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CHILD SUPPORT LAW AND POLICY: THE SYSTEMATIC IMPOSITION OF COSTS ON WOMEN

NAN D. HUNTER*

From 1970 to 1981, the number of divorces in the United States more than doubled, and the number of children living with one parent increased by fifty-four percent, to a total of 12.6 million children, or one child in five.¹ The great majority of these children have a living noncustodial parent from whom they are entitled to receive support payments.² Thus, approximately twenty percent of the nation's children are involved—at least potentially—in the child support system. Yet, despite its growing reach, the child support system remains in many ways primitive and inchoate. Award amounts are inadequate to pay for even half the cost of childrearing.³ Wide disparities exist in the standards utilized to set the amounts,⁴ leading to a general public perception that the system is irrational.⁵ Procedures for the enforcement of support orders range from adequate to nonexistent.⁶

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¹ U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1981*, Series P-20, No. 372, at 1, 5 (table D) (1982) [hereinafter cited as *MARITAL STATUS AND LIVING ARRANGEMENTS*].

² Approximately two percent of American children live with a parent who is widowed. *Id.* at 3 (table D).

³ See *infra* notes 39-40 and accompanying text.

⁴ See *infra* notes 28-31, 47-71 and accompanying text.

⁵ One commentator has suggested that widespread disparities lead to the phenomenon of almost every divorced mother knowing another mother who receives more in child support from a father who earns less than her ex-husband, and almost every divorced father knowing of a man who earns more and pays less. I. GARFINKEL, *CHILD SUPPORT: WEAKNESSES OF THE OLD AND FEATURES OF A PROPOSED NEW SYSTEM* (1982) (available from the Institute for Research on Poverty, University of Wisconsin).

⁶ See *infra* notes 72-74 and accompanying text.

Although the criticism of child support policy is widespread,⁷ there is little explicit recognition that the policy issues involved are vastly different for women than for men. Such a grossly flawed system does more than just lower the standard of living of millions of children; it also imposes on women a disproportionate share of the costs of raising children. As of 1978, 7.1 million women in the United States were single mothers living with their children.⁸ More than ninety percent of all children who live with only one parent live with their mother.⁹ Mothers with custody pay well over half of the costs of childrearing, because the support amounts ordered from the fathers are low to begin with, and because payments are usually irregular, if made at all.¹⁰ Perhaps the most dramatic single fact is that forty-one percent of all custodial mothers are awarded no child support at all from the father.¹¹ Among Black and Hispanic women, seventy-one percent and fifty-six percent, respectively, never receive a child support award.¹² The hardship for Black women is aggravated by the fact that divorce rates for Blacks are higher than for whites or Hispanics.¹³

⁷ See, e.g., Foster, Freed & Midonick, *Child Support: The Quick and the Dead*, 26 SYRACUSE L. REV. 1157 (1975); Weiner, *Child Support: the Double Standard*, 6 FLA. ST. U.L. REV. 1317 (1978); White & Stone, *A Study of Alimony and Child Support*, 10 FAM. L.Q. 75 (1976); Yee, *What Really Happens in Child Support Cases: An Empirical Study of the Establishment and Enforcement of Child Support Orders in the Denver District Courts*, 57 DENVER L.J. 21 (1979).

⁸ U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1978, Series P-23, No. 112, at 1 (1981) [hereinafter cited as CHILD SUPPORT AND ALIMONY: 1978].

⁹ MARITAL STATUS AND LIVING ARRANGEMENTS, *supra* note 1, at 1. Throughout this Article, "mother" is used to denote the custodial parent and "father" to denote the absent parent. Although "custodial parent" and "absent parent" are gender-neutral terms, the choice of "mother" and "father" is intended to reflect the fact that child support is not a gender-neutral issue.

¹⁰ In 1978, the mean annual child support amount for those women who actually received support was \$1,800, or \$150 per month. Child support represented about twenty percent of their mean total income of \$8,944. This annual figure, broken down by number of children, yields mean monthly amounts of \$100 for one child; \$164 for two children; \$210 for three children; and \$230 for four or more children. These monetary computations exclude the three out of every ten women who, after being formally awarded child support, were receiving nothing. CHILD SUPPORT AND ALIMONY: 1978, *supra* note 8, at 1, 5. In a much smaller sample drawn from other nationwide data, Judith Cassetty found that the average annual child support payment actually made in 1974 was \$539. J. CASSETTY, CHILD SUPPORT AND PUBLIC POLICY: SECURING SUPPORT FROM ABSENT FATHERS (1978); see also D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 42-59 (1979).

¹¹ CHILD SUPPORT AND ALIMONY: 1978, *supra* note 8, at 5 (table B).

¹² *Id.* at 1.

¹³ U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1979, Series P-20, No. 349, at 7-8 (table 1).

the turn of the century.¹⁴ The traditional rule was that the father had a proprietary right to his child's labor and services and a reciprocal duty to support the child during the marriage.¹⁵ Some jurists believed that he should be relieved of both if the mother gained custody upon divorce.¹⁶ While Blackstone described the father's duty to provide maintenance for his children, irrespective of custody, as "a principle of natural law,"¹⁷ three family law commentators have observed:

If it was such a principle, it was a moral duty without adequate legal remedy, although ecclesiastical courts perhaps lent their authority as a matter of conscience to force fathers to discharge their natural duty, and in chancery a quasi-contractual duty of support eventually became equitable doctrine.¹⁸

By the 1920's, courts had ceased to treat the child as an item of property, and the father's obligation to continue providing support after divorce was established as a matter of law.¹⁹ Once it was resolved that the father had a duty to provide for his children after divorce, the law often required that the duty be solely his, generally because of the mother's presumed inability to earn a sufficient income.²⁰

In practice, however, then as now, much of the support was not paid.²¹ A 1948 survey of families in Detroit, for example, found that the divorced wife "receives relatively little property from the split of joint possessions, is given very little child support, and in two-fifths of the cases does not receive this support regularly."²²

¹⁴ For some examples of early cases establishing as law the duty of a divorced father to support his children, see *Ward v. Goodrich*, 34 Colo. 369, 82 P. 701 (1905); *Rounds Bros. v. McDaniel*, 133 Ky. 669, 118 S.W. 956 (1909); *Alvey v. Hartwig*, 106 Md. 254, 67 A. 132 (1907).

¹⁵ See, e.g., *State v. Langford*, 90 Or. 251, 176 P. 197 (1918).

¹⁶ Oliver Wendell Holmes, then on the Supreme Judicial Court of Massachusetts, wrote that the duty of the father to support a child living apart from him and with the mother depended on whether the mother's separation from her husband was justified. *Baldwin v. Foster*, 138 Mass. 449, 453 (1885). A contemporaneous legal treatise concluded that fathers were liable only for the "bare maintenance" of children in their mother's custody. G. FIELDS, *THE LEGAL RELATIONS OF INFANTS* 61 (1888).

¹⁷ 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 434-37 (1966 ed.).

¹⁸ *Foster, Freed & Midonick*, *supra* note 7, at 1157 (footnotes omitted).

¹⁹ See J. SCHOULER, *A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* 856 (1921).

²⁰ See *Weiner*, *supra* note 7, at 1318; see also *Bill v. Bill*, 155 Ind. App. 55, 290 N.E. 2d 749 (1972) (traditional view has been that wife's separate income and assets are irrelevant).

²¹ See J. SCHOULER, *supra* note 19, at 880-85.

²² W. GOODE, *AFTER DIVORCE* 222 (1956).

Nonetheless, the misperception arose that divorced fathers actually did provide the full support for their children, while mothers enjoyed a windfall.²³ Today, virtually all child support statutes provide that both parents have the same duty to provide support.²⁴

The role of the legal system since the turn of the century has been to adopt policies that purport to establish and enforce child support but succeed only in hiding the widespread reality of paternal non-support. Thus it functions in an unarticulated but systematic way to force women to assume the financial responsibility for childrearing—responsibility that belongs to both women and men. Though child support law is facially neutral, in practice its profound economic effects are directly tied to gender.²⁵ It is women who pay the bulk of the costs that result when one household becomes two.

This Article first examines the legal processes by which child support amounts are established and enforced. The first section addresses both the private family system of child support and the social "safety net" program of Aid to Families with Dependent Children. The Article then analyzes how the child support system as a whole functions to privatize the costs of divorce, to impose these costs on women, and to reinforce both women's economic dependence on men and the social pressure on women to marry. The final section of the Article discusses proposed reforms, in light of the criteria necessary both to establish equitable standards for a child support system and to empower women.

I. THE SYSTEMS OF CHILD SUPPORT

The care and support of children is treated by the American legal system as an almost entirely private concern. For so long as a mar-

²³ The prevailing assumption of male support is reflected in the assessment of proposed model divorce legislation made by the coauthor of a major text on family law: "There is less support for the proposition that the divorced wife should bear separate and equal responsibility for support of the children; yet most commentators would refuse to absolve the wife, and I would urge the Conference to impose upon her an equal support obligation." R. LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* 205 (1968) (parentheses omitted).

²⁴ See H. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* 4-5 (1981).

²⁵ See *infra* notes 39-46, 101-114 and accompanying text.

riage continues, unless the situation degenerates into one of neglect,²⁶ child support decisions are left within the realm of each nuclear family.²⁷ It is only when one parent leaves or never joins the household unit that an amount of support, and thus a standard of care, may be determined for a given child. It is in the course of divorce and paternity proceedings that courts ascertain whether a duty of support exists, and if so, how much is owed.

The support obligation is established through the public mechanism of the courts, but the amount is generally determined on an individualized basis, according to how the judge hearing the case evaluates each family's situation.²⁸ The law recognizes no benchmark figure for what constitutes an adequate amount to raise a child. The statutes which govern child support typically provide for an amount that is "reasonable and just" or that is based on a list of amorphous criteria, such as the financial resources of each parent, the needs of the child, and the child's previous standard of living.²⁹ A few jurisdictions have adopted uniform tables of suggested amounts or formulae for setting amounts,³⁰ but most parties obtaining a divorce do not know how much child support will be ordered until

²⁶ For a legal definition of "neglected child," see, e.g., N.Y. FAM. CT. ACT § 1012(f) (McKinney 1975).

²⁷ See H. KRAUSE, *supra* note 24, at 10.

²⁸ See H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 496 (1968); see also *infra* note 29.

²⁹ The Uniform Marriage and Divorce Act, for example, provides:

In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

- (1) the financial resources of the child;
- (2) the financial resources of the custodial parent;
- (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (4) the physical and emotional condition of the child, and his educational needs; and
- (5) the financial resources and needs of the noncustodial parent...

UNIF. MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. 167 (1967). For more on the vagueness and discretionary character of standards governing child support, see also J. AREEN, *FAMILY LAW: CASES AND MATERIALS* 630-36 (1978); H. KRAUSE, *supra* note 24, at 15 ("[t]he national picture thus remains one of great diversity, divergence and confusion"); Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 258 (1981); White & Stone, *supra* note 7, at 83.

³⁰ See *infra* note 48 and accompanying text.

the court rules.³¹ Although a court hearing a divorce action has the power to divide property and award spousal support in addition to ordering child support, such relief is atypical. Only forty-five percent of divorced women receive a property award of any size,³² and only fourteen percent are awarded spousal support.³³ Thus for the majority of women, child support is the only financial adjustment made at the time of divorce.

There is one partial exception to the privatized nature of the child support system. The program of Aid to Families with Dependent Children (AFDC) is the social backup system for parents who are unable to provide even subsistence-level support for their children.³⁴ Almost all of its adult recipients are women—typically mothers who are divorced or separated from, or have never been married to, the fathers of their children.³⁵ The amount of a monthly AFDC payment is determined by the number of dependent children, based on a schedule set by state regulation in conformity with federal statute.³⁶ In New York, for example, the basic monthly welfare grant for a family of four in 1982, excluding rent, was \$258.³⁷ As this Article shows,³⁸ this low level of benefits is but one of many problems in the AFDC program which gravely undermine its value as an alternative to the privatized system.

The standards for amount and the procedures for enforcement differ greatly between the private family system and the AFDC system. What the two systems share is a pervasive disregard for the rights and economic security of custodial mothers.

A. *The Private Family System*

It is hard to overstate the extent of the post-divorce child support

³¹ This Article concerns support amounts set through adjudication, although parties frequently negotiate a support amount between themselves. See H. CLARK, *supra* note 28, at 497. Negotiated amounts are not likely to be more predictable than adjudicated amounts, since settlements often depend in large part on how much each party's attorney believes a judge would award. For a description of other factors influencing expectations in support settlement negotiations, see I. GARFINKEL, *supra* note 5, at 2.

³² CHILD SUPPORT AND ALMONY: 1978, *supra* note 8, at 11 (table F).

³³ *Id.* at 10 (table E).

³⁴ 42 U.S.C.A. §§ 601-665 (West 1970 & Supp. Dec. 1982).

³⁵ U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 346 (102d ed. 1981).

³⁶ 42 U.S.C.A. § 602(a) (West 1970, 1978 & Supp. Dec. 1982).

³⁷ N.Y. Soc. SERV. L. § 131-a (2)(a) (McKinney 1976 & Supp. 1982-1983).

³⁸ See *infra* notes 81-100 and accompanying text.

crisis in the United States. Judith Cassetty reported that, in 1974, families composed of women and children received child support payments which totaled far less than one-half of the amount designated as the poverty level that year for those families. By contrast, ninety-three percent of the fathers making the payments earned incomes that were at least twice the poverty level for their current families.³⁹ Lenore Weitzman and Ruth Dixon found that the amount of child support awarded in Los Angeles in 1972 was only half the amount needed to raise children in low-income families at 1960 to 1961 prices and that it amounted to no more than twenty-five percent of the father's net income.⁴⁰ A study of child support practice in Denver found that two-thirds of the fathers were ordered to pay less for child support than they reported spending on monthly car payments.⁴¹

Because women are the custodial parents in the overwhelming majority of cases,⁴² it is almost always women who petition a court for child support. They confront all the difficulties accruing to the plaintiff in a civil action,⁴³ while seeking funds to provide for their children's basic necessities. But unlike many other plaintiffs, they cannot easily eliminate expenses to minimize financial losses during the pendency of litigation. Even a request for support *pendente lite* may face a lengthy court backlog,⁴⁴ and the smart attorney for the father may try to delay the hearing date so as to pressure the financially strained mother to accept an immediate, but relatively low, support offer.

In order to initiate the process, the mother must retain an attorney unless she meets the income eligibility guidelines for Legal Services or similar assistance. But in evaluating whether she is entitled to free legal aid, Legal Services offices often attribute to the wife her husband's income, even if the couple is separated and the husband contributes no child support.⁴⁵

³⁹ J. CASSETTY, *supra* note 10, at 103.

⁴⁰ Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 473, 497-99 (1979).

⁴¹ The average father for whom data was available paid \$136.97 per month for his car and \$113.59 per month for his 1.6 children. Yee, *supra* note 7, at 36.

⁴² See *supra* text accompanying note 9.

⁴³ For a discussion of the particular difficulties confronting women who seek to sue to collect back child support—including the frequent reluctance of private attorneys to take these cases—see J. CASSETTY, *supra* note 10, at 106.

⁴⁴ In situations where there is no issue of paternity and thus no question about the underlying duty of support, the use of formulae or tables could virtually eliminate the need for time-consuming and expensive hearings in most child support cases.

⁴⁵ Woods, *The Challenge Facing Legal Services in the 80's*, 16 CLEARINGHOUSE REV. 26 & n.2.

The burden of meeting expenses while litigating child support cases in the court system falls heavily, often exclusively, on women, since women almost always have custody of the children.⁴⁶ Even a woman who is accustomed to a comfortable level of income because of her husband's earnings can suddenly find herself in a financial crisis if her husband cuts off the amount he has been spending for support of the children. On the other hand, without prompt and effective mechanisms to ensure that needed support transfers do not lapse, the father will benefit from the delay.

Domestic relations courts in different jurisdictions have varied widely in the methods they employ to determine support amounts.⁴⁷ A few state appellate courts have acknowledged the confusion and unpredictability that result from the vagueness of the present criteria, and have adopted formulae.⁴⁸ Irrespective of whether a formula or a conclusory standard is in use, however, almost all courts begin their determination of how much support is due by computing the costs of rearing the particular children before the court.⁴⁹ After establishing these costs, the court normally proceeds to allocate between the parents responsibility for these expenses.

Most court systems now use a simple cost-division system, basing awards on information supplied by parents about the children's expenses and the net earnings of each parent.⁵⁰ The judge will usually use this information to calculate a figure said to represent a reasonable share of child support expenses for the particular father to pay, considering the father's salary. Unofficially, many judges have adopted a "cap" on child support amounts, above which they almost never go.⁵¹

In jurisdictions in which tables have been adopted setting specific support amounts according to the father's income, the rationale for

⁴⁶ See *supra* text accompanying note 9.

⁴⁷ See *supra* notes 28-30 and accompanying text.

⁴⁸ E.g., *Hamilton v. Hamilton*, 57 N.C. App. 40, 290 S.E.2d 780 (1982) (recommending that trial courts use formulae); *Smith v. Smith*, 290 Or. 675, 626 P.2d 342 (1981); see also examples set forth in H. KRAUSE, *supra* note 24, at 12-14.

⁴⁹ See *supra* note 29.

⁵⁰ See Cassetty, *Emerging Issues in Child Support Policy and Practice*, in *THE PARENTAL CHILD SUPPORT OBLIGATION: RESEARCH, PRACTICE AND POLICY* 3 (J. Cassetty ed. 1983).

⁵¹ Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Support Awards*, 28 U.C.L.A. L. REV. 1181, 1234 (1981); see also H. KRAUSE, *supra* note 24, at 15; Yee, *supra* note 7, at 30.

the suggested amounts is presumably that a certain percentage of the father's income should go to child support. Although unstated, such a system necessarily assumes an underlying fixed cost for care of the child or children. Under this system, neither the amount of costs actually needed to raise the particular children nor the extent of the burden placed on the mother is considered. The advantage is that the amounts are predictable, and this predictability decreases litigation and its attendant expenses.

The use of these cost-sharing principles disadvantages custodial mothers by using as the starting point the minimal amount on which she and the children can subsist. An alternative is an income-sharing or equalization principle, which would seek to equalize the financial burden of one household becoming two, so that each family member would experience roughly the same proportional reduction in lifestyle as a result of the readjustment.⁵²

Whether the central principle used to set child support amounts should be based on cost-sharing or on income-sharing is one of the major debates now engaging economists and social workers active in the child support field.⁵³ Critics of income-sharing argue that those formulae provide an incentive for custodial mothers to avoid paid employment, and oppose income-sharing as an improper extension of marital financial commitments beyond the point of divorce.⁵⁴ Income-sharing advocates respond by pointing out that there is no universal standard for the "cost" of a child;⁵⁵ cost cannot be determined except by reference to the economic status of the parents.⁵⁶

⁵² The first methods for allocating the costs of child-rearing between divorced parents on an equalization principle were proposed by Isabel Sawhill. I. Sawhill, *Developing Normative Standards for Child Support and Alimony Payments* (Feb. 1977) (Urban Institute Paper), described in J. AREEN, *supra* note 29, at 653-54; and in J. CASSETTY, *supra* note 10, at 133 n.15.

⁵³ For a good discussion of the policy aspects of income-sharing versus cost-sharing, see THE PARENTAL CHILD SUPPORT OBLIGATION, *supra* note 50.

⁵⁴ E.g., Bergmann, *Setting Appropriate Levels of Child Support Payments*, in THE PARENTAL CHILD SUPPORT OBLIGATION, *supra* note 50, at 116.

⁵⁵ E.g., Cassetty, *supra* note 50, at 5.

⁵⁶ This criticism directly reflects the privatized nature of the child support system. The clear class basis of child support is one of the reasons that courts so consistently produce disparate awards. Judges customarily award support for one ten year old at \$200 per month and for another at \$1000 per month; that the "needs" of a janitor's child may be assessed as a fraction of those of a lawyer's child is an accepted part of the system. See generally H. CLARK, *supra* note 28, at 496; *Ames v. Ames*, 59 Cal. App. 3d 234, 130 Cal. Rptr. 435 (1976) (support duty extends beyond furnishing mere necessities, to include maintaining child in style and condi-

Although the cost-sharing method may satisfy a general reasonableness standard, it is quite possible for a child support award to be "reasonable" as an amount which the father can afford and the mother and child can subsist on, and also to be an inequitable reallocation of limited resources. A division of costs will almost always result in the mother-children household unit living on a lower post-transfer income than the single father household; most child support awards produce for the mother and children a minimal amount to defray expenses, and for the father, a relative increase in disposable income.⁵⁷

The cost-sharing approach raises other questions: whether a cost figure should be based on the expenses actually incurred for the child or on the amount which would have been spent had the marriage not dissolved; whether the value of personal services rendered by the custodial parent should be included in costs; how a costs approach can anticipate expenses for emergencies; and how to account for children needing more expensive items as they grow older. An income-sharing model would accommodate these concerns and be more likely to produce child support awards which equalize the relative well-being of each household.

The criteria utilized by most courts typify a simple cost-sharing principle, insofar as the emphasis is on the child's needs and the parents' ability to pay.⁵⁸ The lack of uniformity even within this set of methods is illustrated by the chart below, which displays the results of applying seven different systems to the same set of facts. The first six are based on variants of a cost-sharing approach. The results demonstrate the enormous disparities in the amounts that would be awarded by different courts for the same family. The chart is based on a hypothetical middle-class family in which the father earns a net monthly income of \$1400; the mother earns a net monthly income of \$815; and there are two children, ages five and ten, both in the custody of the mother.

tion consonant with parents' social position); *Kotkin v. Kerner*, 29 A.D.2d 367, 288 N.Y.S.2d 244 (1968) (support duty of affluent parents includes continuing private school education for children). Indeed, even *within* the same family, there is likely to be a difference in the economic status of parents, at least insofar as that status is based on earnings.

⁵⁷ See *infra* notes 106-112 and accompanying text.

⁵⁸ See Bruch, *Developing Normative Standards for Child-Support Payments: A Critique of Current Practice*, in *THE PARENTAL CHILD SUPPORT OBLIGATION*, *supra* note 50, at 119-32.

<i>Source of Method Used to Calculate Amount</i>	<i>Monthly Support Amount</i>
Franks System (cost-sharing) ⁵⁹	\$364.53
Delaware State Guidelines (cost-sharing proportional to parents' incomes) ⁶⁰	\$399.10
American Bar Association Family Law Section (percentage of income for support depends on number of children) ⁶¹	\$408.50
Pennsylvania Guidelines (fixed percentage of income for sup- port depends on number of children) ⁶²	\$466.00
Los Angeles Guidelines (fixed amounts set by table) ⁶³	\$575.00
Oregon Formula (fixed formula) ⁶⁴	\$585.83
Eden System (income-sharing) ⁶⁵	\$602.95

⁵⁹ Franks, *How to Calculate Child Support*, CASE & COMMENT, Jan.-Feb. 1981, at 3. To arrive at the amount in the table, we assumed that the father had visitation for 87 days per year: roughly 30 days in the summer plus alternate weekends and holidays.

⁶⁰ *Delaware Child Support Formula (Melson Formula)*, Family Court of the State of Delaware, (June 1980) (unpublished report).

⁶¹ Bair, *How Much Temporary Support is Enough?*, 1 FAMILY ADVOCATE 37, 41 (Spring 1979).

⁶² *Scale of Suggested Minimum Contributions For Support by Absent Parents, Interim Statement of Pennsylvania Child Support Enforcement Program*, 3 Fam. L. Rep. (BNA) 3101 (1977).

⁶³ Los Angeles County Superior Court, Family Law Dept., *Guidelines for Initial Order to Show Cause*, (July 1, 1977) (notice to attorneys).

⁶⁴ *Smith v. Smith*, 290 Or. 675, 626 P.2d 342 (1981).

⁶⁵ Eden, *Forensic Economics—Use of Economists in Cases of Dissolution of Marriage*, 17 Am. Jur. Proof of Facts 345 (2d ed. 1978); P. EDEN, ESTIMATING CHILD AND SPOUSAL SUPPORT (1977).

The method that leads to the smallest amount deserves special note. Maurice Franks, who proposes a variant of cost-sharing, is also the author of *How to Avoid Alimony*.⁶⁶ Franks' method begins with a computation of child support divided proportionately between the parents according to income. He then subtracts from that an amount calculated to represent what the non-custodial parent spends on the child during visitation, based on the number of days per year he sees the child. The subtraction is made regardless of the mother's income. Most courts have denied motions by fathers to decrease their support obligations by claiming credit for money spent on the child during visitation.⁶⁷ Yet the Oregon Supreme Court in *Smith v. Smith*,⁶⁸ while rejecting Franks' visitation credits, cited his article with approval as a critique of current methods of determining support.⁶⁹

The method in the chart that leads to the highest support amount is the one developed by Phillip Eden, a forensic economist who bases his figures on government data on the average cost of raising a child. The final support amount is based on a formula which reduces by the same percentage the amount each new household would need to maintain the family's prior standard of living. The method is set up to produce an equally shared burden between the two households, on the assumption that neither can afford its previous lifestyle. Eden's system is one of only a few proposals explicitly designed to equalize the burden of dividing one household into two, so that each adult and child suffers roughly the same level of downward readjustment.⁷⁰

Much of the literature on child support has focused on the role of uniform formulae in eliminating gross discrepancies in awards.⁷¹

⁶⁶ M. FRANKS, *HOW TO AVOID ALIMONY* (1975). In this analysis of alimony, Franks opined that "[t]he steel shackles and iron bars of bondage are every bit as real to the male slaves of the twentieth century as they were to their black counterparts of the nineteenth." *Id.* at 10.

⁶⁷ See, e.g., *Young v. Williams*, 583 P.2d 201 (Alaska 1978); *Mackie v. Hurm*, 5 Fam. L. Rep. (BNA) 2946 (1979) (Del. Fam. Ct. Aug. 22, 1979); *Williams v. Budke*, 606 P.2d 515 (Mont. 1980). But with the trend to joint and shared custody, one can expect more men to argue that their support payments should be reduced because they spend money directly on the child. Custodial mothers might, thus, see already-low support amounts shrink even further while their household expenses decrease very little. This inequity reflects the fact that the original calculation, even if made proportionate to income, did not seek to leave the two households in the same financial condition. A dollar for dollar subtraction merely compounds the underlying problem.

⁶⁸ 290 Or. 675, 626 P.2d 342 (1981).

⁶⁹ *Id.* at _____, 626 P.2d at 346.

⁷⁰ Although other commentators have proposed income-sharing principles, see *supra* note 40, this chart uses Eden's system because its calculations are more easily applied to the data.

⁷¹ See, e.g., *White & Stone*, *supra* note 7; *Yee*, *supra* note 7. *Yee's* study, however, found that the adoption of guidelines in Denver courts did not eliminate major discrepancies in awards, apparently because judges ignored the tables. One Denver father of two children was ordered

The removal of such disparities is important, but the emphasis on uniformity of amounts alone is an example of elevating procedural fairness above substantive fairness. The implementation of universal formulae will not itself ensure an equitable result unless the formulae are designed to produce amounts which equalize the financial burden between mothers and fathers. Within the private family model, the central issue for women is the dollars-and-cents size of the award. Unless uniform formulae are adopted with a specific goal of equalization, they will serve only to freeze women in their current role of absorbing a disproportionate share of childcare costs. The predictability that any uniform formulae might supply is, without more, of limited value to women.

A second aspect of the child support crisis is the issue of enforcement of awards. The Census Bureau found that, of all women who had court orders entitling them to receive child support in 1978, only forty-nine percent received the full amount, and on the average, thirty-five cents out of every dollar owed for child support was never paid.⁷² An examination of the standard procedures for payment reveals why noncompliance is so commonplace.

When a father is ordered to pay child support, he is usually told to send the mother a check every pay period. Keeping track of the payments, or lack of them, is the mother's responsibility. Most courts have a system for computerized record-keeping, but judges frequently do not order that records actually be kept,⁷³ especially for middle and upper-middle class fathers, for whom it may be considered embarrassing. And even when computerized records are kept, often the failure to pay triggers no official response.⁷⁴ Thus, it is up to the

to pay \$120 a month out of a net salary of \$450; another father of two was ordered to pay \$50 a month out of a monthly net income of \$900, or less than half the support amount out of twice the available income. Yee *supra* note 7, at 53 (table 4).

⁷² CHILD SUPPORT AND ALIMONY: 1978, *supra* note 8, at 1, 8; see also G. STERN & J. DAVIS, DIVORCE AWARDS AND OUTCOMES: A STUDY OF PATTERN AND CHANGE IN CUYAHOGA COUNTY, OHIO 188 (1981).

⁷³ Arkansas, for example, did not adopt a procedure for making payments through the court clerk until 1981. *Arkansas: Summary of 1981 Bills Signed Into Law*, 7 Fam. L. Rep. (BNA) 2509 (1981). Judges' resistance to ordering payment through a court registry is discussed in Note, *Enforcement of Maintenance and Support Under the Missouri Dissolution Act*, 44 U.M.K.C. L. REV. 416, 432 (1976).

⁷⁴ Unlike the recordkeeping and enforcement systems in most states, which are "haphazard at best," D. CHAMBERS, *supra* note 10, at 10, Michigan has established a uniquely comprehensive and effective "Friend of the Court" agency to monitor and enforce child support obligations. These county agencies supervise the child support awards for both welfare and nonwelfare families. Their functions include receiving payments, remitting them to the custodial parent, and keeping extensive and detailed records. For a discussion of this unusual program, see *id.* at 10-15.

mother to institute enforcement proceedings. It will not be worthwhile for the mother to sue, however, until the support owed exceeds the fee she will probably have to pay a lawyer to bring suit. By the time it becomes worth it to proceed, her financial plans and budgeting may be in turmoil. If the amount due builds up and the case does get to court, judges in some states are permitted to adjust the amount of arrearage retroactively if they believe the father cannot afford the entire sum.⁷⁵ The system thus provides virtually every incentive for fathers not to pay.

The literature on child support is replete with ideas for improving enforcement mechanisms. An increasing number of courts are using automated record-keeping systems. Some of these systems include automatic notice procedures, so that a father is at least contacted, and perhaps summoned when a payment becomes delinquent.⁷⁶ A number of states have substituted administrative procedures for full-scale court hearings for both the award-setting and enforcement phases.⁷⁷ One commentator has studied the impact of using imprisonment for nonsupport as a deterrent.⁷⁸ The greatest attention has been paid to developing procedures for garnishments and automatic wage withholding systems which would have the employer deduct support payments from fathers' wages like a tax deduction, and then send the support amount to the court. One proposal suggests that a federal income withholding system be instituted to allow support orders to follow the parent from job to job until the obligation ends.⁷⁹ Another author has suggested a "federal floating wage assignment," which would essentially be a nationwide garnishment

⁷⁵ See, e.g., *Dillow v. Dillow*, 575 S.W.2d 289 (Tenn. Ct. App. 1978); *Emanuel v. Emanuel*, 5 Fam. L. Rep. (BNA) 2156 (D.V.I. 1978); *Griffin v. Avery*, 120 N.H. 783, 424 A.2d 175 (1980) (court has discretion to allow credit retroactively toward arrearage in certain circumstances, although cannot reduce total amount of arrearage that must be satisfied in some fashion); Michalik, *Divorce: Power of Court to Modify Decree for Support of Child which was Based on Agreement of Parties*, 61 A.L.R.3d 657, 671-76 (1975). By contrast, in bankruptcy law, child support obligations are among the few debts from which release cannot be obtained. 11 U.S.C.A. § 523(a)(5) (West 1979 & Supp. 1982).

⁷⁶ Chambers found that this self-initiating notification procedure was one of three variables most substantially related to whether fathers paid the support amount due. D. CHAMBERS, *supra* note 10, at 90-91.

⁷⁷ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, *COMPARATIVE ANALYSIS OF COURT SYSTEMS PROCEDURES AND ADMINISTRATIVE PROCEDURES TO ESTABLISH AND ENFORCE CHILD SUPPORT OBLIGATIONS* (1980).

⁷⁸ D. CHAMBERS, *supra* note 10, at 165-253; see also Chambers, *Men Who Know They are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support*, 75 MICH. L. REV. 900 (1977).

⁷⁹ D. CHAMBERS, *supra* note 10, at 258-61.

system, creating a uniform national remedy for violation of a support order.⁸⁰

Any proposal which succeeded in increasing child support enforcement would benefit the majority of custodial mothers. All of these ideas are refinements of judicial procedures, however, and none goes beyond the legal system in the search for a better model. Each seeks to improve incrementally the existing private family support system rather than to build a cohesive social child-care policy. Even the proposals for equalizing the costs of child raising between a woman and a man in a given family fail to address the support problems of parents who lack enough resources to divide.

B. *The AFDC System*

The program of Aid to Families with Dependent Children is the second component of the American child support system. Initiated in the 1930's primarily to provide for widows,⁸¹ AFDC became the only alternative to the purely private family support system. Since that time, the number of recipients has mushroomed, increasing by 225 percent during the 1960's and peaking in 1976.⁸² However narrow were the program's original goals, AFDC currently functions to maintain some 10.5 million children and their mothers.⁸³ The role of AFDC as a government-funded backup system must thus be a major part of any discussion of child support reform.

Indeed it was a reaction to the increasing costs of AFDC and the desire to cut back expenses, rather than social alarm over the plight of mothers raising children with insufficient support amounts, that led to most of the current attention to issues of child support enforcement.⁸⁴ The drive to decrease welfare expenses by collecting

⁸⁰ See Carrad, *A Modest Proposal to End Our National Disgrace*, 2 FAMILY ADVOCATE 31 (Fall 1979).

⁸¹ See W. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 185-87* (1979).

⁸² F. PIVEN & R. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 341, 350 (1971); G. STEINER, *THE FUTILITY OF FAMILY POLICY* 113 (1981).

⁸³ G. STEINER, *supra* note 82, at 113.

⁸⁴ The words of Senator Russell Long of Louisiana, who, on the floor of the Senate, advocated reform of the AFDC statute, illustrate the legislative intent behind its 1974 amendments:

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

support from the absent parent was the basis of then-Governor Ronald Reagan's welfare reform legislation in California in the early 1970's.⁸⁵ A 1974 study by the Rand Corporation on nonsupport by affluent fathers as a cause of welfare dependency was a starting point for much of the later research on child support.⁸⁶ The relationship between paternal nonsupport and the poverty of many unmarried mothers and their children has been well established.⁸⁷

On the federal level, Congress responded by amending the AFDC entitlement provisions to require that mothers cooperate with the state in establishing paternity and obtaining support payments from fathers as a condition of eligibility.⁸⁸ Concern over the dangers to women posed by the requirement of filing suits against physically abusive fathers resulted in a compromise "good cause" exception which waives the requirement to cooperate when the recipient can prove that there is a reasonable likelihood of physical or emotional harm to her or the child.⁸⁹ The exception is rarely invoked successfully,⁹⁰ probably because the "good cause" showing is difficult to make.⁹¹ The great majority of women who receive AFDC have no choice but to name the fathers and "cooperate" in locating and suing them. Loss of privacy is the price of receiving benefits.⁹² Thus, in contrast to

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.

118 CONG. REC. 8291 (1972), quoted in Katz, *A Historical Perspective on Child-Support Laws in the United States*, in *THE PARENTAL CHILD SUPPORT OBLIGATION*, *supra* note 50, at 19.

⁸⁵ Zumbun & Parslow, *Absent Parent Child Support: The California Experience*, 8 *FAM. L.Q.* 329 (1974).

⁸⁶ M. Winston & T. Forsher, *Nonsupport of Legitimate Children by Affluent Fathers as a Cause of Poverty and Welfare Dependence* (1974) (The Rand Corporation) (unpublished report).

⁸⁷ J. CASSETTY, *supra* note 10, at 23-27.

⁸⁸ 42 U.S.C.A. § 602(a)(26)(B) (West 1974 & Supp. 1978).

⁸⁹ To qualify, emotional harm must be serious, demonstrable, and of such impact that it substantially impairs the individual's functioning. 45 C.F.R. § 232.42 (1978).

⁹⁰ In 1980, the Department of Health and Human Services reported 31,522 refusals to cooperate, of which 2,830 evidenced good cause. 5 *HHS OFFICE OF CHILD SUPPORT ENFORCEMENT ANN. REP.* table 27 (1980).

⁹¹ See *supra* note 89.

⁹² A classic description of the life of a welfare mother is that of Johnnie Tillmon, past president of National Welfare Rights Organization:

The truth is that AFDC is like a super-sexist marriage. You trade in a man for the

women not on AFDC, who are often unable to enforce child support orders because of the difficulty and expense involved in initiating collection suits, women who do receive AFDC are forced into intrusive prosecutions over which they have no choice or control. The rights of both groups of women are effectively ignored.

From the traditional viewpoint of the best interests of the child, many AFDC mothers may be the worst group to coerce into pursuing child support. Studies have found that many low-income Black families rely on tight kinship bonds and unstructured mutual aid systems to cope with the conditions of poverty;⁹³ a requirement that mothers cooperate with the state in securing paternal payments jeopardizes these bonds and secondary support systems. Some poor children receive material, psychological, and social support from their fathers or, most likely, from their father's kinship network, despite his absence from the home.⁹⁴ If the father refuses to acknowledge the child for fear of incurring legal obligations, the child may lose a form of support which is arguably more significant than the amount of public funds saved by decreasing the welfare budget. More recently it has been suggested that the loss of a kinship network may occur among low-income communities of a variety of racial and ethnic identities.⁹⁵ Presumably, the risk varies with each specific family, depending on the nature of the interpersonal relationships, the proximity of family members, and numerous other factors. The judgment as to whether more will be gained or lost by seeking coerced support should be left to the mother, and her decision should be respected by the state.

man. But you can't divorce him if he treats you bad. He can divorce you, of course, cut you off any time he wants. But in that case, he keeps the kids, not you.

The man runs everything. In ordinary marriage, sex is supposed to be for your husband. On AFDC, you're not supposed to have any sex at all. You give up control of your own body. It's a condition of aid....

The man can break into your house any time he wants to poke into your things.

You've got no right to protest. You've got no right to privacy when you go on welfare.

Tillmon, *Welfare is a Woman's Issue*, *Ms. Magazine*, Spring, 1972, Preview Issue, 111; see also Glassman, *Women and the Welfare System*, in *SISTERHOOD IS POWERFUL* 102 (R. Morgan ed. 1970).

⁹³ See C. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974); Stack, *Extended Familial Networks: An Emerging Model for the 21st Century Family*, in *THE FAMILY IN POST-INDUSTRIAL AMERICA* 49 (D. Snyder ed. 1979); Blaydon & Stack, *Income Support Policies and the Family*, 106 *DAEDALUS* 147 (1977).

⁹⁴ C. STACK, *supra* note 93, at 50-54.

⁹⁵ Rapp, *Family and Class in Contemporary America: Notes Toward An Understanding of Ideology*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 177-79 (B. Thorne ed. 1982).

Once a woman establishes AFDC eligibility, a variety of incentives built into the law lock her into the system.⁹⁶ The statute requires that the family grant be reduced dollar for dollar when there is a private support award, and totally eliminated once any private support award reaches the family's designated need level.⁹⁷ Thus, it is often to the advantage of recipients to collect only enough child support from absent fathers to reduce, rather than eliminate the family's AFDC payment. Private support sufficient to terminate AFDC benefits also terminates other in-kind benefits—Medicaid, for example—for which AFDC enrollment is an eligibility requirement.⁹⁸ This consequential financial loss can be substantial. In addition, the unreliability of private child support creates a revolving door phenomenon, where recipients are terminated only to reapply later, causing financial chaos for the families and higher administrative costs for the program.⁹⁹ Finally, the state welfare agency itself has an incentive to keep families on AFDC at reduced grant levels, rather than to terminate the family altogether. Statistical records showing dollar savings reflected in decreased grants, rather than completely eliminated grants, reflect better on the agency, from the standpoint of cost-effectiveness.¹⁰⁰ All these factors combine powerfully to keep families on AFDC, once enrolled.

II. THE CHILD SUPPORT SYSTEM AS A MEANS FOR THE SOCIAL CONTROL OF WOMEN

The concept of the privatized, closed family system underlies all American family law principles,¹⁰¹ including those governing intrafamily support. Until the point of destitution, when AFDC

⁹⁶ The analysis in the text summarizes relevant portions of Cassetty, *Program Conflicts and Human Considerations*, 37 PUB. WELFARE J. 33 (1979).

⁹⁷ 42 U.S.C.A. § 657(b)(1) (West Supp. 1982).

⁹⁸ See, e.g., N.Y. SOC. SERV. LAW § 366 (McKinney 1976 & Supp. 1981); see also Cassetty, *supra* note 96, at 34-35.

⁹⁹ Cassetty, *supra* note 96, at 35.

¹⁰⁰ *Id.* at 35-36.

¹⁰¹ See generally Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WISC. L. REV. 5; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 117 (D. Kairys ed. 1982); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. (forthcoming May 1983).

intervenes, the individual family is expected to make its own internal decisions about who in the family will receive which resources.¹⁰² The "hands off" principle increases the control of the more powerful party in marriage—the husband—by failing to counterbalance the various forms of social control that men in general have over women. The general rule has been that during marriage a spouse has no legal claim to more than minimal food and shelter.¹⁰³ The rule has operated systematically to the detriment of women, in light of the fact that it is the husband who is more likely to have a higher earned income and uninterrupted full-time employment.¹⁰⁴ The insulation of relationships within the nuclear family from the reach of the law has always disadvantaged women:

By maintaining a world split into public and private spheres, by denying women the right to participate in the public sphere and then refusing to regulate the private sphere or deferring to custom when compelled to regulate that sphere, the legal order effectively excluded women from its operations and constrained women to exist in a pre-modern world of customary law, a world where personal conduct was determined by patterns of custom and reciprocal expectations and where the distinction between habit and duty becomes blurred and ill-defined.¹⁰⁵

The family support system, with its absence of legal remedies during marriage and the privatization of child support after marriage ends, exemplifies this public/private dichotomy. The system harms women both because it systematically burdens mothers and relieves fathers of the child support obligation, and because it forces individual women to bear the brunt of a major social problem.

Income data on divorced men and women illustrates the extent to which the current child support system maintains male economic supremacy by failing to equalize the impact of divorce between the

¹⁰² See *supra* notes 26-27 and accompanying text.

¹⁰³ See *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953); *Goldstein v. Goldstein*, 271 Pa. Super. 389, 413 A.2d 721 (1979). For an analysis of the rule, see Grozier, *Marital Support*, 15 B.U. L. Rev. 28, 33 (1935).

¹⁰⁴ In marriages where both spouses worked full-time, the median share of family income contributed by the wife was 37.6 percent. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, *PERSPECTIVES ON WORKING WOMEN: A DATABOOK 57* (table 59) (1980).

¹⁰⁵ Powers, *supra* note 101, at 77-78 (footnotes omitted).

two parents.¹⁰⁶ Just as the child support system penalizes women, it directly benefits men. Custodial mothers experience a sharp drop in their living standard and their disposable income after divorce, but divorced fathers realize a financial gain. A father who is ordered to pay one-third of his income for child support, for example, and thus retains sixty-seven percent of his net earnings for discretionary expenses, fares better financially than when he was married.¹⁰⁷

An examination of child support orders in Cleveland from 1965 to 1978 found that divorced fathers retained about eighty percent of their pre-divorce income; the higher the man's earnings, the greater the proportion of income he retained; in fact, the proportion of the average father's income which was ordered for child support declined between 1965 and 1978, especially for the more affluent men.¹⁰⁸ Weitzman's surveys of divorced men and women in Los Angeles found that the households of divorced husbands had a per capita income from one-and-a-half to three-and-a-half times greater than the per capita income of the divorced wives' households; again the disparity between husband and wife increased as the husband's income increased.¹⁰⁹ Data from the University of Michigan's nationwide sample indicated that eighty-six percent of divorced fathers were economically better off than their former wives and children, and more than sixty-four percent had income-poverty ratios¹¹⁰ which were two or more times greater than those of their former wives and children.¹¹¹ In the Cleveland study, for example, divorced fathers

¹⁰⁶ In addition to the studies discussed in the text, see Weitzman, *supra* note 51; Seal, *A Decade of No-Fault Divorce*, 1 FAMILY ADVOCATE 10 (Spring 1979); and Stencel, *Single-Parent Families*, in EDITORIAL RESEARCH REPORTS ON THE CHANGING AMERICAN FAMILY 63 (H. Gimlin ed. 1979).

¹⁰⁷ D. CHAMBERS, *supra* note 10, at 48.

¹⁰⁸ G. STERIN & J. DAVIS, *supra* note 72, at 158. In 1965, fathers were ordered to pay an average of 15 percent of their monthly gross income for child support. By 1978, that figure dropped to 11.6 percent. *Id.* at 94-97.

¹⁰⁹ Weitzman, *supra* note 51, at 1242-48.

¹¹⁰ The income-poverty ratio measures the ratio of family or individual income to the poverty level designated by the Social Security Administration for that number of persons. For example, a four-person family with a 1974 income of \$7000 per year would have an income-poverty ratio of 1.5 because the S.S.A. poverty level for that size family was \$4,680. See J. CASSETTY, *supra* note 10, at 84 n.19.

¹¹¹ J. CASSETTY, *supra* note 10, at 70-71. Using a sample base of almost 2.3 million households, Cassetty found that absent fathers had income-poverty ratios twice as large as those of the mother-children unit in 1,467,000 families, or sixty-four percent of the total sample. By contrast, the same difference in favor of the mother-children unit was found in only 159,500 families, or approximately seven percent of the sample. Cassetty noted that separated families measuring about the same in economic security numbered approximately 195,000, or 8.5 percent of the sample.

living alone were found to have from ten to twenty percent more after-transfer income than the mother-children unit, and if only the two parents were compared to each other, fathers had three times as much (or three-hundred percent more) after-transfer income.¹¹² Thus men as a class are the winners in the universe of child support awards.

Increasing rates of divorce will, over time, lead to a major transfer from men to women of the bulk of family care expenses (in addition to family care labor). The child support system thus contributes to the "feminization of poverty," or the massive shift of women-headed households into the official zone of poverty.¹¹³ This process operates in tandem with broader economic discrimination against women, reflected in women's earnings averaging fifty-nine percent of men's earnings.¹¹⁴

Among the most serious effects of the impoverishment of women brought about by divorce is the reinforcement of women's economic dependence on men. The primary route open in this society for women to raise their standard of living is to marry, remain married, or remarry.¹¹⁵ Indeed, married women are aware of the financial perils accompanying divorce. One recent study of Michigan women, with children, about to receive a divorce, found that twenty-nine percent of those either unemployed or on welfare indicated that they wanted to reconsider or to attempt reconciliation; only eight percent of full-time working women expressed this desire.¹¹⁶ Possessing a full-time job, even given the discounted "woman's wage," may operate as a functional threshold requirement for women to consider divorce to be a viable option. Research has demonstrated an inverse relation-

¹¹² G. STERIN & J. DAVIS, *supra* note 72, at 160. This comparison included only those mothers who had full-time jobs.

¹¹³ The median income of the woman-headed family is 48 percent of that of all families. U.S. BUREAU OF THE CENSUS, *FAMILIES MAINTAINED BY FEMALE HOUSEHOLDERS, 1970-1979*, Series P-23, No. 106, at 34 (table 17) (1980). In 1979, the poverty rate for Black families headed by a woman was 49.2 percent, compared to 13.3 percent for those headed by a male. Among whites, the poverty rate for families headed by a woman was 22.3 percent, compared to 9.1 percent for those headed by a male. U.S. BUREAU OF THE CENSUS, *CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1979*, Series P-60, No. 130, at 2 (table A), 14 (table 3) (1982).

¹¹⁴ U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *PERSPECTIVES ON WORKING WOMEN: A DATABOOK*, Bulletin 2080, at 52 (table 52) (1980).

¹¹⁵ See generally Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 *SIGNS* 137 (Spring 1976).

¹¹⁶ D. CHAMBERS, *supra* note 10, at 52.

ship between a wife's income and the duration of the marriage, as on the average each thousand-dollar increase in a wife's earnings produces a one percent increase in the rate of separation.¹¹⁷ This linkage appears less significant for Black women than for white women, probably because Black women have been economically forced into higher rates of labor force participation, at lower wages, than white women. Thus their earnings are less likely to produce either the perception or the reality of greater independence.¹¹⁸

For the divorced woman with children, remarriage is the surest method to achieve financial security. A survey of women from one county in Michigan in the mid-1970's and a survey of Detroit women in the 1940's both found that remarriage significantly increased women's income.¹¹⁹ The Detroit study found that the average weekly dollar amount available to a woman for expenses almost doubled if she remarried.¹²⁰ The contemporary study found that the percentage of family units consisting of employed mothers with children living at the level of an intermediate budget¹²¹ or higher (assuming full compliance by the father with the child support award) increased from sixty-two percent to eighty percent upon remarriage, and the proportion at below the lower budget level dropped from fifteen percent to four percent.¹²²

The trend in some jurisdictions toward holding stepfathers liable for the support of their wives' children¹²³ also increases the pressure on women to remarry, in order to acquire a provider for their children more reliable than the typical absent father. This pressure is even

¹¹⁷ H. ROSS & I. SAWHILL, *TIME OF TRANSITION: THE GROWTH OF FAMILIES HEADED BY WOMEN* 57 (1975).

¹¹⁸ See Mott & Moore, *The Causes and Consequences of Marital Breakdown*, in *WOMEN, WORK AND FAMILY* 113 (F. Mott ed. 1978).

¹¹⁹ D. CHAMBERS, *supra* note 10, at 63-66; W. GOODE, *supra* note 22, at 230-36.

¹²⁰ W. GOODE, *supra* note 22, at 231.

¹²¹ The intermediate budget level and the lower budget level are two standard budgets adopted by the Department of Labor's Bureau of Labor Statistics to measure the quality of living. Chambers describes the intermediate budget as "the modest but adequate" standard attained by the average American urban working family." He includes in the lower standard group all families (29 percent of the total) with incomes that fall below the Bureau of Labor Statistics lower standard budget, which he uses as "the line below which most people would feel they are living in poverty." D. CHAMBERS, *supra* note 10, at 43-44.

¹²² D. CHAMBERS, *supra* note 10, at 64.

¹²³ *E.g.*, *Logan v. Logan*, 120 N.H. 839, 424 A.2d 403 (1980) (Uniform Civil Liability For Support Act imposes on stepparents a duty to support stepchildren equal to and coextensive with duty to support natural children); *Kaiser v. Kaiser*, 93 Misc. 2d 36, 402 N.Y.S.2d 171 (Fam. Ct. 1978) (stepparent's statutory obligation ceases when remarriage ends for any reason); *Kelley v. Iowa Dept. Social Services*, 197 N.W.2d 192 (Iowa 1972) (Iowa common law obligates stepparent living with stepchildren to support them).

stronger if the divorced father has, by his own remarriage, acquired new support obligations for stepchildren or children born in the new marriage. Under basic cost-sharing principles, the expenses of his "second family" will be seen to justify a reduction in the amount of support he is ordered to pay for his original family. The only way for the divorced mother to keep up in this cycle is to remarry. Policy choices that minimize the child support to be provided by the divorced father strengthen the bonds that tie women to men and to marriage as an institution.

The economic dependence caused by keeping the costs of divorce private (and therefore imposing them on women) is apparently not considered a problem by the "pro-family" forces of the far right. Section 106 of the proposed Family Protection Act,¹²⁴ would make divorce or child support even more difficult for poor women to obtain, by prohibiting Legal Services representation in "any proceeding or litigation seeking to obtain or arising out of a divorce." For poor women, the ties that bind would thus become ever tighter.

Conservative theorist George Gilder, whose work enjoyed much popularity at the beginning of the Reagan Administration, espouses a more far-reaching theory of authoritarian family relationships.¹²⁵ Gilder contends that the best way to promote family stability and the general social good is to preserve explicitly male dominance within the family.¹²⁶ He advocates deliberately lower salaries for employed women, together with the payment of a family allowance to "intact"¹²⁷ two-parent families irrespective of income.¹²⁸ His method is designed to keep mothers in the home and to foster the economic viability of one-wage-earner families. Such right-wing support of a family allowance policy usually considered to be a progressive income redistribution mechanism signals, once again, that family policy considerations for women and men differ greatly. Although a major goal for women is to eliminate a system which hides the costs of childcare in the private sector, it is essential that any policy which attempts to allocate these costs socially do so in a way which does not reinforce women's economic dependence on men.

¹²⁴ S. 1358, 97th Cong., 1st Sess., 127 CONG. REC. S6329-44 (daily ed. June 17, 1981).

¹²⁵ G. GILDER, *SEXUAL SUICIDE*, (1973); see also G. GILDER, *WEALTH AND POVERTY* (1981).

¹²⁶ G. GILDER, *SEXUAL SUICIDE*, *supra* note 125, at 89-108, 191-204, 239-50.

¹²⁷ *Id.* at 175.

¹²⁸ *Id.* at 168-76.

III. BUILDING THE BASIS FOR REFORM

Given the myriad problems plaguing the current child support system, it comes as no surprise that many recommendations have been made for its improvement. This section of the Article surveys briefly suggestions for refinement of the present system, and then examines proposals drawn largely from European systems that have attempted major reforms.

There are a variety of improvements to the current system that could be achieved by state legislative enactment, amendment of court rules, or new decisional law. The most fundamental change would be to adopt income-sharing formulae which seek to equalize between the parents the relative burden of the increased costs of a split household.¹²⁹ Other possible changes that would alleviate problems of delay and nonenforcement include: imposing continuing wage garnishments for the amount which is ordered, or wage assignments which take effect whenever a payment is more than twenty days overdue;¹³⁰ requiring that the father post security or bond to guarantee payment;¹³¹ authorizing hearing officers to order payment of retroactive support for any time period prior to the hearing during which support was not paid;¹³² creating referees or administrative agencies whose only responsibility would be to establish child support amounts;¹³³ providing for attorneys' fees for contested phases of a support determination;¹³⁴ and making promptly

¹²⁹ See *supra* notes 52-71 and accompanying text.

¹³⁰ In North Dakota, Rhode Island, and Wisconsin, statutes require that every order of child support include an income assignment to cover the amount of support. N.D. CENT. CODE §§ 14-09-09.1 to 09.4 (1979 and Supp. 1981); R.I. GEN. LAWS §§ 15-5-24, 15-5-25 to 27 (1980 and Supp. 1982); WIS. STAT. ANN. § 2.055 (West Supp. 1982), §§ 767.23 and 767.265 (West 1979 and Supp. 1982). A number of states have laws similar to CAL. CIV. CODE § 4701 (West 1980), which provides for an income assignment order upon two-month arrearage. The California statute was upheld in *In re Marriage of DeMore*, 93 Cal. App. 3d 785, 155 Cal. Rptr. 899 (1979) (statute bearing rational relationship to valid state purpose survives due process attack).

¹³¹ See, e.g., CAL. CIV. CODE § 4700 (West 1980 & 1982 Supp.); IND. CODE § 31-1-11.5-15 (1979); N.C. GEN. STAT. § 50-13.4 (1976 and Supp. 1981); *In re Marriage of Davis*, 395 N.E.2d 1254, 1259 (Ind. Ct. App. 1979) (courts afforded broad discretion by state statute in providing for security, bond, or other guarantee).

¹³² *Patricia M.D. v. Alexis I.D.*, 442 A.2d 952 (Del. 1982) (retroactive support awards permissible under statute, up to two years prior to date petition is filed).

¹³³ See, e.g., WIS. STAT. ANN. §§ 767.13, 767.29, 757.69 (West 1981 & Supp. 1982).

¹³⁴ CAL. CIV. CODE § 4370(c) (West 1980).

available to non-AFDC recipients such programs as the parent locator service.¹³⁵

States have adopted many of these and other mechanisms for enforcing support orders, primarily as a means of trimming welfare costs.¹³⁶ At the federal level, the Internal Revenue Service has broadened the scope of its collection program—which makes seizure of assets permissible—to encompass delinquent child support debts owed to both AFDC recipients and nonrecipients.¹³⁷

The aforementioned reforms would improve the daily lives of custodial mothers. None, however, addresses the problems raised by the current AFDC system,¹³⁸ nor alters the privatized structure of family law which precludes government involvement in the sphere where it is often most needed.¹³⁹

The most far-reaching and thorough change in the American child support system would be the adoption of supplemental family income programs, such as those which operate in Sweden¹⁴⁰ and France,¹⁴¹ where the government pays a fixed allowance to all parents with children. Yet, a family allowance alone could function as a strong incentive for the woman in an ongoing marriage to remain at home, since it could be used as a substitute for her earnings. Upon divorce, the wife would be faced with an abrupt need to enter the workforce despite a lack of job skills and experience. The French have, however, attempted to lessen this effect by developing the most extensive system of public childcare services in any Western European country.¹⁴² Widespread public childcare services allow divorced women to share the burdens of childrearing with the state. In Sweden, the government advances payments of private child support which are due.¹⁴³ The amount of private child support in Sweden is deter-

¹³⁵ *Carter v. Morrow*, 526 F. Supp. 1225 (W.D.N.C. 1981) (state agency failure to provide all child support enforcement services, including legal representation, violated Social Security Act, 42 U.S.C. § 654(b)).

¹³⁶ Freed and Foster, *Family Law in the Fifty States: An Overview as of September, 1982*, 8 FAM. L. REP. (BNA) 4065 (Sept. 28, 1982).

¹³⁷ *IRS Child Support Collection Aid Broadened*, 8 FAM. L. REP. (BNA) 2368 (April 27, 1982).

¹³⁸ See *supra* notes 81-100 and accompanying text.

¹³⁹ See *supra* text accompanying notes 101-105.

¹⁴⁰ Liljestrom, *Sweden*, in *FAMILY POLICY: GOVERNMENT AND FAMILIES IN FOURTEEN COUNTRIES* 19 (S. Kamerman & A. Kahn eds. 1978).

¹⁴¹ Kamerman, *Work and Family in Industrialized Societies*, 4 SIGNS 632, 642 (1979).

¹⁴² Kamerman, *supra* note 141, at 642-43.

¹⁴³ Garfinkel & Sorensen, *The Swedish Child Support System: Lessons for the U.S.*, 27 SOCIAL WORK 509, 510 (1982).

mined, as in the United States, in a judicial proceeding or by private agreement, but is subject to a statutory minimum.¹⁴⁴ When the amount owed by the father is set by a court at less than the minimum, the government makes up the difference from its general revenue funds.¹⁴⁵ Once the amount is set, the state will pay that sum each month to the mother and assume responsibility for collecting from the father.¹⁴⁶

Although neither country's legal system appears to accept the principle of equalizing the financial burden of divorce between mother and father, the state itself absorbs much of the impact of divorce, thus lessening the burden on women.

An American version of this kind of mixed public-private model for child support at the state level has been proposed by Irwin Garfinkel of the Institute for Research on Poverty at the University of Wisconsin.¹⁴⁷ Garfinkel's plan combines a credit income tax with a public child support payment program.¹⁴⁸ Its child support component would be financed by a tax imposed on the absent parent, in an amount determined by that parent's income and the number of children for whom support is owed.¹⁴⁹ It would be collected through the same withholding method used for other taxes.¹⁵⁰ Children whose fathers are indigent would be protected by a statutory minimum amount, which would be financed by general state revenues but distributed in the same manner—probably through a social services agency—as support amounts collected from individual fathers.¹⁵¹

If adopted at the federal level, this method would effectively nationalize the private family system by bringing child support payments under central control. By combining the private system with AFDC, it would at least make less visible the "welfare" status of many indigent families. But despite its potential to reduce this stigma, the reform value of such a program would be limited if it did not pro-

¹⁴⁴ Garfinkel & Sorensen, *supra* note 143, at 510-11.

¹⁴⁵ *Id.* at 510.

¹⁴⁶ *Id.*

¹⁴⁷ I. GARFINKEL, *supra* note 5; see also Garfinkel, Betson, Corbett and Zink, *A Proposal for Comprehensive Reform of the Child Support System in Wisconsin*, in *THE PARENTAL CHILD SUPPORT OBLIGATION*, *supra* note 50, at 263-82.

¹⁴⁸ I. GARFINKEL, *supra* note 5, at 12-13.

¹⁴⁹ *Id.* at 20-21.

¹⁵⁰ *Id.* at 16-18.

¹⁵¹ *Id.* at 14-16.

vide for reasonable minimum support amounts and eliminate coercive methods of insuring the mother's "cooperation" in locating fathers.

The overall economic impact of such a system on women would depend largely on how the formula used set the support obligations of each parent. If the formula were structured to demand that both parents contribute the identical *proportion* of their income to child support, it would ultimately benefit women. But under Garfinkel's plan, the only variables considered would be the noncustodial parent's income and the number of children. Without giving consideration to the mother's income, it would be impossible to equalize the standard of living in the two households. Thus, while Garfinkel's plan would benefit women by providing an absolute guarantee that support would be paid, the inequity of how the burden is divided would continue.

The Garfinkel proposal could serve as the basis for an intermediate stage of reform. Like most partial improvements, however, its biggest danger is perhaps that it would be frozen into place as the last effort to overhaul the system. A more thoroughgoing reform would supplement Garfinkel's concepts with not only equalization of the burden between the parents, but also an extensive public childcare system, including a floor for support amounts, so that children without support from a male wage earner would be guaranteed a humane upbringing. These components are essential to any system which would decrease women's economic dependence on men.

IV. CONCLUSION

Ultimately, the child support system will not determine the extent to which fathers begin to assume a greater role in childcare, in or outside of marriage, and to demonstrate a stronger commitment to continued financial support of their children. Only basic alterations in social arrangements which significantly empower women, and change relationships between women and men, will address the underlying problems highlighted by the child support system. In the meantime, child support programs should not be premised on assumptions of idealized paternal involvement in childrearing or economic equality between men and women. Rather, child support reforms should be designed to guarantee women with children economic resources sufficient to allow them to achieve real autonomy; without such autonomy, broader social change cannot occur.

