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Two Direct Rights of Action in Child Support Enforcement

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Two Direct Rights of Action in Child Support Enforcement

Cover Page Footnote

Associate Professor of Law, Indiana University Robert H. McKinney School of Law. Many thanks to the members of the University of Chicago Law School, especially Lisa Bernstein, and the University of Kentucky College of Law, especially Brian Frye, as well as the participants of the Second Annual Younger Comparativists Committee Conference at Indiana University Robert H. McKinney School of Law, for their comments on this Article during its presentation. Thanks also to the editors of the Catholic University Law Review for their skillful editing.

TWO DIRECT RIGHTS OF ACTION IN CHILD SUPPORT ENFORCEMENT

Margaret Ryznar⁺

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Child support enforcement is a notoriously difficult proposition. According to the 2011 United States census, in 2009 only 61% of the \$35.1 billion due in child support was reported as received, averaging \$3,630 per custodial parent entitled to support.¹ Although this is an improvement from previous years, the numbers are sobering, given that 28.3% of all custodial parents' incomes were below the poverty level.² Complicating matters is noncustodial parents' inability to pay the required support. Indeed, parents

⁺ Associate Professor of Law, Indiana University Robert H. McKinney School of Law. Many thanks to the members of the University of Chicago Law School, especially Lisa Bernstein, and the University of Kentucky College of Law, especially Brian Frye, as well as the participants of the Second Annual Younger Comparativists Committee Conference at Indiana University Robert H. McKinney School of Law, for their comments on this Article during its presentation. Thanks also to the editors of the Catholic University Law Review for their skillful editing.

1. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009 1, 10 (2011) [hereinafter CHILD SUPPORT: 2009], available at <http://www.census.gov/prod/2011pubs/p60-240.pdf>. By comparison, in 2007, 62.7% of the \$34.1 billion due in child support in the United States was reported as received, averaging \$3,350 per custodial parent due support. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, *Custodial Mothers and Fathers and Their Child Support: 2007* (2009) [hereinafter CHILD SUPPORT: 2007], available at <http://www.census.gov/prod/2009pubs/p60-237.pdf>.

2. CHILD SUPPORT: 2009, *supra* note 1, at 1. By comparison, in 2007, 24.6% of custodial parents were below the poverty level, 18.2% of which received at least some child support. CHILD SUPPORT: 2007, *supra* note 1, at 1. Since the early twenty-first century, the rate of minor children living below the poverty line has risen from 16% to 20%. Leslie J. Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 158–59 (2011). Additionally, child poverty is more prevalent among children of unmarried or single parents. *Id.*

with incomes of \$10,000 per year or less owe approximately 70% of outstanding child support arrears.³

An effective child support system is important to all of the parties involved. A functioning system is vital for the children who are entitled to such support: children born out of wedlock and children born to parents who divorce.⁴ The effectiveness of the child support system is also important to taxpayers, whose tax dollars fund the public assistance that often substitutes for parental support.⁵ Accordingly, governments have spent significant resources to ensure that parents meet their child support obligations.⁶

Enforcement of child support responsibilities has become quite aggressive and frequently involves the court system. This increased judicial involvement prompted one commentator to question whether “deadbeats [are] born or made by a system that creates impossible burdens.”⁷ Indeed, some parents have even been incarcerated for failing to make child support payments, often without the benefit of counsel.⁸ The U.S. Supreme Court recently considered the constitutionality of the failure to provide counsel to indigent parents in *Turner v. Rogers*, which held that, although due process does not require a state to provide counsel to a debtor parent, the state is obligated to ensure “a fundamentally fair determination of the critical incarcerated-related question” of whether the debtor parent is

3. *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011).

4. See Maria Cancian, Daniel R. Meyer & Eunhee Han, *Child Support: Responsible Fatherhood and the Quid Pro Quo*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 153 (2011) (reporting that child support helps to reduce child poverty in single-parent homes); see also Chien-Chung Huang & Ke-Qing Han, *Child Support Enforcement in the United States: Has Policy Made a Difference?*, 34 CHILD. & YOUTH SERVS. REV. 622, 623–26 (2012) (reviewing multiple articles on both the direct and indirect effects of child support enforcement policies and concluding that efforts to improve the enforcement system will have both short- and long-term benefits for children and their families).

5. See Ann Laquer Estin, *Moving Beyond the Child Support Revolution*, 26 LAW & SOC. INQUIRY 505, 505 (2001) (explaining that the child support revolution was motivated in part by a desire to “allow the government to recoup its growing expenditures for public benefits”).

6. See *infra* notes 56–58 and accompanying text (discussing public expenditures and administrative costs associated with the enforcement of child support obligations).

7. Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L.Q. 235, 241 (1999).

8. See *Turner*, 131 S. Ct. 2507 (2011) (considering the constitutionality of South Carolina’s child support enforcement practices, which included prosecuting indigent parents for failing to fulfill their support obligations and refusing to provide them with counsel). The desirability and effectiveness of this practice is beyond the scope of this Article.

able to fulfill his or her support obligations.⁹ The Court's holding reflects the judiciary's effort to protect the rights of the noncustodial parent while also recognizing the custodial parent's entitlement to monetary support.

In the United States, there are two types of parties who sue noncustodial parents to modify or enforce child support orders: (1) custodial parents, and (2) state agencies.¹⁰ Specifically, under state law, each parent may sue the other to enforce or modify support obligations (unless one parent is on welfare and consequently assigned his or her right to sue to the state), or the state agency that would otherwise provide public funds to support the child may sue the debtor parent.¹¹

Although federal law provides a direct right of action against government officials through 42 U.S.C. § 1983,¹² the U.S. Supreme Court held that federal child support law does not provide parents with "a federal right to force a state agency to substantially comply with" its provisions.¹³ Consequently, custodial parents cannot use § 1983 to enforce child support orders by suing the relevant government agencies.

A comparative analysis of child support enforcement cases in the United States and United Kingdom highlights the consequences of minimizing or maximizing the participation of the courts in child support disputes. In contrast to the United States, parents in the United Kingdom cannot use the legal system to sue each other for the failure to meet child support obligations.¹⁴ Instead, only the Child Support Agency—the government agency that manages child support—has standing to sue.¹⁵ As a

9. *Id.* at 2512. The Court ultimately vacated the judgment of the South Carolina Supreme Court and remanded the case for further proceedings to determine if the state provided a fair determination of whether the appellant was able to meet his obligations. *Id.* at 2520.

10. *See, e.g., Child Support Services*, S.D. DEP'T SOC. SERVS., <http://dss.sd.gov/childsupport/services/whoestablishes.asp> (last visited Sept. 15, 2013) ("The Division of Child Support or a parent may ask the court to issue a support order.")

11. *See infra* notes 69–74 and accompanying text (discussing state enforcement mechanisms, including actions taken directly by the state against noncustodial parents).

12. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .").

13. *Blessing v. Freestone*, 520 U.S. 329, 333 (1997); *see also infra* Part III.B.1 (discussing, in detail, *Blessing's* foreclosure on a private right of action against the state to enforce child support obligations).

14. *R (Kehoe) v. Sec'y of State for Work and Pensions*, [2005] UKHL 48 [2006] 1 A.C. (H.L.) 57, [6]–[8] (appeal taken from Eng.) (concluding that the legislature acted deliberately in prohibiting a direct right of action between parents).

15. *Id.* at 54, [3].

consequence, custodial parents in the United Kingdom must cede control over the collection of the child support to which they are entitled.¹⁶ On the other hand, in contrast to the United States, there is judicial review of the child support government agency.¹⁷

The comparison between the United Kingdom and the United States is useful not only because each country has adopted different approaches to enforcing child support judgments, but also because some comparable data is available. For example, for every £1 spent on the administration of the child support system in the United Kingdom, £2.86 in owed child support is recovered,¹⁸ compared to \$5.12 recovered for every \$1 spent in the United States.¹⁹ Similarly, the percentage of cases with a current maintenance liability being received is 80% in the United Kingdom,²⁰ compared to the 70.8% of custodial parents who received any payment in the United States.²¹ Finally, there are approximately 1.2 million child support cases in the United Kingdom that require state attention,²² compared to the 15.8 million cases enrolled in the United States' federal IV-D program.²³

This Article argues that, if the goal of a child support enforcement system is to increase the efficiency of enforcement, parents should have access to the courts to enforce child support orders against each other.²⁴ A

16. See, e.g., *id.* at 53, [1] (noting that the appellant attempted to sue her former husband for support directly because she was unable to recover the full amount owed to her through the Child Support Agency).

17. *Id.* at 68, [45].

18. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T HEALTH & HUMAN SERVS., FY2011 PRELIMINARY REPORT (2012) [hereinafter FY2011 PRELIMINARY REPORT], <http://www.acf.hhs.gov/programs/css/resource/fy2011-preliminary-report>.

19. COMM. PUB. ACCOUNTS, CHILD MAINTENANCE & ENFORCEMENT COMMISSION: COST REDUCTIONS, 2010–12, H.C. 1874, at Ev. 2 (U.K.), available at <http://www.dwp.gov.uk/docs/emec-report-and-accounts-11-12.pdf>. The United Kingdom has contemplated charging parents to use the CSA. *Id.* at Ev. 4 (“[T]he Minister has said that the cost of a typical case is £25,000 over the lifetime of a child using the CSA and it is therefore fair to introduce charging. . .”).

20. *Id.* at 16.

21. CHILD SUPPORT: 2009, *supra* note 1, at 9. This is a decrease from 76.3% in 2007. CHILD SUPPORT: 2007, *supra* note 1, at 1.

22. FY2011 PRELIMINARY REPORT, *supra* note 18.

23. COMM. PUB. ACCOUNTS, *supra* note 19.

24. There are many well-discussed collateral issues to child support that fall beyond the scope of this Article. See, e.g., David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2577 (1995) (arguing that increased enforcement of child support will have “negative consequences [that] would be borne disproportionately by the poorest persons and by persons of color”); J. Brad Reich & Dawn Swink, *You Can't Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era*, 20 ALB. L.J. SCI. & TECH. 1 (2010) (considering the child

comparative analysis of the U.S. and U.K. approaches illustrates the characteristics of a system that recognizes and validates the personal consequences to parents seeking child support.²⁵ Furthermore, to the extent possible under federal law, there should be some judicial oversight of the state agencies responsible for overseeing child support. In the alternative, states should institute a review mechanism to hold noncustodial parents accountable for the failure to fulfill their support responsibilities. Accordingly, Part I of this Article reviews the law of child support collection in the United States. Part II considers the corresponding law in the United Kingdom. Finally, Part III compares the U.S. and U.K. enforcement systems and highlights the important role courts play in child support enforcement and the consequences of increasing judicial involvement.

I. CHILD SUPPORT ENFORCEMENT IN THE UNITED STATES

In the United States, child support enforcement “[has] progressed from private, to state, then to federal remedies.”²⁶ Much of this change is the result of the major demographic shifts in the structure of the American family.²⁷ Today, both parents and the state are often parties to child support enforcement actions.²⁸

A. State Enforcement of Child Support Obligations

Before the rise in the number of children born out of wedlock or to parents who would eventually divorce, parents served as the primary

support obligations of donors and recipients of genetic material for procreative purposes); Sara R. David, Note, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921 (2005) (discussing child support responsibilities following same-sex unions).

25. For the separate issue of international child support, specifically the collection of child support payments across country boundaries, see Michael J. Peters, *International Child Support: The United States Striving Towards a Better Solution*, 15 NEW ENG. J. INT’L & COMP. L. 91 (2009).

26. WALTER WADLINGTON & RAYMOND C. O’BRIEN, *FAMILY LAW IN PERSPECTIVE* 129 (3d ed. 2012).

27. See *infra* Part III. (discussing the changing dynamics of the American family).

28. This Article considers “parent” to include both the custodial parent of the child and the noncustodial parent, although the definition of the term “parenthood” could potentially change. See, e.g., Suzanne B. Goldberg, Harriet Anticzac & Mark Musico, *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of Debra H. v. Janice R.*, 20 COLUM. J. GENDER & L. 348, 349 (2011) (considering whether the law should recognize the rights of a person who “functions” as a parent but who has no biological or adoptive connection to the child).

financial supporters of minor children.²⁹ Indeed, while friends and extended family may have provided financial support to parents in need, there was recourse through the courts to recover the loan once the parents were able to pay.³⁰ Additionally, most American states enacted poor laws, which were based on the Elizabethan Poor Law in England.³¹ However, the fundamental principle of family law was that courts refused to intervene in the matters of an intact family unless the parents neglected or abused their children.³²

By the twentieth century, almost all states had enacted civil statutes requiring parents to support their children, which prompted the question of who had standing to enforce support obligations.³³ Most statutes specifically identified who had standing; some statutes even empowered children to enforce their parents' obligations.³⁴ Other statutes did not address the question of standing.³⁵ Rather, courts enforced support obligations under the doctrine of necessities, which stemmed from the common law duty of a husband to provide for the necessary expenses of his wife and children.³⁶

Modern child support disputes begin in state court after one parent, usually the custodial parent seeking to offset the costs of raising the child, sues the other parent for support.³⁷ Alternatively, the state child support

29. See Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 314 (2008) (noting that only 3.8% of children were born to unwed parents in 1940, compared to 33.8% in 2002).

30. Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 809–10 (1988–89) (noting that a third party could seek reimbursement through the courts for providing “necessaries” to the child).

31. *Id.* at 809 (describing the dual function of poor laws: (1) to codify a mechanism by which relief could be provided to the poor; and (2) identifying individuals responsible for reimbursing the government).

32. See, e.g., *Kilgrow v. Kilgrow*, 107 So. 2d 885, 888–89 (Ala. 1958) (holding that the Alabama Supreme Court had no jurisdiction over a dispute between two parents about their child's education because “the parents and child [were] all living together as a family group”).

33. See 4 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS* § 234, at 56–58 (1936).

34. *Id.* (arguing that statutes that specifically delineate the extent of parents' liability are preferable because “any serious danger of officious intermeddling by private persons is avoided”).

35. *Id.* at 57–58.

36. *Id.* at 56; see also Susan Kalinka, *Taxation of Community Income: It Is Time for Congress to Override Poe v. Seaborn*, 58 LA. L. REV. 73, 94 (1997) (“Under the doctrine of necessities, the earning spouse is responsible for payment of expenses incurred by the nonearning spouse for those things that are necessary for the family.”). Whether an expense is “necessary” is determined by evaluating the means, social position, and circumstances of both parents. *Id.*

37. See, e.g., *Childers v. Childers*, 575 P.2d 201, 203 (Wash. 1978) (reviewing a child support order that originated in an action brought by the custodial parent against the noncustodial parent). However, in *Colonna v. Colonna*, 855 A.2d 648, 649–51 (Pa. 2004), the non-custodial

agency may initiate action on behalf of the custodial parent.³⁸ In addition, both parents and the relevant state agency also have standing to modify child support orders.³⁹

Consequently, state governments play a significant role in child support collection,⁴⁰ and states have become more creative and aggressive in their enforcement efforts.⁴¹ Enforcement techniques range from lighter penalties, such as the suspension of recreational licenses or the loss of a work permit, to severe sanctions, such as criminal prosecution and incarceration.⁴²

parent sued the custodial parent for child support to maintain a certain standard of living for the children when they visited the noncustodial parent. *See also* Jill Lipman, *Recent Decision: A Parent with Primary Custody of the Couple's Children May Be Ordered to Pay Child Support to a Parent with Partial Custody Under Pennsylvania Law: Colonna v. Colonna*, 43 DUQ. L. REV. 481, 494-95 (2005) (expecting *Colonna* to open the litigation floodgates for lower-income, noncustodial parents, which in turn transformed recovery under child support guidelines into a "crapshoot").

38. HOUSE COMM. WAYS & MEANS, *Section 8: Child Support Enforcement Program*, in 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 8-1, 8-2 (2004).

39. *See* 28 U.S.C. § 1738B(b) (2006) (defining "contestants" in a child support order as persons, including a parent, state, or political subdivision of a state).

40. *See, e.g.*, Margaret Wrenn Hickey, *Administrative Enforcement: A New Tool to Collect Support Arrears*, WIS. LAW., Dec. 1998, at 15 (1998) (noting that, in order to collect child support, Wisconsin has "the right to suspend, revoke, limit, or refuse to renew many licenses and the right to levy or take a lien against property held by the payer"); William W. Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 FLA. L. REV. 563, 570 & n.24 (1995) (describing how a number of state welfare departments are "entitled by statute" to sue to recover child support payments).

41. *See, e.g.*, Bobby L. Dexter, *Transfiguration of the Deadbeat Dad and the Greedy Octogenarian: An Intratextualist Critique of Tax Refund Seizures*, 54 KAN. L. REV. 643, 644 & n.9 (explaining how several states have worked with Congress and the U.S. Department of Treasury to collect owed child support).

42. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1000 (2006); *see also* Margaret Campbell Haynes & Peter S. Feliceangeli, *Child Support in the Year 2000*, 3 DEL. L. REV. 65, 89 (2000) (explaining Delaware's ability to suspend recreation, driving, and professional licenses); Elizabeth Warren, *The New Economy and the Unraveling Social Safety Net: The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 410 & n.27 (2004) (noting that parents behind on child support payments may lose their driver's licenses or work permits). For an in-depth treatment of license revocation for child support enforcement purposes, *see* Mark R. Fondacaro & Dennis P. Stolle, *Revoking Motor Vehicle and Professional Licenses for Purposes of Child Support Enforcement: Constitutional Challenges and Policy Implications*, 5 CORNELL J. L. & PUB. POL'Y 355 (1996); and Mai M. Petersen, *Modification and Enforcement of Support: Enforcing Child Support by Revoking Licenses: How Constitutional Is It?*, 11 J. CONTEMP. LEGAL ISSUES 441 (2000). *But see* *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (striking down a Wisconsin law that denied marriage licenses to parents with unpaid child support obligations).

Imprisonment continues to be the most serious penalty a state imposes on parents who fail to pay child support. For example, a Massachusetts study found that parents who had been incarcerated for failing to meet their child support obligations owed an average of \$10,543 in support.⁴³ Furthermore, because a parent's child support obligations do not change if he or she is in prison, the study predicted that parents incarcerated in Massachusetts would generate an additional \$20,461 in debt while serving their prison sentences, plus 12% interest and 6% penalties.⁴⁴

In *Turner v. Rogers*, the U.S. Supreme Court considered whether indigent parents are entitled to state-appointed counsel when they face incarceration for failing to pay child support.⁴⁵ The case arose as a result of the Family Court of South Carolina's practice of enforcing child support orders with the threat of incarceration for civil contempt.⁴⁶ The petitioner was one such parent who was imprisoned for failing to pay child support.⁴⁷ The issue in the case was whether the Due Process Clause granted an indigent defendant, such as the petitioner, a right to state-appointed counsel at a civil contempt proceeding that could result in his imprisonment for up to a year.⁴⁸ The Court held that due process did not require the state to provide counsel in such circumstances.⁴⁹ However, the Court also held that the state nonetheless must conduct contempt proceedings fairly.⁵⁰ The Court noted that the particular circumstances surrounding petitioner's contempt proceeding violated due process, concluding that "[h]e did not

43. NANCY W. THOENNES, CENTER FOR POLICY RESEARCH, CHILD SUPPORT PROFILE: MASSACHUSETTS INCARCERATED AND PAROLED PARENTS 27 (2002), available at <http://cntrpolres.qwestoffice.net/reports/profile%20of%20CS%20among%20incarcerated%20&%20paroled%20parents.pdf>.

44. *Id.* at 20, 27. Critics have deplored the modern day debtors' prison created as a result. See, e.g., Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 117-18 (2008) (noting that the majority of parents with child support debts are indigent or otherwise unable to pay); Richard E. James, Note, *Putting Fear Back Into the Law and Debtors Back Into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 149 (2002) (describing a "de facto debtors' prison system" that has developed to address debt).

45. *Turner v. Rogers*, 131 S. Ct. 2507, 2515-16, 2520 (2011). For arguments in support of indigent parents' right to counsel, see Brief for Constitution Project as Amicus Curiae Supporting Petitioner at 22-23, *Turner*, 131 S. Ct. 2507 (No. 10-10), available at <http://www.scotusblog.com/wp-content/uploads/2010/08/AmConstProj.10-10.pdf>.

46. *Turner*, 131 S. Ct. at 2512-13.

47. *Id.* at 2513.

48. *Id.* at 2512.

49. *Id.*

50. *Id.* at 2519-20 (requiring the state court to provide "alternative procedural safeguards," such as "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information and court findings").

receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding.”⁵¹

As *Turner* illustrates, states have become more aggressive in enforcing child support, often involving the courts and utilizing federal money. However, states have not yet achieved full success in child support enforcement. The initial process of locating the noncustodial parent,⁵² establishing paternity,⁵³ and initiating child support proceedings⁵⁴ is difficult, and the enforcement of orders and collection of support pose their own special issues.⁵⁵ Additionally, although it is difficult to estimate the total cost of child support enforcement, state expenditures alone are high. For example, in 2006, state child support programs spent approximately \$5.6 billion to collect \$23.9 billion in child support.⁵⁶ For every dollar of administrative expense, states collected \$4.30 in owed support.⁵⁷ Furthermore, combined federal-state collection programs employed approximately 60,000 people.⁵⁸

B. Federal Enforcement of Child Support Obligations

The federal government began its oversight of child support enforcement with Aid to Families with Dependent Children (AFDC), a federal program created by the Social Security Act of 1935.⁵⁹ The purpose of this provision of the Act was to provide state funding to “needy dependent children.”⁶⁰ In

51. *Id.* at 2511.

52. See Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1668 & n.246 (2002) (describing an absent noncustodial parent as an “obvious example” of nationwide problems concerning child support enforcement).

53. See Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 253 (2006) (footnote omitted) (“Although DNA technology was envisioned as a tool to establish paternity without the need for judicial involvement, it has been eagerly embraced by litigants who seek to disestablish their status as legal parents.”).

54. See Haynes & Feliceangeli, *supra* note 42, at 74.

55. See *supra* note 1 and accompanying text.

56. HOUSE COMM. WAYS & MEANS, *supra* note 38, at 8-5.

57. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T HEALTH & HUMAN SERVS., FY2006 PRELIMINARY REPORT 1–2 (2007), available at http://archive.acf.hhs.gov/programs/cse/pubs/2007/preliminary_report/. Additionally, “1.7 million paternities were established or acknowledged; almost 1.2 million support orders were established; and 8.5 million cases had collections” in 2006. *Id.*

58. *Id.* This figure marks an increase of almost 50% from the \$2.89 collected per dollar of administrative cost in 1982. *Id.* The figure improved to \$5.12 in fiscal year 2011. FY2011 PRELIMINARY REPORT, *supra* note 18, at 4.

59. Social Security Act of 1935, Pub. L. No. 74-271, tit. IV, 49 Stat. 620, 627–29 (codified as amended at 42 U.S.C. §§ 601–06 (2006 & Supp. 2012)).

60. § 401, 49 Stat. at 627.

1950, Congress amended the AFDC to require state welfare agencies to notify enforcement officials if a child continued to receive benefits under the program after being abandoned by his or her parents.⁶¹ The Act then empowered state officials to search for the child's parents and require them to fulfill their child support obligations.⁶² From 1950 to 1975, the federal government limited its child support efforts to holding the parents of abandoned children accountable for support.⁶³

By that time, the composition of the AFDC caseload had changed. Before this shift, most children required public financial assistance because their parents had died.⁶⁴ However, by the 1970s, most children needed financial support because their parents had never married or had since separated or divorced.⁶⁵ The AFDC aided these children by funding state programs to establish paternity, to locate absent parents, and to aid families in receiving support orders.⁶⁶

To qualify for federal funds under the framework, a state had to certify that it created a child support enforcement program that met the requirements in Title IV–D of the Social Security Act and was approved by the Secretary of the Department of Health and Human Services (HHS).⁶⁷ If the state was successful, the federal government then agreed to underwrite approximately two-thirds of the costs the state incurred through the program.⁶⁸

State governments provided enforcement services automatically to AFDC recipients and to all other custodial parents for a small fee.⁶⁹ The state often required AFDC recipients to assign their rights to the state and to cooperate fully with the state's program in order to benefit from the state's enforcement efforts.⁷⁰ In the early days of the AFDC program, the state retained most of the money it collected on behalf of AFDC recipients, with the exception of the \$50 of each payment the law required the state to

61. HOUSE COMM. WAYS & MEANS, *supra* note 38, at 8-5.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See 42 U.S.C. §§ 651, 654 (1994) (current version at 42 U.S.C. §§ 651, 654 (2006 & Supp. 2012)).

67. 42 U.S.C. §§ 602(a)(2), 652(a)(3) (1994) (current version at 42 U.S.C. §§ 602(a)(2), 652(a)(3) (2006)).

68. 42 U.S.C. § 655(a)(1) (1994) (current version at 42 U.S.C. § 655(a)(1) (2006)).

69. 42 U.S.C. §§ 651, 654(4), (6) (current version at 42 U.S.C. §§ 651, 654 (2006)).

70. See *infra* Part III.B.2.

set aside to help offset welfare costs.⁷¹ However, an amended version of Title IV–D distributed a larger portion of the collected funds to families that left the welfare system.⁷² Conversely, non-AFDC recipients who utilized the state’s enforcement programs received all of the money the state collected on their behalf.⁷³ As one commentator described the AFDC program, “[w]here the mother receives public aid, federal and state governments will provide the child support payment to the mother and hold the father indebted to the government for that amount. In cases where the mother is not dependent on welfare, the government has largely stayed out of the fray.”⁷⁴

Modern child support law has aimed to combat poverty and reduce welfare costs.⁷⁵ In 1975, Congress enacted the Child Support Enforcement and Paternity Establishment Program (CSE Program) under Title IV-D of the Social Security Act.⁷⁶ The CSE Program is a federal-state partnership that aims to increase the rate of child support collection.⁷⁷ To accomplish this goal, the legislation envisioned a more effective child support collection system that was designed to deter parents from abandoning their children, which would in turn lower welfare costs for taxpayers.⁷⁸ Amendments to the legislation also authorized child support agencies to seek medical support as part of child support orders and to collect spousal support for custodial parents.⁷⁹

Among the CSE Program’s most successful enforcement tools is the income withholding order, which automatically deducts delinquent child

71. 42 U.S.C. § 657(b)(1) (1994) (current version at 42 U.S.C. § 657(b)(1) (2006 & Supp. 2012)).

72. 42 U.S.C. § 657(a)(2) (2006 & Supp. 2012) (“To the extent that the amount collected does not exceed the current support amount, the State shall pay the amount to the family.”).

73. 42 U.S.C. § 657(a)(4) (2006 & Supp. 2012). The AFDC required the state to distribute the funds within two days of receiving them. 42 U.S.C. § 654b(c)(1) (2006).

74. Reginald Mombrun, *An End to the Deadbeat Dad Dilemma?—Puncturing the Paradigm by Allowing a Deduction for Child Support Payments*, 13 *FORDHAM J. CORP. & FIN. L.* 211, 217 (2008) (citations omitted).

75. See, e.g., Estin, *supra* note 5, at 505 (“Much of the motivation for the enormous national effort and expense devoted to the child support revolution was the promise that better support enforcement would help keep single-parent families off the welfare rolls and allow the government to recoup its growing expenditures for public benefits.”).

76. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101, 88 Stat. 2337, 2351 (codified at 42 U.S.C. §§ 651–52 (2006)).

77. S. REP. NO. 93-1356, at 46 (1974).

78. *Id.* at 42, 46, 49–50.

79. See HOUSE COMM. WAYS & MEANS, *supra* note 38, at 8-2.

support from the debtor parent's wages.⁸⁰ Income withholding has allowed child support enforcement agencies to collect 68% of owed support, approximately \$21.9 billion.⁸¹ Similarly, Congress also authorized the direct seizure of pending income tax refunds as a means of reaching the assets of debtor parents.⁸²

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, which replaced AFDC and its related programs with the Temporary Assistance for Needy Families (TANF) block grant program.⁸³ Assistance under TANF is time-limited and encourages employment and self-sufficiency.⁸⁴ Under the Act, each state must establish a child support enforcement program that meets federal CSE standards to receive TANF funds.⁸⁵ Congress used this legislation to encourage states to establish paternity and to hold absentee parents accountable for child support obligations by withholding TANF funds from those states that failed to establish effective CSE programs.⁸⁶ The 1996 legislation also withheld funding if the state failed to include an employment requirement in its enforcement program, the goal of which was to prevent custodial parents from relying on welfare resources for their entire incomes.⁸⁷ However, despite these efforts to improve state programs, "[t]here is considerable evidence that reforms have failed to

80. *Quick Facts: Child Support Enforcement*, NAT'L CHILD SUPPORT ENFORCEMENT ASS'N <http://www.nsea.org/wp-content/uploads/2011/12/Enforcement-of-Child-Support-Orders-Quick-Facts.pdf> (last visited Sept. 16, 2013). Debtor parents cannot avoid the order by changing jobs because states are able to track this information. *Id.*

81. *Id.*

82. Dexter, *supra* note 41, at 645 (reporting that "[c]hild-support-related refund seizures have resulted in the collection of billions of dollars of revenue").

83. HOUSE COMM. WAYS & MEANS, *supra* note 38, at 8-3; *see also* H.R. REP. NO. 104-725, at 261, 263 (1996) (Conf. Rep.) (noting that the Act "put[] in place the most fundamental reform of welfare since the program's inception").

84. Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 805 (2005) (describing TANF as a "time-limited program that requires 'workfare' or job training participations as conditions of eligibility"); *About TANF*, ADMIN. FOR CHILDREN & FAMS. ARCHIVES, <http://archive.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited Sept. 16, 2013) (noting that TANF's mission is "to help needy families achieve self-sufficiency").

85. HOUSE COMM. WAYS & MEANS, *supra* note 38, at 8-3.

86. Harris, *supra* note 2, at 157 (criticizing this legislation on the grounds that it does not improve noncustodial parents' involvement in the family and has not achieved the elimination of child poverty).

87. *See id.* at 158 (explaining that welfare reform rejected the traditional assumption that women would stay home to care for their children, instead assuming that all parents would work outside of the home and therefore could support their children without public assistance).

accomplish one of the most important objectives of child support, that of reducing child poverty.”⁸⁸

In 2005, Congress passed the Deficit Reduction Act, which required families not previously enrolled in the TANF program to pay a \$25 fee for each year the state’s CSE program collected more than \$500 in child support on their behalf.⁸⁹ The Deficit Reduction Act of 2005 also reauthorized federal TANF funding through 2010.⁹⁰

By 2006, approximately 70% of families eligible for child support utilized government-funded enforcement services.⁹¹ Accordingly, in May 2006, the Office of Family Assistance established the TANF Bureau to administer the various programs authorized under Titles IV-A and XVI of the Social Security Act.⁹² The Bureau assists families by providing states with the funding necessary to develop and implement their own welfare programs.⁹³

To oversee this complicated federal-state enterprise—and to manage the federal government’s role as creditor⁹⁴—Congress created the Administration for Children and Families, Office of Child Support Enforcement (OSCE) within HHS.⁹⁵ The OSCE oversees federal programs that “promote[] the economic and social well-being of families, children, individuals and communities.”⁹⁶ Specifically, the OSCE enforces child support payments and audits states’ compliance with their federally approved child support enforcement plans.⁹⁷

88. J. THOMAS OLDHAM & MARYGOLD S. MELLI, *CHILD SUPPORT: THE NEXT FRONTIER* ix (2000).

89. H.R. REP. NO. 109-362, at 148 (2005) (Conf. Rep.).

90. *Id.* at 135.

91. HOUSE COMM. WAYS & MEANS, *supra* note 38, at 8-5.

92. *About TANF*, *supra* note 84.

93. *Id.* (“To carry out its mission, the TANF Bureau: 1) develops legislative, regulatory, and budgetary proposals; 2) presents operational planning objectives and initiatives related to welfare reform to the Director; 3) oversees the progress of approved activities; 4) provides leadership and coordination for welfare reform within ACF; and 5) provides leadership and linkages with other agencies on welfare reform issues, including agencies within DHHS, relevant agencies across the Federal, State, local, and Tribal governments, and non-governmental organizations at the Federal, State, and local levels.”).

94. *See supra* note 70 and accompanying text (explaining that families assign their support enforcement rights to the state in exchange for welfare benefits).

95. Fondacaro & Stolle, *supra* note 42, at 360 n.19.

96. *About the Office of Child Support Enforcement (OCSE)*, ADMIN. OF CHILDREN & FAMS., <http://www.acf.hhs.gov/programs/css/about> (last visited Sept. 16, 2013).

97. *Id.* (noting that the OCSE works with state enforcement agencies to help them administer their programs effectively).

The OCSE does not work in isolation. Instead, the OCSE collaborates with various federal and local agencies to ensure the success and efficiency of child support collection.⁹⁸ The OSCE works together with these agencies to locate parents, establish paternity, and enforce child support orders.⁹⁹

In terms of calculating the amount of child support for which noncustodial parents are responsible, federal law encourages states to promulgate rules that specify the dollar amount awarded in each case.¹⁰⁰ To determine the amount of the award, most states dictate “child support guidelines,” which are tables that calculate an adequate award based on the parents’ gross income and the number of children who require support.¹⁰¹ However, despite this standardization, it is difficult to predict how much raising or supporting a child will cost and to divide that speculative amount between the child’s parents.¹⁰²

II. CHILD SUPPORT ENFORCEMENT IN THE UNITED KINGDOM

Child support enforcement began in the United Kingdom with the British Poor Laws of 1576, which imposed a duty of support on the fathers of non-marital children if both the child and the child’s mother received some type of public assistance.¹⁰³ The Laws empowered justices of the peace to seek reimbursement of public funds from a child’s biological father.¹⁰⁴

98. *Id.* (explaining that OCSE collaborates with federal, state, tribal, and local governments).

99. *Id.*

100. See 42 U.S.C. § 667(a)–(b) (2006) (“Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.”). For an excellent background on these guidelines, and Arizona’s position, see Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona’s Child Support Guidelines*, 54 ARIZ. L. REV. 137 (2012).

101. Douglas W. Allen & Margaret F. Brinig, *Child Support Guidelines: The Good, the Bad, and the Ugly*, 45 FAM. L.Q. 135, 136–37 (2011) (using Virginia’s child support guidelines as an example).

102. *Id.* at 138–41 (describing the many variables that factor in to estimating the cost of raising a child and how that cost should be shared by the child’s parents).

103. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL’Y 1, 6 (2004) (tracking the establishment of the duty to support); Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL’Y 335, 337 (2007) (explaining that the duty applied only if the child and mother were receiving public assistance).

104. Baker, *supra* note 103.

Unwed mothers who did not receive public assistance did not have the right to sue the child's father for support until 1844.¹⁰⁵

By the 1980s, the United Kingdom had enacted a patchwork of laws to govern child support enforcement, including the Matrimonial Causes Act 1973, the Domestic Proceedings and Magistrates' Courts Act 1978, the Matrimonial and Family Proceedings Act 1984, and the Children Act 1989.¹⁰⁶ This collection of enforcement statutes allowed a custodial parent to sue the noncustodial parent directly for support.¹⁰⁷

However, by the 1990s, critics of this system considered its patchwork of laws to be "fragmented," overly "discretion[ary]," "inconsistent," and "ineffective."¹⁰⁸ In response, Parliament enacted the Child Support Act 1991 to replace the piecemeal framework.¹⁰⁹ The Act established the Child Support Agency (CSA), a centralized body that assumed responsibility for "the assessment, review, collection, and enforcement of maintenance payments."¹¹⁰ The CSA had the power "to collect information on incomes and obligations, make a legally binding assessment of what amount of [support] was payable, determine methods of payment, monitor and (where necessary) collect maintenance and enforce payment where payments failed."¹¹¹ Importantly, the CSA—rather than the courts—managed all child support issues and disputes; the 1991 Act intended to reduce judicial involvement in the child support system.¹¹² According to the House of

105. *Id.*

106. *See* R (Kehoe) v. Sec'y of State for Work and Pensions, [2005] UKHL 48 [2006] 1 A.C. (H.L.) 54, [3] (appeal taken from Eng.) (listing the various statutes under which the appellant could seek enforcement of her former spouse's child support obligations).

107. *Id.* at 53–54, [3] (explaining that, before 1991, the patchwork of laws allowed for a direct suit against a noncustodial parent to recover "child maintenance").

108. *Id.* at 54, [3]. A White Paper presented to Parliament noted that

[t]he present system of maintenance is unnecessarily fragmented, uncertain in its results, slow and ineffective. It is based largely on discretion. The system is operated through the High and county courts, the magistrates' courts, the Court of Session and the Sheriff Courts in Scotland and the offices of the Department of Social Security. The cumulative effect is uncertainty and inconsistent decisions about how much maintenance should be paid. In a great many instances, the maintenance awarded is not paid or the payments fall into arrears and take weeks to re-establish. Only 30 per cent of lone mothers and 3 per cent of lone fathers receive regular maintenance for their children. More than 750,000 lone parents depend on Income Support. Many lone mothers want to go to work but do not feel able to do so.

Id. (quoting DEP'T OF SOC. SEC., CHILDREN COME FIRST, 1990, Cm. 1264, ¶2 (U.K.)).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (noting that it was "important that, as far as possible, all the services relating to child maintenance provided to the public should be delivered by one single authority, the CSA").

Lords, the reduction of judicial involvement was not an “inadvertent omission,” but rather a “deliberate legislative departure” from the previous system.¹¹³ However, even under the Act, parents remained free to reach private support agreements, so long as the caring [custodial] parent did not also receive state benefits.¹¹⁴

The case of *Kehoe v. Secretary of State for Work and Pensions* provided an opportunity for U.K. courts to interpret and clarify the scope and reach of the 1991 Act.¹¹⁵ The appellant, Mrs. Kehoe, a divorced mother of four children, was attempting to obtain child support from her former husband.¹¹⁶ Following the end of the marriage, Mrs. Kehoe became the custodial parent of the four children.¹¹⁷ For the next ten years, Mrs. Kehoe attempted to obtain child support from Mr. Kehoe through the CSA.¹¹⁸ Mr. Kehoe paid a “significant” amount of the due support following the CSA’s involvement, but, as the court noted, “the process of obtaining payment was protracted and difficult and substantial arrears built up from time to time.”¹¹⁹

Failing to collect all the support due to her through the CSA, Mrs. Kehoe filed a lawsuit alleging that a direct action against Mr. Kehoe would allow her to recover a larger amount of support.¹²⁰ She contended that, by refusing her the right to judicial enforcement against Mr. Kehoe, the Child Support Act 1991 conflicted with Article 6 of the European Convention on Human Rights, which guarantees a right of access to the courts.¹²¹

The House of Lords dismissed the appeal, holding that Article 6 of the Convention did not apply to the case.¹²² Specifically, the court explained that Article 6 guarantees “procedural safeguards in the exercise of rights accorded by national law,” but does not “require that particular substantive rights be accorded by national law.”¹²³ Had the law given Mrs. Kehoe a right of recovery against Mr. Kehoe, Article 6 would “guarantee her access

113. *Id.* at 57, [6] (explaining that, in passing the 1991 Act, Parliament purposely abolished the previous system).

114. *Id.* at 55, [3].

115. *Id.* at 53, [1] (describing the issue on appeal as whether Mrs. Kehoe had a right to directly recover child support payments from her former husband under the Child Support Act 1991).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 57, [8].

to an impartial and independent court.”¹²⁴ However, Article 6 itself does not grant such a right of recovery.¹²⁵ The House of Lords though did leave open the possibility of a suit against the CSA or its administrators.¹²⁶

Mrs. Kehoe appealed to the European Court of Human Rights, which concluded that she could seek relief by initiating judicial review proceedings against the CSA or the Secretary of State for failing to properly enforce Mr. Kehoe’s support obligations.¹²⁷ The court rejected Mrs. Kehoe’s argument that this process was too onerous to be effective.¹²⁸ The court also deferred to the United Kingdom’s child support system, explaining that the United Kingdom did not violate Article 6 simply because a different system could provide a more efficient direct right of action.¹²⁹ In fact, the court commended the U.K. system precisely because it placed the burden of pursuing absent parents on the state rather than on the custodial parent.¹³⁰

Despite the judicial confidence in the United Kingdom’s child support system, the CSA was not completely successful; in thirteen years, the agency accrued £3.4 billion in unrecovered support payments.¹³¹

124. *Id.*

125. *Id.*

126. *Id.* at 68–69, [45]–[48]. Although there is no comparable right of action in the United States, courts have considered allowing custodial parents to sue child support enforcement agencies. *See, e.g.*, *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 619 (1973) (holding that a mother did not have standing to sue a prosecutor to enforce child support payment laws because of the “unique context of a challenge to a criminal statute” and the “special status of criminal prosecutions in our system”); *Jager v. Alameda*, 8 Cal. App. 4th Supp. 294, 297 (Cal. App. Dep’t Super. Ct. 1992) (rejecting a mother’s lawsuit against the family support division of the county’s District Attorney’s Office for negligence in its attempts to obtain child support because there was no attorney-client relationship between the mother and the office).

127. *Case of Kehoe v. the United Kingdom*, App. No. 2010/06, Eur. Ct. H.R. 9-12, [44]–[50] (2008), <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22fulltext%22:%5B%22kehoe%22%22%22documentcollectionid%22:%5B%22COMMITTEE%22,%22DECISIONS%22,%22COMMUNICATEDCASES%22,%22CLIN%22,%22ADVISORYOPINIONS%22,%22REPORTS%22,%22RESOLUTIONS%22%22%22itemid%22:%5B%22001-86980%22%22%7D>.

128. *Id.* at 10–11, [47]–[48].

129. *Id.*

130. *Id.* (noting that vesting control in the state “benefits the many parents with care of children who do not have the time, energy, resources or inclination to be embroiled in ongoing litigation with the absent parent and allows the State to pursue those absent parents who default on their obligations leaving their families on the charge of the social security system and the taxpayer”).

131. *See, e.g.*, Jon Robins, *Mother Challenges CSA ‘Negligence’*, *GUARDIAN* (May 20, 2006), <http://www.guardian.co.uk/money/2006/may/21/observercashsection.theobserver?INTCMP>. For excellent background on child support reform in the United Kingdom, see Nick Wikeley, *Child Support Reform in the United Kingdom*, <http://www.uea.ac.uk/swp/iccd>

Consequently, Parliament passed the Child Maintenance and Other Payments Act 2008, which established the Child Maintenance and Enforcement Commission (CMEC), a non-departmental public body that oversaw the United Kingdom's child maintenance system.¹³² The CMEC had three main functions: "[1] promoting the financial responsibility that parents who live apart have for their children; [2] providing information and support to help parents make effective maintenance arrangements; and [3] providing an efficient statutory child maintenance service with effective enforcement."¹³³ By the summer of 2012, the CMEC had failed: the agency received 23,000 complaints and cost £450 million per year, but 1.5 million children were still not receiving adequate support.¹³⁴ Therefore, the United Kingdom abandoned the CMEC in July of 2012.¹³⁵

On July 31, 2012, Parliament promulgated a new enforcement scheme, which transferred responsibility from the CMEC back to the Department for Work and Pensions, now called the Child Maintenance Service.¹³⁶ The Child Maintenance Service is currently working to establish the parameters of the new system.¹³⁷ It remains to be seen whether this enforcement scheme will be effective. Although the framework is new, it is an alternative to the American system, especially in regard to the direct right of action against the government.

2006/Presentations/tues_pm/ps3%20Child%20support%20reform/Wikeley%20ppt.pdf (last visited Sept. 16, 2013).

132. 3 July 2012, PARL. DEB., H.C. (2012) 3 (U.K.), available at <http://www.publications.parliament.uk/pa/cm201213/cmgeneral/deleg11/120703/120703s01.htm> (noting that the primary function of the CMEC was "to maximise the number of effective maintenance arrangements in place for children who live apart from one or both of their parents").

133. *Id.* CMEC had two delivery bodies, which employed 8,000 staff: (1) Child Maintenance Options, which provided free and impartial information and support services and (2) the Child Support Agency. *Id.*

134. *Id.* (arguing that the CMEC did not "achieve its mission in life").

135. *Id.* at 5 ("[T]he CMEC will be abolished and no longer exist as a separate legal organisation.").

136. *See id.* (explaining that the CMEC's responsibilities and staff will transfer to the Department for Work and Pensions); DEP'T FOR WORK AND PENSIONS, PUBLIC CONSULTATION SUPPORTING SEPARATING FAMILIES; SECURING CHILDREN'S FUTURES, 2012, Cm. 8399, at 7, Annex A (U.K.), available at <http://www.dwp.gov.uk/docs/childrens-futures-consultation.pdf>.

137. DEP'T FOR WORK AND PENSIONS, *supra* note 136, at Annex A (describing the phases of development of the Child Maintenance Service).

III. A COMPARATIVE ANALYSIS

Although the enforcement mechanisms in both countries originate from the English Poor laws,¹³⁸ the United Kingdom and United State have each devised different systems to provide access to the judiciary and a direct right of action in the child support enforcement context.¹³⁹ Neither jurisdiction has yet developed an efficient and successful child support system.

The United Kingdom has centralized collection efforts and prohibited direct action by custodial parents against defaulting noncustodial parents with the CSA, but at the same time permitted a direct action against the government for failing to enforce support obligations.¹⁴⁰ Conversely, the United States allows one parent to sue the other parent directly to enforce support responsibilities (unless one parent receives welfare benefits), but does not allow suits against the enforcement agency.¹⁴¹

Improvement to both systems is necessary, especially to accommodate the changing demographics of the modern family. By comparing the two systems, improvements can be targeted to maximize child support enforcement in both countries, while at the same time protecting the rights of parents and their children.

A. The Changing Demographics of the Modern Family

Today, almost all child support in the United States is ordered for children of divorced or never-married parents.¹⁴² Currently, the divorce rate is nearly 50%,¹⁴³ and 40.8% of children are born to unmarried

138. See *supra* notes 31, 103, and accompanying text.

139. Compare *Blessing v. Freestone*, 520 U.S. 329, 332–33 (1997) (holding that custodial parents do not have a right to sue a state agency for the failure to enforce child support obligations), with *Case of Kehoe v. the United Kingdom*, App. No. 2010/06, Eur. Ct. H.R. 10, [46]–[47] (2008), <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22fulltext%22:%5B%22kehoe%22%22%22documentcollectionid%22:%5B%22COMMITTEE%22%22DECISIONS%22%22COMMUNICATEDCASES%22%22CLIN%22%22ADVISORYOPINIONS%22%22REPORTS%22%22RESOLUTIONS%22%22itemid%22:%5B%22001-86980%22%7D> (noting that the United Kingdom allows custodial parents to seek judicial review of the CSA's efforts to enforce maintenance payments).

140. See *supra* notes 112–114, 120–126, and accompanying text (discussing the avenues of relief in the United Kingdom).

141. See *supra* notes 37–39 and accompanying text (discussing the avenues of relief in the United States); *Blessing*, 520 U.S. at 332–33 (prohibiting a direct action against state child support enforcement agencies).

142. WADLINGTON & O'BRIEN, *supra* note 26, at 129.

143. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 52 NATIONAL VITAL STATISTICS REPORTS: BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2003 1 (2004), available at <http://www.cdc.gov/nchs/data/nvsr>

parents.¹⁴⁴ The consequence of these changing demographics is that many children are entitled support from a noncustodial parent.

Most single parents in the United States are women over the age of twenty.¹⁴⁵ Indeed, in 2010, single-parent households headed by women numbered 8,365,912, which constituted 7.2% of American households.¹⁴⁶ By contrast, single-parent households headed by men numbered 2,789,424 in 2010, 4.2% of American households.¹⁴⁷ Similarly, although unmarried couples with children made up 6.6% of households in 2010 (approximately 7,744,711 households in total), these couples had a 90% chance of separating if they did not marry within five years.¹⁴⁸

By comparison, in the past ten years, 40% of children in the United Kingdom were born to unmarried parents, a sharp increase from 12% in 1980 and 6% in 1960.¹⁴⁹ Many of these children were born to unmarried parents that cohabit. For example, 25% of the children in the Millennium Cohort Study—a survey that tracks 18,800 children who were born in the

/nvsv52/nvsv52_22.pdf (reporting that there were 3.8 divorces per every 7.5 marriages in 2003); Margaret Berger Strickland, Comment, *What's Mine Is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse*, 51 LOY. L. REV. 989, 990 (2005) (“[I]n 2003, for every two marriages, there was a divorce.”).

144. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 61 NATIONAL VITAL STATISTICS REPORTS: BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: FINAL DATA FOR 2010 10 (2012), available at http://www.cdc.gov/nchs/data/nvsv/nvsv61/nvsv61_01.pdf. This figure marked a decrease in children born out of wedlock for the second consecutive year; the number of births to unmarried parents peaked at 1,726,566 in 2008. *Id.*

145. *Id.* Most unmarried mothers have reached adulthood; in 2010, only 20% of non-marital births were to teenagers, compared to 28% in 2000. *Id.*

146. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 5 (2012) available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

147. *Id.*

148. Anna Stępień-Sporek & Margaret Ryznar, *The Legal Treatment of Cohabitation in Poland and the United States*, 79 UMKC L. REV. 373, 373 (2010) (noting that, after five years, only 10% of unmarried, cohabiting couples remain together); see also Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 409 (2004) (explaining that cohabiting couples report feeling less committed to their relationships and, further, that cohabitation before marriage reduces the couple's chances of future marital success); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1005–13 (2003) (arguing that cohabiting partners are less faithful to each other, less happy, less wealthy, and less stable than married couples).

149. Éva Beaujouan & Máire Ni Bhrolcháin, *Cohabitation and Marriage in Britain Since the 1970s*, in OFFICE FOR NAT'L STATISTICS, POPULAR TRENDS 35, 44 (Chris W. Smith ed., 2011).

United Kingdom at the turn of the twenty-first century—were born to parents who cohabit but are not married.¹⁵⁰

The divorce rate in the United Kingdom has also increased in recent years. The number of divorces rose by 4.9% in 2010, a year in which there were 241,100 marriages¹⁵¹ and 132,223 divorces.¹⁵² Half of couples who divorced in 2010 had at least one child younger than sixteen, for a total of 104,364 children affected by divorce that year.¹⁵³ This represents a 27% decrease from the number of children whose parents divorced in 2000.¹⁵⁴ However, the decrease may reflect that an increasing number of children are born to cohabiting, rather than married, couples.

Children of unmarried and divorced parents in both the United Kingdom and the United States face the same disadvantages, such as limited financial resources.¹⁵⁵ For example, in the United States, almost 25% of single custodial parents have incomes below the poverty level, 18.2% of which receive some type of child support.¹⁵⁶ Interestingly, one study suggests that children of unmarried parents face greater financial obstacles than children

150. Kathleen Kiernan & Kate Smith, *Unmarried Parenthood: New Insights from the Millennium Cohort Study*, in OFFICE FOR NAT'L STATISTICS, POPULAR TRENDS 26, 27 (2003).

151. OFFICE FOR NAT'L STATISTICS, DIVORCES IN ENGLAND AND WALES 2010 1–2 (2012) [hereinafter DIVORCES IN ENGLAND AND WALES], available at http://www.ons.gov.uk/ons/dcp171778_246403.pdf.

152. OFFICE FOR NAT'L STATISTICS, MARRIAGES IN ENGLAND AND WALES 2010 1, 8 (2011), available at http://www.ons.gov.uk/ons/dcp171778_258307.pdf.

153. DIVORCES IN ENGLAND AND WALES, *supra* note 151, at 7 (noting that 21% of these children were under 5 years of age, and 64% were under 11 years of age).

154. *Id.* (reporting that 142,457 children were affected by divorce in 2000).

155. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1995) (explaining that, in 1993, the mean income for divorced American mothers was \$17,859, but \$31,034 for divorced fathers); see also Margaret F. Brinig, *Contracting Around No-Fault Divorce*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 275, 277 (F.H. Buckley ed., 1999) (arguing that children of divorced parents “will be worse off,” “may lose out,” and “will be poorer than those of intact families”). But see Kelly Bedard & Olivier Deschênes, *Sex Preferences, Marital Dissolution and the Economic Status of Women*, 40 J. HUM. RESOURCES 411, 413 (2005) (arguing that divorced women earn higher incomes than never-divorced women).

156. CHILD SUPPORT: 2009, *supra* note 1, at 1, 4; see also Harris, *supra* note 2, at 160 (“Almost a quarter of custodial parents live below the level of poverty and that rate has been virtually unchanged since 2001.”). Many children live below the poverty line; in 1975, 17% of children under the age of eighteen lived below the poverty line. *Id.* at 158. That figure rose to 20% in the 1980s and did not begin to decline until early in the twenty-first century, when 16% of children under eighteen lived in poverty. *Id.* However, the statistic rose to 20% again in 2009. *Id.* at 158–59.

of parents who subsequently divorce.¹⁵⁷ Furthermore, economic disadvantages can potentially extend into a child's adult life, causing some American courts to order noncustodial parents to pay for their children's college educations.¹⁵⁸

In sum, well over half of the children born in the next generation will be born to unmarried or eventually-divorced couples. Because this class of children traditionally has not received the same financial support as marital children, it is important to maximize noncustodial parents' payment of child support. Direct rights of action against the noncustodial parent and the government are powerful tools for custodial parents to recover child support.

B. The Importance of a Direct Right of Action

There are two separate and distinct direct rights of action in child support cases. First, one parent may directly sue the other parent; this option is only available in the United States.¹⁵⁹ Second, a parent relying on the enforcement of child support by a government agency may sue the government agency if he or she is dissatisfied with the agency's collection efforts; this method is only permitted in the United Kingdom.¹⁶⁰ Indeed, the role played by the courts may have an important impact on the effectiveness of child support collection for innumerable children.

1. Suits Against the Government Agency

In the United States, a direct right of action against a government official—in this context called a “private right of action”—is permitted in some cases by 42 U.S.C. § 1983, which imposes liability on anyone who, under color of state law, deprives another “of any rights, privileges, or immunities

157. See Harris, *supra* note 2, at 160–61 (noting that unmarried parents are much more likely to live in poverty than parents who marry and subsequently divorce because of their youth and lack of education).

158. See, e.g., Childers v. Childers, 575 P.2d 201, 207 (Wash. 1978) (“[I]t has long been the law in Washington that a divorced parent may have a duty of support for college education if it works the parent no significant hardship and if the child shows aptitude.”); see also MO. ANN. STAT. § 452.340.5 (West 2003 & Supp. 2013) (extending a parent's duty to support if the child enrolls in college no later than October after graduating from high school); Anna Stępień-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 QUINNIPIAC L. REV. 359, 360 (2012) (explaining that post-majority child support is “neither uniform nor universal”).

159. See *supra* notes 37–39 and accompanying text.

160. See *supra* notes 112–114, 120–126, and accompanying text.

secured by the Constitution and laws.”¹⁶¹ The U.S. Supreme Court held that this provision safeguards certain rights conferred by federal statutes.¹⁶²

The Court considered the applicability § 1983 to child support disputes in *Blessing v. Freestone*.¹⁶³ Five Arizona mothers whose children were eligible for state child support services under Title IV–D of the Social Security Act brought suit against the director of Arizona’s child support enforcement agency, alleging that the agency did not adequately attempt to obtain child support payments from their children’s fathers.¹⁶⁴

The mothers blamed structural defects in Arizona’s child support system, including “staff shortages, high caseloads, unmanageable backlogs, and deficiencies in the State’s accounting methods and recordkeeping.”¹⁶⁵ The mothers requested broad relief, including a declaratory judgment that the Arizona program violated the Title IV–D provisions that created rights enforceable under § 1983, as well as an injunction requiring the agency to comply substantially with Title IV–D in all operations.¹⁶⁶

The United States District Court for the District of Arizona granted summary judgment in favor of the state, and the mothers appealed.¹⁶⁷ The United States Court of Appeals for the Ninth Circuit reversed, applying the three main factors used to determine whether a statute creates a privately enforceable right: (1) whether the plaintiffs were “the ‘intended beneficiaries of the statute,’ [2] whether the plaintiffs’ asserted interests are not so ‘vague and amorphous’ as to be ‘beyond the competence of the judiciary to enforce,’ and [3] whether the statute imposes a binding

161. 42 U.S.C. § 1983 (2006).

162. *Maine v. Thiboutot*, 448 U.S. 1, 4–5 (1980) (“[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.”); see also Candace Chun, Comment, *The Use of § 1983 as a Remedy for Violations of the Individuals with Disabilities Education Act: Why it is Necessary and What it Really Means*, 72 ALB. L. REV. 461, 465 (2009) (arguing that a private right of action should be permitted as a method of enforcing certain violations of the Individuals with Disabilities Education Act); Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 186 (1994) (explaining that permitting a private right of action as a means of enforcing the Foreign Corrupt Practices Act would solve many of the Act’s problems).

163. 520 U.S. 329, 332–33 (1997).

164. *Id.* at 332–33, 337 (“In a lengthy complaint, respondents claimed that they had properly applied for child support services but that, despite their good faith efforts to cooperate, the agency never took adequate steps to obtain child support payments from the fathers of their children.”).

165. *Id.* at 337.

166. *Id.*

167. *Id.* at 337–38 (noting that the district court “held that Congress had foreclosed private actions to enforce Title IV–D by authorizing the Secretary to audit and cut off funds to States with programs that do not substantially comply with Title IV–D’s requirements”).

obligation on the State.”¹⁶⁸ The Ninth Circuit concluded that Title IV-D satisfied each factor and this did create a private right of action.¹⁶⁹

The Supreme Court granted certiorari and held that Title IV-D did not provide the mothers with an individually enforceable right to compel Arizona’s child support agency to comply with its provisions.¹⁷⁰ The Court found it “readily apparent” that several of Title IV–D’s other provisions did not satisfy the three factors used to identify statutory rights.¹⁷¹ Furthermore, the Court noted that “[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983.”¹⁷²

The United Kingdom takes the opposite approach to direct rights of action against government agencies, permitting some judicial review of the agency that enforces child support. Specifically, the court in *Kehoe* explained that, “[i]f the Child Support Agency were to refuse to enforce a claim because it made some error of law (such as misunderstanding the extent of its statutory powers) [the custodial parent] could take proceedings by way of judicial review.”¹⁷³ Importantly, allowing for judicial review permits custodial parents “to influence the enforcement process.”¹⁷⁴

On appeal to the European Court of Human Rights, the parties questioned the effectiveness of this remedy:

While the applicant doubted that a domestic court would do more than issue a general order of *mandamus* for the CSA/Secretary of State to comply with their duty, she did not rule out the possibility of applying for specific measures to be included, whether by way of an order for attachment of earnings or for committal, in which context it would have been open to the courts, if they considered it appropriate, to add specific directions. It is true that the courts would not have awarded damages for any alleged periods in the past during which the applicant might have considered the CSA to have been culpably inactive. However, the Court considers that the opportunity to obtain court orders which direct the relevant authority to take appropriate and expeditious action must be regarded as effectively addressing the applicant’s principal

168. *Id.* at 338 (quoting *Freestone v. Cowan*, 68 F.3d 1141, 1147 (9th Cir. 1995), *rev’d sub nom. Blessing*, 520 U.S. 329).

169. *Id.*

170. *Id.* at 333.

171. *Id.* at 344.

172. *Id.* at 341.

173. *R (Kehoe) v. Sec’y of State for Work and Pensions*, [2005] UKHL 48 [2006] 1 A.C. (H.L.) 68, [45] (appeal taken from Eng.).

174. *Id.*

enforcing an obligation which each parent owes primarily to the child.”¹⁸³ Specifically, the 1991 Act “replace[d] the powers of the courts, which [could] no longer make orders for periodical payments for children save in very limited circumstances.”¹⁸⁴ However, denying judicial involvement in this manner has certain costs.

C. *The Costs of Child Support Enforcement by the Judiciary*

There are significant costs and judicial expenditure of resources each time a child support issue is brought before a court.¹⁸⁵ There may be a further waste of resources when a suit is brought against a parent who does not have the financial resources to pay support, even if there is a judgment against him or her.¹⁸⁶ As one commentator noted,

[i]n the modern world of child support collection, in which most debtors are plagued with negative credit reports, wage assignments, driver’s license suspensions, tax refund intercepts, and potential jail time, a parent who still fails to pay child support likely has no significant monetary value from which the child could benefit.¹⁸⁷

Furthermore, limiting enforcement rights to government agencies may prevent meritless suits against insolvent parents and consequently preserve valuable resources. Indeed, “[m]any laws may only be enforced by governmental agencies, precisely because of the concern that unwarranted or harassing suits—or perhaps only an unduly burdensome multiplicity of suits—may be filed if private citizens are also given enforcement rights.”¹⁸⁸

However, blocking access to the court system is costly in itself if the result is a reduction in child support collection. Most apparently, the state is required to step into the shoes of the debtor parent to provide financially for the child, unless the government agency is successful in recovering

183. *Huxley v Child Support Officer* (2000) 1 Fam LR 898, 908 (Austl.).

184. *Id.*

185. See J. Thomas Oldham, *Abating the Feminization of Poverty: Changing the Rules Governing Post-Decree Modification of Child Support Obligations*, 1994 BYU L. REV. 841, 890–91 (1994).

186. See Maldonado, *supra* note 42, at 1002 (“Seventy percent of the \$96 million owed in back child support in 2003 was owed by men earning \$10,000 per year or less, many of whom were unemployed or employed part-time.”).

187. Wendee M. Hilderbrand, Note, *When One Parent Goes and the Other Parent Stays: The Inconsistency and Inequality of Guaranteeing Absent Parents Permanent Parental Rights*, 56 VAND. L. REV. 1907, 1936 (2003). Furthermore, “if the custodial parent is poor, the custodial household remains poor after receiving the child support payment, even when the support obligor’s income is high.” Ellman, *supra* note 100, at 151.

188. Karen Cordry, *Eleventh Amendment Immunity: Everything Old Is New Again*, in WILLIAM NORTON, JR., ANN. SURV. BANKR. L. 143, 165 n.23 (1999-2000 ed. 1999).

support. In addition, without support from the custodial parent, the child may not grow up with sufficient resources to enable him or her to contribute to society to the same extent as other children.¹⁸⁹

Although blocking access to the court system for custodial parents seeking child support is not a costless option, there are two barriers to the judicial system that could be erected: (1) prohibition of lawsuits against government child support collection agencies by custodial parents,¹⁹⁰ and (2) prohibition of lawsuits between parents to accommodate the government's exclusive role in child support collection.¹⁹¹

The latter barrier—preventing parents from suing each other—may have an impact on the maximization of child support enforcement. First and foremost, this approach bars those with the greatest interest in enforcement proceedings from those proceedings. This may be a major mistake because the best enforcers are those with the greatest need for the enforcement of the support obligation: those who need the money and who have an interest in seeing results. While the state agency's stake in child support collection results from budgetary pressure to decrease the toll of unpaid child support on the state's public coffers, it is ultimately the custodial parent who struggles to run a household without child support.

On the other hand, harnessing parents' personal stake in child support enforcement may be unsuccessful in certain cases because of the number of people without financial means who start families.¹⁹² Often these parents establish informal support arrangements between themselves and accordingly do not take legal action, even if one parent technically owes support to the other parent.¹⁹³

189. See Maldonado, *supra* note 42, at 996–97 (discussing the problems caused by a child's inability to have a relationship with his or her father).

190. However, in some instances, the custodial parent may have to pay child support to the noncustodial parent. See, e.g., *Colonna v. Colonna*, 855 A.2d 648, 651–52 (Pa. 2004) (requiring the custodial mother to pay support to the non-custodial father in order to maintain a certain standard of living for the children).

191. See *supra* notes 112–114, 120–126 (explaining that the United Kingdom intentionally omitted parents' right to sue each other from the U.K. enforcement system).

192. See Harris, *supra* note 2, at 159 (“[C]hild support enforcement practices are actually harmful to many poor, non-marital children and their custodial mothers, in some cases reducing economic support from the fathers and disrupting the fathers' relationships with the children.”).

193. See, e.g., Maldonado, *supra* note 42, at 1010 (explaining that, because African American fathers generally do not make enough to support their children, mothers work to build relationships between the father and the child). Maldonado makes the excellent point that “[t]he law has failed to distinguish between fathers who can pay child support but refuse (the true deadbeats), and those who are unemployed or severely underemployed (those who are deadbroke).” *Id.* at 1003.

Prohibiting a direct action against the relevant child support agency poses different issues. Specifically, allowing custodial parents to recover for their dissatisfaction with the agency's efforts may cause the litigation floodgates to open. Although increased litigation could result in improvements in the agency's performance, taxpayers will then be responsible for both the agency's mistakes and the support awards themselves. Furthermore, meritless or harassing suits could exacerbate the problem.¹⁹⁴

However, the lack of both a direct right of action between parents and meaningful judicial review of the relevant state agency results in a child support enforcement system with no teeth. Therefore, given that parental enforcement against the state agency may be costly, permitting a direct action between parents as a cornerstone of the child support system may be worth considering.

IV. CONCLUSION

In the enforcement of any law, the judiciary has a role to play. Enforcement of child support obligations is no exception. Inevitably, some noncustodial parents will fail to provide support for their children, and the resulting costs to both the children and to society requires enforcement of child support laws.

A comparison of the approaches of the United States and the United Kingdom to the role of the judiciary in child support cases reveals distinct differences. Although custodial parents in the United States are permitted to sue noncustodial parents directly for support (unless the custodial parent is on welfare), no such right of action exists in the United Kingdom. However, there may be the possibility of judicial review of the relevant government agencies in the United Kingdom, which does not exist in the United States.

The advantages and disadvantages of each of these approaches must be weighed carefully because of the number of children enforcement laws affect. As more children than ever are born to unmarried or eventually divorced parents, it is important to ensure that the children receive full support from both parents.

194. See Cordry, *supra* note 188 (explaining that awarding enforcement rights to private citizens may result in a burdensome number of suits or suits without merit).