CHILD SUPPORT FOR WELFARE FAMILIES: FAMILY POLICY TRAPPED IN ITS OWN RHETORIC

DEBORAH HARRIS*

INTRODUCTION

One component of the current consensus on welfare reform is that fathers should be made to support their children. Conservatives, liberals, and many feminists claim that the enforcement of child support obligations will reduce welfare costs, will alleviate poverty in mother-only households, and will foster family relations by making fathers responsible for their children.[1] This agreement is reflected in the Family Support Act of 1988[2] which links provisions

* Staff attorney, Community Legal Services, Inc., 3638 North Broad Street, Philadelphia, PA 19140. The views expressed in this Article are mine alone. I am extremely grateful to Paula Roberts of the Center for Law and Social Policy who made many helpful suggestions and criticisms. I also owe a special debt to Amy E. Hirsch whose ideas about dual-track family law provide the starting point for this Article.

1. *See, e.g.*, Kosterlitz, *Reexamining Welfare*, 18 NAT'L J. 2926 (1986); Kuttner, *The Welfare Strait*, NEW REPUBLIC, July 6, 1987, at 20, 21, 24; Simpson, *Making Sure Dad Pays Up*, MS., May 1988, at 65, 67; Solow, *The Economy*, BUS. MONTH, Feb. 1988, at 7.

2. FSA, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (to be codified at scattered sections of 42 U.S.C.).

intended to strengthen child support enforcement with work and training requirements for welfare mothers.

The consensus on child support enforcement, like the consensus on the work requirements, starts with the assumption that children are the private responsibility of their parents.[3] Support of children is supposed to come from parents, not from the government. Fathers will therefore be made to support their children through child support payments, and mothers will be required to support their children through work.

The consensus on child support is almost universal. In contrast to the work and training provisions in the Family Support Act, which generated significant controversy, the child support provisions received virtually no public attention. There is, however, strong reason to doubt that the Family Support Act's child support enforcement provisions will achieve the results envisioned by the consensus.

In this Article, I will show that the child support enforcement system is fundamentally flawed, imposing tremendous burdens on welfare mothers without saving welfare dollars. I will argue that the current consensus on child support, as reflected in the Family Support Act, is based on two conflicting, unsubstantiated beliefs: first, that greater enforcement efforts can produce substantial savings, and secondly, that child support enforcement for welfare families is a social benefit that should be pursued regardless of the fiscal and social costs. Finally, I will discuss the strengths and limitations of several alternatives to welfare child support enforcement which either have been proposed or are in the early stages of implementation.

This Article will be presented in five sections. First, I will describe the current child support enforcement system for welfare families — a separate system of family law for the poor. Section II reviews the development of this dual system of family law, with its primary motive of saving welfare dollars. In section III, I will show that the welfare child support system has not fulfilled its purpose of reducing tax expenditures for welfare. Section IV analyzes the fiscal promises of the child support provisions in the Family Support Act and discusses the recent upsurge of punitive and moral justifications for enforcing child support now that the tax savings have not materialized. Section V shows that recent liberal proposals for reforming the welfare child support system do not address the system's structural defects. Section V also reviews other child support reforms currently in place in a few states and suggests

3. In the rush of compromise, the Conference Committee dropped the preamble to the Senate welfare reform proposal, but the preamble to the Senate bill stands as a good summary of the current consensus:

> It is the purpose of this Act to replace the original AFDC program with new provisions for child support:
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> That stress family responsibility and community obligation in the context of the vastly changed family arrangements of the intervening half century:
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> That enforce the principle that child support must in the first instance come from parents, and only thereafter from the community . . . .

S. 1511, 100th Cong., 1st Sess. § 3, 133 CONG. REC. S10,404 (daily ed. July 21, 1987).

other ways that child support enforcement for welfare families can be made more cost effective and less punitive.

I.
THE DUAL SYSTEMS FOR CHILD SUPPORT

The United States has two distinct child support systems: one for welfare recipients, the other for everyone else. The system for nonwelfare mothers is voluntary: the mother does not have to pursue support from the children's father if the problems she anticipates outweigh the benefits.[4] In contrast, the welfare child support system is compulsory: mothers in the Aid to Families with Dependent Children (AFDC) program are required to cooperate in getting child support as a condition of receiving subsistence welfare benefits.[5]

The required cooperation is extraordinarily intrusive, especially where paternity has not been established. The welfare mother has to identify the father of her child, tell a succession of strangers the intimate details of her sexual history, and subject herself and her child to blood tests.[6] Some states require welfare mothers to answer questions about their sexual life during times long before or long after the child was conceived, even though such evidence is rarely admissible in a paternity proceeding.[7] Some states even require welfare mothers to answer detailed questions about their sex lives without first asking the father if he will acknowledge paternity or determining whether paternity is even at issue.[8] Once paternity has been established, a welfare mother must appear at support proceedings against the father and must testify against him. If she does not "cooperate" to the satisfaction of the welfare officials, she loses her portion of the welfare grant.[9]

In theory, the mother is exempt from the paternity and support requirements if she has "good cause" for refusing to comply.[10] However, the federal regulations do not recognize physical or emotional harm to the mother as

4. I will use "mother" to refer to the custodial parent and "father" to refer to the noncustodial parent. Although fathers increasingly win contested child custody cases, *see* P. CHESLER, MOTHERS ON TRIAL (1986); Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths*, in FAMILIES, POLITICS AND PUBLIC POLICY (I. Diamond ed. 1983), 90% of children living in single-parent families live with their mothers and only 10% live with their fathers. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-20, No. 418, MARITAL STATUS AND LIVING ARRANGEMENTS; MARCH 1986, at 8, table E (1987).

5. 42 U.S.C. § 602(a)(26)(B) (1982 & Supp. IV 1986); 45 C.F.R. § 232.12 (1987).

6. 45 C.F.R. § 232.12 (1987).

7. *See* Johnson & Blong, *The AFDC Child Support Cooperation Requirement*, 20 CLEARINGHOUSE REV. 1389, 1397-99 (1987).

8. *See id.*; *W. Va. Asks Welfare Mothers for Intimate Details on Sex Life*, Philadelphia Inquirer, Oct. 24, 1988.

9. 42 U.S.C. § 602(a)(26)(B) (1982); 45 C.F.R. § 232.12(d) (1987). *See, e.g.*, Jernigan v. Perales, 486 N.Y.S.2d 364, 109 A.D.2d 838 (1985) (reduction of welfare grant properly imposed as sanction for noncooperation). The children's portion of the grant is then supposed to be paid to a protective payee instead of the mother, unless a protective payee cannot be found. 42 U.S.C. § 602(a)(26)(B) (1982); 45 C.F.R. §§ 232.12(d), 234.60 (1987).

10. 42 U.S.C. § 602(a)(26)(B) (1982).

constituting "good cause" unless the harm impairs her "capacity to care for the child adequately."[11] Very few applicants or recipients know about the good cause exemption, and of the few claims asserted, even fewer exemptions are granted.[12]

Because the nonwelfare system is voluntary, the parents of nonwelfare children can work out any arrangements they wish for the payment of support. The support can be paid in cash, or the father can meet some or all of his responsibilities by buying things the child needs or by paying a share of the child's expenses directly. The support can be paid directly to the mother, or the support can be paid to the court or to a clearinghouse for distribution to the mother.

The welfare system does not permit voluntary arrangements and ordinarily does not permit any part of the support obligation to be satisfied by in-kind payments. Once the mother goes on welfare, a support order for a specified cash amount must be entered even where a voluntary arrangement has been working satisfactorily.[13]

The two child support systems also differ in how they handle the support once it is paid. In the nonwelfare system, the support the father pays is supposed to be used for the benefit of his children.[14] In the welfare system, the

11. 45 C.F.R. § 232.42(a)(1)(iii),(iv) (1987). The federal statute requires the Secretary of Health and Human Services to promulgate standards for determining good cause exemptions, "which standards shall take into consideration the best interests of the child on whose behalf aid is claimed." 42 U.S.C. § 602(a)(26)(B) (1982). The Secretary interprets the requirement that the good cause standards consider the best interests of the child as allowing a standard which prohibits consideration of anything but actual harm to the child. For references to the legislative history of the good cause exception and subsequent rulemaking which resulted in the restrictive interpretation of the statutory exemption, see Mannix, Freedman & Best, *The Good Cause Exception to the AFDC Child Support Requirement*, 21 CLEARINGHOUSE REV. 339 (1987).

12. Although state welfare agencies are supposed to notify applicants and recipients about the good cause exception, 45 C.F.R. § 232.40(b) (1987), the states apparently treat this responsibility with varying degrees of seriousness. For fiscal year 1987, the numbers of good cause claims per state ranged from 0 to 1147. Some less populous states reported receiving and allowing many more good cause claims than more populous states. For example, the state of Washington reported 1147 good cause claims and allowed 677. New York reported 198 claims and allowed 124. Only 4587 good cause claims were allowed nationally. 2 U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, TWELFTH ANNUAL REPORT TO CONGRESS FOR THE PERIOD ENDING SEPTEMBER 30, 1987, at 54, table 44 (1987) [hereinafter TWELFTH ANNUAL REPORT]. This was a decrease from the previous year in which 5,474 good cause claims were allowed nationally. *Id.*

13. *See, e.g.*, Johnson v. Cohen, No. 84-6277, slip op. at 21-22 (E.D. Pa. Oct. 2, 1985), *rev'd on other grounds*, 836 F.2d 798 (3d Cir. 1987). If the parents have reached an agreement on support before the mother goes on welfare, the state should enforce the agreement. *See* P. ROBERTS, WOMEN, POVERTY, AND CHILD SUPPORT 38 (1986). As a practical matter, however, many states do not make this option available. Even where the state accepts voluntary agreements reached before the mother goes on welfare, the state can always seek modification of the order on the ground that the family's circumstances have changed. Nor do the states generally allow the parents to enter into voluntary agreements or arrangements for in-kind support after the mother goes on welfare.

14. *See, e.g.*, Bowen v. Gilliard, 107 S. Ct. 3008, 3014 & n.10 (1987).

children's support rights are automatically assigned to the state when the mother applies for welfare.[15] The state is therefore the beneficiary of the support order, and the state keeps most of the payments collected to offset the cost of welfare to the family. The assignment even extends to support arrearages.[16] In other words, the state has the right to collect and keep support payments which are made for back support that was owed to the mother before she went on welfare.

In both the welfare and the nonwelfare systems, the father's duty of support is founded on his biological relationship to the child.[17] Traditionally, support orders have been based on the father's responsibility for meeting the "particular needs of the unique child that is the father's own."[18] In the welfare system, the support order is theoretically based on the same principles, but the support the father pays benefits the state, not the child.

Until late 1984, welfare mothers did have the option of keeping a child off the welfare grant. Support paid for a child in a welfare family who was not included on the welfare grant did not have to be assigned to the state. The mother could receive the support directly and use it for the child.[19]

This option was eliminated with the passage of the Deficit Reduction Act of 1984[20] which required that all welfare-age siblings and half-siblings be included on the welfare grant. The mother no longer has the choice of excluding an independently supported child from the grant and using the support for the benefit of the child. A child must be included on the welfare grant even if the support which is paid for her is more than the her share of the welfare grant. The support payment must be assigned to the state and is used to offset

15. 42 U.S.C. § 602(a)(26)(A) (1982); 45 C.F.R. § 232.11 (1987).

16. 42 U.S.C. § 602(a)(26)(A) (1982); 45 C.F.R. § 232.11(a)(1)(ii) (1987).

17. *See* Rivera v. Minnich, 107 S. Ct. 3001, 3003 & n.2, 3004 (1987).

18. Bowen v. Gilliard, 107 S. Ct. 3008, 3025 & n.12 (1987) (Brennan, J., dissenting). Under current law, states are required to establish guidelines for setting child support awards. 42 U.S.C. § 667 (Supp. II 1984). There are a number of different models for guidelines: a) equalizing the father's and mother's standards of living so that the child enjoys a standard of living which is as close as possible to the standard that the child would have enjoyed if the parents had not separated; b) cost-sharing, which involves computing the costs of raising the child and then allocating the costs between the parents, usually in proportion to the parents' incomes; c) income-sharing, in which a percentage of the parental income is awarded; and d) a combination of cost-sharing and income-sharing, according to which the parents are allowed to keep a minimum of income for their own support until the designated basic cost of raising the child is met and then are required to pay a percentage of income over that amount. For a discussion of these methods, see Goldfarb, *Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses*, 21 FAM. L.Q. 325 (1987) [hereinafter *Child Support Guidelines*]; Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281 (1987); Goldfarb, *What Every Lawyer Should Know About Child Support Guidelines*, 13 FAM. L. REP. 3031 (1987) [hereinafter *What Every Lawyer Should Know*]. All of these models are consistent with the traditional principles according to which noncustodial parents are required to pay support to meet the needs of their own children.

19. Gilliard v. Craig, 331 F. Supp. 587, 593 (W.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807 (1972).

20. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2640(a), 98 Stat. 1145 (codified at 42 U.S.C. § 602(a)(38) (Supp. II 1984)).

the cost of welfare benefits for the supported child's siblings and mother as well as the welfare costs for the child.[21]

The Deficit Reduction Act "sibling rule" embodied in 42 U.S.C. § 602(a)(38) forces an independently supported child to remain in poverty, even though her support payments are enough to provide a higher standard, simply because she lives with half-siblings who are not supported as well. And because the supported child has now been "conscripted into the welfare system,"[22] her father, unlike the fathers of nonwelfare children, is required to support other men's children in addition to his own.[23]

In order to encourage welfare mothers to seek support — and, perhaps, to mitigate the effects of the "sibling rule"[24] — the Deficit Reduction Act also provided that the first $50 of child support collected by the state for a welfare family had to be paid to the family.[25] This payment, commonly called a "pass through," does not reduce the family's AFDC benefits,[26] but does count in computing the family's food stamp allotment.[27] Because the pass through reduces the family's food stamps, the net benefit to the family, if the father pays faithfully, is approximately $35 per month or $420 per year.[28] Moreover, the family gets the pass through payment only if the father paid the support in the month it was due.[29] The family gets nothing if the father pays late, and may even get nothing if he pays in advance.

The practical consequences of the compulsory assignment of child support rights are enormous. The child support action may prompt fathers to retaliate and counter-sue for custody. When fathers counter-sue for custody

21. Bowen v. Gilliard, 107 S. Ct. at 3013, 3019; *see also id.* at 3027 (Brennan, J., dissenting).

22. Gilliard v. Kirk, 633 F. Supp. 1529, 1560 (W.D.N.C. 1986), *rev'd sub nom.*, Bowen v. Gilliard, 107 S. Ct. 3008 (1987).

23. *See, e.g.*, District of Columbia ex rel. K.L.H., 15 FAM. L. REP. 1066 (1988). For a moving description of the damage the sibling rule does to the economic and emotional well-being of families, see Gilliard v. Kirk, 633 F. Supp. at 1555-63.

24. Bowen v. Gilliard, 107 S. Ct. at 3013, 3020.

25. 42 U.S.C. § 657(b)(1) (Supp. II 1984) *amended by* FSA § 102(b) (1988).

26. *Id.* § 602(a)(8)(A)(vi) (Supp. II 1984) *amended by* FSA § 402 (1988).

27. States have the option of excluding the pass through from the food stamp computation only if the state pays the full cost of the additional food stamp benefits itself. 7 U.S.C.A. §§ 2014(d)(13), 2014(m) (West Supp. 1988).

28. Under the food stamp program, an increase of $10 per month in countable income results in a decrease of $3 per month in food stamps. *Id.* § 2017(a) (West Supp. 1988).

29. FSA § 102(a) (amending 42 U.S.C. § 602). Before the FSA, federal regulations allowed pass through payments only for support *collected* in the month it was due. 45 C.F.R. § 302.51(b)(1)(2) (1987). A number of states relied on these regulations to deny pass through payments even where the father's employer had deducted the payment from the father's wages but had failed to forward it to the mother's state in the same month. *See, e.g.*, Wilcox v. Ives, 864 F.2d 915 (1st Cir. 1988); Vanscoter v. Bowen, 706 F. Supp. 1432 (W.D. Wash. 1989); Beasley v. Harris, 671 F. Supp. 911 (D. Conn. 1987); Humble v. Dep't of Public Aid, 165 Ill. App. 3d 624, 519 N.E.2d 99 (1988). Apparently, pass through payments will now be allowed in these situations, but no pass through payments will be made if the father pays late. *Vanscoter*, 706 F. Supp. 1432. Previously, a number of courts had held that the family was entitled to the pass through even if the support payment was late. *Wilcox*, 864 F.2d 915; *Vanscoter*, 706 F. Supp. 1432; *Humble*, 165 Ill. App. 3d 624, 519 N.E.2d 99.

in nonwelfare child support cases, the mother at least has the choice of dropping the child support action and avoiding a custody battle. In the welfare child support system, the mother has no such option. A welfare mother is in a particularly precarious position in custody litigation given the increasing tendency of courts to award custody to fathers because of their greater financial resources.[30] A welfare mother's vulnerability is further aggravated because the state, which is a party to the proceedings, stands to benefit financially if custody is transferred to the father. Moreover, the welfare mother — who cannot afford to hire a lawyer and frequently cannot obtain free legal services — is often unrepresented in custody litigation generated by the state-initiated support action.[31]

The compulsory child support system also operates to set artificially low support orders. Often, support orders for welfare families are set by child support administrators, instead of by judges.[32] Frequently, the welfare mother is not given any opportunity to challenge the father's self-reporting of his income and resources; the support order entered against the father may therefore be lower than he can afford.[33] In addition, some courts and administrative officers have a practice of capping support orders for welfare children at the amount of the child's share of the welfare grant because a higher support order would not benefit the child.[34] The family is stuck with

30. *See* National Center on Women and Family Law, *Sex and Economic Discrimination in Child Custody Awards*, 16 CLEARINGHOUSE REV. 1130, 1131 (1983); *see also* Polikoff, *supra* note 4.

31. For discussions of the problem of custody counterclaims in welfare child support proceedings, see *An AFDC Mother's Right to Counsel: Custody Issues in Proceedings Instigated by the IV-D Agency*, in P. ROBERTS, WOMEN, POVERTY AND CHILD SUPPORT 55 (1987); Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support*, 19 CLEARINGHOUSE REV. 274, 276 (1985). For a discussion of the limited availability of free legal services in family law matters, see National Center on Women and Family Law, *Challenges Facing Legal Services in the 1990s: Perspectives of Women and Family Law Advocates*, 22 CLEARINGHOUSE REV. 457 (1988).

32. 42 U.S.C. § 666(a)(2) (Supp. IV 1986); 45 C.F.R. § 303.101 (1987). Administrative and quasi-judicial processes are supposed to be available as well for nonwelfare mothers who choose to use the state's child support services. *Id.* However, nonwelfare mothers have a choice about whether to use the state's administrative processes instead of the court system to enforce child support.

33. *See Child Support Enforcement Legislation: Hearings on H.R. 2374 Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 122, 126 (1983) [hereinafter *Hearings on H.R. 2374*] (statement of Virginia Ingle, SPLIT, Inc.) (mother treated as "not an involved party," support order reduced in half even though she was not present); *Family Welfare Reform Act: Hearings on H.R. 1720 Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 218-19 (1987) (statement of G. Diane Dodson, Special Counsel for Family Law and Policy, Women's Legal Defense Fund) (hearing officers accept fathers' self-reporting of income). For a discussion of the rights of custodial parents in administrative child support proceedings, see *Expedited Processes and Child Support Enforcement: A Delicate Balance*, in P. ROBERTS, *supra* note 13, at 65.

34. *See, e.g.*, District of Columbia v. K.L.H., 15 FAM. L. REP. 1066, 1067 (1988); Johnson v. Cohen, No. 84-6277 (E.D. Pa. Oct. 2, 1985) (Findings of Fact); Hearings on H.R. 2374, *supra* note 33, at 122 (statement of Virginia Ingle, SPLIT, Inc.). A recent pilot study found that award levels for women who had been or were on welfare were lower than for women who had

the artificially low order when it goes off welfare and rarely has the resources to initiate proceedings to get the order increased.

In addition to putting welfare mothers at risk of losing their children and saddling them with artificially low support orders, the welfare system has, until recently, denied welfare mothers basic information about the state's child support collections from their children's fathers. Because of the assignment, welfare mothers had no way of knowing whether the state was actually collecting support for their children and no way of knowing the amount or regularity of the collections. Because welfare mothers had no information about the payments being made for their children, there was nothing to prevent the state from collecting support in excess of the grant[35] and no way for the welfare mothers to know whether they would have a reliable source of income if they went off welfare.[36]

The blinders the assignment system places on welfare mothers were lifted somewhat by the 1984 requirement that states pass through to the mother the first $50 in child support collected each month.[37] If the state properly pays over the pass through moneys on a timely basis, the welfare mother at least knows whether regular support payments are being made. A few states send monthly notices with the pass through payments stating the full amount of the collection,[38] but federal law does not require monthly notice of collections until 1993.[39] Until then, the law only requires that the states provide an annual notice of total collections. Even this annual notice was not mandated until October 1985.[40] As long as recipients only receive one notice a year showing the sum of all of the collections for that year, they cannot tell whether support is being paid on a timely basis and whether the monthly support is enough for them to go off welfare.[41] Moreover, even after 1993, the law

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never been on welfare, after controlling for other predictors of award levels such as income, race, and marital status. F. SONENSTEIN & C. CALHOUN, SURVEY OF ABSENT PARENTS, PILOT RESULTS 43-44 (1988). For further discussion of the reasons for low child support orders in welfare cases, see Cassetty, *Program Conflicts and Human Considerations*, 37 PUB. WELFARE J. 33, 35-36 (1979).

35. The federal statute and regulations require the state to pay to the recipient all current support collections which exceed the monthly AFDC grant, but which do not exceed the court order, as well as all moneys collected in excess of the court order if there are no past welfare payments for which the state has not been reimbursed. 42 U.S.C.A. §§ 657(b)(3), (4) (Supp. IV 1986); Child Support Enforcement Program, 45 C.F.R. §§ 302.32(e), 302.51(b)(3), (4), (5) (1987).

36. *See, e.g.*, Bennett v. White, 671 F. Supp. 343, 349-50 (E.D. Pa. 1987), *aff'd*, 865 F.2d 1395 (3d Cir.), *cert. denied*, No. 88-1851 (U.S. July 3, 1989).

37. *See supra* note 26.

38. *See Bennett*, 671 F. Supp. at 351.

39. FSA § 104(a) (amending 42 U.S.C. § 654(5)(A)). The state is allowed to send notice only quarterly if the Secretary of Health and Human Services determines that monthly notice "would impose an unreasonable administrative burden." *Id.*

40. 42 U.S.C. § 654(5) (Supp. IV 1986) (effective Oct. 1, 1985).

41. The annual notice provision has been held constitutionally insufficient because it does not provide timely and adequate notice of support collections. Bennett v. White, 865 F.2d 1395 (3d Cir.), *cert. denied*, No. 88-1851 (U.S. July 3, 1989).

only requires notice of support collections. The notice does not have to include information about assistance payments made to the families, even though the amounts of these payments determine how much support the state may retain.[42] In effect, the government has forced all welfare recipients to participate in a state-run bank and then declined to provide a record of deposits and payments. Would this state of affairs be tolerated for any but the politically powerless?

A family's problems with the welfare child support system do not end when the family goes off welfare. By law, the assignment of support rights terminates automatically when the family goes off welfare. Federal regulations, however, allow the state to continue to collect any unpaid support obligation that accrued under the assignment as reimbursement for past welfare payments to the family.[43] Some states treat the entire amount of assistance received by the family as an unpaid support obligation collectible by the state.[44]

States pursue support arrears after a family goes off welfare even though the amount that must be paid on the arrears inevitably reduces the amount of current support available for the family.[45] A state that does nothing to enforce support while the family is on welfare can nevertheless claim a right to back support if the mother succeeds on her own in getting support enforced after she goes off welfare.[46] In fiscal year 1987, one quarter of the welfare child support caseload consisted of cases where the family was no longer receiving welfare and the state was trying to collect arrears.[47] This emphasis on

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42. One court has held that failure to provide a monthly accounting of support payments collected along with a statement of assistance rendered violates due process. *Id.*

43. 42 U.S.C. § 602(a)(26)(A) (Supp. IV 1986); Child Support Enforcement Program, 45 C.F.R. § 302.51(f) (1987). The federal regulations were apparently retroactively authorized by 42 U.S.C. § 657(c) (as amended 1977), which provided that amounts collected in excess of current support were to be distributed in accordance with § 657(b)(3). That section provides that support collected in excess of current cash assistance payments and in excess of the court order is to be retained by the state as reimbursement for past assistance to the family.

The Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9141, 101 Stat. 1330, 1330-321, amended 42 U.S.C. § 657(c) to provide that former AFDC recipients are to be treated the same as non-AFDC recipients. The statutory authority for the states' retention of arrearage payments has therefore been repealed. Nevertheless, the Secretary of Health and Human Services takes the position that the state may continue to retain arrearage payments collected after welfare benefits stop. OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP'T OF HEALTH AND HUMAN SERVICES, Action Transmittal OCSE-AT-88-3 (Apr. 8, 1988).

44. *See, e.g., Hearings on H.R. 2374, supra* note 33, at 99 (statement of Rep. Morrison); CONN. GEN. STAT. ANN. 17-83e (West 1988).

45. *See, e.g.*, CENTER ON SOCIAL WELFARE POLICY AND LAW, NO. 706, COMMENTS ON THE RELATIONSHIP OF CHILD SUPPORT ENFORCEMENT TO THE REDUCTION OF POVERTY AMONG FAMILIES ELIGIBLE FOR AFDC 3-5 (June 1988) [hereinafter COMMENTS]; *Hearings on H.R. 2374, supra* note 33, at 98 (statement of Rep. Morrison).

46. COMMENTS, *supra* note 45, at 4.

47. TWELFTH ANNUAL REPORT, *supra* note 12, at 11, table 2. In fiscal year 1987, the states made collections — defined as any payment made during the second month of the quarter, *id.* at 92 — in 10.7% of the welfare child support cases where the family was currently receiving assistance and in 10.6% of the arrears-only welfare cases where the family was no longer receiving assistance. *Id.* at 11, table 2. This suggests that the states are at least as inter-

collecting arrears was further exacerbated by a 1986 amendment that specifically prohibits state courts or administrative support officers from modifying arrears; judges and administrative support officers therefore no longer have the option of eliminating the arrears owed to the state in order to maximize current payments to the family.[48]

Federal law does provide that families who go off welfare are entitled to all of the current support which is collected. However, the states do not necessarily comply with the law. Plaintiffs in a case in Pennsylvania proved that in one sample of seventy-eight cases the state took an average of five and a half months to reassign the current support to the former recipient.[49] Instead of paying the support promptly to former recipients, the state continued to collect and keep the support payments that were owed to them in seventy-six of the seventy-eight cases. In three of the cases, the state never paid any of the support to the former recipients. In the remaining seventy-three cases, the state took an average of over ten months to refund the illegally collected support to the former recipient.[50] These delays in payment inevitably caused severe hardship. For example, one of the named plaintiffs was forced to reapply for welfare because she did not have access to the child support payments which were her only other means of support for her children.[51] Even when the state finally got around to making refunds of the payments it was not entitled to collect, it refunded less than it owed in forty-six of the seventy-eight cases in the sample. The state illegally kept an average of $195.57; in one case, the state failed to refund $1746.60.[52] In effect, the state was appropriating former welfare recipients' child support.

Despite these problems with the welfare child support system, some welfare mothers do in fact benefit from state child support enforcement efforts. For some mothers, having a support order established while they are on welfare helps to assure a small supplemental income when they go off welfare. This is especially true for welfare mothers who lose benefits because their earnings put them slightly over welfare eligibility levels; in states where benefit

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ested in collecting arrears payable to the state as they are in collecting child support to get families off welfare.

48. 42 U.S.C. § 666(a)(9) (Supp. IV 1986). The provision prohibiting the retroactive modification of arrears was added primarily to prevent a court in a father's home state from wiping out arrears owed on behalf of children in another state. H.R. REP. No. 1012, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3868, 3917-18; 132 CONG. REC. E1561 (daily ed. May 7, 1986) (statement of Rep. Kennelly). Apparently, no thought was given to the competition between arrears owed to the state and the current needs of the family. The goal of preventing fathers from escaping payment on arrears could have been accomplished without reducing funds available for the family's current needs if the legislation allowed courts to forgive arrears if requested to do so by a mother who was not receiving welfare, including a former welfare recipient.

49. Bennett v. White, 671 F. Supp. 343, 345-46 (E.D. Pa. 1987), *aff'd*, 865 F.2d 1395 (3d Cir. 1989), *cert. denied*, No. 88-1851 (U.S. July 3, 1989).

50. *Id.* at 346.

51. *Id.* at 346-47.

52. *Id.* at 348-49.

levels are low and where very low earnings make a family ineligible, even very small support payments are critical. Legal establishment of paternity can also be extremely helpful in obtaining social security survivor's benefits for children.[53] In addition, the small percentage of welfare mothers for whom child support is collected now benefit from the $50 pass through of current monthly support payments, although the balance of the support payments, including all payments made on arrears, are kept by the state.[54]

These benefits from the welfare child support system accrue in spite of the dual nature of the system, not because of it. Welfare mothers, like nonwelfare mothers, would benefit from publicly subsidized child support enforcement services even if these services were optional.

The problems with the welfare child support system, however, are the foreseeable results of a system which is compulsory and in which all rights to support payments are assigned to the state. Because the welfare child support system is compulsory, mothers must participate whether or not their families will benefit and even if their families will be harmed. Even though the system theoretically provides for exemptions for good cause,[55] it is inevitable that such exemptions will be narrowly construed in a system which is designed as compulsory and universal. The required assignment of support rights and state retention of all but $50 per month in support necessarily means that mothers and their children will not enjoy the benefit of most of the support that is collected. Similarly, the state's claims to arrearages owed to the family before it began receiving assistance and to arrearages that accrue while the family is on welfare unavoidably puts state interests in conflict with the interests of former recipients. And the mandatory assignment also predictably results in the state's retention of support payments which the state was legally obligated to distribute to present and former recipients. The state's illegal retention of these funds may be inadvertent, but it is the foreseeable consequence of a system where the state controls the support payments as they are collected.

53. No studies have been done to determine the numbers of children who qualify for social security survivor's benefits because paternity was legally established, either through the welfare child support system or through the voluntary system.

54. The Department of Health and Human Services estimates that 13.2% of welfare families received any pass through payments in 1985. HOUSE COMM. ON WAYS & MEANS, 99TH CONG., 2D SESS., BACKGROUND MATERIAL & DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS & MEANS 415, table 1 (Comm. Print 1986). However, not all families received the full $50, and not all families received pass through payments each month. During fiscal year 1987, support collections were made in only 10.7% of the welfare child support cases. TWELFTH ANNUAL REPORT, *supra* note 12, at 11, table 2. The percentage of welfare child support cases in which a collection is made each month is even lower than 10.7. Some welfare families have more than one child support case (there is more than one absent parent); the percentage of welfare child support cases in which a collection was made is therefore slightly lower than the percentage of welfare families receiving the pass through.

55. *See supra* notes 11-13 and accompanying text.

II.
THE DEVELOPMENT OF THE WELFARE CHILD SUPPORT SYSTEM

Dual systems of family law are not new.[56] As Professor Jacobus ten-Broek wrote almost twenty-five years ago: "Family law in California is not single, uniform, and equal as to all families whatever their status, condition, or wealth. On the contrary, it is dual and distinguishes among families on the basis of poverty."[57] After describing the origins of the dual system in the Elizabethan Poor Law and its present day features, Professor tenBroek concluded that the primary motive for the dual system was financial:

> Today . . . no less than in Elizabethan England, the family law of the poor derives its particular content and special nature from the central concept of the poor law system: public provision for the care and support of the poor. He who pays the bill can attach conditions, related or unrelated to the purpose of the grant, and almost always does. He will wish to make certain that his payments are needed, and he will insist that the family first use all of its own resources. The whole intricate system of the family law of the poor, the source of its difference from the civil family law, and the basis of its perpetuity proceed from this wish and this insistence . . . . [A]ll of . . . [the] basic and determinative elements of the family law of the poor emanate from the public assumption of responsibility and the need to keep the bill down. The basic motive, thus, once the original step is taken, is fiscal and economic: to conserve public funds to the fullest extent possible consistent with the original undertaking.[58]

A. Keeping the Bill Down

The desire "to keep the bill down" has continued to govern the dual system of family law ever since the Elizabethan Poor Law. It is therefore hardly surprising that the welfare child support system is compulsory rather than voluntary and that collections benefit the state rather than the child. However, the essential features of the current welfare child support system — assignment of rights and compulsory participation — were not enacted until 1975, when Title IV-D was added to the Social Security Act.[59]

Children for whom an absent father was a potential source of support were not a major issue when the federal Aid to Dependent Children (ADC)[60] program was created as part of the Social Security Act in 1935. The ADC

56. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, (pts. 1, 2 & 3), 16 STAN. L. REV. 257, 900 (1964), 17 STAN. L. REV. 614 (1965).

57. tenBroek, *supra* note 56, 16 STAN L. REV. at 978.

58. tenBroek, *supra* note 56, 17 STAN. L. REV. at 676.

59. Pub. L. No. 93-647, 88 Stat. 2351 (1975) (codified as amended at 42 U.S.C. §§ 651-667 (Supp. IV 1986)).

60. Social Security Act of 1935, Pub. L. No. 74-271, ch. 531, tit. IV, § 401, 49 Stat. 627 (codified as amended at 42 U.S.C. §§ 601-617).

program was slipped into the Social Security Act to provide grants-in-aid to state pension programs for mothers which had run out of money as a result of the Depression. Those programs were rigorously restricted to the worthy — that is, to white widows with children. Although the statutory definition of dependent children in the Social Security Act included children of divorced, separated, and never-married mothers as well as the children of widows, the ADC program was only intended to help those widows with young children who were covered by the existing state pension programs for mothers.[61] Because the children's fathers were dead, child support was not an issue.

In 1939, the Social Security insurance program was extended to cover surviving dependents as beneficiaries;[62] widows and children of insured workers were now entitled to Social Security benefits and therefore less likely to be eligible for ADC. Many local welfare administrators, however, continued to operate ADC as a program for the "worthy." Children were disqualified because their homes were not "suitable" (birth of an illegitimate child was considered evidence of unsuitability), because their mothers were employable (black women were considered able to do field work or domestic work regardless of the ages of their children), and because the mother had a relationship with a man who was "acting in the role of a spouse" so that the children had a "substitute parent."[63] Most of these restrictions were fully consistent with the congressional discussions of the proposed ADC program which had made it clear that participating states could consider a mother's "moral character" in determining eligibility.[64] The result was to restrict the coverage of black mothers and mothers of illegitimate children.[65]

Beginning in the 1960s, the Department of Health, Education, and Welfare was pressured into prohibiting the states from denying assistance to children on the basis of an "unsuitable home," and the Supreme Court struck down state rules that excluded children who otherwise met federal eligibility criteria.[66] In addition, Congress extended welfare eligibility to the mothers of dependent children, and the program was renamed "Aid to *Families* with Dependent Children" (AFDC) to reflect the expanded coverage.[67] The proportion of the population receiving AFDC benefits jumped from 1.7% in 1960 to 5.2% in 1972.[68]

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61. *See* M. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 237 (1986); W. BELL, AID TO DEPENDENT CHILDREN 3-19 (1965); King v. Smith, 392 U.S. 309, 320-21 (1968).

62. 42 U.S.C. § 402 (1982).

63. W. BELL, *supra* note 61, at 20-92.

64. *See King*, 392 U.S. at 321.

65. *See* W. BELL, *supra* note 61, at 20-136; *King*, 392 U.S. at 313-22.

66. W. BELL, *supra* note 61, at 29-147, 184-86; *King*, 392 U.S. at 321-23; Townsend v. Swank, 404 U.S. 282 (1971).

67. 42 U.S.C. §§ 601, 606(b) (1982).

68. SENATE FINANCE COMMITTEE, 94TH CONG., 1ST SESS., CHILD SUPPORT DATA AND MATERIALS: BACKGROUND INFORMATION PREPARED BY THE STAFF FOR THE USE OF THE COMMITTEE ON FINANCE, 159 (Comm. Print 1975).

At the same time, the number of children in mother-only homes was increasing dramatically. From 1960 to 1970, the proportion of mother-only families grew by 37% for both blacks and whites.[69] The increase in mother-only families, coupled with the official prohibition against excluding children who met federal criteria, resulted in a tremendous expansion of welfare payments to homes in which the father was absent. Mother-only welfare families in which the father was still living increased from 66.7% of the total welfare caseload in 1961 to 76.2% in 1971 and to 80.2% in 1973. In most of these families, the parents were either separated or divorced, but by 1973, the percentage of families receiving benefits where the mother had never been married to the father had increased to 33.7%.[70]

The expansion of the welfare rolls and the increase in the numbers of deserted and never-married mothers generated widespread concern in the late 1960s and early 1970s.[71] But since it was no longer politically acceptable to limit eligibility based on the perceived moral worth of single mothers, Congress turned its attention to the fathers of welfare children: the welfare problem would be solved by making fathers pay.[72]

B. Making Fathers Pay

The notion of trying to make fathers of welfare children pay child support was not entirely new. As early as 1952, the Notice to Law Enforcement Officials (NOLEO) amendments required state welfare officials to notify law enforcement officials whenever welfare was granted for a child who had been deserted or abandoned by a parent.[73] The NOLEO amendments assumed that once they were notified, local law enforcement officials would initiate criminal actions for paternity and nonsupport. Although Professor tenBroek reported that under NOLEO California had greatly expanded its paternity and child support enforcement efforts,[74] Congress and most other observers eventually concluded that the NOLEO program was not effective.[75]

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69. I. GARFINKEL & S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA 49 (1986). Most of the increase for whites is attributable to an increase in the divorce rate and a decline in the rate of remarriage, although there was also some increase in child-bearing among women who were never married. Among blacks, most of the increase in mother-only families after 1960 is attributable to a decline in the marriage rate. The rate of births to unmarried black women peaked in the early 1960s and then declined. The proportion of mother-only families increased, however, because fewer black women were getting married. For both whites and blacks, the growth in single parenthood is thus due to changes in marital behavior. Whites marry and increasingly divorce, while blacks are increasingly less likely to marry at all. *Id.* at 51-54.

70. S. REP. NO. 1356, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8146 [hereinafter 1974 SENATE REPORT].

71. *Id.* at 8148; *see also* Remarks of Rep. Wilbur Mills *infra* note 78.

72. *See* 1974 SENATE REPORT, *supra* note 70, at 8145-50.

73. Social Security Amendments of 1950, ch. 809, § 321(b), 64 Stat. 549 (1950).

74. tenBroek, *supra* note 56, 17 STAN. L. REV. at 659.

75. For a history of the NOLEO provision, see Howard, *Relative Responsibility in AFDC: Problems Raised by the NOLEO Approach — "If at First You Don't Succeed . . . ,"* 9 URB. L. ANN. 203 (1975).

By 1967, Congress had decided that the state welfare agencies themselves should be made responsible for child support enforcement as a condition of receiving federal funding for welfare expenditures.[76] Beginning in 1969, state welfare agencies were required to develop and implement a program for establishing paternity and collecting support.[77] Although some states responded by cutting off welfare benefits where the mother refused to cooperate in efforts to establish paternity and get support from the father, these sanctions were uniformly struck down by the courts on the ground that the federal statute did not specifically authorize the states to punish children for their mothers' failure to cooperate with paternity and support requirements.[78] With or without sanctions, most states did little to try to collect support. The Department of Health, Education, and Welfare gave the child support program low priority and did not even monitor the states' activities.[79]

As the welfare rolls grew in the early 1970s, the pressure for more vigorous child support enforcement continued to mount.[80] There were, however, virtually no data on whether fathers could be made to pay enough support to reduce welfare costs. In 1974, the Senate Finance Committee's report on the Senate's child support enforcement proposal relied heavily on a 1971 Rand Corporation study titled *Nonsupport of Legitimate Children by Affluent Fathers as a Cause of Poverty and Welfare Dependence.*[81] As its title suggests, the Rand study claimed that there were many well-off doctors and lawyers whose wives and children were forced onto welfare because of a lack of child support. The Rand study did not even purport to deal with the potential for support collections from poor fathers or from the fathers of illegitimate children who were prompting increasing congressional concern. Nevertheless, on the basis of the Rand study and almost no other data, Congress concluded that financial

76. *See* Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821.

77. *Id.* The amendments also provided federal funding for states to reimburse law enforcement departments for child support and paternity activity. *See* S. REP. No. 744, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2834, 2997-3000.

78. *See, e.g.*, Shirley v. Lavine, 365 F. Supp. 818 (N.D.N.Y. 1973), *aff'd sub nom.*, Lascaris v. Shirley, 420 U.S. 730 (1975); Doe v. Flowers, 364 F. Supp. 953 (N.D. W. Va. 1973), *aff'd mem.*, 416 U.S. 922 (1974); Taylor v. Martin, 330 F. Supp. 85 (N.D. Cal.), *aff'd mem. sub nom.*, Carleson v. Taylor, 404 U.S. 980 (1971); Meyers v. Juras, 327 F. Supp. 759 (D. Or.), *aff'd mem.*, 404 U.S. 803 (1971). Some of the courts relied on the remarks of Representative Wilbur Mills made prior to the enactment of the 1967 amendments:

> Are you satisfied with the fact that illegitimacy in this country is rising and rising and rising? I am not. We have tried to encourage the States to develop programs to do something about it. We are not going to take a child off the rolls in any State nor fail to participate with Federal funds in the care of the child, regardless of what the parent does.

Remarks of Rep. Wilbur Mills, 113 CONG. REC. 23053 (1967), *quoted in* Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970).

79. 1974 SENATE REPORT, *supra* note 70, at 8146-48.

80. *Id.* at 8145-47.

81. *Id.* at 8146-48 (citing M. WINSTON & T. FORSHER, NONSUPPORT OF LEGITIMATE CHILDREN BY AFFLUENT FATHERS AS A CAUSE OF POVERTY AND WELFARE DEPENDENCE (1971)).

responsibility for welfare children could be transferred from government to the children's fathers.

In the words of Senator Long, chair of the Senate Finance Committee and the leading sponsor of the Senate's child support proposal:

> Should our welfare system be made to support the children whose father cavalierly abandons them — or chooses not to marry the mother in the first place? Is it fair to ask the American taxpayer — who works hard to support his own family and to carry his own burden — to carry the burden of the deserting father as well? Perhaps we cannot stop the father from abandoning his children, but we can certainly improve the system by obtaining child support from him and thereby place the burden of caring for his children on his own shoulders where it belongs. We can — and we must — take the financial reward out of desertions.[82]

Even if fathers can be made to pay, collecting child support cannot significantly reduce welfare costs unless the costs of collecting support are substantially less than the amount collected. In the early 1970s, the only information available on the cost of collecting support was a survey of twenty states conducted by the Senate Finance Committee asking about the amount of support collected for welfare recipients.[83] Not all of the states kept track of administrative costs, but those that did report on their administrative costs told the Committee that they collected $5 in support for every dollar in collection costs.[84]

Lacking better data, Congress enacted the basic outlines of the present welfare child support system in 1975.[85] In order to make sure that all welfare families were subjected to the support requirements, the new program mandated the present system of requiring all recipients to assign their support rights to the state for collection.[86] In order to make sure that the states ac-

82. 118 CONG. REC. 8291 (1972) (statement of Sen. Long). For other statements that the program would reduce the cost of welfare, see 1974 SENATE REPORT, *supra* note 70, at 8145-48; 120 CONG. REC. S21,733 (daily ed. Dec. 17, 1974) (statement of Sen. Long); 120 CONG. REC. S22,523 (daily ed. Dec. 20, 1974) (statement of Sen. Long); 121 CONG. REC. S14,806 (daily ed. Aug. 1, 1975) (statement of Sen. Nunn concerning amendments).

83. *See* 1974 SENATE REPORT, *supra* note 70.

84. *Id.* at 8149. The Senate Report says that reporting states "indicated that in general about twenty cents in collection costs resulted in a dollar return of support payments." *Id.* No data supporting this return on collections are provided.

85. Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337.

86. 1974 SENATE REPORT, *supra* note 70, at 8152. Some supporters of the legislation claimed that the mandatory assignment had a benign purpose: to protect a mother from retaliatory action or harassment by an absent parent. *See, e.g.*, 120 CONG. REC. H12,590 (daily ed. Dec. 20, 1974) (statement of Rep. Ullman); 120 CONG. REC. S21,734 (daily ed. Dec. 17, 1974) (statement of Sen. Long). Although the assignment does permit the mother to disclaim responsibility for the support action, it hardly protects her from retaliation or harassment. *See supra* text accompanying notes 29-32. The 1974 Senate Report says that the mandatory assignment was intended to make the collection of child support "effective and systematic." 1974 SENATE REPORT, *supra* note 70, at 8174.

tively pursued support enforcement, the 1975 law created a system of financial incentives for the states together with a program of federal monitoring.[87]

According to the Senate Finance Committee, the new program would reduce welfare costs by the following year. The Committee predicted that it would cost the federal government forty million dollars in the first year, but after that, the program would generate savings.[88] These predictions have not been borne out.

III.
IS THE WELFARE CHILD SUPPORT SYSTEM COST EFFECTIVE?

The tax savings that Congress predicted when the child support program was enacted have not been realized. In fact, the program has cost the federal government millions of dollars every year since it was instituted. For example, in fiscal year 1987, the federal government spent $337.2 million more on the child support enforcement program than it recovered in collections for welfare families.[89]

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87. 42 U.S.C. § 603(h) (as amended 1974) (up to 5% reduction in federal payment for AFDC expenditures for noncompliance with child support enforcement requirements), § 652 (federal monitoring duties), § 653 (parent locater service), § 654 (state child support plan requirements), § 655 (payment for administrative expenses), § 657 (state retention of state share of AFDC payments), § 658 (incentive payments to states and localities).

88. 1974 SENATE REPORT, *supra* note 70, at 8159. According to the Senate Finance Committee Report, the direct welfare savings from child support collections constituted only part of the anticipated benefits from child support enforcement. "[M]ore importantly," wrote the Committee, "as an effective [child] support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup." *Id.* at 8146. It seems unlikely that the Committee members seriously believed that the child support enforcement system would foster family stability. Senator Long had certainly expressed doubts on that point. He seems to have thought that the program would at least punish the deserter even if it did not deter desertion. *See supra* text accompanying note 82.

89. TWELFTH ANNUAL REPORT, *supra* note 12, at 26, table 17 (Federal Share of Savings), 57, table 47 (Costs and Staff Associated with the Office of Child Support Enforcement). The Department of Health and Human Services reports that the federal child support deficit amounts to $327.4 million. *Id.* at 10, table 1; 26, table 17. This figure reflects only the deficit resulting from federal payments to the states and does not include the costs of the federal Office of Child Support Enforcement (OCSE), which were reported as $9.8 million in 1987. *Id.* at 57, table 47. The deficit resulting from federal payments to the states ($327.4 million) and the federal OCSE expenditures ($9.8 million) totals $337.2 million.

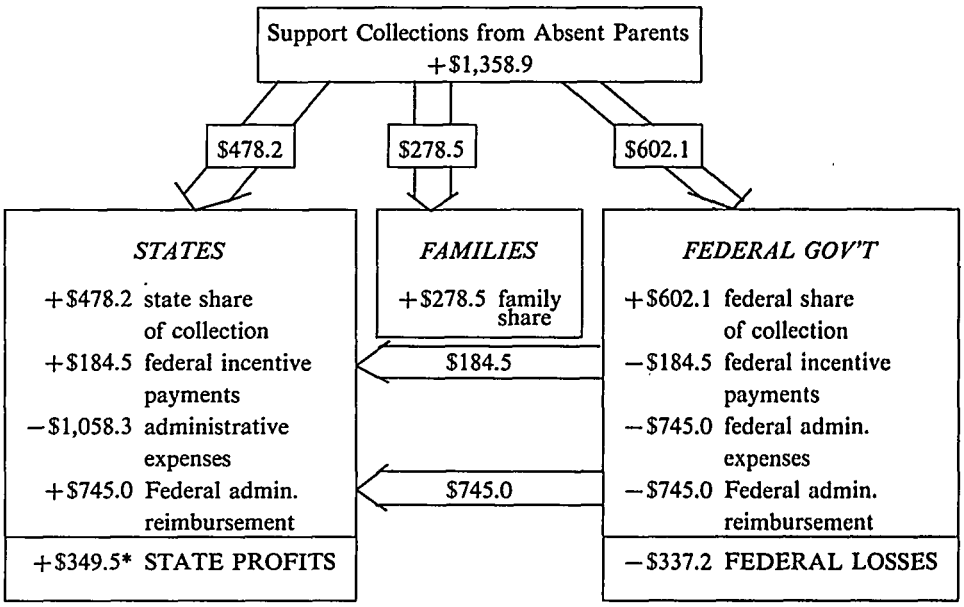
The $337.2 million federal child support deficit for 1987 represents an increase of $52.8 million over fiscal year 1986 when the federal child support deficit resulting from federal payments to the states amounted to $263.2 million, U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, ELEVENTH ANNUAL REPORT TO CONGRESS FOR THE PERIOD ENDING SEPTEMBER 30, 1986, at 23, table 14 (Federal Share of Savings) [hereinafter ELEVENTH ANNUAL REPORT], plus the costs of the federal Office of Child Support Enforcement of $21.3 million, *id.* at 53, table 44, for a total federal child support deficit of $284.5 million.

Federal reports show the costs of the federal Office of Child Support Enforcement as dropping from $21.3 million in fiscal year 1986, ELEVENTH ANNUAL REPORT, *supra*, at 53, table 44, to $9.8 million in fiscal year 1987. TWELFTH ANNUAL REPORT, *supra* note 12, at 57, table 47. This drop apparently occurred primarily because certain federal child support costs which had been charged to OCSE were attributed to other Family Support Administration functions

How is the federal government losing money in a program that was enacted to save federal dollars? Figure 1 tells the story.

In fiscal year 1987, welfare child support collections totalled $1,358.9 million.[90] As shown in Figure 1, $278.5 million of these collections were distributed to welfare families.[91] The remainder was split between the state and federal governments, with each state's share based on the state's percentage share of AFDC payments in the state.[92] The states kept $478.2 million, or 44% of the support collections remaining after the $278.5 million was distributed to the families.[93] The other 56%, or $602.1 million, comprised the "fed-

FIGURE 1: STATE PROFITS AND FEDERAL LOSSES FROM WELFARE CHILD SUPPORT COLLECTIONS



* Numbers do not sum because of rounding.
All amounts in millions, fiscal year 1987.

Source: Dep't of Health and Human Services, Office of Child Support Enforcement, 2 Twelfth Annual Report of Congress for the Period Ending September 30, 1987, tables 1, 47 (1987).

in 1987. *See id.* Were it not for this accounting change, the federal child support deficit would be even higher for fiscal year 1987 and would represent an even larger increase over fiscal year 1986.

90. TWELFTH ANNUAL REPORT, *supra* note 12, at 10, table 1.

91. *Id.* Of the amounts distributed to families, $252 million were pass through payments. *See infra* note 98. The rest consisted of excess support collections. *See supra* note 35.

92. *See* 42 U.S.C. § 657 (b)(2) (1982). The state's share of the AFDC payment varies from state to state. Separate percentages are computed for each state for the AFDC program, 42 U.S.C. § 1301(a)(8)(1982), and for the medical assistance program. 42 U.S.C. § 1301(a)(8)(1982). States may claim federal matching funds at the medical assistance rate if it is higher. 42 U.S.C. § 1318 (1982). For the current AFDC and medical assistance percentages, see 52 Fed. Reg. 41,506 (Oct. 28, 1987).

93. TWELFTH ANNUAL REPORT, *supra* note 12, at 10, table 1.

eral share" of the collection.[94] The federal share was reduced, however, by federal incentive payments of $184.5 million, paid to the states to encourage the states to put resources into the child support program.[95] In addition to the incentive payments, the federal government also spent $745.0 million to reimburse the states for a majority of their administrative costs for operating their child support programs.[96] Finally, the federal government spent $9.8 million on federal administrative costs.[97] The result, as Figure 1 shows, was a net loss

94. Federal reports show the federal government's share of the collection as $417.6 million, *id.* at 10, table 1, because the federal incentive payment, discussed *infra* note 95, has already been deducted.

95. TWELFTH ANNUAL REPORT *supra* note 12, at 10, table 1. Originally, states received incentive payments equal to 25% of support collected in welfare cases within twelve months of the date collection was due, and 10% of the amounts collected more than twelve months after the collection had been due. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101 (a), 88 Stat. 2357. Over the years, Congress has tinkered with the incentive formula. *See* Tax Reduction Act of 1977, Pub. L. No. 95-30, § 503(a)(1), 91 Stat. 162 (15% of all welfare support collections); Tax Equity and Fiscal Responsibility Act (TEFRA), Pub. L. No. 97-248, § 174(c) (1982) (12% of all welfare support collections).

The current system was adopted as part of the Child Support Enforcement Amendments of 1984, which were designed to encourage and reward states for enforcing child support obligations owed to nonwelfare mothers. 42 U.S.C. § 651 (Supp. IV 1986). Under the revised incentive system, the federal government pays states a bonus of 6% to 10% of their welfare support collections plus 6% to 10% of their nonwelfare support collections. The percentage depends on the state's cost effectiveness ratio for child support collection. *Id.* § 658(b), (c) (Supp. IV 1986). The cost effectiveness ratio for welfare collections is the ratio of total welfare collections to administrative costs; the cost effectiveness ratio for nonwelfare collections is the ratio of nonwelfare collections to total administrative costs. *Id.* § 658(c) (Supp. IV 1986). The current system also has various floors, caps, and phase-in provisions to ensure that the incentive payments made to states do not vary greatly from those made under the former system. In particular, the incentive for nonwelfare collections cannot be more than a certain percentage of the incentive for welfare collections, consequently the states will not focus on nonwelfare collections. *Id.* § 658(b)(3) (Supp. IV 1986).

The Secretary of the Department of Health and Human Services does not report how much of the incentive payments are attributable to nonwelfare collections, but the relationship between welfare support collections and incentive payments has remained the same despite the new system. In 1984, before the new system went into effect, incentive payments equalled 13.4% of welfare child support collections. In 1987, under the new formula, incentive payments equalled 13.6% of welfare child support collections. TWELFTH ANNUAL REPORT, *supra* note 12, at 10, table 1. These numbers are consistent with predictions by the General Accounting Office that the change in the incentive system would have little effect on the incentive payments to the states. U.S. GEN. ACCT. OFF., U.S. CHILD SUPPORT: NEEDED EFFORTS UNDERWAY TO INCREASE COLLECTIONS FROM ABSENT PARENTS, GAO/HRD-85-5, 16-17 (Oct. 30, 1984).

Because the AFDC child support collections continue to drive the incentive system, attributing federal expenditures for incentives to AFDC collections continues to be appropriate.

96. TWELFTH ANNUAL REPORT, *supra* note 12, at 10, table 1. When the program was enacted, the federal government paid 75% of the states' administrative costs. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101 (a), 88 Stat. 2355. In an effort to control costs, the federal share of state administrative costs was reduced to 70% in January 1983, and will be further reduced to 68% for fiscal years 1988 and 1989, and finally to 66%. TEFRA § 174(a), (d); 42 U.S.C. § 655(a)(2) (Supp. IV 1986). Costs of automatic data processing systems are reimbursed at the rate of 90% in the hope of encouraging the states to computerize their systems. 42 U.S.C. § 655(a)(1)(B) (Supp. IV 1986).

97. TWELFTH ANNUAL REPORT, *supra* note 12, at 57, table 47.

to the federal government of $337.2 million.[98]

Meanwhile, the states are making money. In fiscal year 1987, the states made $349.5 million in profits on child support collections.[99] The states realized these profits, despite collection costs of $1,058.3 million,[100] because of the

98. Part of the current federal child support deficit is attributable to the "pass through" to welfare mothers of the first $50 paid in support each month. *See* note 25 and accompanying text. But even without the pass through, the federal child support deficit would have been at least $196.8 million. Of the $278.5 million distributed to AFDC families in fiscal year 1987, $252 million were pass through payments. TWELFTH ANNUAL REPORT, *supra* note 12, at 13.

If the pass through payments had been kept by the states and the federal government to reimburse them for the cost of welfare payments, the federal government would have saved about 55.7% of $252 million or $140.4 million. (The 55.7% is the federal share of all child support collections in fiscal year 1987. *See supra* text accompanying note 94). Thus, the federal child support deficit without the pass through would have been $196.8 million ($337.2 million minus $140.4 million equals $196.8 million).

Calculating the deficit without the pass through assumes that the establishment of a pass through has not increased collections. Presumably, both the interest of welfare mothers in getting up to $50 per month more and the interest of fathers in seeing their children benefit from their support payments have operated to increase collections. Welfare child support collections were $358.8 million higher in 1987 than they were in 1984, before the pass through provision went into effect. TWELFTH ANNUAL REPORT, *supra* note 12, at 10, table 1. However, this increase in collections is not necessarily attributable to the pass through. The AFDC child support caseload increased from 6.1 million to 7.6 million during the same period. *Id.* at 11, table 2. In addition to the growth in caseload, some of the increase in collections is attributable to the income tax refund intercept program. *See infra* note 148.

If the pass through provision did promote collections, then the federal child support deficit without the pass through would have been more than $196.8 million. The federal child support deficit for 1984, the last year before the pass through, was $125.6 million, including OCSE costs. TWELFTH ANNUAL REPORT, *supra* note 12, at 23, table 14; DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, NINTH ANNUAL REPORT TO CONGRESS FOR THE PERIOD ENDING SEPTEMBER 30, 1984 at 2.

99. TWELFTH ANNUAL REPORT, *supra* note 12, at 10, table 1. In fiscal year 1987, state profits of $349.5 million exceeded the reported federal child support deficit of $337.2 million. The federal child support deficit is somewhat understated because it omits some federal child support expenditures. Thus, in fiscal year 1987, when more of the federal expenditures were included, the state and federal governments combined lost $9.8 million. *See supra* note 89.

Reported state expenditures are also understated, because the figures do not reflect state expenditures for judges, including expenditures for office-related costs and support staffs incurred by judges. The states do not report these expenditures because they are not reimbursed by the federal government. 45 C.F.R. § 304.21(b) (1987).

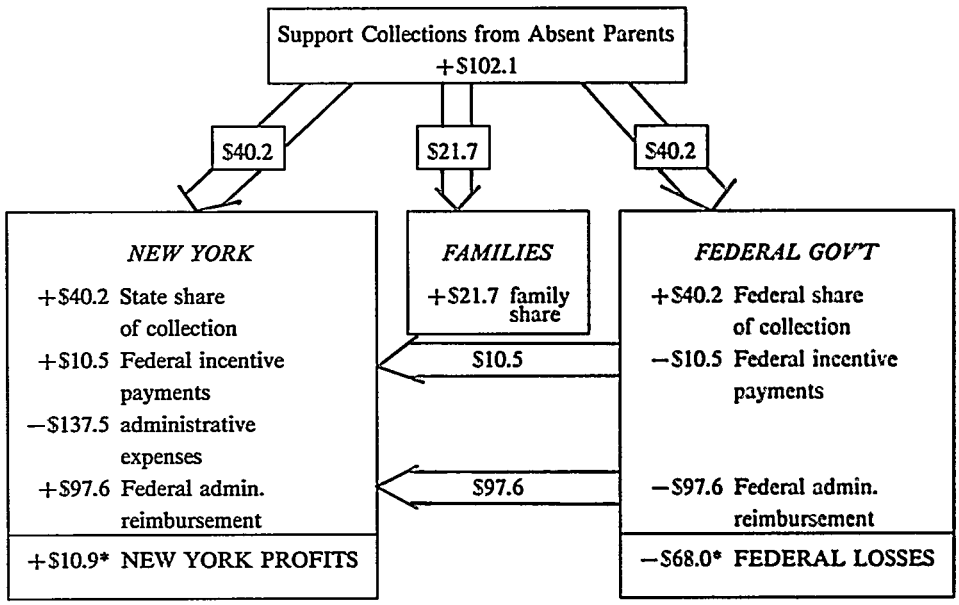
Even though the federal reports underreport state and federal expenditures, there is no doubt that the states benefit from the welfare child support program by retaining most of the child support payments which are made by the fathers of welfare children in addition to receiving substantial payments of federal tax dollars.

100. TWELFTH ANNUAL REPORT, *supra* note 12, at 28, table 19. The child support program provides services to nonwelfare mothers as well as to welfare mothers. *See infra* note 112. Some of the total administrative costs are therefore attributable to expenditures for services to nonwelfare mothers. The expenditures for nonwelfare child support services do not result in any cost savings to the government although they may produce "cost avoidance." *See infra* note 112. In 1986, the Department of Health and Human Services for the first time reported on how the states allocated expenditures between welfare and nonwelfare clients. ELEVENTH ANNUAL REPORT, *supra* note 89, at 30, table 21. The allocation is not reliable, however, because the states are not required to account for welfare and nonwelfare expenditures separately. Also, some of the data as reported by the states are inconsistent — total expenditures on one form do

federal incentive payments of $184.5 million and the federal payment of $745.0 million to reimburse most of the states' administrative expenses.

The bottom line for states is that they can make money even if their programs are not cost effective. For example, as shown in Figure 2, the state of New York collected $102.1 million in welfare support cases in 1987 and had total expenditures of $137.5 million. New York State was allowed to keep $40.2 million of the collections as reimbursement for the state's share of welfare expenditures.[101] In addition, the federal government paid New York in-

FIGURE 2: NEW YORK PROFITS AND FEDERAL LOSSES FOR NEW YORK FROM WELFARE CHILD CARE SUPPORT COLLECTION



* Numbers do not sum because of rounding.
All amounts in millions, fiscal year 1987.

Source: Dep't of Health and Human Services, Office of Child Support Enforcement, 2 Twelfth Annual Report to Congress for the Period Ending September 30, 1987, tables 7, 9, 10, 11, 12, 17, 18, 19, 20 (1987).

not match total expenditures on another form. *Id.*; *see also* TWELFTH ANNUAL REPORT, *supra* note 12, at 32, table 23.

Because the Department of Health and Human Services does not accurately identify nonwelfare child support expenditures, it is not possible to determine how much of the states' administrative expenditures or how much of the federal child support deficit is attributable to nonwelfare expenditures. The federal budget treats all federal expenditures for the child support program, including expenditures for child support services to nonwelfare mothers, as welfare expenditures. *See, e.g.*, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1989, 5-120, 5-128 to 5-129 (1988). Thus, to the public, all of the federal child support deficit is a welfare expenditure.

101. TWELFTH ANNUAL REPORT, *supra* note 12, at 16, table 7, at 28, table 19, at 19, table 10.

centive payments estimated at $10.5 million, plus $97.6 million as reimbursement for the state's administrative expenses.[102] New York therefore had a profit of $10.9 million while the federal government lost $68.0 million.[103]

States with more cost effective programs make even higher profits. California, which spent $156.5 million to collect $202.5 million, made a profit of $60.8 million.[104] The federal child support deficit for California was $47.7 million.[105]

These profits are "free money" for the states; they are over and above what the states spend for their child support enforcement bureaucracies. The states do not have to put the money back into their welfare programs and are not even required to use the child support profits to improve child support services. The state revenue implications of the child support system are, of course, not lost on the states. A recent publication by the National Conference of State Legislatures touts the child support program as a way of raising unrestricted general funds for the states.[106] In Philadelphia, Pennsylvania, where the court provides child support services under a cooperative agreement with the state, over $5 million in child support profits were earmarked for a new criminal court and lock-up facility.[107]

Lacking evidence that the welfare child support program saves welfare dollars directly, some supporters of the program have argued that it indirectly produces welfare savings because the support collections make families ineligible for welfare.[108] These claimed indirect savings are called "cost avoidance" as opposed to cost savings.

There are, however, no data on the the extent to which the welfare child support program avoids welfare costs by collecting enough support to make welfare families ineligible for benefits. The Department of Health and Human Services reports that of the welfare cases which closed in 1987 nationwide, less than 190,000 had a single support payment recorded during the quarter in

102. *Id.* at 20, table 11, at 29, table 20.

103. *Id.* at 27, table 18, at 26, table 17.

104. *Id.* at 28, table 19, at 13, table 4, at 27, table 18.

105. *Id.* at 26, table 17.

106. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE BUDGET IMPLICATIONS: CHILD SUPPORT ENFORCEMENT at vii (1988) ("Federal incentive money and the state share of collections on behalf of AFDC recipients can be used in any way the state chooses.").

107. COURT OPERATIONS COMMITTEE OF THE FAMILY LAW SECTION OF THE PHILADELPHIA BAR ASSOCIATION, REPORT ON THE IV-D PROGRAM IN PHILADELPHIA 25-28 (1988). The funds were paid by the state to the Philadelphia County Court for child support services. The court turned over the $5 million to the City of Philadelphia for the criminal court and lock-up. The City of Philadelphia also retains all interest on the federal incentive payments and reimbursements for administrative expenditures which Pennsylvania passes on to the City for child support functions. The interest, which is estimated at $500,000 to $1 million per year, is also not earmarked for child support functions. *Id.* at 28-29.

108. *See, e.g., Potential Inequities Affecting Women, Part 2: Hearings Before the Senate Comm. on Finance on S. 19 and S. 888*, 98th Cong., 1st Sess. 152 (1983) (statement of Michael E. Barber, California District Attorneys Family Support Council) [hereinafter *Potential Inequities*].

which the case was closed.[109] These cases amount to a small fraction of the 3.7 million families on welfare.[110] In all likelihood, many of the cases were closed for reasons not connected to the fathers' payment of support.[111] And because many of the families who do go off welfare because of support payments are unable to stay off for very long, the total welfare savings from those who go off are not very great.[112]

The welfare child support program neither saves welfare dollars nor avoids welfare costs. The program's major beneficiaries are the state and local child support enforcement administrators and state and local discretionary funds. The major losers are poor mothers and children whose child support payments maintain the state's child support welfare bureaucracy instead of the families for whom the payments are made.

IV.
JUSTIFYING THE WELFARE CHILD SUPPORT SYSTEM: THE FAMILY SUPPORT ACT OF 1988

Why has the welfare child support system persisted despite the experience of the past ten years? First, there seems to be a deeply ingrained belief that welfare support collection efforts can be made cost effective if collection tech-

109. TWELFTH ANNUAL REPORT, *supra* note 12, at 52, table 42, 93.

110. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, 51 SOC. SECURITY BULL. 63 (1988) (table M-27).

111. In previous years, the states reported numbers of cases closed because of child support collections. TWELFTH ANNUAL REPORT, *supra* note 12, at 52, table 42. These figures show 33,897 welfare case closings in 1985 in which child support collections were cited as a factor contributing to the closing.

112. MAXIMUS, INC., EVALUATION OF THE CHILD SUPPORT ENFORCEMENT PROGRAM FINAL REPORT at III-43 (1983). According to this study, the data are not available to derive a precise estimate of the cost avoidance achieved by the welfare child support program, but the savings appear to be substantially less than one percent of total welfare grants. *Id.* at III-42 to III-45. A more recent study by Advanced Sciences, Inc. and SRA Technologies attributes no AFDC cost avoidance to child support collections on behalf of AFDC families. ESTIMATES OF COST AVOIDANCE ATTRIBUTABLE TO CHILD SUPPORT ENFORCEMENT: FINAL REPORT at III-22 (1987) [hereinafter ESTIMATES OF COST AVOIDANCE].

Advocates of increased child support services to nonwelfare families frequently argue that these services avoid welfare costs by keeping families off welfare. *See, e.g., Potential Inequities, supra* note 108, at 88-89 (statement of Donna Lenhoff, Women's Legal Defense Fund). There are, however, no studies thus far confirming this assertion. *Estimates of Cost Avoidance* calculated AFDC cost avoidance from child support payments received by non-AFDC families to be $516 (± $156) million per year, based on 1983-1984 data. ESTIMATES OF COST AVOIDANCE, *supra*, at V-3. However, even though the study purports to quantify the amount of cost avoidance which may be attributed to child support enforcement, *Estimates of Cost Avoidance* did not assess whether child support enforcement programs in any way contributed to the estimated cost avoidance. Indeed, the study did not even attempt to determine if payment of child support — regardless of whether it was prompted by state enforcement efforts — had any connection with the fact that the families were not receiving welfare. Instead, *Estimates of Cost Avoidance* simply looked at whether the families that received the child support would have been eligible for benefits if their child support payments were not considered. *Id.* at V-18 to V-19. In all likelihood, a substantial percentage of mothers would increase their earnings rather than qualify for AFDC benefits if their child support payments ceased.

niques are improved. Second, there is now widespread acceptance of the idea that fathers should be made to support their children regardless of the cost.

Both of these ideas are reflected in the legislative proposals that culminated with the recently enacted welfare "reform" law, the Family Support Act of 1988.[113] Although most of the public attention on the legislation focused on its work and training provisions, both the House and Senate bills at least nominally suggested that child support, not work, would be the cornerstone of the new welfare program. In order to promote the idea that welfare is only a supplement to child support, the House bill proposed a "Family Support Program" instead of AFDC and called welfare payments "family support supplements."[114] The Senate bill tried to replace AFDC with a "Child Support Supplement" program and renamed AFDC "child support supplements."[115] The names embodied the principle that support for children is supposed to come from families, not from the state.[116]

The new names for welfare were dropped in conference, presumably because someone figured out that changing the name for AFDC would cost a lot of money without increasing child support collections at all. However, the Conference Committee did adopt most of the House and Senate proposals for the child support program which were intended to make welfare into a "supplement" to child support. In this section, I will analyze the claims that the Family Support Act will substantially increase welfare savings from child support enforcement. I will then examine Congress's recent willingness to spend money to force fathers to pay support, even where support enforcement will not be cost effective.

A. Welfare Savings from the Family Support Act's Child Support Enforcement Provisions

The Congressional Budget Office predicts that welfare savings will be realized from only two of the child support provisions in the Family Support Act: one involves a change in the states' use of guidelines to set child support awards, and the other involves a change in the use of wage withholding to

113. FSA, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (to be codified at scattered sections of 42 U.S.C.).

114. H.R. 1720, 100th Cong., 1st Sess. § 2, 133 CONG. REC. H11,536 (daily ed. Dec. 16, 1987).

115. S. 1511, 100th Cong., 1st Sess., § 4, 133 CONG. REC. S10,404 (daily ed. July 21, 1987).

116. *See, e.g., id.* § 3. The Senate proposal also reordered the parts of the welfare title, putting child support enforcement first, the work programs second, and child support supplements (transfer payments) third. *Id.* § 5. The Senate report explained that

> [t]he new structure is designed to emphasize the new approach to welfare embodied in the bill which places independence ahead of dependency. The primary responsibility for the well being of children rests not with the Government, but with the parents of the child. Consequently, the first part of the new welfare law requires the Government — State, Local, and Federal — to make sure that parents live up to their obligation to provide financial support for their children.

S. REP. No. 377, 100th Cong., 2d Sess. 65 (1988).

collect support through the father's employer.[117] These provisions will certainly improve collections to some degree, but they will not eliminate the federal child support deficit, and they certainly will not make child support a substitute for welfare.

1. Mandatory Guidelines

According to Congressional Budget Office estimates, the biggest source of welfare cost savings in the Family Support Act is a requirement that the states use guidelines to set support awards for all child support orders that are established or modified after October 1989.[118] The first federal requirements concerning guidelines appeared in the Child Support Enforcement Amendments of 1984[119] when Congress mandated that the states adopt guidelines for setting child support orders. The guidelines requirement was intended to increase the adequacy of child support orders and to improve the consistency and predictability of child support awards.[120]

Like the other provisions in the 1984 Child Support Enforcement Amendments, the guidelines requirement was prompted primarily by advocates for nonwelfare mothers.[121] It therefore applied to orders in both the welfare and the nonwelfare child support systems. The guidelines requirement thus represented a significant departure from traditional legal principles which reserved family law for nonwelfare families as the exclusive province of the states.[122] In order to limit the extent of this departure, the 1984 amendments required the states to *adopt* support guidelines, but did not insist that state

117. S. REP. NO. 377, *supra* note 116, at 71, 74-75.

118. *Id.*

119. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. § 667(a) (Supp. IV 1986)). Federal regulations implementing the statutory requirement provide that the guidelines adopted by the state must be based on "specific descriptive and numeric criteria and result in a computation of the support obligation." 45 C.F.R. § 302.56(c) (1987).

120. For discussion of the purpose of the guidelines requirement, see *Child Support Guidelines, supra* note 18, at 326-27; *What Every Lawyer Should Know, supra* note 18, at 3032; Williams, *supra* note 18, at 284-86.

121. *See generally Potential Inequities, supra* note 108; *Child Support Enforcement Legislation: Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the Comm. on Ways and Means*, Serial 98-41, 98th Cong., 1st Sess. (1983); S. REP. No. 387, 98th Cong., 2d Sess. 1, 22, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 2397, 2418 (1984); H.R. REP. No. 925, 98th Cong., 2d Sess. 29, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 2447 (1984); 129 CONG. REC. H9975 (daily ed. Nov. 16, 1983) (statement of Rep. Campbell).

122. A series of Supreme Court cases reiterated that the United States has a "federal system in which regulation of domestic relations has been left with the States and not given to the national authority." Williams v. North Carolina, 325 U.S. 226, 237 (1945). Nearly a century ago, the Supreme Court pronounced that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *In re* Burrus, 136 U.S. 586, 593-94 (1890). *See also* McCarty v. McCarty, 453 U.S. 210, 220 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979); Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930). These pronouncements clearly have not prevented federal preemption of state family law in the case of welfare families. For example, in Bowen v. Gilliard, the Supreme Court held that the support paid for welfare children may be used to offset the cost of welfare benefits for other children with whom the child lives notwithstanding state

judges and administrative officers actually *follow* them.[123] Although the 1984 amendments did not require the states to make their guidelines mandatory, a number of states chose to do so.[124] Some of those states reported substantial increases in collections.[125]

Based on this experience, Congress decided that the time had come for further federal direction on the setting of child support orders, notwithstanding the tradition against federal interference in state family law concerning nonwelfare families. The Family Support Act of 1988 consequently provides that the states' guidelines shall constitute "a rebuttable presumption" for setting the amount of child support orders for both welfare and nonwelfare families. A recorded finding that application of these mandatory guidelines would be unjust in a particular case is required before a judge or administrative officer is permitted to deviate from the guidelines.[126]

The Congressional Budget Office predicted AFDC savings from the mandatory guidelines provision at $20 million in 1990, $55 million in 1991, $85 million in 1992, and $115 million in 1993.[127] Given the current federal child support deficit of $337.2 million, these estimated savings are impressive. However, a closer look at the estimates suggests that they are unreliable.

First, the estimates are based on the assumption that mandatory guidelines will increase support collections by $600 per year for every family, both welfare and nonwelfare, for which a support order is established or modified.[128] Since the guidelines are designed in part to improve the fairness of child support orders, however, one would expect that orders which are set according to the guidelines will be higher for relatively high income fathers than for low income fathers. Not surprisingly, fathers of welfare children have substantially lower incomes, on average, than fathers of nonwelfare children. According to data reported in one study, the fathers of welfare children have incomes which are less than 60% of the average income of men in the United States.[129] Another study found that up to half of the fathers of children in the child support enforcement system in the samples studied had incomes at or below the poverty level.[130] In light of the large income gap between the fa-

laws restricting child support to the use of the child for whom it is paid. 107 S. Ct. 3008 (1987) (discussed *supra* notes 21-24 and accompanying text).

123. 42 U.S.C. § 667(b) (Supp. IV 1986) (guidelines must be "available . . . but need not be binding").

124. *See* Williams, *supra* note 18, at 313.

125. *See* S. REP. No. 377, 100th Cong., 2d Sess. 75 (1988).

126. FSA § 103 (a) (amending 42 U.S.C. § 667(a)-(b)).

127. S. REP. No. 377, 100th Cong., 2d Sess. 71 (1988).

128. S. REP. No. 363-3, 100th Cong., 2d Sess. 74-75 (1986).

129. R. HASKINS, A. DOBELSTEIN, J. AKIN & J. SCHWARTZ, ESTIMATES OF NATIONAL CHILD SUPPORT COLLECTIONS POTENTIAL AND THE INCOME SECURITY OF FEMALE-HEADED FAMILIES: FINAL REPORT 47 (1985). This study found the mean annual income of fathers of welfare children in North Carolina to be $9512 in 1983. *Id.* After adjusting for low income in North Carolina, the annual income of fathers of welfare children was less than 60% of national average income for males employed full time. *See id.*

130. F. SONENSTEIN & C. CALHOUN, THE SURVEY OF ABSENT PARENTS: PILOT RE-

thers of welfare children and the fathers of nonwelfare children, it is doubtful that mandatory guidelines will produce as much of an increase in support collections for welfare families as for nonwelfare families.[131] If collections in all child support cases increase by an average of $600 per year because of mandatory guidelines, the increase for welfare child support cases will surely be less than $600.

Indeed, one study of ten counties in Wisconsin found that the publication of guidelines resulted in *lower* awards for low income fathers.[132] Before the guidelines were promulgated, fathers with gross incomes under $10,000 per year were ordered to pay support at rates which were higher than the guidelines would have required. After the guidelines were promlgated, the awards for low income fathers as a percentage of income declined, but the low income fathers were still ordered to pay support at rates that were higher than the guidelines.[133] The Wisconsin study speculates that the high awards against low income fathers are based on the assumption by judges and family court commissioners that the fathers are experiencing only a temporary drop in income.[134] Another possible explanation is that courts and hearing officers are biased against low income fathers. In any case, the Wisconsin study suggests that welfare child support collections will *decrease* once guidelines are

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SULTS 21 (1988). This study collected data concerning fathers who had support obligations established as part of a divorce or separation proceeding and fathers in the child support enforcement system (including the fathers of welfare and nonwelfare children). The study found that 38% of the fathers in the child support enforcement system in selected jurisdictions in Florida had annual incomes at or below the poverty level; 49% of the fathers in selected jurisdictions in Ohio had annual incomes at or below the poverty level. *Id.* The study concludes that

> [t]he high incidence of poverty in the CSE [child support enforcement] non-custodial parent samples, although lower than among custodial parents, suggests that up to half of the noncustodial parents in the CSE samples have few resources available to support their children. Child support transfers alone may not be a viable approach to eliminating poverty for a portion of the CSE population.

Id. at 22.

131. In addition, compliance levels may fall as child support award levels are raised. One study found that the use of formulas to determine the award raised the award level but reduced compliance. When the support order was set using guidelines, compliance levels fell by 29% according to the custodial parent and by 37% according to the noncustodial parent. *Id.* at 45, 49.

132. I. GARFINKEL, UTILIZATION AND EFFECTS OF IMMEDIATE INCOME WITHHOLDING AND THE PERCENTAGE-OF-INCOME STANDARD: AN INTERIM REPORT ON THE CHILD SUPPORT ASSURANCE DEMONSTRATION 19, table 6 (1986). This study calculated the difference in child support awards as a percentage of the father's income before and after publication of guidelines. Guidelines were not made mandatory in the state until after the study was completed. *Id.* at 4. The study therefore did not compute the effects of *mandatory* as opposed to advisory guidelines.

133. The guidelines provided for a support obligation equal to 17% of the absent parent's gross income for one child, 25% for two children, 29% for three children, 31% for four children, and 34% for five or more children. *Id.* at 3. Fathers with incomes below $10,000 were obligated to pay more than these amounts both before and after the guidelines were published. *Id.* at 19, table 6.

134. *Id.* at 20.

mandatory.[135]

A second reason to question the estimates calculated by the Congressional Budget Office for welfare savings from the mandatory guidelines provision of the Family Support Act lies in assumptions concerning welfare cost avoidance. According to the Congressional Budget Office, 20% of the anticipated increase in collections for nonwelfare families may be characterized as welfare cost avoidance and consequently may be counted as welfare savings.[136] Collections for nonwelfare families may legitimately be treated as enabling nonwelfare families to stay off welfare to the extent that the families would apply for welfare if they did not receive the support payments. However, the 20% cost avoidance estimate is suspect. The Congressional Budget Office does not explain how this percentage was derived, but says that the figure is based on a study which in fact sets forth no such percentage and which does not even measure whether child support collections actually keep families off welfare.[137] In any case, anticipated welfare savings resulting from collections for nonwelfare families cannot justify the welfare child support system. Rather, such welfare savings argue for putting more resources into underfunded government services to help nonwelfare mothers collect child support.

2. *Immediate Wage Withholding*

Apart from the establishment of mandatory child support guidelines, the only other change in collection techniques called for in the Family Support Act concerns wage withholding. Under current law, as established by the 1984 Child Support Enforcement Amendments, wage withholding is supposed to go into effect whenever the father is one month in behind in payments.[138] The Family Support Act revises this provision to require immediate wage withholding in all new and modified orders, effective two years after enactment; other cases would continue to be subject to wage withholding once there is a month's arrears.[139]

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135. Indeed, the Wisconsin guideline levels of child support awards against low income fathers are higher than the levels set by guidelines in other states. *See* Williams, *supra* note 18, at 304-09. If, like Wisconsin, these states are setting awards against low income fathers at levels above the levels required by each of their guidelines, then mandatory use of the guidelines would reduce the level of orders against low income fathers even more than the Wisconsin data suggest. *See also* R. HASKINS, A. DOBELSTEIN, J. AKIN & J. SCHWARTZ, *supra* note 129, at 16-26 (Delaware formula would produce much lower collections from low income fathers than Wisconsin formula).

136. S. REP. NO. 363-3, *supra* note 128, at 75.

137. S. REP. NO. 363-3, *supra* note 128, at 74-75 (citing ESTIMATES OF COST AVOIDANCE, *supra* note 112). *Estimates of Cost Avoidance* does not give a percentage cost avoidance estimate. Indeed, as discussed *supra* note 112, the study does not provide any way to measure the extent to which support collections keep families from going on welfare.

138. 42 U.S.C. § 666(b)(3)(A) (Supp. IV 1986).

139. FSA § 101(a) (amending 42 U.S.C. § 666(b)(3)). The payor can get out of automatic withholding by demonstrating good cause for not being subjected to it or where parties reach a written agreement that provides for an alternative arrangement. A welfare mother may not be

The Congressional Budget Office projected AFDC savings from immediate wage withholding of $15 million in 1991, the first year of implementation, $40 million in 1992, and $60 million in 1993.[140] Although immediate wage withholding may well help families by improving the timeliness of child support payments, it is doubtful whether welfare child support collections will increase nearly as much as the Congressional Budget Office predicts.[141] According to the Congressional Budget Office, the savings estimates were based on preliminary data from Wisconsin on the implementation of immediate wage withholding in ten Wisconsin counties in 1984.[142] However, the Wisconsin data do not distinguish between AFDC and non-AFDC collections.[143] Nor does the Congressional Budget Office mention the fact that the Wisconsin study of immediate wage withholding showed no discernible effect on support compliance *before* controlling for low income fathers.[144]

Wage withholding is an effective collection technique over the long term only where the father has steady income from wages. If the father loses his job, the wage attachment in many cases effectively dissolves. Most jurisdictions have no system for forwarding the wage attachment to the father's new employer if he becomes reemployed.[145] Low income fathers suffer frequent bouts of unemployment. In one study, over half of the fathers of welfare children suffered one or more bouts of unemployment during a two-year period. The average time unemployed was fourteen weeks a year.[146] The instability of employment for these fathers suggests that they did not return to work for

considered a party and therefore may not be able to agree to another arrangement even where she thinks the father will pay regularly without automatic withholding. *See supra* note 13, 15. For arguments that the welfare mother is entitled to status as a party, see P. ROBERTS, *supra* note 13.

140. S. REP. NO. 363-3, *supra* note 128, at 71.

141. The pass through is paid only for current support payments. *See supra* note 29 and accompanying text. Timely payment therefore benefits welfare families as well as nonwelfare families. To the extent that welfare families benefit from prompt payment, the government will lose money, not save money.

142. S. REP. NO. 363-3, *supra* note 128, at 74. The Congressional Budget Office now acknowledges that these estimates are overly optimistic because increased collections in other states which have already implemented immediate wage withholding should not be attributed to the FSA. Telephone interview with Richard Curley, Congressional Budget Office, Washington, D.C. (Nov. 17, 1988). However, estimates published shortly before enactment of the FSA by that office claim the same savings. CONGRESSIONAL BUDGET OFFICE, SUMMARY OF ESTIMATED COST TO THE FEDERAL GOVERNMENT OF THE FAMILY SUPPORT ACT (Sept. 28, 1988).

Like the estimates on the mandatory guidelines provision, the projected AFDC savings from immediate wage withholding include savings to be achieved from support collections for non-AFDC families on the theory that these collections will avoid welfare costs. S. REP NO. 363-3, *supra* note 128, at 74. To the extent that the projected AFDC savings are based on nonwelfare collections, the numbers are suspect. *See supra* note 127 and accompanying text.

143. *See generally* I. GARFINKEL, *supra* note 132.

144. *Id.* at 33-41.

145. *See* Johnson v. Cohen, No. 84-6277 (E.D. Pa. Oct. 2, 1985) (Findings of Fact).

146. R. HASKINS, A. DOBELSTEIN, J. AKIN & J. SCHWARTZ, *supra* note 129, at 49.

their previous employers, and that wage attachments directed to the original employers would have become moot for many of the fathers in the sample.

Welfare support collections will certainly increase somewhat with immediate wage withholding, but immediate wage withholding — like other collection techniques — will have it greatest impact on collections from higher income fathers. These fathers are less likely to be the fathers of welfare children.[147] Collection efforts directed against the low income fathers of welfare children will necessarily produce lower collections in proportion to administrative costs than collection efforts against higher income fathers.[148]

Except for the provisions concerning guidelines and immediate wage withholding, most of the child support provisions in the welfare reform act will cost federal tax dollars, rather than save money.[149] Some of the provisions could improve efficiency in the long run but will not save money in the short run. For example, the Family Support Act requires states to develop statewide automated data processing systems for child support,[150] whereas under prior law development of statewide computerized systems was optional

147. *See supra* notes 129, 130.

148. An additional reason that welfare savings from immediate wage withholding will probably be less than projected is that the Congressional Budget Office does not seem to recognize that the collections from immediate wage withholding will reduce collections currently being made with other techniques. For example, to the extent that wage withholding assures timely payment of support, the amount which may be collected as an arrearage will be reduced. Since 1981, a significant part of the increase in child support collections has come from the interception of income tax refunds for support arrearages. Collections from federal income tax refunds increased from $168.1 million in 1982 to $338.9 million in 1987. ELEVENTH ANNUAL REPORT, *supra* note 89, at 60, table 51; TWELFTH ANNUAL REPORT, *supra* note 12, at 64, table 54. Welfare child support collections during the same period increased from $785.9 million in 1982 to $1358.9 million in 1987. ELEVENTH ANNUAL REPORT, *supra* note 89, at 10, table 1; TWELFTH ANNUAL REPORT, *supra* note 12, at 10, table 1. Most of the tax refund collections are welfare collections. *Compare* ELEVENTH ANNUAL REPORT, *supra* note 89, at 60, table 51, *with* TWELFTH ANNUAL REPORT, *supra* note 12, at 23, table 14. Tax intercepts for nonwelfare support payments began with refunds payable after December 1, 1985. 42 U.S.C. § 664(a)(2)(B) (Supp. IV 1986).

The tax intercept collections will probably decline as large, old arrearages are cleared up. *See Child Support Enforcement Program Reform Proposals: Hearings Before the Senate Comm. on Finance*, 98th Cong., 2d Sess. 195-96 (1984) (statement of Dave Frohnmayer, Attorney General, State of Oregon). If future arrearages do not accrue, collections from arrearages will be further reduced. The projected savings from wage withholding will therefore probably be partly offset by decreases in the collection of arrearages.

149. The other provisions include the paternity requirements and data processing requirements, discussed *infra*; alterations to the pass through provisions, discussed *supra* note 29; new requirements for notice of support collections, discussed *supra* note 35 and accompanying text; a requirement that the Department of Health and Human Services establish time standards for state child support agencies, FSA § 122 (amending the Social Security Act § 452); a requirement that states obtain fathers' social security numbers before issuing a birth certificate, FSA § 125 (amending 42 U.S.C. § 405; creation of a commission on interstate child support enforcement, FSA § 126 (amending 42 U.S.C. § 405); a requirement that the Department of Health and Human Services conduct a study of child rearing costs, FSA § 128; and a provision for demonstration projects to study whether visitation problems affect child support collections, FSA § 504. All of these provisions are projected to cost money, although relatively small amounts. S. REP. No. 377, 100th Cong., 2d Sess. 71, 72 (1988).

150. FSA § 123(a)(i) (creating 42 U.S.C. § 654(24)).

with the states.[151] Statewide computerized systems may increase cost effectiveness over time. But since the federal government pays 90% of the costs for these systems,[152] the requirement is expected to cost more federal dollars, at least for the next several years.[153]

B. Family Support Act Expenditures for the Social Benefits of Child Support Enforcement

The most curious feature of the new legislation is its focus on establishing paternity. Under current law, most states do not give high priority to cases in which paternity must be established because these cases produce the lowest collections in relation to adminstrative costs.[154] The states make the most money with the least effort on those cases where the father is already complying with a support order before the family goes on welfare. In those cases, all the state has to do is to arrange for the payments to go to the state instead of the family. More effort is required where there is no existing support order, but the father can easily be located and readily agrees to pay. The hardest and most expensive cases are the ones where the father's whereabouts are not known and where paternity must be established.[155] In addition, because most families do not stay on welfare for more than a few years[156] and because it takes time to establish paternity, the family may be off welfare before a support order is entered and support is paid. The collections in these cases are therefore less likely to offset welfare.[157]

The federal reimbursement scheme rewards states based on how much

151. FSA § 123(a) (amending 42 U.S.C.A. § 654(16) (West Supp. 1988)).

152. 42 U.S.C. § 655(a)(1)(B) (Supp. IV 1986).

153. The Congressional Budget Office originally projected that the automatic data processing provisions would cost the federal government $36 million over five years. 133 CONG. REC. S10,409 (daily ed. July 21, 1987). The projected cost was later reduced to $25 million. S. REP. No. 363-3, *supra* note 128, at 71, 76.

154. MAXIMUS, INC., *supra* note 112, at VI-13 (1983).

155. *Id.* at II-39, Exhibit II-14.

156. Research estimates of the percentage of new welfare recipients who leave within two years vary from 48% to 69%. *See* I. GARFINKEL & S. MCLANAHAN, *supra* note 69, at 38. Some of those who leave will return to welfare at some point. Nevertheless, 30% of AFDC recipients spend a total of less than two years on welfare. Seventy percent receive welfare for less than seven years. Duncan, Hill & Hoffman, *Welfare Dependence Within and Across Generations*, 239 SCIENCE 467, 468 (1988). However, younger, never-married women with young children are more likely to be long term recipients. More than 40% of such women who first received welfare before age twenty-five received it for nine or more years. *Id.* The greater incidence of long-term receipt of welfare by never-married mothers of young children suggests that paternity establishment may generate collections over time, but does not alter the fact that cost-effectiveness is lower in cases where paternity needs to be established.

157. One study examined three jurisdictions with well-regarded child support enforcement programs: Essex County, New Jersey; Eugene, Oregon; and Dane County, Wisconsin. Essex County took over four years to break even on an average paternity case, Eugene took just under three years, and Dane County took just under two years. CENTER FOR HEALTH AND SOCIAL SERVICES RESEARCH, COSTS AND BENEFITS OF PATERNITY ESTABLISHMENT 61, table 4-11 (1985). The programs were losing money until they reached the breakeven point; at the breakeven point, the programs had spent one dollar for every dollar collected.

support they collect in welfare cases and how efficient they are in collecting it. States are allowed to keep the state share of the welfare payment from any welfare child support collections, plus an incentive payment based on the cost-effectiveness of the state's collection efforts.[158] Not surprisingly, the states have engaged in "creaming" — going after the cases with the highest collections potential for the least effort. The states have therefore given short shrift to cases where paternity needs to be established.

Despite the negative connotations of creaming, one would expect the federal government to approve of state efforts to maximize collections at the lowest cost. Federal regulations, in fact, specifically authorize the states to prioritize cases, presumably to increase cost effectiveness.[159] In recent years, however, the federal government seems to have abandoned the idea that the child support program should save money. Faced with a program that costs more than it brings in, regardless of the techniques used, more and more advocates of the welfare child support system are saying that the program should not even be trying to be cost effective. According to this line of thinking, the welfare child support program should be emphasizing the *social* benefits of enforcing child support, instead of the financial benefits.[160]

An unexpected proponent of the notion that the welfare child support program should focus on social benefits rather than cost savings is the United States General Accounting Office (GAO). A recent GAO study castigated the Department of Health and Human Services for emphasizing welfare collections and cost savings instead of forcing the states to pursue paternity and get a support order for every welfare child. The GAO complained that the department was only interested in the financial bottom line and did not audit the states to see whether they were managing effective programs to establish paternity and obtain support orders. According to the GAO, most of the local child support agencies in its survey managed cases in a way that emphasized collections and cost-containment and deemphasized paternity determinations. Agencies directed staff resources toward cases with the greatest apparent collection potential and away from cases that appeared to require greater development effort, such as those needing paternity determinations. Thus, according to the GAO, the state child support agencies denied some children the social benefits that result from a paternity determination, such as reducing

158. *See supra* note 95.

159. 45 C.F.R. § 303.10 (1987).

160. *See, e.g., Tax Refund Offset Program for Delinquent Student Loans and Child Support Payments: Hearing on S. 150 Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Finance Comm.*, 98th Cong., 1st Sess. 89-90 (1983) (statement of Dan Copeland, President, National Council of State Child Support Enforcement Administrators) (primary goal of child support enforcement is provision of services, not reimbursement for AFDC expenditures); *Potential Inequities, supra* note 108, at 143 (statement of Sue Hunter, President, Louisiana Child Support Enforcement Association) (advocating federal emphasis on effective support enforcement rather than the cost-effectiveness of the program).

the stigma of illegitimacy.[161]

The GAO view of the importance of establishing paternity is reflected in the Family Support Act. The Act proposes to force the states to increase efforts to establish paternity by reducing federal funding for welfare in states that fall below the national average for establishing paternity and do not improve their performance by at least three percent a year.[162] The Congressional Budget Office estimated costs for the paternity requirements of the Family Support Act at $40 million in 1991, $25 million in 1992, and $15 million in 1993.[163]

In enacting the Family Support Act, Congress seems to have adopted the GAO view that the "social benefits" of establishing paternity justify greater effort despite the costs. What are these social benefits? According to the GAO and other advocates of increased efforts to establish paternity, the social benefits include:

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161. U.S. GENERAL ACCOUNTING OFFICE, CHILD SUPPORT: NEED TO IMPROVE EFFORTS TO IDENTIFY FATHERS AND OBTAIN SUPPORT ORDERS, GAO/HRD-87-37 (1987).

162. FSA § 111(a) (creating 42 U.S.C. § 652(g)). The national average is to be based on the ratio of children receiving welfare and nonwelfare child support services for whom paternity has been established to the number of children receiving child support services for whom paternity has not been established. *Id.* The national paternity establishment rate for 1987 was 31.3%. THE STAFF OF HOUSE COMMITTEE ON WAYS & MEANS, 100TH CONG., 2D SESS., CHILD SUPPORT ENFORCEMENT: A REPORT CARD 37 (1988). States also would not be subject to penalty if they have established paternity for half of all the children receiving child support services who were born to unmarried mothers. FSA § 111(a) (creating 42 U.S.C. § 652(g)). The FSA paternity provisions follow the Senate proposal. *See* S. 1511, § 111-12, 100th Cong., 1st Sess., *reprinted in* 133 CONG. REC. S10,411 (daily ed. July 21, 1987). The House "welfare reform" proposal was even more ambitious in the number of paternities it expected the states to establish. The House bill would have required the states to have procedures for establishing paternity which produce 50% more paternity determinations in 1989 than the state had in 1986 and a 15% increase in each of the next four years. Unlike the Senate bill, the House bill specifically recognized that focusing on paternity would reduce a state's cost effectiveness. The House bill therefore provided that whenever a state established paternity it would be *deemed* to have collected $100 a month for the next twelve months even if it did not collect a dime. These fictitious collections would then have been used in computing the state's cost effectiveness ratio on which the federal incentive payment is based. H.R. 1720, § 502, 100th Cong., 1st Sess., 133 CONG. REC. H11,547 (daily ed. Dec. 16, 1987).

163. S. REP. NO. 377, 100th Cong., 2d Sess. 71 (1988). These cost estimates include paternity establishment for non-AFDC families as well as for AFDC families.

The FSA also provides for reimbursing states at 90% for the cost of laboratory blood tests to establish paternity, instead of the usual reimbursement for administrative expenditures of 68% or 66%. FSA § 112(a) (creating 42 U.S.C. § 655(a)(1)(C)). The Senate Finance Committee estimated the costs of the total increased reimbursements at $15 million for 1989 through 1993. S. REP. NO. 377, 100th Cong., 2d Sess. 71 (1988).

Under current law states may exclude laboratory costs incurred in determining paternity from their administrative costs for purposes of computing federal incentive payments. As a result, states that spend money on laboratory costs for establishing paternity do not suffer a reduction in federal incentives on the ground that their programs are not cost effective. 42 U.S.C. § 658(c) (Supp. IV 1986); S. REP. NO. 387, 98th Cong., Sess. 25, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2421. This favorable treatment continues under the FSA and will have even more impact as costs of paternity establishment increase.

- Encouraging the idea that unmarried men are responsible for the consequences of their behavior;
- Reducing the stigma of illegitimacy and giving the child a sense of identity;
- Increasing the child's opportunity to develop a relationship with the father;
- Improving the child's health prospects by enabling the child to learn the father's health history (which "may even save the child's life");
- Providing a father to share child rearing responsibilities;
- Giving the father an opportunity to develop a close parental relationship with his child.[164]

There are no data supporting the proposition that the legal establishment of paternity through the compulsory child support system produces any of these benefits. In fact, paternity advocates do not even point to anecdotal evidence to support their claims. There has not been a single reported instance in which the "stigma" of illegitimacy was reduced by dragging the mother and child through court proceedings. Nor has a single instance been reported in which a child's life was saved because the child was able to learn her father's health history as a result of state-established paternity.

Despite the lack of evidence to support them, however, these rationalizations now seem to be sufficient to justify a program that has utterly failed to fulfill its original promise of saving taxpayer dollars.

Is the child support enforcement program so socially beneficial that it should be forced on mothers against their will? If the answer is yes, then child support enforcement should be compulsory for all families, not just those on welfare.[165]

Although cloaked in the rhetoric of public service, the compulsory welfare support program exists to punish poor people and not for their benefit.

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164. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 161, at 12; CENTER FOR HEALTH AND SOCIAL SERVICES RESEARCH, COSTS AND BENEFITS OF PATERNITY ESTABLISHMENT 25 (1985).

165. Fifteen years ago, Connecticut did attempt to impose paternity establishment on both welfare and nonwelfare mothers. After the courts struck down Connecticut's regulations which made cooperation a condition of eligibility for welfare mothers, Doe v. Harder, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970); *see supra* note 71 and accompanying text, Connecticut passed a statute punishing all unmarried mothers who refused to name the child's father with a fine of $200 or one year imprisonment or both. A three-judge court upheld this twentieth century scarlet letter law, in part on the ground that the statute was beneficial rather than burdensome and therefore did not discriminate against illegitimate children so as to warrant strict scrutiny under the Constitution. The Supreme Court vacated the three-judge court decision in light of the 1975 child support enforcement amendments which provided for a reduction in welfare grants, but not for fines or imprisonment. Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *vacated sub nom.* Roe v. Norton, 422 U.S. 391 (1975). Having achieved its goal of establishing sanctions against welfare recipients, Connecticut did not pursue efforts to force nonwelfare mothers to participate in paternity establishment.

Lacking fiscal justification, the program seeks to punish men who have children on welfare by making them pay for their desertion and bastardy. And it seeks to punish welfare mothers for failing to keep a man to support them. Mothers of welfare children must assist in administering the punishment of their children's fathers regardless of the mothers' assessment of their own interests, and regardless of the costs to the state.

V.
ALTERNATIVES TO THE WELFARE CHILD SUPPORT SYSTEM: A LOOK AT CURRENT PROPOSALS

What are the alternatives to the present welfare system? Several alternatives are currently under discussion or in the early stages of implementation.

A. The Wisconsin Child Support Assurance Plan

The most widely discussed child support reform proposal has been put forth by Irwin Garfinkel and others at the Institute for Research on Poverty in Wisconsin.[166] The Garfinkel proposal is loosely based on the "advance maintenance payment systems"[167] already in place in a number of industrialized countries.

Under an advance maintenance payment system, children with absent fathers are entitled to a monthly benefit. If the father is unemployed or cannot be found, the state pays for the benefit. If the father is located and employed, the state takes a percentage of his income in taxes each month to pay for the benefit. When the father's income is too low to cover the full benefit, the state makes up the difference. If the tax on the father exceeds the benefit, the family receives the amount he is taxed.

Sweden has the oldest and most generous advance maintenance payment system. Under the Swedish system, single mothers who are not employed outside the home receive an advance maintenance payment plus a family allowance, a housing subsidy, and social assistance equal to 94% of the average production worker's wage. For employed single mothers, the combination of wages and benefits equals 123% of the average production worker's wage.[168]

The Garfinkel plan for Wisconsin — called a Child Support Assurance System (CSAS) — is considerably more restricted and less generous than the Swedish model.[169] Unlike the advance maintenance payment systems in other countries, the CSAS is only available to mothers where a support obligation

166. I. GARFINKEL, *supra* note 132.

167. This description is based on Roberts, *Child Support and Beyond: Mapping a Future for America's Low-Income Children*, 22 CLEARINGHOUSE REV. 594, 597 (1988).

168. *Id.*

169. For descriptions of the Wisconsin plan, see generally Garfinkel, *The Evolution of Child Support Policy*, FOCUS, Spring 1988, at 11, and WIS. DEP'T OF HEALTH & SOCIAL SERVICE, THE WISCONSIN CHILD SUPPORT ASSURANCE SYSTEM — A BRIEF DESCRIPTION (1988) (available from the Wisconsin Office of Child Support, P.O Box 7851, Madison, Wisconsin 53707-7851). Federal authorization for the Wisconsin plan, which has not yet been imple-

has already been established against the father. Besides excluding many mother-only families because they do not have a support order, the Wisconsin plan provides a relatively low level of financial benefits. The assured benefit is currently set at only $3000 per year for one child, $3528 for two children, with additional increments for additional children. These amounts are less than current welfare benefits for comparable families in Wisconsin. As in the advance maintenance payment systems, if the father pays less than the assured benefit, the state supplements the child support so that the family receives the full benefit. However, if the mother has earnings, the state taxes her earnings to offset the state's cost for the assured benefit.[170] Although the tax on the mother's earnings is substantial — 17% to 34% of the mother's income depending on the number of children — the tax is much lower than the reduction for earnings in the current welfare program.[171]

The Wisconsin plan does not alter any essential features of the welfare child support system. The mother's cooperation in establishing a support order is a condition of participation, support rights are in effect assigned to the state, and families without earnings for whom child support is paid will be no better off than they are now on welfare. The major difference between the Wisconsin plan and the current welfare system is that the Wisconsin plan permits low income families with earnings to retain more of those earnings than the current welfare program. The Wisconsin CSAS is thus a work incentive program in the guise of child support reform. It may be a good idea, but it does not change the welfare child support system.

Although the Wisconsin CSAS plan has received a great deal of attention for several years, it has not yet been implemented. New York is now piloting a plan similar to Garfinkel's proposal for Wisconsin.[172] The New York plan has a higher basic benefit and a much lower benefit reduction for earnings. Like the Wisconsin plan, New York limits participation to mothers who already have obtained support orders.[173] The New York plan may therefore encourage some welfare recipients to try to establish a support order in order to qualify for the plan's favorable treatment of earnings, but it does not otherwise reform the welfare child support system. Welfare advocates see the plan as a work incentive program for welfare recipients, not as a child support

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mented, was provided by Wisconsin Child Support Initiative, Pub. L. No. 98-378, § 22, 98 Stat. 1326 (1984).

170. The tax on the mother's earnings *increases* from 17% to 34% depending on the number of children she has. WIS. DEP'T OF HEALTH & HUMAN SOCIAL SERVICE, *supra* note 169. Thus, the amount of earnings the mother is allowed to keep varies inversely with the number of people she is supporting. This peculiar feature is designed to offset the cost of the CSAS benefit. The percentages are the same percentages used to set support orders against fathers, symmetry having triumphed over logic.

171. *See* 42 U.S.C. § 602(a)(8)(A) (Supp. IV 1986).

172. The description of the New York plan is based on a presentation by Rus Sykes, State Communities Aid Ass'n, Albany, N.Y. (October 20, 1988).

173. N.Y. SOCIAL SERV. LAW, § 111-l (L. 1987, c. 842) (McKinney 1989).

program.[174]

Superficially, there does not seem to be any reason for restricting a welfare work incentive program to single mothers who are fortunate enough to have a child support order against the father. It also seems peculiar to deny the work incentive to poor two-parent families and to mother-only families where the father has not been located or is dead. The link between child support and the work incentive in the Wisconsin and New York plans, however, is not accidental. Garfinkel explicitly promoted his proposal with the rhetoric of private responsibility for children: support for children is to come from child support payments by their fathers and paid employment by their mothers.[175] The problem is that it costs money to provide incentives to encourage welfare mothers to work. In order to claim that the work incentive would not increase welfare expenditures, Garfinkel therefore linked it to child support enforcement. The savings from increased child support collections are supposed to offset at least some of the cost of the work incentive. Because child support collections are intended to fund the work incentive, the program excludes poor two-parent families and families where the father is dead.

If Garfinkel really believed that it was cost effective to make fathers responsible for their children, one would expect that his plan would at least cover familes where the father is absent but a support order has not yet been entered. Instead, Garfinkel's plan specifically excludes families that do not already have a support order in place. Presumably, Garfinkel does not think that the fathers of these children should be exempt from responsibility for their children. Rather, he seems to recognize that support enforcement is unlikely to be cost effective unless the father has already been located, paternity has been established, and a determination has been made that the father's income is high enough for a support order to be entered against him. By excluding the cases where child support enforcement is least cost effective, Garfinkel avoids some of the pitfalls of the Family Support Act and reduces the cost of the work incentive in his Child Support Assurance Plan. In restricting participation, however, he undermines the principle of private responsibility on which his program theoretically rests.

B. Fill-the-Gap Programs

A few states have made improvements in the welfare child support system without making grand claims of reform. In some states, the amount the state deems necessary for minimum subsistence — the standard of need — is higher than the state's welfare payment. A few of these states allow welfare recipients to keep child support payments without a reduction in their welfare payments, as long as the resulting family income falls below the state's standard of need. In other words, where the state itself recognizes that the family needs a particular income in order to maintain a subsistence standard, but the

174. *Supra* note 172.
175. Garfinkel, *supra* note 169.

state's welfare payment is below that amount, the state permits the family to keep not only the first $50 in support, but *all* support payments — and usually other income such as earnings from work — up to the standard of need.[176] Five states currently allow recipients to use child support payments to fill all or part of the gap between the state's payment level and the standard of need.[177]

Fill-the-gap programs do not make support enforcement voluntary and do not eliminate the required assignment of support rights. However, they do increase the benefits that accrue to families where the father is making support payments, and they expand welfare coverage to families whose incomes fall between the standard of need and the state's payment level. It is too early to tell whether allowing recipients to keep more of their child support will have a significant effect on welfare child support collections.

C. Voluntary Participation: Cost-Effective Policy?

One alternative which policy makers have not considered is to make child support enforcement voluntary for welfare mothers. The current system gives welfare mothers very little financial incentive to pursue paternity and child support enforcement. It seems reasonable to suppose that welfare mothers are just as able as nonwelfare mothers to decide whether the monetary benefits that do exist — including the advantage of having a support order in place when welfare ends — make it financially worthwhile to try to establish paternity and enforce support. Welfare mothers, like nonwelfare mothers, can also make rational decisions about whether or not the "social benefits" of establishing paternity outweigh the disadvantages. Some states have shown that voluntary work programs for welfare recipients are more successful than coercive programs. The states market the benefits of the program to encourage recipients to participate voluntarily.[178] Similar promotion efforts might also be effective in encouraging welfare mothers to assist voluntarily in getting fathers

176. The states have broad discretion both in computing the standard of need and in setting payment levels for various family sizes. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535, 541 (1972); Dandridge v. Williams, 397 U.S. 471, 478 (1970). The payment levels and standards of need are set forth in U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN UNDER THE SOCIAL SECURITY ACT TITLE IV-A (1987).

177. The five states are Georgia, Maine, Mississippi, South Carolina, and Tennessee. Presentation by Paula Roberts, Center for Law and Social Policy (October 29, 1988). The federal welfare statute expressly permits fill-the-gap only for states that allowed recipients to retain child support payments up to the standard of need before the welfare child support program was enacted. 42 U.S.C. § 602(a)(28) (Supp. III 1983). Some states that did not allow fill-the-gap for child support before have taken the position that they are prohibited from doing so now. North Carolina allows recipients to fill the gap with any type of income — including unearned income such as social security benefits — *except* child support. Telephone communication from Pam Silberman, North Carolina Legal Services Resource Center (Sept. 2, 1988).

178. *See* Schulzinger & Roberts, *Welfare Reform in the States: Fact or Fiction? Part I*, 21 CLEARINGHOUSE REV. 695 (1987); Savner, Williams & Halas, *The Massachusetts Employment and Training Program*, 20 CLEARINGHOUSE REV. 123 (1986).

to accept responsibility for their children. As long as most of the welfare child support collections are kept by the state, allowing welfare mothers to decide whether to pursue paternity and support would probably result in fewer welfare support actions and lower collections. But the support enforcement program would probably be significantly more cost effective, because collection efforts would be limited to those cases where the welfare mother thought that they would produce results. At a minimum, making support enforcement voluntary for welfare recipients would eliminate the present absurdity of forcing dubious social benefits on welfare recipients at the taxpayers' expense. A voluntary program that also raised the amount of child support that mothers could keep would provide an even greater incentive for mothers to assist with support enforcement, and it might well produce even larger collections at lower cost.

CONCLUSION

Social concerns have always played a role in determining the family law of the poor, but until recently, these concerns were secondary to fiscal considerations. Thus, Professor tenBroek perceived that "[a]lthough [the] fundamental [fiscal] motive from time to time has been augmented by the punitive, the moralistic, the political, and restrained by the humane and the rehabilitative, it has been determinative in molding the character and fixing the features of the law of the poor in general and the family law of the poor in particular."[179]

With the Family Support Act, punitive, moralistic, and political motives have taken precedence over fiscal considerations. The Family Support Act requires expansion of child support enforcement efforts for welfare families even though expanded enforcement will cost taxpayer dollars. Meanwhile, the Wisconsin Child Support Assurance Plan — the most widely discussed liberal welfare reform proposal in recent years — has been distorted both by its moralistic and political reliance on the rhetoric of private responsibility and by the need to exclude whole categories of poor families in order to "keep[ ] the bill down."

It is time for a fundamental rethinking of the welfare child support program. I suggest that we start by respecting the autonomy, personal integrity, and intelligence of welfare mothers.

179. tenBroek, *supra* note 56, 17 STAN. L. REV. at 676-77.