07/ex-yankee-danny-tartabull-top-la-deadbeat-dad/> [<http://perma.cc/WD8H-A9GB>] (“Former Major League Baseball star Danny Tartabull is the ‘Most Wanted’ deadbeat dad in Los Angeles after failing to pay more than \$275,000 in child support for his two sons . . .”); ANVIL, DEADBEAT DAD (Hypnotic Records 1998) (metal song about deadbeat dads, lyrics include: “Deadbeat dad, support he won’t pay/ Deadbeat dad always staying away/ Deadbeat dad in disgrace and despair/ Deadbeat dad to the kids it is not fair”); *The Simpsons: Marge vs. Singles, Seniors, Childless Couples and Teens, and Gays* (FOX television broadcast Jan. 4,

failure to care for his children, but for his failure to comply with his paternal duty to provide financial support.⁴¹ Yet society is outraged when a mother turns her back on a child.⁴² The outrage has many origins, but it at least partially stems from the expectations of maternal behavior developed by and encompassed in our social norms. Social norms inform private and legal decisionmaking and cement expectations about gender roles—with men solidly cast as providers and women as nurturers.

B. *Traditional Family Law Doctrine*

The origins of the different values assigned to paternal roles can be seen clearly in traditional custody and child support doctrine, both of which embody and reinforce the caretaking and wage-earning dichotomy in family gender roles. Family law's traditional doctrine influences the contemporary application of custody law and informs the structure and enforcement of child support law.

2004). In this episode, a local interest group builds a statue of a “deadbeat dad” reaching into his pockets, complete with inscription reading “I Just Don’t Have It.” *Id.*

⁴¹ See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 940 (2005) (“Even if he has little contact with his children, so long as he supports them financially he will not elicit the moral opprobrium of most of his neighbors, coworkers, or relatives. . . . [S]ociety condemns economic deadbeat dads but apparently cares little about emotional deadbeats.”); see, e.g., *Deadbeat Parents: 14 Celebs Who Reportedly Had Trouble Making Child Support Payments*, HUFFINGTON POST (Feb. 21, 2013, 11:59 AM), http://www.huffingtonpost.com/2013/02/21/deadbeat-parents-celebrity_n_2586035.html [<http://perma.cc/8F6V-NK8F>] (characterizing celebrity fathers as “deadbeats” because of their failure to provide financial support for their children); *The Simpsons: A Milhouse Divided* (FOX television broadcast Dec. 1, 1996). Kirk Van Houten, Milhouse’s father, is a stereotypical and self-described “deadbeat dad” who is mocked for his inability to provide for his son, despite his involvement in his life. See *id.*

⁴² See, e.g., Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 523 (1996) (suggesting that maternal abandonment of children would be viewed with “widespread alarm”); Andrea Doucet, *Between Two F-Words: Fathering and Feminism*, HUFFINGTON POST (Apr. 2, 2011, 11:53 AM), http://www.huffingtonpost.com/andrea-doucet/feminism-fathering_b_840421.html [<http://perma.cc/FG3M-G75F>] (describing society’s vastly different expectations for mothers and fathers and noting the “media frenzy” about a mother who left her children and then returned); see also Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 386-87, 450 (1996) (discussing society’s view that “most mothers who separate from children are selfish and ill-motivated”); Peggy Drexler, *Why There Are More Walk-Away Moms*, CNN (May 6, 2013, 5:42 AM), <http://www.cnn.com/2013/05/04/opinion/drexler-mothers-leaving> [<http://perma.cc/WJ5Y-THLJ>] (“Mothers who abandon their children tend to be judged far more harshly by society, and by their children, than fathers who do the same When mothers abandon their children, it’s seen as unnatural.”); Lea Goldman, *What Kind of Mother Leaves Her Kids?*, MARIE CLAIRE (July 7, 2009), <http://www.marieclaire.com/world-reports/news/mothers-giving-up-custody> [<http://perma.cc/8P6G-42SS>] (discussing how mothers who give up custody are judged more harshly than fathers); Christine Spines, *Love Them and Leave Them*, ELLE (May 21, 2013), <http://www.elle.com/life-love/society-career/women-who-leave-their-marriages-families> [<http://perma.cc/XX9W-AQX7>] (discussing maternal abandonment as “one of society’s biggest taboos”).

1. Child Support Law

The history of child support law and enforcement also reflects a deep-rooted focus on fathers as the primary source of financial support. William Blackstone, in his eighteenth-century *Commentaries*, noted that marriage is built on the “natural obligation of the father to provide for his children.”⁴³ Early Colonial law provided that the state could sue only fathers for support of their children.⁴⁴ In the late 1700s, states implemented “Bastardy Acts,” which permitted states to require parents to cooperate in supporting illegitimate children.⁴⁵ Though these Acts targeted both parents, for the most part, women were merely required to comply by identifying the father, whereas the father was mandated to provide support for his illegitimate child.⁴⁶ This differential treatment may well have derived from the reality that illegitimate children were more likely to live with their mothers than their fathers. Regardless of the rationale, in the Bastardy Acts, the government codified its expectation that fathers must support their children financially but not in any other way. Later statutes enacted nationwide remained focused on the husband as the source of support to the exclusion of the mother.⁴⁷

Indeed, early court dicta reinforced the primacy of a father’s duty to support his children, with one case affirming a

⁴³ 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 447 (George Sharswood ed., 1893).

⁴⁴ See Daniel L. Hatcher, *Don’t Forget Dad: Addressing Women’s Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL’Y & L. 775, 778 (2012).

⁴⁵ See, e.g., 1 WILLIAM LITTELL, THE STATUTE LAW OF KENTUCKY; WITH NOTES PRAELECTIONS, AND OBSERVATIONS ON THE PUBLIC ACTS 282-83 (1809) (codifying that fathers of illegitimate children are responsible for their maintenance); AN ACT FOR THE MAINTENANCE OF BASTARD CHILDREN, 1795 N.J. Laws 152 (specifying that mother and reputed father are responsible for maintenance of bastard children). See generally *Baker v. State*, 26 N.W. 167, 169 (1885) (citing a state bastardy law specifying that it is the natural obligation of the parent to support his offspring); Hatcher, *supra* note 44, at 778 (citing a 1781 Maryland law).

⁴⁶ See, e.g., LITTELL, *supra* note 45, at 283 (requiring the mother to name under oath the person who is the father of the illegitimate child and requiring the father to provide for the child’s maintenance); *Stafford v. Withers*, 20 Ky. 510, 511 (1827) (holding that the state’s bastardy law was intended to force a father to support his offspring); *Schooler v. Commonwealth*, 16 Ky. 88, 88 (1 Litt. Sel. Cas. 1809) (noting that the state’s bastardy law is intended to enforce a natural duty against the father for the benefit of the mother). See generally Hatcher, *supra* note 44, at 778.

⁴⁷ See, e.g., CAL CIV. CODE § 139 (1933) (imposing an obligation only on the father to maintain the children after divorce); GA. CODE ANN. § 30-206 (1870) (noting that in a suit for custody, a father might be liable for support of a child); 1897 Haw. Sess. Laws 702 (specifying that the father is liable for suitable and proper support of his children in all respects); COMPILED STATUTES OF NEBRASKA 3192 § 27 (1881) (providing only for the obligation of a father and not a mother to provide monetary support to a spouse and children).

mother's right to seek support from a father, noting the "natural obligation . . . on the father to bear the expense of the support and education of his children."⁴⁸ Another case noted the "high moral duty" of the father to support his children.⁴⁹ One Illinois case highlighted that this duty rested disproportionately on the father: "The duty devolves first upon the father, and next upon the mother . . ."⁵⁰ While contemporary child support law imposes on both parents a duty to support their children, this historical focus on men's natural obligation to provide financial support feeds into the current primacy of paternal financial support at the expense of devaluing fathers' nonfinancial parenting roles.

2. Custody Law

After a century of paternal preference in custody law,⁵¹ family law began to favor mothers in custody disputes during the nineteenth century with the establishment of the maternal preference,⁵² which endured well into the twentieth century.⁵³

⁴⁸ *Kell v. Kell*, 161 N.W. 634, 635-36 (Iowa 1917); *see also White v. White*, 180 S.W. 1004, 1005 (Kan. City Ct. App. 1915) (noting a father's primary obligation to support his minor children); *Pretzinger v. Pretzinger*, 15 N.E. 471, 476 (Ohio 1887) (affirming the natural duty of a father to support his children even if he is deprived of custody of them); *Evans v. Evans*, 140 S.W. 745, 746 (Tenn. 1911) (holding that a father's natural duty of support is not extinguished by losing custody to the mother and noting that this obligation is one imposed by natural law and the laws of society); *Zilley v. Dunwiddie*, 74 N.W. 126, 127 (Wis. 1898) ("At the common law the husband was primarily liable for the support of his minor children.")

⁴⁹ *Perkins v. Mobley*, 4 Ohio St. 668, 673 (1885).

⁵⁰ *Plaster v. Plaster*, 47 Ill. 290, 291 (1868); *see also Zilley*, 74 N.W. at 127 (citing a Wisconsin statute that made the father primarily liable for the support of his children).

⁵¹ Prior to the nineteenth century, and following British rule, U.S. law enforced a paternal preference in custody disputes. *See* Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 *YALE L.J.* 1123, 1126 (1999); David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 *HOFSTRA. L. REV.* 1461, 1467-68 (2006) (noting that a paternal preference prevailed in the United States into the nineteenth century); *see, e.g., Commonwealth v. Briggs*, 16 Mass. 203, 205 (1 Pick. 1834) (stating in an early twentieth-century case that the father "is by law clearly entitled to the custody of [the] child").

⁵² *See generally* JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 136-37 (2014) (discussing the transition in nineteenth-century law from conceiving of children as economic resources benefitting fathers to conceiving of them as "sources of economic expense requiring a tremendous amount of caretaking, especially from mothers"); Meyer, *supra* note 51, at 1468.

⁵³ *See, e.g., Meinhardt v. Meinhardt*, 261 Minn. 272, 276 (1961) (holding, as late as 1961, that "there is no substitute for the love, companionship, and guidance of a good mother . . . She has the time and opportunity of providing care and comfort to children at times when normally the father is away from home. In many other ways she is the one to whom the children normally look for guidance"). It's important to note that some state gender-bias reports, however, found bias against women and in favor of men in custody proceedings in the late twentieth century. *See, e.g., GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT* 62 (1989) (reporting that when fathers sought custody in contested cases, mothers were awarded sole custody in only seven percent of

This preference relied on the natural law assumption that mothers possess a biological mandate to care for and nurture children.⁵⁴ In contrast, courts characterized fathers, by nature, as unequipped to care for children and at times even as detrimental to their children's well-being.⁵⁵ The clearest example of the maternal preference is embodied in the tender years doctrine, which endured in the American legal system until the 1970s.⁵⁶ The tender years doctrine—often applied as a presumption—directed the judge to place a young child with her mother in a custody dispute.⁵⁷ This reinforced the notion that mothers were uniquely qualified to care for young children.⁵⁸

For many years, states assessed custody cases involving older children using a primary-caregiver standard.⁵⁹ This

those cases). *But see* Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian—An Empirical Study*, 23 SUFFOLK U. L. REV. 711, 717 (1989) (reporting on a study of 38 states and D.C. that found that fathers were only awarded sole custody in 29% of contested cases).

⁵⁴ *See, e.g., Ex parte Alderman*, 73 S.E. 126, 128 (N.C. 1911) (“The love of the mother for her child, regardless of conditions and environments, has been proven by the history of the ages . . .”); *Bruce v. Bruce*, 285 P. 30, 37 (Okla. 1930) (“Courts know that mother love is a dominant trait in the heart of a mother, even in the weakest of women. It is of divine origin, and in nearly all cases far exceeds and surpasses the parental affection of the father. Every just man recognizes the fact that minor children need the constant bestowal of the mother’s care and love.”); *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916) (“Mother love is a dominant trait in even the weakest of women, and as a general thing, surpasses the paternal affection for the common offspring, and moreover, a child needs a mother’s care even more than a father’s.”).

⁵⁵ *See, e.g., Alderman*, 73 S.E. at 128 (“[I]t is sad to say that sometimes the tie between father and child is a different matter, and requires the strong arm of the law to regulate it with some degree of humanity and tenderness for the child’s good.”).

⁵⁶ *See, e.g., Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (holding that maternal and paternal roles were not necessarily to be considered differently); *Watts v. Watts*, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973) (holding the tender years presumption unconstitutional under the state constitution). *See generally* Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 L. & SOC’Y REV. 769, 770 (2004) (discussing the history of the tender years doctrine).

⁵⁷ *See Artis, supra* note 56, at 770; *see also* CAL CIV. CODE § 138 (1935) (“As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.”); *Butler v. Butler*, 134 So. 129, 130 (Ala. 1931) (holding four-year-olds should be placed with their mothers); *Sorrels v. Sorrels*, 234 P.2d 103, 105-07 (Cal. Dist. Ct. App. 1951) (affirming that a three-year-old should be placed with his mother under the tender years presumption).

⁵⁸ *See, e.g., Artis, supra* note 56, at 770; *Caldwell v. Caldwell*, 119 N.W. 599, 600 (Iowa 1909) (“Nature has devolved upon the mother the care and nurture of her children in tender years.”); *St. Clair v. St. Clair*, 507 P.2d 206, 216 (Kan. 1973) (“[I]f children are of tender age they almost of necessity must be entrusted to their mother’s care . . .”).

⁵⁹ *See* Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 433-39 (1990) (citing cases that found that courts in at least 16 states gave some consideration to the primary caretaker standard, with at least 7 of these states finding that the factor should be given significant weight).

standard also embodied the presumption that after family dissolution, mothers should continue to care for children and men should take a secondary role. In assessing who was the primary caregiver, the court looked to which parent provided the bulk of the caretaking prior to the custody dispute and awarded custody to that parent.⁶⁰ Naturally, since women were more likely to have been consistently engaged in the lives of their children⁶¹ due to a dearth of professional opportunities in the workforce and traditional norms of nurturing, this standard favored mothers and perpetuated the inequality in allocating responsibility for nurturing and caretaking.⁶² Though child custody law is now formally gender neutral, these deep-seated beliefs about gender-specific parenting roles that animated traditional legal doctrine influence the application of contemporary family law, where we still see the application of the tender years principles and decisions that deride parents for failing to fulfill their gendered parenting roles.⁶³

⁶⁰ See generally Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POLY REV. 168 (1984) (discussing the parameters of the primary caretaker rule); Kathryn L. Mercer, *The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389 (1997) (describing the approach of states adopting the primary caretaker presumption).

⁶¹ See Dowd, *supra* note 42, at 524-25 (describing the traditional "gendered differential" in parenting where women assume greater responsibility for childcare and are more likely to forego paid employment); see also Maldonado, *supra* note 41, at 942-43 (describing how fathers are far less likely than mothers to remain consistently involved in their children's lives).

⁶² See Artis, *supra* note 56, at 787 ("Many judges said that instead of using the tender years doctrine, they try to discern which parent is the most nurturing, which parent has the strongest bond, which parent is more emotionally connected to the child, or which parent spends the most time with the child. Interestingly, several of these judges explained that mothers are usually the primary caretaker."); Cheryl Buehler & Jean M. Gerard, *Divorce Law in the United States: A Focus on Child Custody*, 44 FAM. REL. 439, 442 (1995) ("Theoretically, [the primary caretaker] preference is gender neutral (although practically it favors mothers)."); Jocelyn Elise Crowley, *Taking Custody of Motherhood: Fathers' Rights Activists and the Politics of Parenting*, 37 WOMEN'S STUD. Q. 223, 237 (2009) ("The primary care-giver standard on its face is gender neutral, although undoubtedly, given the current division of childcare labor within the majority of American homes, women would still be granted physical custody more often than men.").

⁶³ See Huntington, *supra* note 14, at 170 ("[T]raditional gender norms, establishing economic support as the sine qua non of fatherhood and day-to-day caregiving as the hallmark of motherhood, still inform much of family law's approach to legal regulation, particularly in the conception of legal fatherhood."); Artis, *supra* note 56, at 770-71, 83 (reporting on a 2004 study of family court judges in Indiana in which more than half of the judges revealed that they continued to support the tender years presumption after its formal abolition and that they imposed that presumption in court). Moreover, although the tender years presumption has been formally abandoned in virtually all jurisdictions, a maternal preference for the custody of young children still often explicitly assists the court in tie breaking tough custody contests. See, e.g., *McCarty v. McCarty*, 52 So. 3d 1221, 1228 (Miss. Ct. App. 2011) (reaffirming the tender years doctrine as a presumption in cases involving young children, especially daughters). Contemporary cases also reveal the

C. *Children's Welfare and Protection of State Coffers*

The roots of the differential valuation of paternal roles can also be traced to the state's interest in the welfare of children and in the protection of state coffers. Although benign, these interests have helped shape the contours of a legal system that values fathers only for finances and perpetuates traditional gender roles in the family. Throughout its existence in imposing parental obligations, child support law has been guided by the dual goals of ensuring children's welfare and protecting the government's fiscal interests.⁶⁴ Since women have traditionally comprised a smaller proportion of the workforce and have received less remuneration for their work,⁶⁵ fathers have been the logical source of funds to support children when parents do not cohabit. Therefore, in order to ensure the best interests of the children, the federal government and courts have sought funds from the parent most able to provide those funds.

The state, of course, also has a vital interest in ensuring that parents support their children, which informs the second of the dual goals of the child support system: protection of government finances. Without child support, children are more likely to become the responsibility of the state. A father's voluntary abdication of his parental responsibilities, so the rationale proceeds, should not become a burden on the state—and by extension, the taxpayer. Even as far back as the Elizabethan Poor Laws, this rationale animated the state's interest in child

enduring strength of judicial assumptions about proper parental roles. *See, e.g.,* *Marvell v. Nicholson*, 816 A.2d 527, 531 (Vt. 2002) (affirming a custody decision in favor of the mother based partially on the consideration that the mother was responsible for more of the household chores and faulting the father for not taking care of the repair and maintenance of the home).

⁶⁴ *See* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1035-36 (2007) (noting the dual goals of child support as cost recovery and promoting the best interest of the child); Maria Cancian et al., *Child Support: Responsible Fatherhood and the Quid Pro Quo*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 144 (2011) (citing to the dual goals of the federal child support program); *Kell v. Kell*, 161 N.W. 634, 636 (Iowa 1917) (holding that the purpose of the child support statute is to protect the state from the burdens of abandoned children as well as to support children).

⁶⁵ *See* Jean Kimmel & Catalina Amuedo-Dorantes, *The Effects of Family Leave on Wages, Employment, and the Family Wage Gap: Distributional Implications*, 15 WASH. U. J.L. & POL'Y 115, 115-16 (2004) (noting that women have historically been less likely to be employed and continue to suffer from a gendered wage gap); *see also* Catherine Ho, *Minding the Gap*, WASH. POST (Sept. 4, 2011), http://articles.washingtonpost.com/2011-09-04/business/35275502_1_wage-gap-female-workers-paycheck-fairness-act [<http://perma.cc/77BW-V33L>] (discussing the gender wage gap and the role of limited female workforce participation in the gender pay disparity).

support.⁶⁶ Several nineteenth-century cases articulate the dual goals of child support,⁶⁷ with one Iowa case focusing solely on child support as an obligation to protect the state and holding that a father has a duty to support his children so that they do not become public burdens.⁶⁸ To this day, the state is involved in the collection and enforcement of child support obligations with these dual goals in mind.⁶⁹

One doesn't have to search far to unearth the basis for the legal system's current valuation of paternal roles. The assumption that fathers have little role to play in direct nurturing and caretaking of the child clearly surface in an examination of traditional child custody law, which branded the father as secondary or even irrelevant to the nurturance of children. The primacy of paternal financial support has similarly deep roots in child support law and in the state's interest in protecting both children and the taxpayer.

II. THE VALUATION OF CARETAKING AND BREADWINNING ROLES IN THE CONTEMPORARY LEGAL SYSTEM

In aspects of both formal child support law and its enforcement, our legal system reflects its significant valuation of fathers' financial contributions and its comparatively minimal valuation of fathers' caretaking. This discrepancy is especially apparent in the differential enforcement of child support orders on the one hand, and custody and parenting-time orders on the other. This Part analyzes each of these facets of the legal system in turn and considers how implicitly or explicitly they convey the state's virtually singular interest in paternal child support and its apathy toward paternal caretaking. While overt gender neutrality governs our current legal system, these aspects of formal law and law-in-action betray the persistent assumptions about parental behavior embodied in our family law system.

⁶⁶ See generally Hatcher, *supra* note 64, at 1035 (noting that the laws were enacted "[w]ith an aim of indemnifying society from the burden of supporting indigent children . . . in order to reimburse public aid provided to single mothers and children").

⁶⁷ See, e.g., Perkins v. Mobley, 4 Ohio St. 668, 672-73 (1855) (holding that the dual goals of a statute compelling fathers to pay support to their illegitimate children are to support the children and to indemnify the state); Zilley v. Dunwiddie, 74 N.W. 126, 127 (Wis. 1898) (noting that a father's duty to support his children is owed to the child and to the state).

⁶⁸ Hatcher, *supra* note 64, at 1037.

⁶⁹ See Kohn, *supra* note 1, at 534 & n.110 (discussing the enduring dual goals of the child support enforcement program).

A. *Prohibition of In-Kind Support*

The law's unwavering focus on a father's monetary support without regard to the importance of nonmonetary paternal caretaking betrays the entrenchment of gender norms. In child support law's treatment of in-kind support payments, the legal system dictates that only formal financial payments can satisfy a parent's obligation to his child.

Child support guidelines specify that a parent with a child support obligation receives no credit for in-kind or informal monetary contributions to his child.⁷⁰ Under this ban, for example, a noncustodial father cannot receive credit for providing diapers or formula, for taking his child shopping for new sneakers, or for going on a trip with his child.⁷¹ The government's interest in such a ban is rational. Through this prohibition, the government can verify not only that payments are being made, but also that they are made at an appropriate rate and on a regular basis—and when they are not, the obligation can be enforced. The state also seeks to protect custodial parents from intimate-partner violence and coercion and negotiation about the satisfaction of child support obligations.

At the same time, the ban on in-kind contributions reflects the state's preference for formal financial payments. For low-income men, the ban degrades the value of nonmonetary contributions. As one father in Washington, D.C., expressed about his child support order: "It does not account for the time and resources I spend, nor the fact that my son's well-being is tied to my own."⁷² Devaluing a contribution that often involves direct contact between father and child reinforces the message that a father's nonfinancial contributions are irrelevant and disincentivizes what might be a father's positive involvement with his children.

⁷⁰ See *id.* at 539-40.

⁷¹ See, e.g., *Perry v. Whitehead*, 10 A.3d 673, 676-77 (Me. 2010) (holding that a husband's monthly mortgage payments, as well as his responsibility for all real estate taxes, insurance, and repairs relating to his wife's home, were in-kind payments that did not reduce his child support obligation); *Stewart v. Rogers*, 92 P.3d 615, 619-20 (Mont. 2004) (holding that a father was not entitled to credit for in-kind contributions); *Donaldson v. Donaldson*, No. 96APF06-766, 1997 WL 35539, at *5-7 (Ohio Ct. App. Jan. 30, 1997) (holding that a husband's expenditures for piano, violin, and ski lessons for his children were voluntary, in-kind expenses and could not be used to reduce the amount he owed in child support); *In re Marriage of Heiman*, No. 01-0848, 2002 WL 1587671, at *1 (Iowa Ct. App. July 19, 2002).

⁷² Survey conducted by the author with Washington, D.C. fathers (June 12, 2014) (on file with author).

B. *Enforcement of Child Support Orders*

The legal system's treatment of child support nonpayment expresses and perpetuates the consistent message that men must fulfill their traditional roles as wage earners regardless of their ability to do so. In the past 15 years, government programs to collect child support have become increasingly aggressive, as mandated by both federal legislation and local statutes.⁷³ Existing child support enforcement mechanisms reinforce the law's singular interest in a father's breadwinning role. They do so by impeding or even foreclosing parenting time through the imposition of jail time and other sanctions for failure to pay child support that prevent a father from having contact with his children.

Though the government should enforce obligations and take financial support of children seriously, this enforcement system was developed for the parent who has the ability to pay. And it may well be effective at coercing payment from a recalcitrant parent with the means to meet his obligation.⁷⁴ When the target is an unemployed or underemployed father who cannot meet even a minimal obligation, however, the system is ineffective at best, and significantly damaging to the well-being of children at worst.

The enforcement system utilizes two general mechanisms—or sticks—to coerce payment and/or punish nonpayment. First, a nonpaying parent can be sanctioned for failure to pay by the withholding of a driver's or other professional license.⁷⁵ For low-income fathers who are unable to meet their

⁷³ See Anna Aizer & Sara McLanahan, *The Impact of Child Support Enforcement on Fertility, Parental Investments, and Child Well-Being*, 41 J. HUM. RESOURCES 28, 28 (2006) ("In response to [increasing childhood poverty and single motherhood], and in an effort to compel absent fathers to provide financially for their children, federal and state government officials began pursuing policies designed to strengthen child support enforcement."); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 126 (2006) ("[T]he law of parental obligation has stiffened, with courts and legislatures resorting to ever more aggressive means of child-support enforcement . . .").

⁷⁴ Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 IOWA J. GENDER, RACE & JUST. 617, 619 (2012) ("Although effective in securing payments from noncustodial parents with the means to pay, the impact of these reforms on no- and low-income noncustodial parents and their families has been disproportionate and destructive."); see Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POLY 95, 97 (2008) ("When applied to those who are willfully refusing to pay though able to do so, use of the contempt sanction to punish or coerce the recalcitrant parent is an appropriate means of assuring that absent parents take financial responsibility for the children they have brought into the world.").

⁷⁵ See, e.g., D.C. CODE § 46-225.01 (2012) (authorizing the withholding of car registrations, driver's licenses, and various professional licenses for failure to pay child

obligations, such a sanction can directly preclude work opportunities and access to parenting time. The loss of a license is likely to be a counterproductive sanction for low-income fathers, as it will further inhibit their ability to work and financially provide for their children.

Second, an obligor parent can face incarceration for failure to pay. A court may find a father in criminal or civil contempt for his failure to meet his child support obligation.⁷⁶ Civil contempt actions threaten a nonpaying parent with incarceration unless or until he pays.⁷⁷ The Supreme Court recently addressed the issue of civil contempt for failure to pay child support in the case of *Turner v. Rogers*, holding that a court must inquire into a contemnor's ability to pay and find he is willfully withholding payment before incarcerating him.⁷⁸ In theory, this holding should reduce the number of low-income fathers who are incarcerated for failure to pay child support. In practice, however, judges exercise broad discretion in determining when an alleged contemnor has the ability to meet his child support obligation, making it routine for judges to impute income to fathers who are not working,⁷⁹

support); VT. STAT. ANN. tit. 15, § 798 (2015) (authorizing license suspension for failure to pay child support). See generally Milton C. Lee Jr., *Fathering Court: A New Model for Child Support Enforcement*, 51 JUDGES' J. 24, 25 (2012) (discussing a holistic approach to child support).

⁷⁶ See generally CARMEN SOLOMON-FEARS ET AL., CONG. RESEARCH SERV., CHILD SUPPORT ENFORCEMENT: INCARCERATION AS THE LAST RESORT PENALTY FOR NONPAYMENT OF SUPPORT 1 (2012) (discussing civil and criminal contempt actions for nonpayment of child support that could result in incarceration and noting that in many states, prosecutors bring contempt charges in support cases).

⁷⁷ *Id.* (noting that civil contempt proceedings can result in jail time). For criminal contempt, a nonpaying parent can be sentenced for a set period of time; under civil contempt, a parent can be incarcerated until he makes his payment. *Id.* at 5-8 (discussing the differences between civil and criminal contempt and their penalties).

⁷⁸ *Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011).

⁷⁹ See CONSIDERATIONS IN THE USE OF CHILD SUPPORT GUIDELINES, N.J. RULES OF COURT, App. IX-A (2015) (allowing courts to impute income to noncustodial parents as full-time minimum wage work, even when records of past work are not available); UTAH CODE ANN. § 78B-12-203 (West 2012); VT. STAT. ANN. tit. 15, § 653(5) (2012) (defining "income" to include "the potential income of a parent who is voluntarily unemployed or underemployed"); WASH. REV. CODE § 26.19.071(6) (2011) (allowing imputation of income to unemployed and underemployed parents); DIV. OF CHILD SUPPORT MGMT. & AUDIT PROGRAM STAT. UNIT, WASH. ST. DEP'T OF SOC. & HEALTH SERVS., A STUDY OF WASHINGTON STATE CHILD SUPPORT ORDERS: EXPLORING THE UNIVERSE OF CASES WITHIN THE CONTEXT OF THE CHILD SUPPORT SCHEDULE 7 (2005), <https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/FinalGrant205.pdf> [<http://perma.cc/2N8F-PRD2>] (finding that about 50% of IV-D child support orders used imputed income in Washington State). If a parent falls into this "willful" category, then income can be imputed even if the parent has no actual income or has less income than is imputed. See *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001) (concluding that evidence of a parent's ability to work at a greater income is enough to establish "willful underemployment"); see also *Freedman v. Horike*, 809 N.Y.S.2d 649, 651 (N.Y. App. Div. 2006) (finding father willfully unemployed because he conducted activities against company policy that resulted in termination from

thereby rendering them lawful targets for prosecution. Therefore, despite *Turner*, indigent unemployed and underemployed parents may still lawfully be incarcerated for nonpayment in civil contempt cases.⁸⁰

In criminal contempt suits and in misdemeanor prosecutions,⁸¹ prosecutors routinely seek incarceration as punishment for failure to pay but do not pursue payment of arrears.⁸² Incarceration is a common sentence in contempt cases, with, for example, 13-16% of the South Carolina prison population serving time for child support-related civil contempt.⁸³

Incarcerating a nonpaying obligor expresses the seriousness with which the government approaches a child support obligation and, at the same time, the government's lack of

his employment). Willful unemployment or underemployment is not limited to parents who purposefully lower their income to avoid high child support payments. See *Willis*, 62 S.W.3d at 738 (finding father willfully underemployed when he left a job paying \$30,000 per year to pursue a career with the police department that paid less, even though his motivation to switch was his unhappiness with the first employment).

⁸⁰ See SOLOMON-FEARS ET AL., *supra* note 76, at 7; see also Mike Brunner, *Unable to Pay Child Support, Poor Parents Land Behind Bars*, S. CTR. FOR HUM. RTS. (Sept. 12, 2011), https://www.schr.org/action/resources/unable_to_pay_child_support_poor_parents_land_behind_bars [<http://perma.cc/36DB-MGMN>] (reporting that an Urban Institute study found that only half of the child support debtors in California jail had any income within the last two years and that of those who had income, the median was \$2,881 per year). Trial courts have great discretion when determining whether a parent is willfully unemployed or underemployed. See *Sandlin v. Sandlin*, 972 N.E.2d 371, 372 (Ind. Ct. App. 2012) (discussing the court's discretion to impute income in order to discourage voluntary unemployment and diminution of compensation).

⁸¹ See, e.g., ARK. CODE ANN. § 5-26-401 (West 2007) (establishing the offense of nonsupport); D.C. CODE § 46-225.02 (2007) (creating a criminal offense for failure to support a child); MICH. COMP. LAWS § 750.165(1) (2015) (establishing failure to pay child support as a felony criminal offense); N.D. CENT. CODE ANN. § 12.1-37-01 (2007) (establishing failure to pay child support as a crime); OR. REV. STAT. ANN. § 163.555 (West 2015) ("Criminal nonsupport is a Class C felony."); see also SOLOMON-FEARS ET AL., *supra* note 75, at 1 ("All states have criminal statutes that relate to the failure to pay child support.").

⁸² See SOLOMON-FEARS ET AL., *supra* note 76, at 5-8.

⁸³ See Brito, *supra* note 74, at 618 (citing Brief of Elizabeth G. Patterson and South Carolina Applesseed Legal Justice Center as Amici Curiae in Support of Petitioner at 7, *Turner*, 113 S. Ct. 2507 (2011)); see also Maureen A. Pirog & Kathleen M. Ziolk-Guest, *Child Support Enforcement: Programs and Policies, Impacts and Questions*, 25 J. POL'Y ANALYSIS & MGMT. 943, 960 (2006) ("Older data from noncustodial parents collected as part of the Survey of Absent Parents found that 13 percent of survey respondents in Florida and 6 percent in Ohio had been jailed in an effort to collect child support."); Brunner, *supra* note 80 (noting that "approximately 10,000 men were in jail for non-payment of child support, representing 1.7 percent of the overall U.S. jail population"); Douglas Galbi, *Incarcerating Child-Support Debtors Without the Benefit of Counsel*, PURPLE MOTES (Mar. 22, 2011), <http://purplemotes.net/2011/03/22/persons-in-jail-for-child-support-debt/> [<http://perma.cc/DHM8-8N9M>] ("Across the U.S. on an average day, roughly 50,000 persons are in jail or in prison for [child support] debt."). See generally REBECCA MAY & MARGUERITE ROULET, CENT. FOR FAM. POL'Y AND PRAC., A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT: ENFORCEMENT, COURT AND PROGRAM PRACTICES 13-38 (2005) (documenting, on a state-by-state basis, arrests and incarcerations for failures to pay child support).

concern for the estrangement that incarceration creates in a parent-child relationship.⁸⁴ Indeed, incarceration's potential for harm usually outweighs the benefits associated with this punitive measure. For a low-income father, incarceration rarely results in payment of child support obligations or arrears. Rough estimates suggest that less than two percent of child support collections can be associated with the threat of incarceration.⁸⁵ Further, once incarcerated, few parents are able to make payments.⁸⁶ In fact, the collateral consequences of incarceration exacerbate the precariousness of a father's finances. He is unlikely to leave a period of incarceration with an enhanced ability to provide for his children if he had been struggling prior to incarceration. One father in a recent study explained that "[my jail time for nonpayment of support] really affected me and just put a stain on me I wanted to look for a job, you know, and [] that's something that I can't get off my record. I spent 28 years, [] I've never been arrested. I never got in trouble. So now there's this one instance with child support and I go to jail."⁸⁷ Incarceration results in myriad nonfinancial consequences for fathers as well, including mental health effects⁸⁸ and increased drug and alcohol use after release.⁸⁹ The legal system's focus on enforcing child support obligations may well serve children whose fathers can meet their obligations. For children of low-income fathers, however, this focus often results in further estrangement and frequently enhances the improbability of payment. When fathers

⁸⁴ See ARK. CODE ANN. § 5-26-401 (West 2007) (establishing that "[a] person commits the offense of nonsupport if he or she fails to provide support to the person's [l]egitimate child who is less than (18) years of age"); 2014 Minn. Laws 1 ("Whoever is legally obligated to provide care and court-ordered support to a spouse or child, whether or not the child's custody has been granted to another, and knowingly omits and fails to do so is guilty of a misdemeanor, and upon conviction may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than \$1,000, or both."); MO. ANN. STAT. § 568.040 (West 2011) (providing that "[c]riminal nonsupport is a class A misdemeanor, unless the total arrearage is in excess of an aggregate of twelve monthly payments due under any order of support issued by any court of competent jurisdiction or any authorized administrative agency, in which case it is a class D felony"); OR. REV. STAT. ANN. § 163.555(5) (West 2015) ("Criminal nonsupport is a Class C felony."); TENN. CODE ANN. § 39-15-101 (West 2013) (distinguishing between nonsupport as a Class A misdemeanor and flagrant nonsupport as a Class E felony).

⁸⁵ SOLOMON-FEARS ET AL., *supra* note 76, at 3.

⁸⁶ *Id.*

⁸⁷ JACQUELYN BOGESS ET AL., WHAT WE WANT TO GIVE OUR KIDS: HOW CHILD SUPPORT DEBT CAN DIMINISH WEALTH-BUILDING OPPORTUNITIES FOR STRUGGLING BLACK FATHERS AND THEIR FAMILIES 13 (2014), <http://www.cffpp.org/publications/whatwewanttogiveourkids.pdf> [<http://perma.cc/CZS7-6NGX>].

⁸⁸ SOLOMON-FEARS ET AL., *supra* note 76, at 14 (noting that commentators assert that incarceration negatively affects a prisoner's mental health).

⁸⁹ *Id.* (noting commentators who have found that after incarceration, many former prisoners "self-medicate" with alcohol and drugs).

who cannot pay are sanctioned or imprisoned for failure to pay, they are more likely to fall further behind in payments or to become absent than they are to spontaneously find the means to meet their child support obligations.

C. *Differential Enforcement of Child Support Orders and Parenting-Time Orders*

The difference between the court's enforcement of child support orders on one hand and parenting-time orders on the other conveys a salient message about the legal system's valuation of paternal roles. As discussed above, child support is a responsibility that the court enforces through a range of coercive and punitive measures. In contrast, when a noncustodial parent violates a parenting-time order by failing to show up for visits, judges refrain from enforcing the obligation. Visitation and custody are characterized as rights to be taken advantage of at a noncustodial father's discretion.⁹⁰ So although a judge may well grant a father regular parenting time or joint custody with extensive residential time with his child, a father's decision to take advantage of that time remains his own.⁹¹

When mothers file suit to enforce visitation and custody agreements because fathers have abdicated their parenting-time rights, judges rule that fathers can only be encouraged but not forced to parent.⁹² For example, an Illinois court held that it could not order a reluctant father to visit with his children:

⁹⁰ See, e.g., Nancy E. Dowd, Essay, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 133 (2003) ("[M]ens' ability to nurture and parent, however, has remained far secondary to defining men's role as purely economic, with the classic paradigm of the breadwinner.").

⁹¹ One scholar asserts that legal decisionmaking regarding caretaking after the dissolution of the family perpetuates social norms to such a point that fathers are treated as volunteers and mothers as draftees. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1436-42 (1991). As long as a child has not been abandoned or neglected by both parents, courts generally refuse to intervene to mandate parental engagement. Courts will terminate parental rights if abandonment is willful. However, there is a high bar for finding willful abandonment. See, e.g., *Hardy v. Gunter*, 577 S.E.2d 231, 235-37 (S.C. Ct. App. 2003) (holding father's failure to visit does not amount to abandonment); *White v. Farley*, No. E2005-00396-COA-R3-PT, 2005 WL 2604050, at *3 (Tenn. Ct. App. Oct. 14, 2005) (affirming decision to deny termination of parental rights for abandonment); *K.S.O.H. v. J.W.B., Jr.*, No. E2001-00055-COA-R3-CV, 2001 WL 1173302, at *4-6 (Tenn. Ct. App. Oct. 4, 2001) (upholding lower court's refusal to terminate parental rights for abandonment).

⁹² See, e.g., *In re Marriage of Mitchell*, 745 N.E.2d 167, 171-72 (Ill. App. Ct. 2001) (holding that the court will not force a father to visit against his will); *Jennifer Diane D. v. Arnold D.*, 589 N.Y.S.2d 554 (N.Y. App. Div. 1992) (upholding lower court's refusal to require visitation against a father's will); *Dana v. Dana*, 789 P.2d 726 (Utah Ct. App. 1990) (holding that a court may encourage but not compel a noncustodial parent to visit with his children); *Louden v. Olpin*, 173 Cal. Rptr. 447, 449 (Cal. Ct. App. 1981) (holding that the

First of all, a court simply cannot order a parent to love his or her children or to maintain a meaningful relationship with them. We are not convinced that forcing the children to spend time with a parent who views the visit as a punishment or obligation would truly be in the children's best interests. Any feelings of abandonment the children may have might actually be reinforced by the realization that their father (or mother) was seeing them only to avoid being jailed for contempt of court.⁹³

Another court acknowledged that the father's absence would detrimentally affect his relationship with his daughter.⁹⁴ It held, however, that coerced visitation would not be in the best interest of the child⁹⁵:

We are inclined to believe that visitation motivated solely by the threat of contempt could not truly be said to satisfy a child's best interest. . . . While we are sympathetic to [the mother's] plight, we are not convinced that visits coerced by threat of incarceration would be much better than no visits at all. [The father] will understand soon enough the error of his ways. No court order can make up for the loss of his daughters' affection and respect.⁹⁶

Indeed, enforcing visitation through coercive means is unlikely to achieve a result that is in the best interest of a child. Even given the constitutional and practical limitations on enforcement, however, a court is not left with only apathy or shoulder shrugging when confronted by a father who is not taking advantage of his parenting-time rights, as discussed in Section IV.B. In actively abdicating involvement in these cases, the legal system reinforces the minimal value it assigns to paternal engagement.⁹⁷ In the end, even despite the increasing gender equity principles behind legal rules, the differential enforcement of these orders compared to the enforcement of child support obligations persists in conveying the message that men's responsibilities to their children end at financial support and that any other support is purely discretionary.

court "cannot order [the noncustodial parent] to act as a father"); *McKinley v. Iowa Dist. Court for Polk Cty.*, 542 N.W.2d 822, 825-26 (Iowa 1996) (declining to hold a father in contempt for his failure to visit with his children despite a divorce decree granting him visitation); see also UNIF. MARRIAGE & DIVORCE ACT § 407, cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 1974) ("[A] judge should never compel the noncustodial parent . . .").

⁹³ *Mitchell*, 745 N.E.2d at 172.

⁹⁴ *McKinley*, 542 N.W.2d at 825-26.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ As Professor Czapanskiy argued, "the only mandatory aspect of the unwed father's relationship with the child is financial. . . . At the same time, no mandatory duty has developed with respect to the family or personal relationship between father and child." Czapanskiy, *supra* note 91, at 1418; see *infra* Section IV.B.

III. IMPLICATIONS OF THE LEGAL SYSTEM'S HIERARCHY OF PATERNAL VALUES

The legal system's justifications for its significant interest in fathers' financial contributions are sound. Concern about children's welfare, a mother's ability to provide for her child's needs, and the fairness of burdening the taxpayers with the support of children whose fathers are unable to take on that role are legitimate considerations. Aggressively enforcing child support obligations seems appropriate, given these goals. But doggedly privileging financial contributions from low-income men without consideration of their ability to pay, while simultaneously remaining apathetic to their parental involvement, has collateral consequences that interfere with the legal system's ultimate goals and with the best interests of children. The system's long-standing focus on the monetary contributions of fathers and its failure to support or encourage paternal caretaking has significant implications for fathers, mothers, children, and even for the state itself.

A. *Implications of Skewed Values for Fathers*

The legal system's differential valuation of breadwinning and nurturing roles is evident to fathers as they interact with the system.⁹⁸ For a low-income father with child support debt, his interactions with the legal system convey an unavoidable message that financial support is the only way to fulfill a parental role that is recognized, encouraged, and mandated. As one father noted, "They ask fathers why they don't stay more involved? Well, the system, the whole system, says to them 'All we need is your money, we don't need you as a person . . .'. They drive you away."⁹⁹ Another father in the District of Columbia reported that he feels the court is more interested in him paying child support than in him spending time with his children, adding that the

⁹⁸ See, e.g., EDIN & NELSON, *supra* note 4, at 18 ("These disadvantaged dads recoil at the notion that they are just a paycheck . . ."); Huntington, *supra* note 14, at 211 ("By sending the message that the only 'parenting' required of fathers is that they pay child support, marital family law underscores the economic failure of fathers and devalues the caregiving that fathers try to offer."); CARMEN SOLOMON-FEARS, CONGRESSIONAL RESEARCH SERVICE, FATHERHOOD INITIATIVES: CONNECTING FATHERS TO THEIR CHILDREN 13 (2014) (noting that policy analysts have argued that fathers are "devalued when their role in their children's lives is based solely on their cash contributions").

⁹⁹ TERRY ARENDELL, FATHERS & DIVORCE 83 (1995).

court “only sees us as black men not taking care of their children and that’s not always true.”¹⁰⁰

The values embodied by child support law and enforcement also have many direct practical influences on paternal behavior. First, the prohibition of in-kind contributions to meet child support obligations disincentivizes direct contact with children and collaboration with the custodial parent to help meet the family’s needs. Second, child support enforcement, with obligations established based on imputed income or set at unrealistically high levels, coupled with the threat of jail time for noncompliance, can result in fathers leaving the formal economy and, in some instances, disappearing from the lives of their children.¹⁰¹

Third, incarceration has a clear and direct effect on the parent-child relationship. Over 60% of inmates in state prison and 80% of inmates in federal prison are housed more than 100 miles from their homes,¹⁰² and a study of fathers in prison revealed that almost 42% of fathers who had not lived with their children prior to incarceration had contact with their children on only a monthly basis or less.¹⁰³

For incarcerated fathers—many of whom are, ironically, often jailed for failing to meet child support obligations—child support arrears can be particularly crippling.¹⁰⁴ State laws inconsistently assess the relevance of incarceration to child support obligations.¹⁰⁵ In some states, incarceration suspends

¹⁰⁰ Author survey, *supra* note 72.

¹⁰¹ See, e.g., Hatcher, *supra* note 44, at 784 (“Facing unrealistically high child support orders and having up to 65% of their net wages garnished, many low-income fathers have no other realistic choice than to leave the ‘above ground’ economy. These fathers are more likely to engage in criminal activities, less likely to receive medical care, less likely to pay taxes, less likely to pay child support, and less likely to have a positive relationship with the mothers of their children.”).

¹⁰² EMILY SANDERS & RACHEL DUNIFON, CORNELL COOPERATIVE EXTENSION, CHILDREN OF INCARCERATED PARENTS 4 (2011).

¹⁰³ LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PARENTS IN PRISON AND THEIR MINOR CHILDREN 6 (2008), <http://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<http://perma.cc/G8LJ-8E2G>].

¹⁰⁴ See generally Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL’Y 313 (2006) (discussing the crippling effects of child support enforcement, particularly on fathers who have recently been released from incarceration); Hatcher, *supra* note 44, at 785 (discussing the effect of child support arrears on formerly incarcerated fathers).

¹⁰⁵ See Cancian et al., *supra* note 64, at 151-52 (discussing various jurisdictions’ approaches to child support obligations and incarceration); OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., REALISTIC CHILD SUPPORT ORDERS FOR INCARCERATED PARENTS (2012) (providing an overview of the state of the law regarding incarceration and child support obligations and highlighting programs that address the inability of an incarcerated parent to meet his/her obligation).

child support obligations,¹⁰⁶ while other states consider jail time to be voluntary unemployment and continue to toll arrears.¹⁰⁷ For fathers who leave jail with significant arrears, obtaining employment and meeting child support obligations becomes exponentially more difficult, making it more likely that these fathers will hide from enforcement of these orders and, by extension, from their families.¹⁰⁸

As such, the legal system exacerbates the many forces that alienate noncustodial fathers from their children.¹⁰⁹ Social scientists have long studied father absence and point to wide-ranging cultural, sociological, economic, and psychosocial explanations.¹¹⁰ To the extent the legal system makes it difficult for a father to feel appreciated as anything other than a financial resource, its message merely adds to the multitude of forces that influence father absence, which has been increasing in recent

¹⁰⁶ See, e.g., *Clark v. Clark*, 902 N.E.2d 813, 817 (Ind. 2009) (holding imprisonment can constitute a “changed circumstance,” allowing for suspension of child support arrearage during incarceration); *Leasure v. Leasure*, 549 A.2d 225, 227-28 (Pa. Super. Ct. 1988) (holding the support obligation was properly suspended when obligor had no assets from which to derive income); see also *Kuron v. Hamilton*, 752 A.2d 752, 757 (N.J. Super. Ct. App. Div. 2000) (finding voluntary conduct, including incarceration, may allow for suspension of child support arrears); *Wills v. Jones*, 667 A.2d 331, 336-39 (Md. 1995) (holding that obligor’s incarceration justified modification of child support award).

¹⁰⁷ See, e.g., TENN. COMP. R. & REGS. 1240-2-4-.04(3)(a)(2)(i)(I) (2008) (explicitly stating that incarceration will be treated as voluntary unemployment), <http://share.tn.gov/sos/rules/1240/1240-02/1240-02-04.20080815.pdf> [<http://perma.cc/WMY9-5M6T>]; *Kentucky ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 401 (Ky. Ct. App. 2000) (holding that incarceration shall be treated as voluntary unemployment); *State v. Nelson*, 587 So. 2d 176, 177-78 (La. Ct. App. 1991) (finding father’s voluntary actions that affected his income, including incarceration, could not justify the extinction of child support obligations and did not constitute a “change in circumstances”).

¹⁰⁸ See Brito, *supra* note 74, at 658 (noting the negative effects of incarceration on employment prospects); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1014 (2006) (discussing the effect of enforcement on fathers, including sending them into hiding and making them less desirable employees); Blaine Harden, *‘Dead Broke’ Dads’ Child-Support Struggle*, N.Y. TIMES (Jan. 29, 2002), <http://www.nytimes.com/2002/01/29/us/dead-broke-dads-child-support-struggle.html> [<http://perma.cc/8RGD-C9YQ>] (noting that the current system of child support enforcement encourages poor fathers to hide from enforcement and from their families).

¹⁰⁹ The connection between a system that sends a message to low-income fathers with arrears that they are irrelevant to their children and father absence is well supported by logic and science. A hypothesis informed by biology posits that fathers will remain connected with their children if their presence is useful to their children. For a discussion of Catherine Franssen’s research on mice and fatherhood, see RAEBURN, *supra* note 18, at 91-103. By considering and enforcing only financial paternal contributions, the legal system reinforces the notion that a father is otherwise of little use to his children.

¹¹⁰ See Jessica Dixon Weaver, *The First Father: Perspectives on the President’s Fatherhood Initiative*, 50 FAM. CT. REV. 297, 300-04 (2012) (providing a historical overview of the prevailing analyses of father absence and its causes).

decades.¹¹¹ In one large-scale study of the general population of families with nonresidential fathers, mothers reported that 34% of fathers had no contact with the child's household at all.¹¹² The statistics related to fragile families—those families in which the parents never marry—reveal that fathers are even less likely to be present.¹¹³ Based on the 2006 Current Population Report, 3.7 million unmarried mothers reported that about 40% of fathers had no contact with their children within the prior year.¹¹⁴ The Fragile Families Report of 2010 compiled consistent results, illustrating that one year after their child's birth, 37% of nonresident fathers did not visit with their children on a regular basis, defined as at least one time a month.¹¹⁵ Data show that as children grow, fathers in fragile families become even less engaged; by the time the child is five years old, 49% of fathers fail to see their children on a regular basis.¹¹⁶

These statistics are troublesome given their dissonance with the stated intentions and aspirations of nonresidential fathers. A large-scale study of fragile families in 16 out of the 20 largest American cities focused on mothers' and fathers' attitudes shortly after the birth of a child and reported that a "high" percentage of all unmarried fathers in the study asserted that they wanted to be involved in raising their child.¹¹⁷ Further, multiple studies illustrate that many low-income fathers claim they want to be involved but that economic disadvantages

¹¹¹ Geoffrey L. Greif et al., *Working with Urban, African American Fathers: The Importance of Service Provision, Joining, Accountability, the Father-Child Relationship, and Couples Work*, 14 J. FAM. SOC. WORK 247, 249 (2011) ("Fathers often lose contact with their children after the breakup of the parenting relationship, leaving children to be raised by single mothers in increasing numbers." (citing U.S. BUREAU OF THE CENSUS, 2008)).

¹¹² Robert I. Lerman, *Capabilities and Contributions of Unwed Fathers*, 20 FUTURE OF CHILD. 63, 74 (2011).

¹¹³ See generally CHRISTINE WINQUIST NORD & NICHOLAS ZILL, U.S. DEP'T OF HEALTH & HUM. SERVS., NON-CUSTODIAL PARENTS' PARTICIPATION IN THEIR CHILDREN'S LIVES: EVIDENCE FROM THE SURVEY OF INCOME AND PROGRAM PARTICIPATION (1996) (arguing that frequency of father contact correlates to family structure, including whether the parties are married or not). Indeed, the frequency of visitation by nonresident fathers tends to decrease as the years pass. HEATHER KOBALL & DESIREE PRINCIPE, URBAN INST., DO NONRESIDENT FATHERS WHO PAY CHILD SUPPORT VISIT THEIR CHILDREN MORE? 4 (2002), <http://www.urban.org/uploadedpdf/310438.pdf> [<http://perma.cc/44UU-C9VZ>] (citation omitted).

¹¹⁴ Lerman, *supra* note 112, at 73.

¹¹⁵ Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE OF CHILD. 17, 22 (2010).

¹¹⁶ *Id.* This population is of particular interest because it disproportionately includes traditionally more marginalized members of our society. Approximately 70% of African-American babies and 50% of Hispanic babies are born to unmarried parents. *Id.*

¹¹⁷ SARA MCLANAHAN ET AL., THE FRAGILE FAMILIES AND WELLBEING STUDY: BASELINE NATIONAL REPORT 9-10 (2003).

hamper their ability to remain engaged.¹¹⁸ These studies suggest that despite the reality that some fathers willingly abdicate their relationships with their children, father absence is not a natural inclination for a sizeable proportion of fathers. For these fathers, the implications of the differential value the legal system assigns paternal roles can be real and relevant to them, the mothers of their children, and their children.

B. *Implications of Skewed Values for Mothers*

Mothers are affected on multiple levels by the differential valuation of paternal roles. The system's apathy toward paternal caretaking carries one set of implications and its focus on financial contributions another. On the one hand, the low value the legal system assigns to paternal engagement may benefit mothers who want to keep fathers out of their lives and their children's lives.¹¹⁹ Mothers may want to maintain distance from their children's fathers for a variety of reasons, such as intimate-partner violence,¹²⁰ controlling behavior,¹²¹ risky conduct,¹²² infidelity,¹²³ poor judgment,¹²⁴ or frequent incarceration.¹²⁵ By

¹¹⁸ ELAINE SORENSEN & MARK TURNER, NAT'L CTR. ON FATHERS AND FAMILIES, BARRIERS IN CHILD SUPPORT POLICY: A LITERATURE REVIEW 15 (1996), <http://files.eric.ed.gov/fulltext/ED454978.pdf> [<http://perma.cc/C4VR-N4X7>] (noting after reviewing multiple studies that "[t]hese studies amply suggest that many fathers do want to be involved, but suffer from economic disadvantages and a lack of skills and resources that inhibit or undermine these desires over time").

¹¹⁹ Reports of "maternal gatekeeping," or mothers restricting fathers' access to children, suggest that it is not uncommon for mothers to intentionally try to distance fathers. See generally Marsha Kline Pruett et al., *The Hand That Rocks the Cradle: Maternal Gatekeeping After Divorce*, 27 PACE L. REV. 709, 713-14 (2007) (discussing the prevalence of maternal gatekeeping as a way for mothers to control fathers' interactions). Pruett asserts that maternal gatekeeping is relatively common.

More restrictive gatekeeping occurs in about one-quarter of the married couples that have been studied, and it occurs more often in divorced contexts even if the nonresidential fathers are as involved as those living with their children are. It may occur even more often among non-married, separating couples, as these fathers report more obstacles to access posed by their ex-partners than do their married-but divorcing counterparts.

Id. at 716-17.

¹²⁰ KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 94-97 (2005) (discussing mothers' accounts of fathers' violent behavior that led to the end of their relationships).

¹²¹ See *id.* at 59 (discussing the instances of fathers trying to exercise an almost "maniacal control over their baby's mother").

¹²² *Id.* at 81-84 (discussing the frequency of drug dealing among fathers and mothers' blindness to the risks that poses for the family).

¹²³ *Id.* at 81 (stating that four in ten women in their study explained that a father's inability to stay faithful led to the relationship's demise).

¹²⁴ *Id.* at 78-81, 84-87 (discussing the mothers in her study who reported that their relationships with fathers end because the mothers become fed up with fathers')

restricting fathers' access, mothers may seek to protect themselves and their children from harm.

Further, as Kathryn Edin revealed in her study of inner-city, low-income mothers, *Promises I Can Keep*, mothers cite to parenthood as central to their self-esteem, self-worth, and success in life.¹²⁶ Maintaining control over their children without the interference of an unstable and unpredictable coparent is one way to protect this valuable asset. A legal system that enforces a father's sole role as a financial provider but does not support, encourage, or mandate any other parenting can be consistent with a mother's wishes. On the other hand, many mothers welcome, invite, and crave the involvement of their children's fathers.¹²⁷ They seek not only the financial support the fathers owe, but also the assistance, role modeling, and love that fathers have the potential to provide.¹²⁸

Separately, mothers might also stand to benefit from a system that supports fathers in taking on more caretaking responsibilities. By disrupting the gendered social norms and expectations of fathers as breadwinners over caregivers, mothers might be more liberated to take part in the market economy, to pursue financial opportunities, and to do so while facing less entrenched bias.¹²⁹

Even if the legal system were to place less emphasis on monetary child support payments, the implications of this change for the mother would depend on an array of factors. The most relevant factor would be a father's ability to pay. In the best-case scenario, the legal system's emphasis on child support collection

spending habits and their refusal to maintain jobs, and ultimately, "drug and alcohol abuse, the criminal behavior and consequent incarceration, the repeated infidelity, and the patterns of intimate violence [] are the villains looming largest in poor mothers' accounts of relational failure").

¹²⁵ *Id.* at 81 (stating that one in three mothers said that crime and the consequent incarceration led to the relationship's demise).

¹²⁶ *Id.* at 168-85 (discussing and analyzing the benefits of self-esteem, security, and pride that mothers derive from motherhood).

¹²⁷ See Marcia J. Carlson & Sara S. McLanahan, *Fragile Families, Father Involvement, and Public Policy*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 461, 468 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002) (citing studies illustrating that over 90% of unmarried mothers want fathers to help raise the child).

¹²⁸ See, e.g., EDIN & KEFALAS, *supra* note 120, at 208-10 (reporting from their study that poor women are more likely than middle class women "to say [that] they believe . . . a child raised by two parents [fares] better" than one raised by a single parent).

¹²⁹ See generally Doucet, *supra* note 42 (discussing, among other topics, the salutary effects on women's opportunities if men were to partake more in caretaking).

would result in full satisfaction of child support payments.¹³⁰ When full payment is secured, custodial mothers certainly benefit. In contrast, if the system falls short of effective child support enforcement—as it most often does among low-income obligors¹³¹—custodial mothers reap little benefit from the legal system’s myopic focus on child support. They receive little money from fathers and stand on the sidelines as the system enhances paternal hostility and threatens to further alienate fathers.

Further, the child support system’s emphasis on formal monetary payments and the requirement that custodial parents on Temporary Aid to Needy Families (TANF) comply with child support enforcement to locate fathers and to assign their rights to child support to the government¹³² can pit mothers and fathers against each other. Such requirements also preclude private ordering between parents, which would allow them to bargain and negotiate as needed and as possible to meet their children’s needs. Enforcement can alienate a father to the point that he can become unwilling to work with the mother to best support their child.¹³³ Although for some mothers—particularly those who have been subject to intimate-partner violence—such informal bargaining is fraught with risks of coercion and manipulation, other mothers report highly valuing such dealings.¹³⁴ One study of mothers on public benefits in four U.S. cities found that those mothers acted strategically

to maximize their family’s economic and emotional well-being and those decisions did not always mean working within the formal child support enforcement system. On the contrary, [some mothers] . . . were actually better off because they received from the absent father more than [they would have gotten through] formal child support enforcement.¹³⁵

¹³⁰ This assumes that the father is making payments from legal sources of income and without excessive hostility toward the mother. Illegal income and hostility could render even full payments problematic for mothers and children.

¹³¹ See *supra* Section III.A (discussing the limitations of child support enforcement among low-income fathers).

¹³² Under mandatory assignment, custodial parents on TANF must assign their rights to child support payments that exceed their TANF benefit to the government as reimbursement. See 42 U.S.C. § 608(a)(3) (2012); D.C. Code Ann. § 4-205.19(b) (West 2015); see also Kohn, *supra* note 1, at 534-36 (discussing assignment).

¹³³ See generally Elizabeth Stuart, *How Anti-Poverty Programs Marginalize Fathers*, ATLANTIC (Feb. 25, 2014), <http://www.theatlantic.com/politics/archive/2014/02/how-anti-poverty-programs-marginalize-fathers/283984/> [<http://perma.cc/C4E6-G4NG>] (explaining that child support enforcement can have a negative effect on children by providing an incentive for mothers to withhold their children from fathers and forcing fathers underground to avoid incarceration for failure to meet child support obligations).

¹³⁴ See Kohn, *supra* note 1, at 535.

¹³⁵ SORENSEN & TURNER, *supra* note 118, at 9.

It is the mothers who seek both nonmonetary support and engagement from low-income noncustodial fathers who are most often at odds with a legal system that aggressively pursues fathers for their monetary contributions but is apathetic or obstructionist in the face of paternal engagement. As a result, the system leaves custodial mothers without financial resources or support to establish and enforce their realistic parenting plans.

In the end, there appears to be a chicken and egg problem. Mothers seem to prefer paternal involvement, but only when that involvement is positive and when fathers demonstrate a track record of support and responsibility. That track record, however, is hard to build for fathers with limited resources in a legal system that discourages caretaking and may impede fathers from providing financial support. Fathers also report that they are reluctant to be involved when they feel disapproval from mothers.¹³⁶ By equalizing the value the legal system assigns to paternal roles, this problem could be addressed to some degree. Fathers, in receiving increased recognition of their efforts to nurture and provide financial support, might show up for their children more often and more responsibly. In doing so, mothers might want them around with increased frequency. Of course, the recalibration of the values assigned to paternal roles will not address every reason a mother may choose to exclude a father from the lives of her children—most notably intrafamily violence. But a rebalancing of these roles would not force mothers to involve fathers who endanger them or their children. Instead, a reassessment would allow the legal system and the parents themselves to determine how best to support children through parental involvement—facilitating rather than inhibiting parental involvement in appropriate cases. As a result of such changes to the legal system, some of the destructive and disappointing cycles of paternal behavior might be remedied.

C. *Implications of Skewed Values for Children*

Though one of the central goals of the federal child support system is to enhance the welfare of children, aggressive enforcement of child support responsibilities against low-income fathers often fails to result in increased payments. Child support enforcement against men who lack the means to meet their

¹³⁶ See Debra A. Madden-Derdich & Stacie A. Leonard, *Parental Role Identity and Fathers' Involvement in Coparental Interaction after Divorce: Fathers' Perspectives*, 49 FAM. REL. 311, 313 (2000) (“[F]athers who do not perceive that the child’s mother is supportive of them as a parent, are less likely to display high levels of parental involvement.”).

obligations may, in fact, reduce payments that might otherwise be made. In perpetuating father absence, aggressive enforcement might also affirmatively put children at greater risk for a range of negative outcomes.¹³⁷

The child support program has not been successful in reducing childhood poverty because the children of low-income fathers receive little money from these enforcement efforts.¹³⁸ In 2010, for example, child support payments to families receiving public assistance comprised only four percent of the cases for which child support was collected by enforcement efforts.¹³⁹ And even if a father makes his child support payments to his child who happens to be on TANF, the government captures at least part, if not all, of that payment as reimbursement for government welfare expenditures.¹⁴⁰ As a result, even in those limited instances where the fathers of the most financially needy children make child support payments, little of that money actually benefits the child.

Finally, the system's effect on father absence has direct implications for the well-being of children. Over many decades, social scientists have analyzed the effects of father absence on children. While some debate still exists,¹⁴¹ many studies have

¹³⁷ See RAEBURN, *supra* note 18, at 223 (“Efforts to encourage father involvement by focusing on increasing absent fathers’ child-support payments did not work out so well. The problem was that absent fathers often didn’t have the resources to make the payments.”).

¹³⁸ See BOGGESE, *supra* note 87, at 2 (2014) (citing that “70 percent [of custodial parents with children living in poverty receive no child support]”; Cancian et al., *supra* note 64, at 153 (noting that studies show “a fairly modest impact of child support” on low-income families, “in large part because in a given year, a majority of poor families do not receive any payments”); see also *TANF Reauthorization: Hearing Before the Senate Comm. on Fin., 107th Cong. 4* (2002) (statement of Vicki Turetsky, Senior Staff Attorney, Center for Law and Social Policy), <http://www.finance.senate.gov/imo/media/doc/051602vttest.pdf> [<http://perma.cc/J99A-HRCR>] [hereinafter *Welfare Reauthorization*] (arguing that the narrow focus on punishing nonsupporting fathers without any measures to make it easier for poor fathers to make regular child support payments might be an appealing symbolic way to enforce personal responsibility, but it does little to promote the welfare of American children).

¹³⁹ Brito, *supra* note 74, at 647-48.

¹⁴⁰ 42 U.S.C. § 608(a)(3) (2012).

¹⁴¹ See Valarie King, *Variation in the Consequences of Nonresident Father Involvement for Children’s Well-Being*, 56 J. OF MARRIAGE & FAM. 963, 963, 971 (1994) (asserting that the majority of studies have found little association between father visitation and child well-being); Maldonado, *supra* note 41, at 950-52 (citing the various studies that debate the effects of father absence on children); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 312 (1996) (“There is no evidence in Dr. Wallerstein’s work of many years, including the ten and fifteen year longitudinal study, or in that of any other research, that frequency of visiting or amount of time spent with the noncustodial parent over the child’s entire growing-up years is significantly related to good outcome in the child or adolescent.”).

concluded that absent substantial parental conflict,¹⁴² violence, or abuse, healthy father involvement suggests positive outcomes for children, while paternal absence correlates to a range of negative outcomes.¹⁴³

Studies have illustrated that for children who seek relationships with their fathers, paternal interactions can have a significant positive emotional impact.¹⁴⁴ Many studies have also chronicled the correlation between father absence and diminished levels of school achievement.¹⁴⁵ Further, children without access to their fathers are also disproportionately represented among

¹⁴² Studies have concluded that when conflict between parents is high, frequent visitation can be detrimental to children. See Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. REL. 352, 365 (2003) ("In the context of low conflict, frequent visits between fathers and children is associated with better child adjustment, but where interparental conflict is intense, more frequent visits were linked to poorer adjustment, presumably because of the opportunities for more direct exposure of the children to parental aggression and pressures." (citations omitted)); Daniel Pollack & Susan Mason, *Mandatory Visitation: In the Best Interest of the Child*, 42 FAM. CT. REV. 74, 75 (2004) (citing multiple studies of black adolescent males and reporting that the studies concluded that when interparental tension is high, "frequent visitation [with] the noncustodial parent" can be damaging to the child's well-being).

¹⁴³ See RAEBURN, *supra* note 18, at 121-80 (providing an overview of studies on the relevance of fathers to show that at various ages, from infancy to teenage years, and for girls and boys alike, a positive relationship with a father has been shown to be correlated with childhood health and success); Valarie King et al., *Racial and Ethnic Diversity in Nonresident Father Involvement*, 66 J. MARRIAGE & FAM. 1, 2-3 (2004) (stating that studies have consistently found that children who grow up apart from their fathers suffer adverse consequences).

¹⁴⁴ See, e.g., KOBALL & PRINCIPE, *supra* note 113, at 1 ("Children often desire more contact with their nonresident fathers. In fact, children of divorce reported that the most negative outcome of their parents' divorce was reduced contact with their fathers." (citation omitted)); Erin Kramer Holmes et al., *Marriage, Fatherhood, and Parenting Programming*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 438, 439 (Natasha J. Cabrera & Catherine S. Tamis-LeMonda eds., 2013) (citing studies that illustrate how positive father presence yields "healthy family outcomes"); Paul R. Amato et al., *Changes in Nonresident Father-Child Contact from 1976-2002*, 58 FAM. REL. 41, 43 (2009) (citing a study concluding "that young adults with divorced parents felt closer to their fathers, less abandoned by their fathers, less angry toward their mothers, and more favorable about the postdivorce years when they had regular contact with their fathers during childhood"); Lois M. Collins & Marjorie Cortez, *Why Dads Matter: A Third of American Children Are Growing Up in Homes Without Their Biological Fathers*, ATLANTIC (Feb. 23, 2014), <http://www.theatlantic.com/health/archive/2014/02/why-dads-matter/283956/> [http://perma.cc/4DU4-XKVD] (citing to studies showing that fathers can have a positive emotional impact on their infants and children); Wallerstein & Tanke, *supra* note 141, at 312 ("A child who feels abandoned or rejected by a father suffers tragically, often turning the feelings back on himself or herself as unworthy of being loved.").

¹⁴⁵ See, e.g., Brent McBride et al., *The Mediating Role of Fathers' School Involvement on Student Achievement*, 26 J. APPLIED DEV. PSYCH. 201, 213 (2005) (reporting on his study that found a correlation between school performance and father presence and explaining that "[b]y taking a more active role in their children's education, fathers may enhance the resources that are available to their children as they attempt to cope with the negative impact of risk factors commonly associated with family income").

children in the juvenile justice system.¹⁴⁶ Girls have been found to be at greater risk for adolescent pregnancy and early sexual activity when they do not have significant contact with their fathers.¹⁴⁷ These negative effects of father absence are particularly present at the intersection of poverty and single parenthood, where custodial families do not have the financial or social capital to overcome paternal absence.¹⁴⁸

Some studies of father absence have attributed negative child outcomes to the diminished financial resources that result from father absence—rather than to a lack of paternal engagement.¹⁴⁹ Other studies have concluded that visitation and child support have equally prophylactic effects on the consequences of living without a father in the home.¹⁵⁰ Regardless of the relative effects, it is clear that when fathers positively engage with their children, absent high parental conflict or violence, fathers play important social and financial roles in the lives and future successes of their children. The legal system's valuation of paternal roles has wide-ranging implications for children. Children stand to be significantly harmed by a legal system that blindly pursues fathers for financial support without regard to their roles as emotional caretakers.

¹⁴⁶ See Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. OF RES. ON ADOLESCENCE 369, 375 (2004) (citing a long-term study on father absence and youth incarceration involving over 6,000 adolescent males illustrating a correlation between the two that cannot be explained away by coexisting factors). Significantly, though this study also measured the correlation between the absence of child support and youth incarceration, it did not find a correlation. *Id.* at 386.

¹⁴⁷ See Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 CHILD DEV. 801, 811-15 (2003) (citing a study of 242 girls in the United States that concluded that father absence was strongly associated with increased risk for early sexual activity and adolescent pregnancy).

¹⁴⁸ See EILEEN MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 130-31 (2002) (pointing to study results illustrating that the coexistence of poverty and separated parents puts children at increased risk for academic and psychological issues).

¹⁴⁹ See, e.g., Maldonado, *supra* note 41, at 961 (“[I]t is well established that children whose fathers pay child support tend to experience fewer behavioral and social problems and to perform better in school than children whose fathers do not.”); Pollack & Mason, *supra* note 142, at 75 (“Consistent child support was found to be a more positive influence overall than was visitation . . . [on child well-being in a separated family].”).

¹⁵⁰ See Jennifer F. Hamer, *What African-American Noncustodial Fathers Say Inhibits and Enhances Their Involvement with Children*, 22 W. J. BLACK STUD. 117, 117 (1998) (noting that some researchers concluded that a father's provision of social and emotional support is as important as financial support).

D. *Implications of Skewed Values for the State*

The federal and state child support enforcement mechanism requires significant state expenditures.¹⁵¹ Despite the significant cost of the child support enforcement program, aggressive child support enforcement against low-income fathers has failed to yield significant benefits for the state. Low-income noncustodial parents owe the vast majority of outstanding child support debt¹⁵²—by some estimates around 70%.¹⁵³ The limited return on the government's aggressive child-support enforcement program of the last 15 years is underscored by the reality that child support collections have remained flat over the last 30 years.¹⁵⁴ That low return is largely due to the futility of seeking to collect from parents who are simply unable to meet their obligations. The enforcement program has been repeatedly criticized for its failure to distinguish between fathers who are able but are willfully shunning their child support obligations and those who are truly unable to meet their obligations.¹⁵⁵

In fact, data unambiguously illustrate that many fathers with arrears are truly unable to meet their obligations, and enforcement through penalties, contempt, criminal prosecution, and mounting arrears is futile—not to mention counterproductive—when considering the best interests of the child and the finances of the state. Recent data illustrate that the average income of unmarried nonresident fathers is \$17,000 at the time of the child's birth.¹⁵⁶ Between 34% and 43% of fathers of children on welfare live below the poverty line.¹⁵⁷ As a practical matter, this group of fathers does not present fertile ground for

¹⁵¹ ADMIN. FOR CHILD. & FAMILIES, DEP'T OF HEALTH & HUM. SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 274 (2012), http://www.acf.hhs.gov/sites/default/files/olab/2012_all.pdf [<http://perma.cc/3QTG-6QVP>] (estimating the money paid to states for child support enforcement as just under \$4 billion); see also Hatcher, *supra* note 64, at 1070-74 (arguing that state enforcement efforts “result[] in minimal benefit to the government's net finances and possibly even a loss”).

¹⁵² Brito, *supra* note 74, at 619.

¹⁵³ ELAINE SORENSEN ET AL., URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 22 (2007).

¹⁵⁴ Cancian et al., *supra* note 64, at 149.

¹⁵⁵ See, e.g., Brito, *supra* note 74, at 664-65 (“An assumption that all nonpaying fathers are deadbeats is inequitable and unjust, especially in light of the current recession and historically high unemployment rate, particularly for low-skilled workers. . . . There is widespread understanding that many low-income fathers who want to pay support are unable to simply because of the obstacles to full participation in the labor market.”); Maldonado, *supra* note 108, at 1003 (“The law has failed to distinguish between fathers who can pay child support but refuse (the true deadbeats), and those who are unemployed or severely underemployed (those who are deadbroke).”).

¹⁵⁶ Cancian et al., *supra* note 64, at 142.

¹⁵⁷ *Id.* at 142-43.

financial enforcement actions. Yet the bulk of enforcement actions to collect over \$100 billion in arrears is brought against this cohort.¹⁵⁸ More than two-thirds of child support debtors report either no income or income of less than \$10,000 per year.¹⁵⁹ These fathers are already struggling even before the child support judgment, which is often set at unrealistic levels.

To the extent that the legal system's emphasis on child support enforcement and its lack of support for engaged fathers results in or perpetuates father absence, the state further suffers financially. When children are living in deeper poverty, their reliance on all public benefits, including TANF, is longer lasting and more burdensome on the state.¹⁶⁰

The state's comparative valuations of child support and parental engagement, which are reflected in the structure of child support law, the enforcement of child support and parenting-time orders, and the operation of family courts, have significant implications for fathers, mothers, children, and the state. While some implications are neutral at best, the relentless focus of the legal system on enforcement of financial obligations against low-income fathers can hurt families while failing to meet state goals. Given these implications, an economy that does not suggest that low-income fathers will soon have the means to meet obligations, and the trends in rising father absence,¹⁶¹ a reassessment of the legal system's valuation of paternal breadwinning and caretaking is necessary to provide for the well-being of children, families, and the state alike.

IV. RECALIBRATING THE VALUE OF THE BREADWINNER AND NURTURER ROLES TO SUPPORT THE FAMILY

By locating the enduring legacies of a legal system and social norm structure that unequally assign gender responsibilities and expectations in the family, and by understanding the

¹⁵⁸ As of 2008, \$105 billion was owed in child support. *Id.* at 150.

¹⁵⁹ MARGUERITE ROULET, FINANCIAL LITERACY AND LOW-INCOME NONCUSTODIAL PARENTS 20 (2009), http://cffpp.org/publications/Policy_finance.pdf [<http://perma.cc/X5P4-ZXPA>] (noting that of the men who could not pay their child support obligations, 48% had no reported income in the past year, and 36% made \$10,000 a year or less); SORENSON ET AL., *supra* note 153, at 19 (reporting that “[n]early three quarters of the high debtors had either no reported income (44 percent) or reported income of \$10,000 a year or less (30 percent)”); Hatcher, *supra* note 64, at 1078 (citing to an OCSE report from 2006 noting that close to two-thirds of obligors reported income of less than \$10,000).

¹⁶⁰ *Cf.* Hamer, *supra* note 150, at 117 (alluding to the connection between welfare policy and father absence).

¹⁶¹ *See supra* notes 107-16 and accompanying text.

implications of this role valuation on low-income families and the state, we can now consider ways of recalibrating the legal system to better serve families. In refining aspects of the legal system that perpetuate its unrelenting focus on a father's financial contributions and apathy toward his caretaking, the system could allow all parents—particularly low-income parents who are the most vulnerable to the ill effects of the current system—to better meet children's needs and to make their most valuable contributions to their children's well-being. These changes could equalize the importance of both paternal roles and destabilize the aspects of the system that force mothers into the full-time caretaking role regardless of their preferences. This new paradigm could be accomplished by changes in child support laws, enforcement of child-related obligations and commitments, and the operation of the domestic-relations system.

A. *Amending Child Support Law*

To enable the legal system to maximize the potential of parents to holistically support their children, child support law must be reconsidered in light of the realities of low-income and unemployed fathers. Child support law's current structure—based on the assumption of payor parents who can meet their obligations and who can be forced to do so with coercive threats of enforcement—does not allow the vast majority of low-income parents to meet their children's needs and, as discussed earlier, conveys to fathers that their sole parental contribution of value involves money. A reconsidered approach to child support at the lowest income levels would allow the court to use the child support system to buttress the entire parent-child relationship in a way that is realistic for struggling fathers, validates their nonfinancial efforts, and continues to stress the importance of paternal responsibility. Specifically, modifications to the current law's ban on in-kind payments, its setting of initial obligations, and its enforcement mechanisms could have a significant positive effect on low-income families.

1. Creating Exceptions to the In-Kind Prohibition

Loosening the absolute prohibition on in-kind support payments could serve to reduce barriers to paternal involvement, provide realistic support to custodial mothers, and inoculate noncustodial fathers from the collateral consequences of

staggering child support arrears.¹⁶² Guidelines that ease these restrictions for a limited period of time while a father searches for employment and documents his efforts could benefit families and validate fathers' involvement with their children.¹⁶³ Noncash support could include the types of in-kind services permitted under the federal guidelines regulating child support in Native American lands.¹⁶⁴ Pursuant to those guidelines, such support must directly satisfy the needs of the children and can include "making repairs to automobiles or a home, the clearing or upkeep of property, [or] providing a means for travel."¹⁶⁵ The success of such a program at the federal level suggests that the states could more broadly permit noncash support as a workable alternative for low-income, unemployed, noncustodial parents.

Loosening the ban on informal and in-kind payments would likely maximize support payments by low-income fathers. Societal norms in low-income and minority communities encourage fathers to support their children in informal ways. As explained by two child support scholars, these "well-developed community norms regarding paternal responsibility for out-of-wedlock children . . . engender in-kind contributions of food, clothing, toys, child care or other assistance in lieu of financial contributions."¹⁶⁶ This community support of in-kind payments, coupled with government approval of such child support, could result in increased incentives for fathers, which would benefit fathers, mothers, children, and the state alike.

¹⁶² See generally PETER EDELMAN ET AL., RECONNECTING DISADVANTAGED YOUNG MEN 130 (2006) (asserting that mounting arrears are particularly destructive to postincarcerated men); Cammett, *supra* note 104, at 315 (discussing the crippling effects of child support enforcement on fathers who have recently been released from incarceration).

¹⁶³ There has been some support for a move toward in-kind child support contributions. See SOLOMON-FEARS ET AL., *supra* note 76, at 19-20 (noting that some commentators have suggested that permitting in-kind contributions would show that the state recognizes the reality of a noncustodial parent's circumstances but allows him to remain involved with his child); Maldonado, *supra* note 108, at 1017-18 (analyzing the prohibition on in-kind contributions and urging the law to find a way to credit fathers for such contributions).

¹⁶⁴ See 45 C.F.R. § 309.05 (2012) (defining noncash payment as "support provided to a family in the nature of goods and/or services, rather than in cash, but which, nonetheless has a certain and specific dollar value").

¹⁶⁵ U.S. DEPT OF HEALTH & HUM. SERVS., OFFICE OF CHILD SUPPORT ENFT, TRIBAL AND STATE JURISDICTION TO ESTABLISH AND ENFORCE CHILD SUPPORT 74 (2007), <http://www.acf.hhs.gov/programs/cse/pol/IM/2007/im-07-03.htm> [<http://perma.cc/A98S-ZQG7>] (citation omitted). Significantly, the 2011 census data revealed that the most common types of noncash support received, after gifts for special events, were clothes, food, groceries, medical expenses, and full or partial payment for childcare or camp. GRALL, *supra* note 2, at 12.

¹⁶⁶ SORENSEN & TURNER, *supra* note 118, at 11 (citation omitted).

Fathers express an interest in being able to contribute money when they can and to compensate with other contributions when necessary.¹⁶⁷ They resent the system's refusal to credit in-kind contributions.¹⁶⁸ For example, one study of unmarried fathers in six cities across the country revealed that the majority of fathers "contributed to the support of their children informally. Overall, their preference was to purchase goods and services for their children."¹⁶⁹ Edin and Nelson's study corroborated this finding, noting that the "as needed" approach to financial provision, which seldom puts [the] cash in the hands of the child's mother but is directly responsive to particular needs of the child, is the method . . . nearly all men prefer."¹⁷⁰ Making informal payments allows fathers to contribute in a way that feels "tangible and gratifying."¹⁷¹ Indeed, in-kind payments are more pervasive than formal child support payments according to one survey, which concluded that less than half of all custodial parents receive formal child support payments, whereas "nearly 60% receive in-kind support of some form."¹⁷²

Mothers also express interest in informal and in-kind payments. Low-income mothers often conclude that they are more likely to receive money from struggling low-income fathers through informal payments.¹⁷³ Further, mothers, with the significant exception of those who share children with abusive fathers, often seek to maximize the type of paternal engagement that usually accompanies noncash support.¹⁷⁴ And significantly, mothers support the availability of in-kind and informal

¹⁶⁷ SOLOMON-FEARS ET AL., *supra* note 98, at 13 ("Not surprisingly, noncustodial parents, especially low-income fathers, prefer informal child support agreements between themselves and the child's mother wherein they contribute cash support when they can and provide noncash aid such as taking care of the children from time to time and buying food, clothing, presents, etc. as often as they can.").

¹⁶⁸ See Kohn, *supra* note 1, at 541-42 (discussing research on fathers and restrictions on in-kind support).

¹⁶⁹ MARY ACHATZ & CRYSTAL A. MACALLUM, *YOUNG UNWED FATHERS: REPORT FROM THE FIELD* 98 (1994).

¹⁷⁰ EDIN & NELSON, *supra* note 4, at 111.

¹⁷¹ ACHATZ & MACALLUM, *supra* note 169, at 98.

¹⁷² Steven Garasky et al., *Toward a Fuller Understanding of Nonresident Father Involvement: An Examination of Child Support, In-Kind Support, and Visitation*, 29 *POPULATION RES. & POLY REV.* 363, 364 (2010); see also Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 *J. POLY ANALYSIS & MGMT.* 89, 96 (2001) ("[M]any parents believe that formal child support is appropriate only when private agreements cannot be established or maintained or when fathers do not accept their responsibility voluntarily."); TIMOTHY GRALL, *supra* note 2, at 2 (2011 census data revealed that close to 60% of custodial parents received noncash support from noncustodial parents).

¹⁷³ See Garasky, *supra* note 172.

¹⁷⁴ See Carlson & McLanahan, *supra* note 127, at 468 (citing studies illustrating that over 90% of unmarried mothers want fathers to help raise the child).

payments because they are able to bargain with noncustodial fathers as necessary depending on their needs.¹⁷⁵ Contrary to logic, research suggests that when fathers are financially able to meet their formal support obligations in the first place, in-kind payments do not lower the payment of formal child support.¹⁷⁶

Eliminating the prohibition on in-kind payments would likely maximize family well-being in many homes by encouraging parental contact and positive father involvement and even by increasing formal support payments. The act of supporting a child has been found to be more critical to child well-being than the formal nature and amount of child support.¹⁷⁷ In-kind support is also likely to result in increased paternal engagement. A recent study analyzing the relationship between formal child support payments, in-kind support, and visitation found the strongest correlation to be between in-kind payments and visitation.¹⁷⁸ In addition, the legal preference for wage withholding and automated payments of child support¹⁷⁹ results in financial

¹⁷⁵ See Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375, 423 (1996) (noting that informal means of support allowed mothers to bargain based on a child's month-to-month needs and use the threat of the formal system as a bargaining tool); see also Maldonado, *supra* note 108, at 1009-10 (noting that low-income African-American mothers recognize informal and in-kind contributions as an important form of support); cf. Hatcher, *supra* note 64, at 1046 (stating that both child support and welfare caseworkers reported that mothers' fear of losing informal support was a main reason for their noncooperation with enforcing child support obligations). *But see* EDIN & NELSON, *supra* note 4, at 117 (noting that fathers' in-kind contributions may not correlate to the needs of the child, leaving a mother without the resources for her child's actual well-being).

¹⁷⁶ Garasky, *supra* note 172, at 366 (also noting that we cannot say with certainty if higher in-kind contributions lower child support payments, though prior data suggests that is not the case).

¹⁷⁷ Maldonado, *supra* note 41, at 962 ("[A] number of researchers have suggested that the payment of child support is important in and of itself, independent of amount."); see also Judith A. Seltzer et al., *Will Child Support Enforcement Increase Father-Child Contact and Parental Conflict After Separation*, in FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 157, 180-81 (Irwin Garfinkel et al. eds., 1998) ("Both the instrumental variables models in the cross-sectional analysis and the longitudinal analysis, in which we take account of fathers' income and many aspects of the quality of family relationships prior to separation, suggest that requiring fathers to pay at least some child support will increase their involvement with their children.").

¹⁷⁸ Garasky, *supra* note 172, at 389. While Professor Garasky acknowledged earlier studies linking formal child support and visitation, he asserts that the link is weaker than the link between informal child support and nonresident father contact. *Id.* at 389-90; see also Lenna Nepomnyaschy, *Child Support and Father-Child Contact: Testing Reciprocal Pathways*, 44 DEMOGRAPHY 93, 108 (2007) (concluding that there is a minimal link between child support payments and father-child contact but a stronger link between informal contact and support).

¹⁷⁹ *E.g.*, D.C. Code Ann. § 46-218 (West 2001); FLA. STAT. ANN. § 61.1301 (West 2009); MINN. STAT. § 518A.53 (2014); TEX. FAM. CODE ANN. § 158.011 (West 1997) (jurisdictions providing for automatic enforceability through withholding unless the court finds there is good cause not to require immediate withholding or the parties agree to an alternative method of payment).

transfers without contact between the payor and family, whereas in-kind payments generally involve personal interactions and can foster a deeper connection between father and child.¹⁸⁰

As promising as an in-kind payment regime seems to be for the very low-income father, the risks of permitting these payments must also be considered. Most significantly, informal or in-kind contributions might be unreliable and the obligation unenforceable. A less formal system might also result in a mother becoming vulnerable to manipulation and coercion by the noncustodial parent, particularly in abusive relationships. The contributions a noncustodial father makes may not correlate to the needs of the child, leaving a mother without useful support. As Edin and Nelson concluded, some low-income fathers provide items to please and impress the community or the child but not to fulfill the child's actual needs.¹⁸¹

There are also risks for noncustodial parents. The informality of the agreement creates the potential for enforcement actions that are difficult to defend against given the sometimes amorphous nature of the obligation. As one D.C. father noted, he prefers making formal child support payments because the "mother could report not receiving support, [whereas] the court would/should have a record."¹⁸² Further, the family as a whole might be hurt by this arrangement, as it could instigate increased parental conflict.¹⁸³

Finally, from the state's perspective, the government would lose the opportunity to track payments and enforce obligations. Tracking, which requires payors to make payments through a central registry, allows the government to monitor whether noncustodial parents are fulfilling their obligations to their children who might otherwise depend on government benefits.¹⁸⁴ The government would also lose the opportunity to recoup TANF payments for mothers who assigned their child

¹⁸⁰ See Garasky, *supra* note 172, at 367 ("Compared to current automated methods for paying child support (e.g., wage withholding), the provision of in-kind support more likely depends upon the father seeing the child."). *But see* TERRY ARENDELL, *supra* note 99, at 89 ("When child support is withheld automatically from wages, higher amounts are paid . . ."); Chien-Chung Huang, *Mothers' Reports of Nonresident Fathers' Involvement with Their Children: Revisiting the Relationship Between Child Support Payment and Visitation*, 58 FAM. REL. 54, 54-64 (2009) (asserting that automation of child support enhances collection, thereby benefiting mothers).

¹⁸¹ EDIN & NELSON, *supra* note 4, at 117.

¹⁸² Author survey, *supra* note 72.

¹⁸³ See Kohn, *supra* note 1, at 521-22 (discussing the effects of parental conflict on father presence).

¹⁸⁴ If assignment provisions were eliminated, however, the government also would have less interest in the collection of monies.

support payments to the state, which is a requirement of TANF receipt.¹⁸⁵ Moreover, this system would require the court to set and determine an “exchange rate” between nonmonetary contributions and cash—a challenging prospect for any judge.

Relaxing the rules might also express a tolerance for reduced parental responsibility. Any time the state excuses paternal nonpayment, it risks sending the message that fathers—in this case poor fathers—are absolved of their full responsibilities. In fact, this concern animated the Senate’s debate of the Bradley Amendment,¹⁸⁶ which prohibits state courts from retroactively reducing child support obligations.¹⁸⁷

A system permitting in-kind and informal payments need not fail for these reasons, however. First, such a program could be available only on a short-term basis to assist parents who are between jobs but are actively engaged in employment searches and job training.¹⁸⁸ Legislation permitting in-kind contributions could require courts to ratify that the agreement was in the best interest of the child and to assess whether the custodial parent’s agreement to participate was voluntary, thereby safeguarding, at least in part, against manipulation by abusive partners in violent or coercive intimate relationships.¹⁸⁹ Parties opting in would need to be fully informed that enforcement would be challenging given the informality of the arrangement and that consent to these payments could be withdrawn at any time by returning to court. Parents—both custodial and noncustodial—could be strongly advised to keep formal records of payments. The court could also require that the obligor submit proof of “payment” in the form of a sworn statement or receipt. A custodial parent could also specify the types of in-kind contributions that would satisfy the obligation, guarding against misaligned contributions. The federal guidelines regulating child support in the Native American tribal

¹⁸⁵ See generally Kohn, *supra* note 1, at 534-38 (discussing assignment of child support).

¹⁸⁶ 42 U.S.C. § 666(a)(9)(c) (2006).

¹⁸⁷ S. REP. NO. 99-348, at 155 (1986) (noting that “[w]hat the Committee is seeking to prevent is the purposeful noncompliance by the noncustodial parent, because of his hope that his child support obligation will be retroactively forgiven”).

¹⁸⁸ See Maldonado, *supra* note 108, at 1018 (discussing her proposal of implementing a temporary program to allow in-kind contributions and requiring participants to show active employment search efforts). Professor Maldonado’s proposal would also require that participant fathers spend a “minimum number of hours” per week with their children. *Id.* Because of the challenges of ensuring the quality of parental interaction when that interaction is coerced, this article would not require such a minimum and would instead leave it to the court to fashion an appropriate in-kind exchange.

¹⁸⁹ In making this proposal, this article also acknowledges the limits on judicial inquiries into the presence of intimate-partner violence and coercion.

system have responded to the challenge of monetizing in-kind payments by requiring each support order to state the specific dollar amount satisfied by the noncash payment.¹⁹⁰

Moreover, while relaxing the ban would temporarily excuse fathers from their formal financial responsibilities, if carefully implemented, such a rule need not express acceptance of reduced responsibilities, because the in-kind payment schedule would have strict parameters. Such an exception to the ban would be available only in cases of extreme indigence and for a temporary period and pending a job search. Further, the law would require performance and proof of in-kind contributions and that those contributions were linked to taking responsibility for a child and being part of a parenting unit.

Despite the evident risks, such a regime is worth consideration, particularly for families with an unemployed noncustodial parent. The current alternative is untenable. In the present system, fathers are faced with mounting arrears and their collateral consequences,¹⁹¹ and children are left without financial or other support from their fathers. This alternative child support regime could not only open avenues to greater monetary and informal support, but it could also send the message that financial obligations and parental engagement are equally important, thus encouraging and validating positive father involvement from a cohort of fathers whose current interactions with the legal system seem to alienate them rather than encourage them to be involved with their children. A child support system that permits more flexible ways of supporting children reflects a commitment to supporting families by allowing both parents to maximize their potential to serve the best interests of their children in both financial and nonfinancial ways.

2. Setting Child Support Obligations

Destabilizing family law's focus on paternal financial support requires reconsidering the support calculation. Any recalibration of initial child support obligations must take into account children's and mother's needs, as well as noncustodial

¹⁹⁰ CARMEN SOLOMON-FEARS, CONGR. RESEARCH SERV., RL41204, CHILD SUPPORT ENFORCEMENT: TRIBAL PROGRAMS 12 (2012). Monetizing caretaking work could also provide a collateral benefit to mothers who perform the bulk of caretaking and for whom caretaking has been deemed of visible value. *See generally* Maldonado, *supra* note 108, at 1019-20 (noting that women, as traditional caregivers, would benefit from the general notion of monetizing care work).

¹⁹¹ *See generally* Cammett, *supra* note 104, at 313-15 (discussing the collateral consequences of child support enforcement, particularly on incarcerated parents).

parent resources. At the lowest end of the income spectrum, state statutes specify a minimum monthly obligation.¹⁹² Though the child support obligation for an unemployed father might be as low as \$50 per month,¹⁹³ such an obligation could still be impossible for some fathers to meet.¹⁹⁴ Research suggests that the majority of low-income fathers fail to meet their obligations not for lack of willingness to support their children, but because they do not earn enough to satisfy their obligations.¹⁹⁵ Child support obligations that set up low-income fathers for failure cannot meet the needs of the children or the state. They also have significant potential negative ramifications—in the form of enforcement costs for the state and in the alienation of fathers from their families. Just as child support guidelines do not generally impose a presumptive obligation at the highest end of the spectrum,¹⁹⁶ at the lowest end, judges should use their discretion to develop an obligation that considers the obligor's actual employment prospects and the potential for him to meet his parental responsibilities in a different way. Further, courts should be empowered to alter or suspend child support obligations in a timely way during periods of unemployment, incarceration, or incapacity.¹⁹⁷

¹⁹² See, e.g., COLO. REV. STAT. ANN. § 14-10-115 (West 2014) (setting the minimum payment for an obligor with a monthly adjusted gross income of less than \$1,100 at \$50 for one child and \$70 for two children); GA. CODE ANN. § 19-6-15 (West 2014) (setting the minimum child support payment for a low-income noncustodial parent at \$100 per month for one child); N.J. R. PRAC., App. IX-F (2013), <http://www.judiciary.state.nj.us/csguide/app9f.pdf> [perma.cc/U6RN-WV5Y] (stipulating a minimum of \$5 per week paid in child support when parents' combined net income is less than \$180).

¹⁹³ See, e.g., D.C. CODE. § 16-916.01(c)(3) (2001).

¹⁹⁴ See Lee, *supra* note 75, at 25 (noting that noncustodial parents with a \$50 support obligation “appropriately ask . . . [h]ow am I supposed to pay \$50 per month without a job?”).

¹⁹⁵ JACINTA BRONTE-TINKEW ET AL., ELEMENTS OF PROMISING PRACTICE IN TEEN FATHERHOOD PROGRAMS: EVIDENCE-BASED AND EVIDENCE-INFORMED RESEARCH FINDINGS ON WHAT WORKS 3 (2008); Murphy, *supra* note 40, at 354.

¹⁹⁶ See, e.g., COLO. REV. STAT. ANN. § 14-10-115 (West 2014) (giving judges “discretion to determine child support in circumstances where combined adjusted gross income exceeds the uppermost levels of the schedule for basic child support obligations”; the uppermost level is \$30,000 in Colorado); TEX. FAM. CODE ANN. § 154.126(a), (b) (West 2007) (allowing the court discretion to determine additional child support if the obligor's net resources exceed \$7,500). Some states provide a cap on certain aspects of child support. See, e.g., MINN. STAT. ANN. § 518A.35 (West 2007) (stating that for parents with a combined income greater than the income limit in this statute (\$15,000), the basic support obligation must be the same as it would be if their income was equal to that limit (\$15,000)).

¹⁹⁷ See generally SOLOMON-FEARS ET AL., *supra* note 76, at 19 (discussing some commentators' proposals that involve making child support statutes more sensitive to changes in noncustodial parent employment). One problem for noncustodial parents with shifting employment is the heavy docket in family courts. A motion to modify a child support order may not be docketed and heard until after significant arrears have accrued.

In addition, to further address the collateral consequences of imposing untenable child support obligations, the legal system must reconsider imputation of income. Judges can impute income to unemployed or underemployed child support obligors¹⁹⁸ based on the assumption that obligors should be able to find employment commensurate with their earning potential. Imputation of income can offer a partial explanation for the irrationally high child support obligations that low-income noncustodial fathers may be obligated to meet. If the obligor parent is present at the hearing, the judge may base the imputed income on his testimony. If the obligor is not present, the judge bases that calculation on the custodial parent's testimony or on no testimony at all.¹⁹⁹ The calculation is often unrealistic because it ordinarily assumes a 40-hour work week and minimum-wage compensation, which can be an inaccurate assumption for some populations.²⁰⁰ Further, it presupposes that everyone who invests effort is able to obtain full-time employment regardless of the economy and the particularities of the job seeker.²⁰¹ In short, it presumes all unemployment or underemployment of able-bodied child support obligors is voluntary.

In reality, while some fathers remain voluntarily unemployed and underemployed, data suggest that job prospects for men with limited education and work history are dim given current economic realities. Of the population of roughly three million noncustodial fathers who have trouble meeting their child support obligations, many have reported limited education and work histories.²⁰² Eighty percent of these fathers have remained in school only long enough to attain at most a high school degree, and some have criminal records that create a further barrier to employment.²⁰³

Widespread imputation of income to low-income noncustodial parents is unlikely to result in fuller employment and

¹⁹⁸ See *supra* note 79 and accompanying text.

¹⁹⁹ See Patterson, *supra* note 74, at 108-09 (labeling the calculation of imputed income as a "stab in the dark").

²⁰⁰ *Id.*

²⁰¹ The erroneous nature of this presumption is evident in the Iowa case of *In re Marriage of Fogle*, 497 N.W.2d 487 (Iowa Ct. App. 1993). The court of appeals modified the trial court's child support order and instead imposed a child support obligation on an unemployed father by imputing income to him based on a 40-hour work week at minimum wage. See *id.* at 489. The court did so without any factual inquiry into his ability to work but with the knowledge that the trial court characterized the father as an "ignorant, dull-witted, lazy, inarticulate, unmotivated, thick-headed, moron of a man." *Id.* at 488.

²⁰² ELAINE SORENSEN & KYE LIPPOLD, URBAN INST., STRENGTHENING FAMILIES THROUGH STRONGER FATHERS INITIATIVE: SUMMARY OF IMPACT FINDINGS 5 (2012).

²⁰³ *Id.*

higher levels of compliance with child support orders. Instead, these parents are more likely to fall behind on payments, accrue staggering arrears, and grow to resent the system and their children. Imputation of income should be utilized in limited circumstances that depend on proof of willful under- or unemployment. When imputing income, a court should consider the local unemployment rate and a parent's individual job qualifications. If a court cannot determine based on credible evidence that a noncustodial parent is willfully unemployed,²⁰⁴ then it should use constructive approaches to support the parent in his attempts to reach full employment and refrain from imputation.

Ultimately, any forgiveness of initial child support obligations could be perceived as a diminution in expectations for low-income fathers. A minimum presumptive statutory obligation and a hard line on arrears express the legal system's expectation that even unemployed parents will take responsibility for their children and mothers should not have to go it alone. The proposal discussed above, however, should not be implemented in a way that absolves fathers of all responsibility. This new system of setting initial child support obligations would rely on a broader conception of parental responsibility, including nonmonetary contributions. Any father who cannot meet a minimum obligation would be required to perform other actions in support of his children, and he would be required to do so until he is able to meet a minimum obligation or satisfy reasonable arrears payments. Reconsidering the obligation for a low-income father does not involve eliminating the responsibility—it merely involves imposing it in a way that is realistic and supportive to the child and custodial parent and that fosters paternal engagement with the child, which studies have found to be enormously beneficial to the entire family.

3. Enforcing Child Support Orders

Finally, the child support system's enforcement methodology must be reconsidered. As discussed above, the current enforcement system fails to meet its goal of securing payments and supporting mothers and children, costs the state significant money, and perpetuates father absence. The key issue in enforcing obligations against low-income fathers is the ability to

²⁰⁴ See, e.g., GA. CODE ANN. § 19-6-15(f)(4)(D) (West 2014) (setting forth criteria by which to determine willful or voluntary unemployment or underemployment).

pay, as held in *Turner*.²⁰⁵ The current system is rational only when nonpayment is volitional. When a court determines that a father cannot pay, the judge must consider other approaches. Courts should be empowered to forgive debts, fashion the repayment of arrears through in-kind contributions, and order obligors into supportive programs designed to enhance a father's potential to contribute in a range of ways. For example, mandatory job training or placement programs could replace incarceration and enhance a father's potential to make monetary contributions.²⁰⁶ Or a court could order in-kind support to compensate the custodial parent if she agrees to such payments.

A recalibrated child support system should also involve repealing the Bradley Amendment, under which judges cannot forgive or reduce child support debt. A system that is committed to getting the most it can from noncustodial parents and supporting children and families must afford judges the discretion to forgive child support debts. Judges working with families are currently hamstrung when dealing with chronically low-income fathers who have accrued arrears. Instead, they must maintain the obligation and enforce it based on the government's or custodial parent's wishes, even in the face of compelling evidence to explain the arrears.²⁰⁷ Judicial discretion in considering arrears is key to a system dealing with indigent families in a poor economy.

In order to enhance a low-income family's potential to meet its children's needs, the legal system cannot treat the satisfaction of monetary obligations as the only way to be a responsible parent. Demanding without nuance that fathers play this breadwinner role creates a cycle of repeated failure for fathers and futility for the court system and children.

²⁰⁵ See generally *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (analyzing whether a court can hold a child support obligor in criminal contempt if he does not have the resources to purge the contempt).

²⁰⁶ See SOLOMON-FEARS ET AL., *supra* note 76, at 21 (discussing job training as an alternative to incarceration and citing a model program). The D.C. Fathering Court also provides a useful example of how such a response to nonpayment might work. See *infra* Section III.C.

²⁰⁷ See generally Cheryl Wetzstein, *Child-Support-Law Amendment Comes to Attention of Hill; Provision Revision Could End to Horror Stories*, WASH. TIMES, Apr. 27, 1999 (reporting on fathers returning from extended prison sentences and periods of war captivity to find staggering child support arrears that judges could not retroactively reduce or forgive due to the Bradley Amendment); Lena Trondson, *Inequity of the Bradley Amendment*, TRONDSON ONLINE (Jan. 27, 2009), <http://www.trondson.com/2009/01/persecuting-low-income-and-disabled-parents> [<http://perma.cc/G6VL-M8X4>] (arguing that the Bradley Amendment unfairly labels low-income and disabled parents as deadbeat parents when they are unable to meet their child support obligations).

B. *Enforcing Parenting-Time Orders*

To enhance the family well-being and to express the state's interest in fathers taking on a more involved parental role, the legal system must reconsider the consequences for parents who fail to take advantage of their parenting time. Judicial approaches that include incentives and self-activating contingency provisions in custody orders could achieve these dual goals without imposing overly coercive or punitive remedies.

Despite legal precedent holding that visitation rights cannot be enforced against a recalcitrant father through forced visitation, some scholars have advocated for courts to take a more active role, but have left the parameters of that role vague.²⁰⁸ Others have argued that courts should and do have the authority to order the performance of particular caretaking tasks,²⁰⁹ to protect child welfare,²¹⁰ and to ensure that parenting time is construed as a responsibility, not just a right.²¹¹

But strict enforcement of parenting-time and custody orders against noncustodial parents who fail to take advantage of the time the court has awarded them is neither likely to receive court support nor well calibrated to achieve engaged paternal relationships.²¹² Judges considering strict enforcement of visitation provisions have refused to order fathers to visit against their

²⁰⁸ See Pollack & Mason, *supra* note 142, at 79 ("When it is determined that continued contact with both parents is in the best interest of the child, the courts and the state legislatures need to take a more active role in enforcement.").

²⁰⁹ See Maldonado, *supra* note 41, at 995 (suggesting that judges are authorized to order compliance with visitation provisions in the same way judges can order the payment of child support).

²¹⁰ See Czapanskiy, *supra* note 91, at 1436-42 (arguing that by analogy to the abuse and neglect system, when a child's well-being is at issue, the court has the authority to order caregiving); see also Maldonado, *supra* note 40, at 995 n.366 (arguing that courts have the authority to enforce missed parenting time under a theory of *parens patriae* in order to protect children).

²¹¹ See Czapanskiy, *supra* note 91, at 1468; Maldonado, *supra* note 41, at 995. Stating that courts normally take an active role in enforcing caretaking, Professor Maldonado also argues that both mothers and fathers should be held responsible for ensuring children visit with their nonresidential parent. See Maldonado, *supra* note 40, at 991-92 (suggesting such solutions as mothers being required to post bond until they produce children for court-ordered visitation). Professor Maldonado also advocates for additional sanctions to encourage visitation, suggesting that public penalties seeking to shame absent parents could be effective. *Id.* at 996. Advocating for orders to engage in community service, booting cars, and posting names of absent fathers online, Professor Maldonado argues that stricter enforcement will lead to social norms of engaged fatherhood that will stimulate community support and self-sanctioning. *Id.* at 998-1000.

²¹² See Steven L. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121, 196 (1983) ("A court order literally requiring an unwilling noncustodial parent to visit, on pain of contempt, is absurd and counterproductive.").

will²¹³ and have held that coercive visitation could be detrimental to children.²¹⁴ Coercing fathers to parent their children is unlikely to create the kind of positive relationships that result in desirable outcomes for children. A focus on hours logged rather than time spent engaged with a child would result merely in compliance with a court order and not in healthy parenting.

Courts are not powerless to encourage parenting time through judicial action when fathers fail to take advantage of their parenting-time rights, even if enforcement through contempt might be legally untenable and counterproductive. By providing self-activating remedies and ready access to status hearings and modifications, judges can exert some influence in making parenting time more probable in situations when it has been problematic.

First, judges can draft custody orders that include self-activating consequences for violations of parenting-time provisions.²¹⁵ For example, when a noncustodial parent misses a visitation, an order could require him to make in-kind payments of food, clothing, or labor, such as house repairs and laundry.²¹⁶ Drafted carefully, these consequences would be imposed without further court action and might act as deterrents to missed visitations. Of course, if fathers failed to comply with the consequences, court action would be required to enforce the provision, but a court would be far more likely to enforce an in-kind obligation than to order visitation to occur.²¹⁷

²¹³ See *supra* notes 91-96 and accompanying text; *Messer v. Messer*, 66 Cal. Rptr. 417, 419 (Cal. Ct. App. 1968) (finding visitation to be a right).

²¹⁴ *Louden v. Olpin*, 173 Cal. Rptr. 447, 449 (Cal. Ct. App. 1981) (“[T]he court cannot order him to act as a father.”); *In re Marriage of Mitchell*, 745 N.E.2d 167, 172 (Ill. App. Ct. 2001) (noting the potential harm to children when they realize their fathers are visiting them only due to the threat of contempt); *McKinley v. Iowa Dist. Court for Polk Cty.*, 542 N.W.2d 822, 825-26 (Iowa 1996) (“We are inclined to believe that visitation motivated solely by the threat of contempt could not truly be said to satisfy a child’s best interest.”); *Dana v. Dana*, 789 P.2d 726 (Utah Ct. App. 1990) (finding that compelling a visit under the threat of an increased child support obligation fails to promote a positive parenting environment).

²¹⁵ These provisions could be written to impose consequences on both custodial and noncustodial parents for visitation violations. Such even-handed provisions would be better received by the parties in a contested case and are more likely to be adopted by parties in a settlement agreement.

²¹⁶ Another commentator has endorsed further consequences, such as terminating visitation or imposing liquidated damages for pain and suffering of the parent or child. See *Novinson*, *supra* note 212, at 198-99. Terminating visitation would frustrate the end goal of alleviating father absence. Liquidated damages might be a powerful disincentive for fathers who have substantial income, but for low-income fathers, such a consequence would be unrealistic.

²¹⁷ An alternative approach to responding to lapsed parenting-time rights—admittedly one that relies on antiquated analogies of children to property—could involve a property law analogy to adverse possession. A custody order could stipulate, for example, that if a parent fails to use his or her parenting time, the primary parent would gain more

Second, a custody order could include a provision giving a parent seeking to enforce the visitation provision the right to a status hearing upon filing a request. This clause would relieve the party from filing a motion for modification or contempt and would ease the court's administrative burden of handling the motion practice involved. Instead, a party could merely file a request for a status hearing. At the hearing, the court could explore the barriers to successful visitation, problem solve with both parties present, and modify either *sua sponte* or at the request and agreement of the parties. Such a hearing might reveal problems with the order as written. For example, ambiguous terms might be frustrating the efforts of the parties to cooperate or comply.²¹⁸ Alternatively, the judge could assist the parties in solving practical problems impeding visitation. If the status hearing reveals that the father merely does not want to visit, such a revelation would allow the mother and children to adjust their expectations for the future. In some instances, problem solving will require modifications, which, if implemented by the court at a status hearing by consent of the parties, could make the process far more efficient and effective.

In taking failure to visit seriously, the legal system could validate engagement as an important paternal contribution and offer a reluctant father the incentive he may need to take advantage of his visitation rights. By crafting rational and constitutionally sound ways to address failure to visit, the legal system would convey the important message that paternal engagement and child support contributions are mutually reinforcing and equally critical ways of fulfilling parenting responsibilities. The dialectic relationship between law and social norms suggests that a reconsidered legal approach to the noncustodial parent's role as caregiver could have a significant effect on behavior.²¹⁹ Although judicial decisionmaking and law

rights to parent the child. This gradual shifting of rights based on *use* parallels adverse possession in property law, whereby a squatter gains rights over land through occupation and use of the property. See Eric M. Larsson, *Acquisition of Title to Property By Adverse Possession*, in 142 AM. JUR. PROOF OF FACTS 3D 349 (2015). In the family law context, the "property" would be the children, and the "occupation and use" would be having regular visitation. Allowing child visitation to be adversely possessed would not only give mothers more meaningful recourse when visits are missed, but would also provide another incentive for fathers to take advantage of visitation—a simple "use it or lose it" policy.

²¹⁸ See, e.g., *Messer v. Messer*, 66 Cal. Rptr. 417, 419 (1968) (urging courts to draft visitation provisions clearly and noting "where a decree is indefinite, it may make a hesitant parent reluctant to exercise his rights of visitation").

²¹⁹ See generally Patrick S. O'Donnell, *Social Norms & Law: An Introduction*, 9 THEORY & SCI. 1, 6 (2007) (describing the interrelationship of laws as being multifaceted

making may not bring about rapid change,²²⁰ together they can support eventual shifts in social norms surrounding the family.²²¹

C. Implementing a Problem-Solving Court System to Consider Children's Needs and Parental Contributions

Currently, many court systems bifurcate child support and custody, considering them as separate legal matters and scheduling them before different judges.²²² To maximize the potential for parents to support their children and to validate the dual roles of parents, courts should consider the matters as the inextricably tied issues that they are.²²³ Together, support payments and custody comprise the formal structure of childcare responsibilities, and in considering them in a holistic way, a court can fully consider the needs of the children and the potential of each parent to meet those needs.

Addressing support and child custody holistically could entail merely consolidating the cases or treating them as companion cases to be scheduled in tandem.²²⁴ Or a court system could enhance its treatment of family cases by creating problem-

and discussing laws relating to the creation, maintenance, elimination, and even sublimation of social norms).

²²⁰ See generally Dowd, *Law, Culture and Family*, *supra* note 20, at 787 (describing the “limited instrumentalism principle,” which explains that in the absence of cultural support, law has only a limited ability to accomplish social change).

²²¹ See *id.* at 791 (noting that law can facilitate social norm change).

²²² Child custody and child support are seen as separate legal matters because of the unconnected legislation behind both. See, e.g., 42 U.S.C. § 667 (2012) (giving guidelines to states for child support without mention of child custody); see also WASH. ADMIN. CODE § 388-14 (2012) (giving administrative law judges power to enter support obligations, but explicitly barring their authority to determine child custody or visitation issues). Judges are admonished not to allow child support disputes to inform custody disputes, and vice versa. See CHILD CUSTODY PRAC. & PROC. § 15:11 (2015) (explaining that courts refuse to allow, “a parent [to] use visitation as a tool to secure support . . . on the theory that the provision for support and the one for visitation are independent”); see, e.g., Sampson v. Johnson, 846 A.2d 278, 287 (D.C. 2004) (noting that “[p]ublic policy requires the treatment of support of children and visitation rights as distinct problems” (quoting Stancill v. Stancill, 408 A.2d 1030, 1034 (Md. 1979))). Some courts do allow judges to consider the issues in tandem under certain circumstances. See MICH. COMP. LAWS § 552.16 (2001) (providing that the court can make determinations about both custody and child support at the time of divorce or annulment); OR. REV. STAT. § 107.431 (2014) (allowing the court to modify child support payment when visitation is denied).

²²³ This article does not advocate for linking visitation to child support in the more common scenario: withholding visitation from a nonpaying parent until he comes into compliance. Not only does such an action discourage visitation, but it inappropriately makes reciprocal the right of visitation and the obligation of child support. See generally Dowd, *supra* note 90, at 141 (“Linking social rights to economic responsibilities reinforces the notion of children as property, a classic hallmark of rejected patriarchal norms.”).

²²⁴ Some courts may resist consolidating child support and custody, because doing so would require the custodial parent to appear for each hearing on a child support matter unless the court expressly waived her presence.

solving courts to address custody and support conflicts. Problem-solving courts are traditionally instituted to create and apply collaborative and holistic responses to chronic problems that have proven resistant to conventional legal solutions,²²⁵ but these courts have only been established in a limited way in the family law context.²²⁶ Problem-solving courts are distinguishable from traditional courts in that they involve cross-disciplinary collaboration and judges taking a proactive role in solving underlying problems in order to resolve legal conflicts.²²⁷

By design, problem-solving courts proactively address barriers and engage litigants and concerned parties in brainstorming successful solutions that would enhance custody and support cases. Structural barriers to parenting time and custody could be addressed with a problem-solving approach. Custodial parents could express their own preferences for the assignment of support responsibilities. Courts could more thoughtfully consider the ways that noncustodial fathers might participate in the lives of their children and support them even during periods when financial support may be impossible. Partnerships with resource providers could provide fathers with the support they need to both meet their child support obligations and to simultaneously engage positively and consistently with their children.

For low-income fathers, a narrow focus on enforcing child support payments without considering alternatives fails to serve

²²⁵ See John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 282 (2000) (describing the collaborative approach utilized by judges, lawyers, and service providers in New York's problem-solving drug courts); *Problem-Solving Justice*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/research/problem-solving-principles?url=research%2F11%2Farticle&mode=11&type=article> [<http://perma.cc/J48E-4TYD>] (last visited Dec. 14, 2015) (examining various shared principles of problem-solving courts, including collaborative responses by members of the legal community).

²²⁶ Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1280 (2008) ("Although some alternatives are developing, . . . the adversarial system remains at the center of family law, overshadowing other procedures."). Even though there are thousands of problem-solving courts in the United States, only a small number of them are exclusively family law courts. See *How Many Problem-Solving Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR., <http://www.ndcrc.org/content/how-many-problem-solving-courts-are-there> [<http://perma.cc/XFP8-ZDAM>] (last visited Dec. 14, 2015) (listing the number of problem-solving courts by type, excluding drug courts, and revealing that there are only 63 child support, problem-solving courts in the United States and its territories as of June 30, 2014). Most problem-solving courts are drug courts. See *About NADCP*, NAT'L ASS'N OF DRUG CT. PROFS., <http://www.nadcp.org/learn/about-nadcp> [<http://perma.cc/CH5Y-AZMF>] (last visited Dec. 14, 2015) (showing NADCP has 2,734 drug courts and 1,122 other problem-solving courts).

²²⁷ See generally Donald J. Farole, Jr., et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57 (2005) (providing an overview of the principles behind problem-solving courts); Lee, *supra* note 75, at 25 (discussing the philosophy of problem-solving courts).

the goals of child welfare or government reimbursement.²²⁸ A problem-solving court allows a judge to consider how to assist obligors in meeting their obligations in lieu of routine fines and contempt convictions.²²⁹ Positioning a father for compliance with his order²³⁰ better situates him for meeting his obligations and being involved with his children, which will result in more positive outcomes for fathers, mothers, and children.²³¹

Model programs suggest that problem-solving courts would succeed in enhancing family potential and expressing the legal system's interest in supporting fathers' dual roles as breadwinners and engaged parents. One example, the D.C. Superior Court's Fathering Court Initiative, features a problem-solving approach that is not solely focused on how to maximize child support payments—as a court handling child support matters generally would. Instead, the program incorporates services to enhance the noncustodial parent's ability to contribute financially to his child while balancing that obligation with “the many other issues necessary to promote co-parenting.”²³² The

²²⁸ See Brito, *supra* note 74, at 619 (“Inflexible application of child support collection and enforcement measures designed to ensure that child support payments are ‘automatic and inescapable,’ no matter the circumstances, lead to this devastating phenomenon when applied to the chronically poor.” (citing Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, in CHILD SUPPORT: THE NEXT FRONTIER, 46, 49-50 (J. Thomas Oldham & Marygold S. Melli, eds. 2000))).

²²⁹ Although several commentators have called for such reform, few jurisdictions have implemented problem-solving approaches to child support enforcement. See Brito, *supra* note 74, at 665 (“[C]hild support enforcement efforts must be coupled with measures designed to improve the employment prospects and overall financial security of poor fathers.”); Cancian et al., *supra* note 64, at 153-58 (proposing a system designed to maximize child welfare, reduce public expenditures, and assist fathers in meeting their obligations, and noting that some states consider child support obligations in tandem with food stamps and health care).

²³⁰ Consolidating child support and custody into one matter can facilitate a court's thoughtful implementation of statutes and court rules that balances child support obligations with parenting time and custody. Increasingly common, such statutes permit the court to modify child support obligations based on the time the child actually spends with each parent. See, e.g., MINN. STAT § 518A.36.2 (2014) (specifying the procedures for reducing support obligations based on additional parenting time by the payor parent); NEB. CT. R. 4-210 (2008); UTAH CODE ANN. § 78B-12-216 (1) (West 2008) (specifying that the child support calculation is based on the actual time a child spends with each parent). For example, in Nebraska, court rules empower a court to adjust a child support obligation by as much as 80% when a parent who does not have primary custody takes advantage, by agreement of the parties or court order, of parenting or visitation time not originally contemplated in a custody order. NEB. CT. R. 4-210 (2008). Through such statutes and rules, the court can allow families to recalibrate the balance of parenting time and support.

²³¹ See *Welfare Reauthorization*, *supra* note 138, at 2 (“If children are to benefit from the ongoing support and involvement of both parents, it is important to develop strategies to improve the limited economic prospects of low-income fathers.”).

²³² Lee, *supra* note 75, at 25. Though the program initially sought to focus on the general population owing child support obligations, grant funding dictated that the program offer services only to recently released offenders owing child support arrears. *Id.*

collaborative program involves the court, several agencies, and private sector partners²³³ that all play a role in supporting the noncustodial father's efforts to meet his child support obligations and maintain a relationship with his children.²³⁴ The partners provide support to fathers in job training and placement, budgeting, and parenting skills and require that each participant enroll in a curriculum focused on the role and importance of a father in a child's life.²³⁵

A Texas program involves a similar collaboration between the courts, the Attorney General, and nonprofits, and refers to itself as a "child support-driven employment project."²³⁶ This program focuses on helping noncustodial parents obtain employment and overcome the challenges that prevent or limit their career advancement.²³⁷ Along with counseling organizations, the program endeavors to prepare noncustodial parents to financially and emotionally support their children.²³⁸ Data show success in both employment and child support compliance.²³⁹ Participants in the program were 21% more likely to be employed than the control group parents.²⁴⁰ The program also reported that participants paid their child support 47% more often and at a higher rate than the control group. They also reported a 21% drop in TANF reliance by the custodial parents—relative to a comparison group not enrolled in the program—in their first year in the program and a 29% drop in years two through four.²⁴¹

Problem-solving courts do have their limitations that must be considered and strategically addressed. Problem-solving courts mandate extensive court involvement. Routine hearings, judicial oversight, and mandatory referrals allow these courts to play the constructive role expected of them. For low-income litigants who

²³³ These organizations include the government's child support enforcement agency, its probation office, the Department of Human Services, the Department of Employment Services, and the Criminal Justice Coordinating Council. *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 27.

²³⁶ *Noncustodial Parents Choices Project—Texas*, OFF. OF CHILD SUPPORT ENFORCEMENT (Oct. 1, 2007), <http://www.acf.hhs.gov/programs/css/resource/noncustodial-parents-choices-project> [<http://perma.cc/LQ3V-Q29R>].

²³⁷ *Id.*

²³⁸ *Noncustodial Parent Choices—Program Overview*, TEXAS WORKFORCE (June 24, 2014), <http://www.texasworkforce.org/welref/noncustodial-parent-choices-program-overview.html> [<http://perma.cc/9AEA-ZA8D>].

²³⁹ Daniel Schroeder & Stephanie Chiarello, *Texas Non-Custodial Parent Choices: Program Impact Analysis*, LYNDON B. JOHNSON SCH. OF PUBL. AFFS. (Aug. 2008), https://www.texasattorneygeneral.gov/cs/ofi/nep_choices_program_impact.pdf [<http://perma.cc/9PS4-YPUD>].

²⁴⁰ *Id.*

²⁴¹ *Id.* at 65-66.

often experience extensive government intrusion related to public benefits, however, such involvement may be unwanted²⁴² and may place an untenable burden on their work obligations. For this reason, and because problem-solving courts require a longer-term commitment and a certain level of cooperation from the litigants, any problem-solving court handling custody and child support should require express, informed opting in by the parties.²⁴³ To address the extensive time commitment, the problem-solving court could sit during weekends or in the evenings. Such flexibility, inherent in the problem-solving model, could serve both custodial and noncustodial parents—but would require additional judicial resources.

Problem-solving courts have provoked criticism for reducing adversarial justice's procedural safeguards.²⁴⁴ As such, they may disadvantage pro se litigants and those with less social capital.²⁴⁵ Problem-solving courts have also been critiqued for devaluing the legal issue and suggesting it is not worth formal adjudication.²⁴⁶ While these are causes for concern, studies of problem-solving courts have found that litigants generally express satisfaction and are in compliance with the courts' orders, diminishing the realistic concerns about the possible negative implications of reducing procedural justice.²⁴⁷

²⁴² See Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 910-11 (2010) (discussing the troubling loss of privacy for poor people in therapeutic courts).

²⁴³ *But see* Paul Holland, *Lawyering and Learning in Problem-Solving Courts*, 34 WASH. U. J.L. & POLY 185, 204 n.68 (2010) (noting the complications of obtaining true consent for problem-solving court procedures).

²⁴⁴ *See, e.g., id.* at 195-210 (analyzing the lack of procedural safeguards in problem-solving courts); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POLY 57, 63-64 (2009) (noting that there has been too little consideration of procedural rights and justice in problem-solving courts); BUREAU OF JUST. ASSISTANCE, DEP'T OF JUST., CHALLENGES AND SOLUTIONS TO IMPLEMENTING PROBLEM-SOLVING COURTS FROM THE TRADITIONAL COURT MANAGEMENT PERSPECTIVE 4-5 (2008), https://www.bja.gov/Publications/AU_ProbSolvCourts.pdf [<http://perma.cc/674E-T5A6>] (describing the drawbacks of shifting from adversarial to problem-solving courts).

²⁴⁵ *See, e.g., Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1917-19 (1998) (detailing the lack of procedural safeguards in drug courts, a type of problem-solving court where the traditional model seen in adversarial systems is diminished, putting defendants at a significant disadvantage).

²⁴⁶ *See, e.g., Morris B. Hoffman, Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2067-68 (2002) (arguing that therapeutic courts are anti-intellectual and wholly ineffective because they focus on state-sponsored treatment and curing diseases rather than on adjudication, "and the adjudicative process is often seen as an unnecessary and disruptive impediment to treatment").

²⁴⁷ In the few states that have implemented problem-solving courts in a family law context, experience suggests that problem-solving courts work very well in child support cases. *See Georgia Finds Successes in Its Problem Solving Courts*, DIV. OF CHILD SUPPORT

Problem-solving courts can be expensive to establish and maintain; however, when balanced against their potential cost savings, the investment in such courts can be cost effective.²⁴⁸ The Texas program reported that the average cost of the program is only \$1,000 for each noncustodial parent served.²⁴⁹ The D.C. program requires limited expenditures since all partnering programs preexisted the establishment of the court.²⁵⁰ Further, the program saves the jurisdiction significant resources by reducing or obviating the need for enforcement actions, incarceration for failure to pay child support, and the administration of the enforcement mechanism.²⁵¹ Navigating the resources previously directed towards enforcements actions and incarceration of fathers for failure to pay to these problem-solving courts will result in positive outcomes for both families and the state without imposing an extreme financial burden on the state.

Problem-solving courts do not come without complications. But if carefully designed and implemented, the concerns about the burdens these courts impose on litigants and the court's finances, as well as the reduced levels of procedural justice, can be overcome—or at least minimized. The benefits to this area of law likely outweigh the drawbacks. Problem-solving courts could simultaneously convey the importance of monetary support of children and the significance of paternal caretaking. At the same

SERVS. (Sept. 13, 2013), <http://dcss.dhs.georgia.gov/press-releases/2013-11-12/georgia-finds-successes-it%E2%80%99s-problem-solving-courts> [<http://perma.cc/38B5-6GSW>] (explaining the success of a child support problem-solving court in Georgia in 2013; in one year, the problem-solving “program helped 313 participants in 11 . . . courts . . . , resulting in 76 percent now paying their child support”); see also Aaron Arnold, *The Parent Support Program: The Problem-Solving Court Approach to Child Support Enforcement*, 61 CHILD SUPPORT Q. 25, http://www.courtinnovation.org/sites/default/files/documents/Parent_Support_Program_article.pdf [<http://perma.cc/9364-KVRZ>] (explaining problem-solving courts' methods of child support enforcement and their success).

²⁴⁸ See, e.g., Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1484, 1486 (2004) (comparing problem-solving to traditional adjudication and highlighting the cost benefits that treatment courts have because there is no cost of incarceration); see also Sarah Felsen, *Colorado's Family-Integrated Problem-Solving Courts*, 42 COLO. L., 75, 76-77 (2013) (asserting that family-integrated problem-solving courts in Colorado are more cost effective than the normal system, even with the addition of program and treatment costs).

²⁴⁹ Schroeder & Chiarello, *supra* note 239.

²⁵⁰ Lee, *supra* note 75, at 26-28 (discussing the various partners in the program and noting that the programs pre-dated this specialized court). Only the private contract with a job-training organization and the overhead of family outings are direct costs to the program.

²⁵¹ *Id.*; see also Brito, *supra* note 74, at 667-68 (arguing that individualized approaches to child support enforcement result in increased expenses, which are offset by savings in enforcement proceedings and increased child support payments).

time, they could further enhance opportunities for parents to contribute most effectively to their children's development.

CONCLUSION

The legal system's assignment of high value to paternal breadwinning fails low-income children and families generally. Deadbroke fathers, unless they are given considerable support, may not be able to fulfill this role for their children, and in failing to do so, they become vulnerable to time-consuming and costly enforcement actions, incarceration, and alienation from their children. Fathers who are advised to not show up at all if they don't have cash in hand²⁵² have few incentives to engage with their children. The state has little to gain in continuing to privilege paternal breadwinning responsibilities and much to lose in wasting resources and perpetuating father absence. Nor do mothers and children stand to reap substantial benefits from the legal system's myopic pursuit of child support from fathers who are unable to pay. Instead, mothers lose the ability to bargain privately with fathers and rarely see significant payments. For mothers who want fathers involved, the state's prioritization of the father's breadwinning role over the caretaking role can result in paternal absence and the perpetuation of gender inequality.

By seeking to equalize the importance of paternal financial support and caretaking, the legal system can help nonintact families maximize the true support of their children. A reconsidered approach could eliminate explicit and implicit legal preferences for paternal financial support in lieu of caretaking support, enforce responsibilities related to both roles in a thoughtful and rational way, and handle family law cases holistically, with the goal of maximizing the best interests of the children and the potential contributions of each parent. After such changes, our legal system could more efficiently protect government coffers, positively influence social norms, and maximize child welfare in low-income families. Such a recalibration of values would actually create higher expectations for the noncustodial parent, demanding more than his money and validating his role as parent. Such a shift in norms and expectations accomplished through these reforms could take place without conveying to fathers that their financial contributions are irrelevant or that their financial responsibilities are excused. Instead, such shifts in the family

²⁵² Greif et al., *supra* note 111, at 252.

law system, if undertaken thoughtfully, could reflect the system's commitment to paternal involvement and responsibility. And it could do so through a contextual approach that supports mothers in performing their critical roles in both the family and the economy and assists fathers in fulfilling their multifaceted paternal obligations to their children.