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# Child Support Savings Accounts: An Innovative Approach to Child Support Enforcement

Monica HofWallace

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# CHILD SUPPORT SAVINGS ACCOUNTS: AN INNOVATIVE APPROACH TO CHILD SUPPORT ENFORCEMENT

MONICA HOF WALLACE\*

*The national child support epidemic needs a long-term, progressive solution to reinvigorate nonpaying noncustodians, and this Article proposes a Child Support Savings Account as one solution. In this Article, I urge state governments, in coordination with financial institutions, to offer an account into which noncustodial parents deposit child support payments and from which custodial parents, through the use of a debit card, gain immediate access to the funds. I likewise urge the federal government to offer a federal tax benefit for noncustodial parents who elect to use a Child Support Savings Account, a concept that already exists in the Internal Revenue Code for health and dependent care accounts. A tax-free account to care for a child of a broken home is a natural derivative, and contemporary social policy demands it.*

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## INTRODUCTION

A woman once described her battle over child support payments: "I could see his hand shaking when he wrote the check to me. He hated me so much. He was convinced that I sat home and ate Bon-Bons on his nickel. It was a constant fight to get the monthly check."<sup>1</sup> The nonpayment of child support is a national epidemic that negatively affects the well-being of children.<sup>2</sup> Unfortunately, many couples who once shared a life and a family together now harbor resentment and distrust, and their children's psychological and financial well-being is lost in the acrimony. Furthermore, more children are born out of wedlock than ever before,<sup>3</sup> leaving some children longing for emotional and financial support. With progressive and creative legislation, state and federal governments could ease the financial tension between parents to ensure that more dollars are given to those who need it—the children. A Child Support Savings Account ("CSSA") offers one solution.

This Article proposes that state governments, in coordination with financial institutions, offer an account into which noncustodial parents deposit child support payments and from which custodial parents can access the funds.<sup>4</sup> These funds would be the property of the minor and could be used by the custodial parent at any time for child-related expenditures. The custodial parent would be issued a debit card and a checkbook on the savings account from which she could access the deposited funds.<sup>5</sup> The funds would be immediately available to the

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1. The idea for this Article came from a student who took my Civil Law of Persons (Family Law) class and explained the vengeful relationship with her ex-husband. Although she will remain nameless, I thank her for illuminating a problem that has yet to be recognized in the law.

2. See discussion *infra* Part I.C.

3. JOYCE A. MARTIN ET AL., NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORT, BIRTHS: FINAL DATA FOR 2003, at 2 (2005) ("The proportion of all births to unmarried women increased to 34.6 percent; this measure has risen steadily since the late 1990s.").

4. The "noncustodial" parent is the parent without primary physical custody of the child. The "custodial" parent is the parent with whom the child primarily resides.

5. In discussing my proposal, I often refer to the payor/noncustodial parent as male and the payee/custodian as female. Although I recognize that these traditional roles may not always apply, evidence exists that almost 85% of custodial parents are mothers. See

custodial parent—and therefore the child—and a spending record would exist, even though generally it would be unavailable to the noncustodian.

In addition, the federal government should offer a federal tax benefit for noncustodial parents who use a Child Support Savings Account, providing motivation for maintaining child support. Historically, child support has been enforced through punitive measures such as fines and jail time.<sup>6</sup> Although negative repercussions may motivate some parents to pay child support, providing a positive consequence for supporting the child would cause other parents to meet their obligation more frequently and more willingly. Tax-advantaged savings accounts already exist for health and dependent care expenses;<sup>7</sup> providing support for a child of a broken home is a natural derivative.

The financial and psychological benefits that would result for children and their parents could be significant. First, from a financial standpoint, increasing the collection of child support could prevent some children from falling into poverty. The amount owed in child support would be withheld from the payor parent's wages and deposited into the account, making dollars immediately available to the custodial parent. More dollars would be filtered to the child because courts and parents could take into account the tax benefit afforded the payor parent and assign those additional dollars to the amount paid in child support. The net loss of tax dollars would be offset by the decline in government-related assistance to the child. Psychologically, children benefit from increased assistance from their parents. Having both parents providing emotionally and monetarily validates the worth of the child as part of a family.

Additionally, the custodial parent will be more likely to receive child support because either the amount will be withheld by the noncustodian's employer or the noncustodian will pay into the account, rather than making payments directly to the former spouse or companion. The noncustodian may feel better protected because a record of expenditures would exist. The interaction between the

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TIMOTHY S. GRALL, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, at 4 (2003), available at <http://www.census.gov/prod/2003pubs/p60-225.pdf>.

6. Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1149 (1999).

7. 26 U.S.C. § 105 (2000) (health care flexible spending account); *id.* § 129 (dependent care flexible spending account); 26 U.S.C. § 223 (Supp. IV 2004) (health spending account).

parents would be limited to nonfinancial activities that involve the child. In turn, the acrimony may subside.

State and federal governments have worked diligently to reduce child support arrearages and collect ongoing child support obligations.<sup>8</sup> Although some enforcement techniques have been successful, the gap between child support due and child support unpaid continues to grow.<sup>9</sup> That is not to suggest that traditional means of enforcement should be abandoned. Rather, innovative ideas like a CSSA should be tested to challenge the enforcement paradigm.

This Article first explains the need for reform. Part I outlines the federal law governing child support enforcement. Additionally, the reader will get a sense of the financial and psychological suffering of both children and parents when faced with nonpayment of child support. Part II of this Article delves into the reasons parents do not pay child support and considers the type of reform necessary to address these concerns. Part III presents the logistics of the CSSA, including the proposed tax benefits. Part III also outlines the advantages, both psychological and financial, that a CSSA can offer. Finally, the Article concludes that creating Child Support Savings Accounts would increase the amount of child support collected and may improve parent-parent and parent-child relationships.

## I. THE NEED FOR REFORM

### A. *The Law Governing Child Support Enforcement*

Historically, only state governments were tasked with enforcement of child support orders.<sup>10</sup> The federal government became involved in child support enforcement in the latter half of the twentieth century.<sup>11</sup> At that point, the social landscape of the country had begun to change, and steadily rising divorce rates, coupled with an escalating number of children born to single mothers, placed a new strain on the funds of the Nation's public assistance program.<sup>12</sup>

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8. *See infra* Part I.A.

9. *See infra* Part I.B.

10. STAFF OF H. COMM. ON WAYS & MEANS, 108TH CONG., GREEN BOOK, SEC. 8—CHILD SUPPORT ENFORCEMENT PROGRAM 8-2 (Comm. Print 2004) [hereinafter GREEN BOOK].

11. *See id.* (noting that child support for welfare children was the exception to the general public notion that child support was a domestic relations issue and solely a matter for state courts).

12. *Id.* “Divorce rates increased dramatically between 1965 and 1974, when the annual number of divorces nationwide more than doubled to 977,000.” OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., ESSENTIALS FOR

In these early stages of federal involvement, the government focused on collecting support owed to a single group of the Nation's children—those living in families receiving assistance under national welfare programs.<sup>13</sup> A large motivating force behind the federal government's entrance into the field was purely economic—an attempt to cut federal welfare spending by transferring the financial burden of supporting welfare children back to the children's delinquent parents.<sup>14</sup>

In the mid-1970s, the focus of the federal government's involvement in child support enforcement shifted to include the needs of children and families not receiving public assistance.<sup>15</sup> This new wave of federal involvement began with the Social Services Amendments of 1974, which created Title IV-D of the Social Security Act.<sup>16</sup> Title IV-D gave rise to a new federal initiative, the Child Support Enforcement and Paternity Establishment Program.<sup>17</sup> This novel program evidenced a congressional push to prevent families not receiving government benefits from entering the welfare system by helping them obtain child support and establish paternity for children born outside of marriage.<sup>18</sup>

Title IV-D also created an Assistant Secretary of Child Support, who reports to the Secretary of the Department of Health and Human Services, and directed the Assistant Secretary to administer, oversee, and assist in the implementation of the states' child support enforcement programs.<sup>19</sup> The Social Services Amendments of 1974

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ATTORNEYS IN CHILD SUPPORT ENFORCEMENT (3d ed. 2002), available at <http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials> [hereinafter ESSENTIALS FOR ATTORNEYS]. The percentage of births occurring during a first marriage decreased from 81.1% between 1965 and 1969 to 58.9% between 1990 and 1994. AMARA BACHU, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, TRENDS IN PREMARITAL CHILDBEARING: 1930 TO 1994, at 7 (1999), available at <http://www.census.gov/prod/99pubs/p23-197.pdf>. From 1990 to 1994, 35.1% of births occurred before a first marriage, up from 16.8% during the 1965 to 1969 time period. *Id.*

13. GREEN BOOK, *supra* note 10, at 8-2. From 1950 to 1975, the federal government focused its child support enforcement efforts solely on the children of families receiving benefits under Aid to Families with Dependent Children ("AFDC"). *Id.*

14. *Id.* In an effort to shift the welfare burden to absentee parents, AFDC required the states' welfare agencies to notify law enforcement when a child abandoned by a parent began receiving benefits. *Id.*

15. *See id.* (stating that the motivation was to prevent families from needing public assistance).

16. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101, 88 Stat. 2337, 2351 (codified as amended in scattered sections of 42 U.S.C.).

17. GREEN BOOK, *supra* note 10, at 8-2.

18. *Id.*

19. 42 U.S.C.A. § 652 (West 2003 & Supp. 2006). The Secretary's duties include "establish[ing] such standards for State programs for locating noncustodial parents, establishing paternity, and obtaining child support." *Id.* § 652(a)(1). The Secretary also evaluates the overall success of state programs established pursuant to the Act, *id.*

placed responsibility for the enforcement of all child support obligations (to welfare and nonwelfare children) at both the federal and state levels.<sup>20</sup> Primarily, the federal role was to oversee and evaluate state and local agencies implementing the federal laws.<sup>21</sup>

The federal government continued its involvement in the arena of child support enforcement law with the passage of additional legislation in the years following the Social Services Amendments of 1974. In 1981, Title IV-D was amended by the Omnibus Budget Reconciliation Act,<sup>22</sup> which authorized both state and federal government to withhold portions of funds due to delinquent obligors and reroute those funds to the child.<sup>23</sup> For instance, it authorized the Internal Revenue Service to withhold portions of the federal income tax refunds of noncustodial parents who owed child support.<sup>24</sup> It also required that states withhold portions of unemployment benefit payments to parents owing support in order to fulfill their delinquent obligation.<sup>25</sup>

Next, Congress passed the Child Support Enforcement Amendments of 1984.<sup>26</sup> These amendments equalized many services between welfare and nonassisted families<sup>27</sup> and improved interstate enforcement of child support orders.<sup>28</sup> Most importantly, the 1984 amendments required each state to use improved enforcement techniques, such as (1) mandatory income withholding; (2) expedited

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§ 652(a)(4), and provides overall technical assistance to the states in implementing their programs, *id.* § 652(a)(7).

20. *See, e.g., id.* § 654 (establishing standards for state plans for child support). Every state must provide enforcement services free of charge to welfare recipients, while nonwelfare families are charged a minimal fee. *Id.* § 654(6).

21. *See, e.g., id.* § 652(b) (allowing the Secretary of Treasury, upon certification by the Secretary of Health and Human Services, to collect state child support owed under an approved state plan).

22. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (codified in scattered titles and sections of the U.S.C.).

23. *See* 42 U.S.C.A. § 664 (West 2003 & Supp. 2006) (adding additional child support provisions).

24. *See* 42 U.S.C. § 664(a)(2)(A) (2000) (setting out the procedure for the Secretary of Treasury to withhold the tax refund of any parent who owes child support and divert it to the appropriate state agency).

25. *See id.* § 2335; *see, e.g.,* ALA. CODE § 25-4-152 (LexisNexis 2000); FLA. STAT. ANN. § 443.051 (West 2006); GA. CODE ANN. § 19-11-19 (2004); LA. REV. STAT. ANN. § 23:1693 (1998 & Supp. 2007); MISS. CODE ANN. § 71-5-516 (West 1999).

26. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 42 U.S.C.).

27. *See* 42 U.S.C. § 606 (1994), *repealed by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2112 (codified as amended at 42 U.S.C. §§ 601-10, 612-13, 615-17 (2000)) (preserving certain benefits for families deemed ineligible once in receipt of child support).

28. *See* 42 U.S.C. § 655(e) (2000) (establishing grants to promote interstate enforcement of child support obligations).

processes for establishing and enforcing support orders; (3) state income tax refund interceptions; (4) liens against real and personal property, and security or bonds to assure compliance with support obligations; and (5) reports of support delinquency information to consumer reporting agencies.<sup>29</sup>

These amendments produced a nationwide mandate to make existing enforcement techniques more effective by supplementing ordinary wage withholding procedures with new initiatives such as allowing states to withhold portions of their state income tax refunds.<sup>30</sup> Most importantly, these amendments allowed states to use child support enforcement techniques that proved to be more effective against delinquent parents without traditional wage-earning jobs. By moving away from simple income withholding, these newer enforcement techniques, such as the ability to report nonpaying parents to credit bureaus,<sup>31</sup> coupled with the strengthening of traditional mechanisms like real and personal property liens,<sup>32</sup> made nonpaying parents feel the effects of their irresponsibility in more aspects of their everyday lives.

The Family Support Act ("FSA") of 1988 was yet another federal initiative in the area of child support enforcement.<sup>33</sup> The FSA focused on immediate wage withholding<sup>34</sup> and locating absent parents.<sup>35</sup> The FSA also required that each state have an operational automated national child support enforcement system.<sup>36</sup>

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29. 42 U.S.C.A. § 666 (West 2003 & Supp. 2006); *see also* Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIMONIAL L. 103, 115-16 (1990) (outlining the various statutory changes made by the Child Support Enforcement Amendments of 1984).

30. *See, e.g.*, ALA. CODE §§ 40-18-100 to -109 (LexisNexis 2003 & Supp. 2006); GA. CODE ANN. § 19-11-18(a) (2004 & Supp. 2006); LA. REV. STAT. ANN. §§ 47:299.31 to .41 (2001 & Supp. 2007); MISS. CODE ANN. §§ 27-7-501 to -519.

31. *See, e.g.*, FLA. STAT. ANN. § 61.1354 (West 2005 & Supp. 2007); LA. REV. STAT. ANN. § 46:56(M) (1999 & Supp. 2007); MISS. CODE ANN. § 93-11-69; TEX. FAM. CODE ANN. § 231.114 (Vernon 2002).

32. *See, e.g.*, ALA. CODE §§ 30-3-191 to -200 (LexisNexis 1998); GA. CODE ANN. § 19-11-18; KAN. STAT. ANN. § 38-16,119(f)(1) (2000); LA. REV. STAT. ANN. § 46:236.15(D)(1)(b); TEX. FAM. CODE ANN. § 157.312 (Vernon 2002 & Supp. 2006).

33. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

34. *See* 42 U.S.C. § 666(b)(3) (2000) (establishing immediate garnishment of an absent parent's wages, regardless of whether the parent is in arrears, with some exceptions).

35. The FSA aided states in finding absent parents and in holding them responsible for child support payments by allowing states to access wage and unemployment compensation claims, 42 U.S.C.A. § 653 (West 2003 & Supp. 2006), and by instituting a requirement that every state-issued birth certificate evidence each parent's social security number, 42 U.S.C. § 405(c)(2)(C)(ii) (2000).

36. 42 U.S.C. § 654(24) (requiring states to establish automated data processing and information retrieval systems).



The most recent major federal child support enforcement initiative was contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").<sup>37</sup> PRWORA required states' child support enforcement systems to comply with both new and existing federal standards before that state became eligible to receive federal dollars for Temporary Assistance to Needy Families ("TANF").<sup>38</sup> The legislation also required states to institute tougher enforcement techniques, such as additional income withholding,<sup>39</sup> seizure of assets,<sup>40</sup> and withholding and suspension of licenses.<sup>41</sup> PRWORA also established a National Directory of New Hires aimed at cracking down on delinquent parents across state lines.<sup>42</sup>

PRWORA augmented many of the federal enforcement initiatives that had come about in previous legislative actions and mandated that all states implement new enforcement tactics. One of the nontraditional enforcement techniques that the Act required state systems to support was the revocation or denial of a nonpaying parent's licenses.<sup>43</sup> Another

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37. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 601-10, 612-13, 615-17 (2000)).

38. See 42 U.S.C. § 602(a)(2) (requiring a state to certify that it will operate a child support enforcement program approved under federal law in order to be eligible to receive TANF). PRWORA abolished the Aid for Families with Dependent Children welfare program and replaced it with TANF, a program for block grants directed to states. GREEN BOOK, *supra* note 10, at 8-3.

39. See 42 U.S.C. § 666(a)(1) (mandating income withholding procedures, with exceptions).

40. See 42 U.S.C.A. § 666(a)(14) (West 2003 & Supp. 2006) (mandating creation of state procedures for the identification and seizure of an obligor's assets on request from another state).

41. See 42 U.S.C. § 666(a)(16) (2000) (mandating procedures giving states the authority "to withhold or suspend . . . driver's licenses, professional and occupational licenses, and recreational and sporting licenses").

42. *Id.* § 653a. Under PRWORA, the National Directory of New Hires mandated that states require employers to report all new hires within the first twenty days of their employment to child support enforcement authorities. *Id.* § 653a(b)(2). This new requirement aided enforcement authorities not only in locating absent parents but also in the process of wage withholding.

43. See *supra* note 41. The particular licensed activities over which this mechanism extends vary from state to state. See, e.g., ALA. CODE § 30-3-170 (LexisNexis 1998 & Supp. 2006) (covering occupational, professional, sporting, recreational activity, and driving licenses); FLA. STAT. ANN. §§ 61.13015 to .13016 (West 2006) (covering driving, professional, and occupational licenses); GA. CODE ANN. § 19-11-9.3 (2004) (covering professional, occupational, and driver's licenses); LA. REV. STAT. ANN. §§ 9:315.30 to .36 (2000 & Supp. 2007) (impeding issuance of driving, professional, sporting, hunting, and fishing licenses); MISS. CODE ANN. § 93-11-153 (West 1999 & Supp. 2006) (covering driving, professional, occupational, hunting, fishing, and alcoholic beverage sales licenses); TEX. FAM. CODE ANN. § 232.001 (Vernon 2002) (covering professional, occupational, driving, and recreational licenses).

nontraditional enforcement technique highlighted by PRWORA is the denial or revocation of a passport to a parent owing more than \$5,000 of child support.<sup>44</sup> These two strategies took aim not at delinquent parents' wallets but at their personal preferences, individual mobility, and daily life activities.

In 1998, Congress passed two additional statutes, one intended to promote child support collection and the other to punish nonpayors. The Child Support Performance and Incentive Act<sup>45</sup> provides new incentive payments to states that comply with federal guidelines<sup>46</sup> and alternative penalty reductions to states whose compliance plans would otherwise be disapproved, but are making a good faith effort to correct their deficiencies.<sup>47</sup> Congress also passed the Deadbeat Parents Punishment Act of 1998,<sup>48</sup> which stiffened criminal sanctions for failing to pay child support by increasing the maximum jail sentence and providing for mandatory restitution equal to the total support obligation.<sup>49</sup>

Today, there is increasing legislative resolve at both federal and state levels to improve the collection of child support payments. The Office of Child Support Enforcement ("OCSE") has implemented innovative guidelines for states to follow in their child support collection efforts.<sup>50</sup> And, although each state administers its own child support enforcement program, the federal government plays a major role in each program's oversight, implementation, and monitoring.<sup>51</sup>

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44. 42 U.S.C.A. § 652(k) (West 2003 & Supp. 2006). On October 1, 2006, the threshold amount of child support owed to warrant a denial of passport was decreased to \$2,500. Deficit Reduction Act of 2005, § 7303, Pub. L. No. 109-171 (to be codified at 42 U.S.C. §§ 652(k)(1), 654(31)).

45. Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645 (codified as amended at 29 U.S.C. § 1169 and 42 U.S.C. §§ 603-04, 651-69, 671 (2000)).

46. 42 U.S.C. § 658a (2000).

47. *Id.* § 655(a). Additionally, the Act created a working group to study and report on the "impediments to effective enforcement of medical support" by state Title IV-D agencies. *Id.* § 651.

48. Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified at 18 U.S.C. § 228 (2000)).

49. 18 U.S.C. § 228(c)-(d).

50. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., HANDBOOK ON CHILD SUPPORT ENFORCEMENT (2005), available at [http://www.acf.dhhs.gov/programs/cse/pubs/2005/handbook\\_on\\_cse.pdf](http://www.acf.dhhs.gov/programs/cse/pubs/2005/handbook_on_cse.pdf).

51. GREEN BOOK, *supra* note 10, at 8-2. The federal government shapes state law by conditioning welfare funding on meeting certain standards imposed by the OCSE. *Id.* at 8-3. Additionally, if the state program meets certain standards, the state receives a portion of its program's cost from the federal coffers. *Id.*

The Child Support Enforcement Program “has changed from one that recoups welfare costs to one which serves a mostly non-welfare clientele.”<sup>52</sup> Federal involvement in child support enforcement has come a long way from its initial economically motivated entrance into this area of law. In approximately fifty years, federal legislation has become the overarching force behind states’ child support enforcement efforts, regardless of the family’s financial situation.<sup>53</sup> Over the next fifty years, federal and state governments should continue to reexamine and refine enforcement techniques to capture every dollar that belongs to a child.

### *B. Results of Collection Efforts*

Overall, federal involvement in child support enforcement has increased the collection of support payments by custodial parents.<sup>54</sup> Over the past ten years, however, the percentage of parents receiving part or full child support payments due has stagnated.<sup>55</sup> Approximately 25% of custodial parents who are entitled to child support are receiving none at all and 30% are receiving only part of what is due to them.<sup>56</sup> The system needs a catalyst to reinvigorate noncustodians and expand the enforcement paradigm that has existed for several years.

According to the most recent survey by the U.S. Census Bureau, conducted in 2001, there were 13.4 million custodial parents, ages fifteen years or older, with children under twenty-one years of age, living without the other parent.<sup>57</sup> Of these 13.4 million custodial parents, 6.9

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

53. The benefits of federal law affecting child support enforcement apply only to the states themselves or the clients of the state IV-D agency. If a client represented by a private attorney wishes to use any of the enforcement mechanisms, such as diverting income tax refunds, they must be referred to the state IV-D agency. *See* 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 17.3 (2d ed. 1988).

54. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-04-377, *CHILD SUPPORT ENFORCEMENT: BETTER DATA AND MORE INFORMATION ON UNDISTRIBUTED COLLECTIONS ARE NEEDED* 6 (2004), *available at* <http://www.gao.gov/new.items/d04377.pdf> (tabulating the child support dollars collected as a result of the federal tax intercept program).

55. *See* GRALL, *supra* note 5, at 7 fig.5 (charting the proportion of custodial parents receiving partial and full payment of child support).

56. *See id.*

57. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *CHILD SUPPORT: 2001*, at 5 tbl.4, *available at* <http://www.census.gov/hhes/www/childsupport/chldsuo1.pdf> [hereinafter *CHILD SUPPORT*].

million were due child support from an absent parent.<sup>58</sup> To these 6.9 million parents, \$34.9 billion in support was due, and \$21.9 billion in support was received, leaving a \$13 billion child support deficit.<sup>59</sup> This deficit affected 55% of custodial parents due child support; in other words, only 45% of custodial parents due child support received the full amount in 2001.<sup>60</sup>

The proportion of custodial parents receiving the full amount of child support due increased from 37% to 46% between 1993 and 1997, and the 2001 proportion remained relatively unchanged at 45%.<sup>61</sup> The proportion of custodial parents receiving some payments, however, fell from 39% in 1993 to 28.6% in 1999 and remained unchanged in 2001.<sup>62</sup> Overall, the increase in parents receiving full support was met by the decrease in parents receiving partial payments, and the total number of parents receiving partial or full child support—74% in 2001—remained relatively the same over the eight-year span.<sup>63</sup> In other words, approximately one quarter of custodial parents due child support are consistently receiving nothing.

Even though the percentage of custodial parents who did not receive any child support due to them has remained the same over the past eight years, the total child support deficit has increased. The child support deficit increased 30%, from \$10 billion in 1993 to \$13 billion in 2001, leaving considerable child support dollars unpaid.<sup>64</sup> Over the last half century, federal and state governments have improved collection efforts,<sup>65</sup> but the amount due to children has increased. There are nearly four million parents seeking child support due and unpaid.<sup>66</sup> The detrimental effects on children, both financial and psychological, require the government to reevaluate collection strategies and

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58. GRALL, *supra* note 5, at 4 tbl.B. Approximately 7.9 million custodial parents had child support agreements or awards in 2002, but 1.1 million of those parents were “not due child support payments because either the child(ren) were too old, the noncustodial parent died, the family lived together part of the year, or some other reason.” *Id.* at 6 n.8.

59. CHILD SUPPORT, *supra* note 57, at 2 tbl.1.

60. Of the 6.9 million custodial parents due support, 3.1 million (or 45%) received the full amount of child support due to them, leaving 3.8 million custodial parents (or 55%) who received either some or no child support. GRALL, *supra* note 5, at 7.

61. *Id.*

62. *Id.*

63. *Id.* In 1993, 75.8% of custodial parents received partial or full child support payments due. *Id.* These percentages ranged from 75.7% in 1995, to 75.3% in 1997, to 73.7% in 1999, and to 74% in 2001. *Id.*

64. *Id.* at 2; CHILD SUPPORT, *supra* note 57, at 2 tbl.1. The figures are in 2001 dollars based on the Consumer Price Index Research Series. GRALL, *supra* note 5, at 2.

65. See *supra* Part I.A.

66. GRALL, *supra* note 5, at 2. In 2001, 6.9 million parents were due child support, but only 3 million parents received the full amount due to them. *Id.*

implement new and different enforcement techniques to increase child support collection.

C. *The Effects on Children and Parents*

1. Financial Suffering

Notwithstanding the emotional upheaval endured by families of divorce or separation, the financial strain placed on children and parents as a result of the nonpayment of child support can be overwhelming. There is a direct correlation between nonpayment of child support and poverty.<sup>67</sup> Nonpayment is particularly serious because child support can make the difference between poverty and nonpoverty for some families.<sup>68</sup> Children in families near the poverty line can easily fall below the poverty line if child support payments are not made.<sup>69</sup>

Statistical evidence supports this conclusion. Twenty-nine percent of all custodial mothers who did not receive child support payments fell below the 2001 poverty line, while only 15% of those who received full payment fell below the poverty line.<sup>70</sup> The same variance held true for custodial fathers.<sup>71</sup>

Employment and income derived from employment likewise impacts poverty rates,<sup>72</sup> but income from child support may be more valuable to a custodial parent than income from employment.<sup>73</sup> Although the rate of poverty for custodial parents has declined ten percentage points,<sup>74</sup> the rate of employment for custodial parents has climbed at almost the same rate.<sup>75</sup> Increasing employment for custodial

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67. *See id.* at 3.

68. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 284 (1985).

69. *Id.*

70. GRALL, *supra* note 5, at 4. For custodial mothers who received partial payment, 25.5% had family income below the poverty line. *Id.*

71. *Id.* The family income of 22.8% of custodial fathers who did not receive child support payments fell below the poverty line, while 10.8% of those who received full payment fell below the poverty line. *Id.*

72. At least 55% of unemployed custodial parents lived in poverty in 2001, while only 7.8% of custodial parents working full-time and year-round lived in poverty. *Id.* at 3.

73. *See infra* notes 73–81 and accompanying text.

74. GRALL, *supra* note 5, at 3 (reporting that poverty rates declined from 33.3% in 1993 to 23.4% in 2001). The rate of poverty for custodial parent families is four times higher than the rate for married couple families with related children. *Id.*

75. *Id.* at 3 fig.1 (reporting that employment rates climbed from 75.3% of custodial parents employed in 1993 to 83.4% in 2001). The percentage of custodial parents employed in full-time, year-round jobs increased from 45.6% to 55.3% during the eight-year span. *Id.*

parents translates to less time with the children and additional child care costs, making child support dollars more valuable than employment income. In fact, custodial mothers had a significant increase in full-time, year-round employment, jumping from 40.9% in 1993 to 52.3% in 2001.<sup>76</sup> To the extent that child support, rather than full-time, year-round employment, can lift families out of poverty, children may enjoy the residual benefit of increased time and involvement by the custodial parent.

In addition to statistical support, the day-to-day impact on children—even those above the poverty line—has been documented. Drs. Judith Wallerstein and Joan Kelly interviewed parents and children in sixty divorcing families in California during the initial six weeks of separation, one year following, and again five years later.<sup>77</sup> These families came from a relatively affluent community and even though some children received child support on a fairly regular basis, 75% of the custodial mothers reported a decline in their standard of living.<sup>78</sup>

After divorce, custodial mothers assumed the dual role of wage earner and head of household and ultimately spent less time with their children.<sup>79</sup> Because of the financial strain on the custodial parent due to the divorce and the nonpayment of child support, children were forced to relocate and change schools. Within the first three years of the separation, “almost two-thirds of the [children] had changed their . . . residence, and . . . [some] had moved three or more times.”<sup>80</sup> Many of these moves were related to financial factors—a new job, the need for less expensive housing, or more preferable child care arrangements.<sup>81</sup> The children’s stability was shaken because the financial picture of the family had changed, which resulted in disruptions in the child’s home and school environments.<sup>82</sup>

Even if child support is paid timely and in full, the economic consequences to a child’s life can be startling. Failure to receive all or

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76. *Id.* Custodial fathers who worked full time, year round increased from 70.2% in 1993 to 71.7% in 2001, with a peak in 1997 of 76.9%. *Id.*

77. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 320, 332–33 (1980).

78. *Id.* at 23.

79. *See id.* at 25 (noting that children spent less time with their fathers as well).

80. *Id.* at 183.

81. *Id.*

82. *Id.* at 41–43. For example, after divorce or separation, “children were more likely to eat by themselves, to make their own lunches for school, . . . [or] put themselves to bed” because the parent was working full time, had school commitments, or had new social engagements. *Id.* at 42.

some child support places the child and the custodial parent in a more difficult situation—struggling to stay above the poverty line or being unable to do the same types of activities to which the child was accustomed in an intact family. Financial strain can also lead to emotional suffering, yet another consequence of nonpayment.

## 2. Emotional Suffering and Development

The emotional suffering that children endure as a result of the nonpayment of support often goes unspoken. Aside from enduring the separation of their mother and father, many children experience anger and resentment because one parent is not providing financial help to the other parent for their care. Wallerstein and Kelly found in their study that children often compared the economic situation in their mother's and father's households.<sup>83</sup> When the mother and children experienced downward economic mobility and the father did not, the children exhibited a sense of deprivation and anger.<sup>84</sup>

Not only is child support important for the emotional well-being of children, but it may also have a distinct impact on their development. Various studies have concluded that children of disrupted marriages achieve greater academic success with increased levels of child support.<sup>85</sup> In fact, statistically, child support income creates greater benefits for children than other types of income.<sup>86</sup> According to several separate analyses of data compiled from surveys of children, the ability of single mothers to receive child support from noncustodial fathers measurably impacts the cognitive development of their children.<sup>87</sup>

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83. *Id.* at 231.

84. *See id.* (adding that this created additional conflict between the mother and father).

85. *See* John W. Graham et al., *The Effects of Child Support on Educational Attainment*, in CHILD SUPPORT AND CHILD WELL-BEING 317, 343 (Irwin Garfinkel et al. eds., 1994) (concluding that child support had a greater impact on academic success than other types of income); Virginia W. Knox & Mary Jo Bane, *Child Support and Schooling*, in CHILD SUPPORT AND CHILD WELL-BEING, *supra*, at 287, 302-07 (finding a correlation between the level of child support and the length of time in school, controlling for income level and receipt of welfare).

86. Sarah S. McLanahan et al., *Child Support Enforcement and Child Well-Being: Greater Security or Greater Conflict?*, in CHILD SUPPORT AND CHILD WELL-BEING, *supra* note 85, at 239, 253 (finding a positive correlation between child support and grade point averages); Daniela Del Boca & Christopher J. Flinn, *Expenditure Decisions of Divorced Mothers and Income Composition*, 29 J. HUM. RESOURCES 742, 760 (1994) (concluding that child support income is associated with greater degrees of expenditures on children).

87. Laura M. Argys et al., *The Impact of Child Support on Cognitive Outcomes of Young Children*, 35 DEMOGRAPHY 159, 159-60 (1998) (citing several empirical studies);

One study found increases in grade point averages and reductions in behavioral problems as a result of child support received.<sup>88</sup> Another study found evidence that child support has positive effects on achievement test scores, over and above the effects of the total family income.<sup>89</sup> Still another study found that child support was positively related to more years in school, after controlling for income level and receipt of welfare.<sup>90</sup>

The importance of child support dollars cannot be understated because it has distinct effects when compared to other methods of income, such as employment by the custodial parent or government assistance.<sup>91</sup> First, child support income may improve a child's material well-being because mothers may feel obligated to spend it directly on purchases for the child.<sup>92</sup> Second, child support payments may improve the payor parent-child relationship by increasing the custodial parent's willingness to let the other parent spend time with the child or by having important symbolic meaning to the child.<sup>93</sup> Third, child support, unlike other forms of income, comes with no negative consequence.<sup>94</sup> Other types of income, such as government assistance, may create a stigma that affects the custodial parent and the child's outlook, and employment by the custodial parent, while providing a role model, may take away from time with the child and result in poor child care situations.<sup>95</sup>

A child's well-being, aside from his or her financial needs, is affected by the failure of a parent to pay support. Children are aware that support is being provided by one parent, particularly when it goes unpaid.<sup>96</sup> Failure to support a child can lead to resentment of the

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Virginia W. Knox, *The Effects of Child Support Payments on Developmental Outcomes for Elementary School-Age Children*, 31 J. HUM. RESOURCES 816, 819-20 (1996).

88. McLanahan et al., *supra* note 86, at 253.

89. Knox, *supra* note 87, at 819. Like other forms of income, additional child support also improved the level of cognitive stimulation available in the home environment, however achievement test scores were isolated and improved as a result of child support income alone. *Id.* To assure that the effects of child support are different than those of other income sources, the author used three methods to control for unmeasured heterogeneity among families: (1) accounting for the average number of visitation days shared annually; (2) controlling for characteristics of the local economy; and (3) determining whether local variation influences income and payment for those families in which the fathers were never absent during the previous five years. *Id.*

90. Knox & Bane, *supra* note 85, at 302-07.

91. Knox, *supra* note 87, at 817.

92. *Id.* (citing Del Boca & Flinn, *supra* note 86).

93. *Id.* at 818 (citing McLanahan et al., *supra* note 86).

94. *Id.*

95. *Id.*

96. See WALLERSTEIN & KELLY, *supra* note 77, at 231.



nonpaying parent and feelings of unworthiness by the child. A rejection of the child's needs by the parent can translate to feelings of rejection by the child. While the custodial parent and other adult caregivers will attempt to mitigate any effects that nonpayment will have on the child, finding ways to cause the noncustodian to pay will offer greater, long-term benefits.

## II. THE PROBLEM: WHY PARENTS DON'T PAY

Developing a successful program first requires an examination of the primary causes of nonpayment. Previous studies have identified several recurring reasons that parents fail to pay.<sup>97</sup> By isolating each reason, appropriate solutions can be considered, keeping in mind that these reasons may interplay and overlap. In the literature, researchers consistently articulate four reasons why parents fail to pay child support: inability to pay, lack of access to and relationship with the child, poor enforcement, and psychological reasons related to feelings about the ex-spouse and attitude about the child support award.<sup>98</sup> Each will be addressed in turn.

### A. *Inability To Pay*

Some believe that failure to pay results from inability to pay.<sup>99</sup> In the most comprehensive research on this question, Lenore Weitzman conducted a ten-year study of families in California and determined that inability to pay was not a primary reason for failing to pay child

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97. See generally DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 129-30 (1979) (suggesting that the remarriage of either parent may result in nonpayment); Sumati N. Dubey, *A Study of Reasons for Non-Payment of Child Support by Non-Custodial Parents*, 22 J. SOC. & SOC. WELFARE 115 (1995) (concluding that fathers fail to pay because of lack of money and no visitation rights); Deena Mandell, *Fathers Who Don't Pay Child Support: Hearing Their Voices*, 23 J. DIVORCE & REMARRIAGE 85 (1995) (conducting a study to provide insight into why fathers fail to pay); Raymond I. Parnas & Sherry Cermak, *Rethinking Child Support*, 22 U.C. DAVIS L. REV. 759 (1989) (suggesting that the family court process contributes to nonpayment).

98. Additional reasons have been raised for nonpayment: socioeconomic reasons related to new children in a marriage, occupation of the payor, length of the marriage, age of the parents and children, and whether the parties had a marital agreement. See CHAMBERS, *supra* note 97, at 109-12; Parnas & Cermak, *supra* note 97, at 762.

99. See Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, in DIVORCE REFORM AT THE CROSSROADS 166, 175 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (stating that "large numbers of defaulting fathers do not have (and never had) the missing money").

support.<sup>100</sup> Weitzman considered the percentage of a father's income used to pay child support and found that it was rare for a court to order more than 25% of a father's net income in child support.<sup>101</sup> She also analyzed the U.S. Department of Labor's budget standards for a family of four and concluded that approximately three-fourths of California fathers had the ability to pay the amount of court-ordered child support "without a substantial reduction in their standard of living."<sup>102</sup> Indeed, when divorced women and men in her study were asked "Can you (or your ex-husband) afford to pay the child support the court ordered?," 80% of the women and 90% of the men said yes.<sup>103</sup>

Weitzman also looked at the relationship between compliance and the father's income. If lack of ability to pay is a true cause for nonpayment, then fathers with lower incomes should have higher rates of noncompliance. Her data, however, showed that fathers earning between \$30,000 and \$50,000 per year were just as likely to avoid child support payments as those earning less than \$10,000 per year.<sup>104</sup>

Conclusions from other studies support Weitzman's position that inability to pay is not a primary cause for nonpayment. In one study, the author concluded that nonresident fathers could afford to pay more child support because they spend on average only 7% of their income on child support.<sup>105</sup> Additionally, a group of Canadian researchers

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100. WEITZMAN, *supra* note 68, at 295. Indeed, Weitzman concluded that there is normally enough money to permit payment of significantly higher awards than are being made. *Id.*

101. *Id.* at 267, 273. She found an inverse relationship between the percentage of a father's income awarded in child support and the father's income level. *Id.* at 266. Lower-income men were required to pay a greater proportion of their incomes in child support, but higher-income men were more likely to pay alimony as well as child support. *Id.* When comparing the total amount of support (child support plus alimony), there was less of a difference between high- and low-income fathers. *Id.*

102. *Id.* at 274. She concluded that 61% of California fathers would be able to comply fully with court-ordered child support and still live above the high standard budget as set forth by the U.S. Department of Labor. *Id.* An additional 12% of fathers would be in full compliance and would be able to live above the lower standard budget. *Id.*

103. *Id.* at 276.

104. *Id.* at 296. Weitzman considered a father's post-divorce income and found that 27% of fathers whose annual income was less than \$10,000 did not pay or paid irregularly and 29% of those earning between \$30,000 and \$50,000 per year did not pay or paid irregularly. *Id.* Only 8% of fathers who earned over \$50,000 failed to pay or paid irregularly. *Id.* at 296 tbl.25. See also JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 136 (1989) ("Wealthier men do not have a better record of child support.").

105. Elaine Sorensen, *A National Profile of Nonresident Fathers and Their Ability To Pay Child Support*, 59 J. MARRIAGE & FAM. 785, 792-93 (1997). Nonresident fathers were defined as fathers of biological or adopted children under age eighteen who do not live with them most of the time. *Id.* at 786.

found that low income could be associated with irregular payment but failed to find a relationship between low income and nonpayment.<sup>106</sup> Although inability to pay was the second most common reason given by parents for not paying child support, an analysis of their (lack of) disposable income showed that irregular payment, rather than nonpayment, was the result.<sup>107</sup> The priority that the noncustodian gave to the child support payments, rather than income, affected his ability to pay.<sup>108</sup>

A study conducted by David Chambers found rates of payment statistically similar for men at low and high income levels due, in large part, to stringent enforcement practices.<sup>109</sup> Even when “the financial pinch” was severe, men with little income would rather pay than go to jail.<sup>110</sup> Finally, in a smaller study conducted in one California county, even though payor parents with lower incomes were more likely to be in default than their higher-income counterparts, the authors concluded that fiscal mismanagement was likely the reason for nonpayment.<sup>111</sup> Because lower-income payors are left with a small pool of disposable income, poor money management can more readily affect the payment of child support.<sup>112</sup> Further, psychological or pragmatic factors may cause a parent to give other financial obligations a higher priority than the support obligation.<sup>113</sup> The payor may be angry at the ex-spouse or may be concerned about paying his bills, thereby causing his commitment to pay child support to falter.<sup>114</sup>

Support orders today are the result of careful calculations by judges, attorneys, and the parties.<sup>115</sup> In every jurisdiction, judges are bound to follow child support schedules, and judges cannot deviate from the schedule without adequate oral or written support.<sup>116</sup> The

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106. 1 CANADIAN INST. FOR RESEARCH, *MATRIMONIAL SUPPORT FAILURES* 20–22 (1981).

107. *Id.* at 21–22.

108. *Id.* at 22.

109. CHAMBERS, *supra* note 97, at 161–62.

110. *Id.* at 162.

111. Parnas & Cermak, *supra* note 97, at 764.

112. *Id.*

113. *Id.*

114. *See id.*

115. For a review of state child support formulas and guidelines, see Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7 (1999).

116. *See* JUDITH AREEN, *FAMILY LAW: CASES AND MATERIALS* 767 (3d ed. 1992) (noting that although no two states have the same standards, all states have adopted child support guidelines). Some states require oral or written reasons before a judge can deviate from the guidelines. *See* ARIZ. REV. STAT. ANN. § 25-320 (2007) (requiring a written finding that application of the guidelines are inappropriate); LA. REV. STAT. ANN.

parent's ability to pay is of primary importance, and an amount of child support is determined based on a uniform set of criteria.<sup>117</sup> As a result, support awards are manageable for the parent paying child support, and inability to pay should not be a primary reason for nonpayment. Rather, poor money management and psychological issues are likely the underlying causes for nonpayment.

A Child Support Savings Account could alleviate budgeting and money management concerns by providing an automatic transfer into the account. A payor parent's disposable income would not include amounts needed to satisfy the child support award. If parents are not placing priority on the child support owed, the decision of when and if to pay would not be in their hands. Additionally, with a tax benefit, the child support award could free up more dollars for the child. Even if a parent is angry at the ex-spouse, preventing interaction over financial matters—a source of disagreement in and out of marriage—can only benefit the child and his personal relationship with both parents.

#### *B. Access to and Relationship with the Child*

As another reason for the nonpayment of child support, parents report not feeling the same connection with the child because of the decreased time spent with the child.<sup>118</sup> Remarriage of the mother or father, or both, often contributes to this feeling because one parent believes the step-parent has assumed the role of caregiver.<sup>119</sup> Data from the U.S. Census Bureau support this belief. Of those custodial parents who had arrangements with the other parent for joint custody or visitation, 77.1%, or approximately three-fourths, received either full or partial child support from the other parent.<sup>120</sup> Of those custodial parents who did not have joint custody or visitation arrangements, only 55.8%, or approximately one-half, received some child support from the

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§ 9:315.1 (2000 & Supp. 2007) (establishing a rebuttable presumption for the guidelines and requiring written or oral reasons); N.H. REV. STAT. ANN. § 458-C:4 (LexisNexis 2007) (requiring either a written or specific finding of special circumstances to deviate from the guidelines); VA. CODE ANN. § 20-108.2 (2004 & Supp. 2006) (requiring written reasons to overcome a rebuttable presumption in favor of application of the guidelines).

117. See AREEN, *supra* note 116, at 763–67.

118. See CHAMBERS, *supra* note 97, at 127–28; Judith A. Seltzer et al., *Will Child Support Enforcement Increase Father-Child Contact and Parental Conflict After Separation?*, in FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 157, 158–59 (Irwin Garfinkel et al. eds., 1998).

119. See CHAMBERS, *supra* note 97, at 129–30.

120. GRALL, *supra* note 5, at 8.

other parent.<sup>121</sup> Parents with more access to the child may establish a stronger bond with the child, leading to higher rates of compliance.<sup>122</sup>

Other studies have echoed a relationship between custody and nonpayment of child support. For example, in one study, 75% of payees who shared joint legal and physical custody with the other parent received court-ordered child support in full.<sup>123</sup> When joint legal, maternal physical custody was awarded, only 64% of payees received full payment, as compared to 46% when sole legal and physical custody was awarded.<sup>124</sup> Again, less time with the child leads to less payment. One author has suggested that the emotional adjustment of being a parent after divorce but lacking equal access to the children leads to stress and creates a lack of incentive to pay child support.<sup>125</sup>

Because custody inherently involves different emotional and psychological responses for individual families, it is difficult to isolate a specific custodial arrangement that is a direct cause of nonpayment of child support. Rather, the payor's access to the child—or *perceived* access to the child—may affect his desire to pay. To encourage meaningful relationships between noncustodians and their children, both from a financial and psychological perspective, the federal government implemented a program entitled "Grants to States for Access and Visitation."<sup>126</sup> States were directed to provide services including mediation, counseling, parental education, development of parenting plans, visitation when it must be monitored or supervised, and

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121. *Id.*

122. See Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 76 (2002).

123. Jessica Pearson & Nancy Thoennes, *Child Custody, Child Support Arrangements and Child Support Payment Patterns*, 36 JUV. & FAM. CT. J. 49, 52 (1985). This study has been criticized. See Nancy Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support*, 19 CLEARINGHOUSE REV. 274, 274 (1985) (concluding from that study's data that no conclusion could be reached).

124. Pearson & Thoennes, *supra* note 123, at 52–53; see also Parnas & Cermak, *supra* note 97, at 771 (finding that payors who were granted joint physical custody produced the best payment); W.P.C. Phear et al., *An Empirical Study of Custody Agreements: Joint Versus Sole Legal Custody*, 11 J. PSYCHIATRY & L. 419, 432 (1983) (finding that sole custody cases returned to court most often over nonpayment of child support).

125. Neil J. Salkind, *The Father-Child Postdivorce Relationship and Child Support*, in THE PARENTAL CHILD-SUPPORT OBLIGATION: RESEARCH, PRACTICE, AND SOCIAL POLICY 173, 177 (Judith Cassetty ed., 1983). But see WEITZMAN, *supra* note 68, at 297 (finding no correlation between compliance and complaints about visitation and arguing that men who do not comply with child support use visitation as an excuse as to why they are failing to do something which is morally right); Chuck Shively, *Examining the Link Between Access to Children and Payment of Support*, 11 DIVORCE LITIG. 85, 89 (1999) (citing a study that found that increases in visitation have no effect on payment of child support).

126. 42 U.S.C. § 669b (2000).

a neutral place for exchange time with the child to support and facilitate noncustodial parents' access to and visitation with their children.<sup>127</sup> In 2003, states provided access and visitation services to 70,000 parents, and states reported that nearly 26,000 noncustodial parents increased their parenting time with their children.<sup>128</sup>

State legislatures have also recognized that equal access to both parents produces fiscal and psychological benefits to the child. States have passed laws articulating a preference for joint or shared custody and adjusting the amount of child support owed when the child spends a significant amount of time with the noncustodian. For example, in Louisiana, the law is express that physical custody of the children should be shared equally when feasible and in the best interest of the child.<sup>129</sup> Furthermore, when a child spends at least 20% of the year with the payor parent, the court can adjust the amount of child support paid to the payee during that time.<sup>130</sup> Other states have a presumption that joint custody is in the best interest of the child<sup>131</sup> and recognize downward adjustments in the amount of child support owed for time spent with the noncustodian.<sup>132</sup> Not only may an increase in visitation decrease the amount of child support owed, but the additional time spent with the child may strengthen the parent-child bond and increase the amount of child support paid.

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127. *Id.* Since its passage, \$10 million per year has been appropriated for the states, to which each state must provide a 10% match of the federal grant amount. *Id.*

128. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., PRELIMINARY DATA; CHILD ACCESS AND VISITATION GRANTS: STATE PROFILES (FY 2003) § 2 chart A, chart J (2004), *available at* [http://www.acf.hhs.gov/programs/cse/pubs/2004/reports/prelim\\_access\\_visitation\\_grants#sect2](http://www.acf.hhs.gov/programs/cse/pubs/2004/reports/prelim_access_visitation_grants#sect2). Each state reports to the Office of Child Support Enforcement but has discretion to decide on what services to provide, organizations to be funded, geographic areas to be covered, and persons to be served to meet the purposes of the program. *Id.* § 1.

129. LA. REV. STAT. ANN. § 9:335(A)(2)(b) (2000); *see also* LA. CIV. CODE ANN. art. 132 (1999) (articulating a preference for joint custody if the parents fail to agree to a custody arrangement or if the arrangement is not in the best interest of the child).

130. LA. REV. STAT. ANN. § 9:315.8(E)(1)–(2) (2000 & Supp. 2007). In determining the amount of credit given, the court must consider the amount of time the child spends with the payor parent, the increase in financial burden to the payor parent, the decrease in financial burden to the payee parent, and the best interest of the child. *Id.* § 9:315.8(E)(3).

131. *See, e.g.,* FLA. STAT. ANN. § 61.13 (West 2006 & Supp. 2007) (“The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.”); N.M. STAT. ANN. § 40-4-9.1 (West 2003) (“There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination.”).

132. *See, e.g.,* MISS. CODE ANN. § 43-19-103(g) (West 1999); *see also* Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 560–69 (1994) (analyzing the various formulae used to give credit for joint custody).

Using a Child Support Savings Account will not directly affect one parent's access to or relationship with the child, but it may change the overall family dynamic. Without challenges over money, the parents can focus on the personal needs of the child. To the extent that custodial arrangements influence the payment of child support, state and federal laws encourage joint custody and provide monetary accommodations for parents who spend considerable time with their children. As more parents enjoy equal parenting over their children, the result should be higher levels of child support collection from involved parents.

### C. *Poor Enforcement*

Evidence suggests that noncustodians who live in communities with poor enforcement practices are more likely to forgo child support payments than those who live in communities with successful enforcement schemes. In David Chambers's study, counties with the best payment levels required that payments be made directly to the court with a threat of jail time in the case of nonpayment.<sup>133</sup> Chambers found that counties that jailed men were only successful if they implemented a "self-starting" system, under which the payor made payments directly to the court so that court personnel could monitor compliance.<sup>134</sup> If the payor missed a few payments or was in arrears, the court would send reminders, prodding letters, and warning notices, without any intervention by the payee.<sup>135</sup>

Chambers also found that a high probability of jail time for continuously delinquent fathers increased the level of compliance. According to Chambers, the threat of jail time was successful because of the self-starting enforcement practice.<sup>136</sup> Imprisoning delinquent payors, however, prevents the parent from providing the support needed for the child and frustrates the parent-child relationship.<sup>137</sup> The ongoing economic consequences of having been convicted may further impede the parent's ability to provide for the child and may lead to resentment of the other parent for bringing him to justice, further frustrating the family relationship.<sup>138</sup> Whether the threat of

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133. CHAMBERS, *supra* note 97, at 90.

134. *Id.* at 90-91.

135. *Id.*

136. *Id.*

137. See HARRY D. KRAUSE, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 1090 (3d ed. 1990) (noting that imprisonment may frustrate an already fragile family dynamic). For an interesting historical perspective on child support, see Hansen, *supra* note 6, at 1133-50.

138. KRAUSE, *supra* note 137, at 1090.

incarceration—without actual jail time—could be enough to increase compliance is less clear.<sup>139</sup>

Scholars do agree, however, that direct wage deduction provides a successful approach to ensuring payment.<sup>140</sup> When the order for child support is signed, the court will order the payor's employer to withhold an amount from the payor's wages to be paid directly to the court or to the payee. Although income withholding has been "required" for support orders entered after 1994, a parent can avoid immediate withholding by demonstrating "good cause" or by having the other parent agree to forgo any withholding.<sup>141</sup>

In practice, wage assignments are underused. In Weitzman's study, family law judges in California, Florida, and New York City routinely failed to issue wage assignments even when they were mandatory.<sup>142</sup> Some of those judges reported that they disapproved of the law, stating that it "took away [judicial] discretion" or "could jeopardize the [payor's] job."<sup>143</sup> A study from Wisconsin examined ten counties that required routine wage withholding and concluded that the strategy could increase child support collection between 11% and 30%.<sup>144</sup> These figures could be impacted further by removing the stigma of a wage withholding order issued by a court and allowing the noncustodial parent to elect to have his income withheld.

Interestingly, most men subject to wage assignments preferred their use. One man explained that with a wage assignment, "I have what I have."<sup>145</sup> Wage assignments eliminated budgeting decisions and made paying child support less painful.<sup>146</sup> Several men also explained that "having the child support deducted from [their] wages eliminated

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139. For example, Judge Rosemary Barkett of West Palm Beach, Florida, "found that the most effective means of securing compliance was to sentence noncomplying fathers to jail, but to delay the incarceration if they paid the arrearage." WEITZMAN, *supra* note 68, at 299.

140. See CHAMBERS, *supra* note 97, at 258–61 (discussing advantages of a mandatory system of garnishment at the time of the initial child support order); WEITZMAN, *supra* note 68, at 293, 298, 302.

141. 42 U.S.C.A. § 666(a)(8) (West 2003 & Supp. 2006).

142. WEITZMAN, *supra* note 68, at 302–03. Wage assignments were mandatory in California if the parent had not paid support for two months. *Id.*

143. *Id.* at 303.

144. Irwin Garfinkel & Marieka M. Klawitter, *The Effect of Routine Income Withholding of Child Support Collections*, 9 J. POL'Y ANALYSIS & MGMT. 155, 155, 168 (1990).

145. WEITZMAN, *supra* note 68, at 305.

146. *Id.*



the resistance" from new wives or girlfriends to pay the "ex."<sup>147</sup> No decisions have to be made; child support is automatic.

A Child Support Savings Accounts would capitalize on this phenomenon without requiring judicial intervention. In fact, a CSSA offers more benefits than a simple wage assignment—the tax savings incentivize payor parents to withhold child support from their wages. If strict enforcement causes a higher level of compliance, then a CSSA provides the same causal relationship without the negative repercussion. Rather, the CSSA provides a positive motivation to the paying parent, and the benefit of paying child support is shared among the family—the child, the parent receiving the funds, *and* the payor parent.

#### D. *Psychological Reasons*

Parents also resist paying child support for several psychological reasons: they believe that the payments are not being used to benefit the child, but for the parent and her new spouse and children; they are angry or resentful toward the parent and her new life; or they lack understanding of the court's method of awarding child support and have refused to accept it.<sup>148</sup> The psychological effects of divorce cannot be understated. In Chambers's study, he concluded that the payor's attitude is one of the most important factors in payment.<sup>149</sup> He explained, "If recollection of the separation is painful, the writing of a check is a weekly stab from the past. One avoids pain by not thinking about payments."<sup>150</sup>

The resentment and lack of control over the funds makes some parents resistant to paying child support. One Canadian researcher explained:

Child support is like the tax system in that non-custodial parents do not like the idea of having their income taken from

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147. *Id.*

148. See LESLIE HARRIS ET AL., FAMILY LAW 470 (1996) (suggesting that noncustodial parents resist paying child support because the money "isn't really going to the kids"); WALLERSTEIN & BLAKESLEE, *supra* note 104, at 136 (noting that the new lives of ex-spouses, the failure to pay child support, and the belief that child support is being used for the selfish purposes of the ex-spouse all fuel anger); David M. Betson, *Fair Shares: Meeting the Financial Needs of Children After Divorce*, in CHILD SUPPORT: THE GUIDELINE OPTIONS 135, 139 (1994) (noting that parents resent paying child support that improves the standard of living of a former spouse).

149. CHAMBERS, *supra* note 97, at 73–75, 107. Chambers looked at the frequency that men attended a Friends of the Court meeting before the divorce process began. Those men who did not attend the meeting paid fewer support awards than those who attended. *Id.* at 112–13.

150. *Id.* at 73.

them and not having control over how it can be spent. . . . [T]he benefits of the child support payments are diminished in the eyes of the non-custodial parent by the knowledge that the payments are making the custodial parent better off.<sup>151</sup>

Resentment will fester when a parent believes that his “ex” is using the money “for her own selfish or frivolous purposes.”<sup>152</sup> At least one scholar, Judith McMullen, has recognized parental concerns that child support is not being spent on the child and has suggested the use of a child support trust to alleviate this concern.<sup>153</sup> Professor McMullen found that “lack of ability to assure that [child support] funds are used for the children is one reason for nonpayment.”<sup>154</sup> She argues that any fear that the children are not receiving the benefits of the money can be alleviated by using a child support trust.<sup>155</sup>

In the past, child support trusts have been used when parents act irresponsibly; for example, when the paying parent is in arrears or the payee is not using the funds for the support of the child.<sup>156</sup> Some courts, however, have refused to impose a trust on child support payments because it interferes with the ability of the custodial parent to make decisions on behalf of the child and creates an additional burden on the custodian to provide receipts or expenses to the trustee to obtain the funds.<sup>157</sup> Recognizing some judicial reluctance, Professor McMullen

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151. Betson, *supra* note 148, at 139.

152. WALLERSTEIN & BLAKESLEE, *supra* note 104, at 136; see HARRIS ET AL., *supra* note 148, at 470.

153. Judith G. McMullen, *Prodding the Payor and Policing the Payee: Using Child Support Trusts To Create an Incentive for Prompt Payment of Support Obligations*, 32 NEW ENG. L. REV. 439, 464 (1998). Professor McMullen distributed a survey to family lawyers who attended the American Inns of Court meeting in 1997. *Id.* at 452 n.104. Twenty-eight family lawyers were asked, “When you have represented persons who are in arrears on their child support payments, what reasons do *they* give for their failure to pay?” Twenty of the twenty-eight respondents indicated that one reason was “[c]oncern that the support money [would] not actually be spent on the children,” second only to the “[l]ack of money or financial difficulties,” which was selected by twenty-six of the twenty-eight respondents. *Id.*

154. *Id.* at 451–52.

155. *Id.* at 453.

156. *Id.* at 464. Child support trusts have also been used when the “paying parent has a variable income,” “[w]here the payor is financially able to establish a trust fund to cover future educational expenses,” and when the parties agree to enter into a trust. *Id.* at 454–55.

157. See *Cameron v. Cameron*, 562 N.W.2d 126, 134–35 (Wis. 1997) (finding that the court of appeals erroneously upheld a trust in the absence of evidence of consent or that the custodial parent unwisely managed the money); *Winkler v. Winkler*, 2005 WI App 100, 699 N.W.2d 652, 662–63 (Wis. Ct. App. 2005) (applying *Cameron* to uphold the trial court’s refusal to establish a trust); *Resong v. Vier*, 459 N.W.2d 591, 595 (Wis. Ct. App. 1990) (establishing a “best interests of the child” standard for application of trusts).

argues that child support trusts should be used more frequently, as a needed incentive for parents to pay with the assurance that the payments will benefit the child.<sup>158</sup> If the trust is properly structured, she argues custodial parents would not be stripped of their “autonomy or control over spending decisions.”<sup>159</sup> An interest-bearing checking or savings account could comprise the trust, and a suitable family member or friend could serve as the trustee.<sup>160</sup> According to McMullen, even though a custodial parent would have to present documentation to collect funds from the trust, no approval would be needed from either the trustee or the paying parent.<sup>161</sup>

Likewise, a Child Support Savings Account can remedy concerns over use of the funds without much administrative expense and without placing any limitation on the custodian’s autonomy. Unlike an individual trust with individual trustees, a CSSA would be administered by a financial institution for hundreds of payors. Because financial institutions already have the systems in place to operate these types of accounts, the expense and administrative burden on the parties would be minimal.<sup>162</sup> Additionally, using a CSSA would not hamper the decisionmaking authority of the custodian. Unlike an individual trust, a custodian would not have to provide documentation for expenses; the CSSA’s automatic recordkeeping function would provide the necessary detail if the custodian’s choices were challenged.

The payor’s attitude about paying child support should improve if he is paying it to a financial institution or if it is being withheld from his wages. The paying parent will no longer feel a complete loss of control over how the money is being spent. A spending record could help ensure that the money is being spent on the child, and the custodial parent will retain unencumbered decisionmaking authority over the funds. The payor’s attitude should change without sacrificing the autonomy of the payee or imposing administrative burdens.

Whether a parent fails to pay child support due to inferior money management skills, unsatisfactory time spent with the child, poor local enforcement, or damaging feelings about the other parent, a CSSA can offer an incentive that may pacify a nonpaying parent’s reason for noncompliance. Answering the question of why parents do not pay can

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158. McMullen, *supra* note 153, at 470.

159. *Id.*

160. *Id.* at 475.

161. *Id.* at 477.

162. Telephone Interview with Dana Moore, Senior Vice President, J.P. Morgan/Chase Bank, in New Orleans, La. (Aug. 14, 2006).

provide ideas to improve collection, but as always, the devil is in the details.

### III. A SOLUTION: A CHILD SUPPORT SAVINGS ACCOUNT

A Child Support Savings Account provides a creative alternative to improve the payment and collection of child support. Both parents will benefit from incentives for the prompt payment of child support, and ultimately a child of a divorced or single-family home will reap the reward. The results from traditional forms of enforcement have waned. The time has come to introduce a new mechanism to increase child support collection, keeping the best interest of the child as the principal goal.

#### A. *The Logistics of a CSSA*

The first step in creating a CSSA would be state-sponsored legislation authorizing payment of child support into an account at a qualified financial institution. In most cases, after the parties litigate child support or enter into a consent judgment, the noncustodial parent pays his share of child support to the custodial parent, generally on a monthly basis. If the state is seeking payment of child support, the noncustodial parent pays directly to the court or state agency charged with collection of child support.<sup>163</sup> The state agency or court performs a recordkeeping function and then forwards the monies to the custodial parent.<sup>164</sup> In either event, a court can mandate that a portion of the noncustodian's earnings be withheld by his employer and paid to the custodial parent or state agency.<sup>165</sup>

When using a CSSA, the noncustodial, payor parent would contribute his monthly child support by authorizing his employer to withhold funds and deposit them directly into the CSSA. If a payor was self-employed, he could contribute directly into the account.<sup>166</sup> To access the funds, the custodial parent would receive a debit card, sponsored by a widely accepted provider, such as Visa or MasterCard,

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163. In order to comply with federal law, a state must offer "assistance in establishing and enforcing [child] support orders" and must "initiate proceedings to establish and collect child support awards." 42 U.S.C.A. §§ 652(h), 654(4) (West 2003 & Supp. 2006).

164. If the payee is receiving public assistance through TANF, the support is used to reimburse the state for assistance already paid to the parent for the child. *Id.* § 657.

165. See 42 U.S.C. § 654b (2000) (mandating that states have automated procedures for the collection and disbursement of child support payments).

166. Although there is a noteworthy benefit to having an employer withhold funds from the noncustodian's wages, CSSAs should also be available to parents who are self-employed or whose employer does not perform this service.

which could be used for purchases for the child. The custodial parent could also request checks to be drawn from the account to accommodate payments to schools or other noncredit-accepting businesses. Each time the custodial parent used the CSSA card, the account would be debited for the specified amount. Simultaneously, a record would be created for every transaction.<sup>167</sup>

An additional element of the CSSA debit card could be borrowed, in part, from the nationwide food stamp program. Currently, food stamps in all states are distributed via an “electronic benefit card” similar to a debit card.<sup>168</sup> Although the card does not carry a Visa or MasterCard logo, it functions similarly to a debit card and immediately debits the account holder’s food stamp allowance. The card also contains technology that prevents the cardholder from purchasing alcohol or cigarettes with the card.<sup>169</sup> The CSSA debit card could likewise prohibit the purchase of alcohol or cigarettes with the card, to protect not only the noncustodial parent but, in particular, the child.

Ordinarily, when a custodial parent receives her share of child support, she deposits the check into her account or cashes the check. The money is required to be used for the benefit of the child. The noncustodial parent receives no accounting of how the funds are spent unless he lives in one of the eleven states that allow noncustodians to request an accounting of child support paid.<sup>170</sup> Several of these states, however, permit an accounting only when good cause is shown.<sup>171</sup> In

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167. The statement of monthly transactions would be available only to the custodial parent. The noncustodial parent would be entitled to view the statement only in the event that an accounting had been ordered. *See infra* notes 170–72 and accompanying text.

168. 7 U.S.C. § 2016(i) (2000 & Supp. IV 2004); 7 C.F.R. § 274.12 (2006) (setting forth rules and regulations for the approval, implementation, and operation of the electronic benefit transfer).

169. *See* 7 U.S.C. § 2012(g)(1) (2000) (excluding alcohol and tobacco products from the definition of food).

170. ARK. CODE ANN. § 9-14-103 (2002); COLO. REV. STAT. § 14-10-115(3)(b)(III) (2002); DEL. CODE ANN. tit. 13, § 518 (1999); FLA. STAT. ANN. § 61.13(1)(a) (West 2006 & Supp. 2007); IND. CODE ANN. § 31-16-9-6 (LexisNexis 2003); LA. REV. STAT. ANN. § 9:312 (2000 & Supp. 2007); MO. ANN. STAT. § 452.342 (West 2003); NEB. REV. STAT. § 42-364(6) (2004 & Supp. 2006); OR. REV. STAT. § 107.105(1)(c) (2005); UTAH CODE ANN. § 78-45-7.20 (2002); WASH. REV. CODE ANN. § 26.23.050(2)(a)(ii) (West 2005). Alabama has authorized an accounting under the specific facts of a case. *See* McDuffie v. Holland, 690 So. 2d 386, 390 (Ala. Civ. App. 1996).

171. In Delaware, Indiana, Louisiana, Missouri, and Washington, “good cause” or a “proper showing of necessity” must be shown before an accounting is ordered. *See* DEL. CODE ANN. tit. 13, § 518; IND. CODE ANN. § 31-16-9-6; LA. REV. STAT. ANN. § 9:312; MO. ANN. STAT. § 452.342; WASH. REV. CODE ANN. § 26.23.050(2)(a)(ii). In Nebraska, the standard is “abusive disregard” of child support. NEB. REV. STAT. § 42-364(6). For a more comprehensive discussion of the accounting statutes, see Laura W. Morgan, *Whose*

many circumstances, the noncustodian may be disgruntled because he paid the child's mother—no longer a trustworthy spouse or companion—without any guarantee that the money will be spent on his child. The debit card associated with a CSSA would automatically record the transactions as money is spent. Even though the payor would not be entitled to see the record of transactions,<sup>172</sup> his concerns would be eased knowing that a record exists—which is not currently the case—and that his child support could not be used to purchase adult items, such as alcohol or cigarettes.

The custodial parent may face trepidation when collecting the support check as well. Often, custodial parents must plead for the child's money. Without an income assignment order that requires an employer to withhold income to pay the custodial parent or the state agency, the custodial parent must deal with the other parent on a monthly basis. According to the U.S. Census Bureau, only 33.8% of child support payments are made using an income assignment order, and 31.7% of payments are made to the other parent.<sup>173</sup> Replacing payments made to the other parent with automatic deductions from wages will result in less parental interaction about money and should result in increased collection.

Voluntary wage assignments strike an appropriate balance for noncustodians. On the one hand, the noncustodian gains control by choosing automatic wage assignment, rather than being forced to do so, knowing that a spending record will exist. On the other hand (and more important to the child), control over whether or when to make the payment is taken away from the noncustodian. David Chambers explained the propriety of wage assignments well:

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*Money Is It, Anyway? A Custodial Parent's (Non)Duty To Account for Child Support*, 14 AM. J. FAM. L. 15 (2000).

172. Valid reasons exist for generally preventing the noncustodial/payor parent from seeing a record of the custodial parent's expenditures. With the ability to view a record of expenditures, the payor would have "inordinate control over everyday expenditures for child support to the detriment of the custodial parent's decision-making authority." Morgan, *supra* note 171, at 16. Courts would be burdened with supervising discontent parents and intruding into the financial affairs of custodial parents. *Id.* at 18–20. Few states allow the noncustodial parent to challenge child support expenditures, *see supra* note 170, and this proposal does not suggest that payor parents should have a greater right to view the custodian's expenditures. Rather, the CSSA will give the payor comfort knowing that a spending record exists—if at some point it becomes necessary to challenge—without giving the payor any additional rights to intrude into the financial affairs of the other parent.

173. TIMOTHY S. GRALL, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUBL'N NO. P70-99, SUPPORT PROVIDERS: 2002, at 4 (2005), available at <http://www.census.gov/prod/2005pubs/p70-99.pdf>.

[W]age assignment may remove some of the sting of paying. Even the man inclined toward payment is subject to the emotional turmoil of the divorce. Each week's payment, when it requires an affirmative act by the father, may be invested with symbolic content. . . . He may still feel some twinge when he sees the deduction listed on his pay stub, but by then the deed is done and he cannot act on his feeling by withholding payment for that week.<sup>174</sup>

Using a CSSA will also assure that funds paid by the noncustodian are immediately available. Having the funds immediately available to the custodial parent is especially meaningful for those parents who rely on the state agency for enforcement. Due to necessary recordkeeping functions, the state office of child support enforcement may require several days to collect, record, and forward the monies paid by the payor parent to the custodian.<sup>175</sup> This process prevents some custodial parents from accessing the funds when they are needed.

Louisiana's Office of Family Support, in the wake of Hurricanes Katrina and Rita, realized the need to get child support to custodians when they were no longer in the State and could not receive their child support payments by mail.<sup>176</sup> As a result, Louisiana now offers custodial parents a "stored value card," which operates similarly to the proposed CSSA.<sup>177</sup> Payments made to the Office of Family Support are deposited into the custodial parent's account and a debit card is provided to the custodial parent.<sup>178</sup> Custodial parents can access the funds no matter where they relocate, and the funds are available as soon as they are received by the Office of Family Support.<sup>179</sup>

Like the stored value card, a CSSA would filter child support to the custodial parent immediately. Using a CSSA, however, would eliminate the need for state enforcement agencies to collect the child support payments. Instead, the employer would deduct the amount owed in child support from the noncustodian's wages and would deposit it into a savings account with an associated debit card. Because employers are accustomed to setting aside employee dollars for flexible spending

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174. CHAMBERS, *supra* note 97, at 154.

175. Telephone Interview with Robbie Endrisi, Executive Dir., Child Support Program, La. Office of Family Support, in Baton Rouge, La. (Aug. 8, 2006).

176. *Id.*

177. Currently, twenty-eight states offer a debit card for clients of the state agency and eight more states are in the planning stages. Telephone Interview with Robin Rushton, Dir., Div. of State and Tribal Sys., Fed. Office of Child Support Enforcement, in Wash., D.C. (Aug. 8, 2006).

178. Telephone Interview with Robbie Endrisi, *supra* note 175.

179. *Id.*

accounts, a Child Support Savings Account should not require additional resources. In fact, employers should welcome the use of CSSAs, which may prevent the employer from being subject to an income assignment order by a court. When employers are subject to an order of the court, employers must comply or subject themselves to contempt. By allowing employees to manage their child support obligation without the need for court intervention, the employer as well as the employee will be free of judicial oversight.

Using a CSSA will provide benefits to both parents that will in turn benefit the child. Custodial parents will have immediate access to child support dollars. Noncustodial parents will feel more secure knowing that a record of transactions exists. Additionally, child support dollars will be deducted from the noncustodian's paycheck, thereby eliminating the choice of whether or not to pay. The negative interplay and emotion that occurs when the noncustodial parent delivers or mails the monthly child support check to the custodial parent will disappear.

#### *B. Accounts Similar to a CSSA Already Exist*

Accounts like the proposed CSSA already exist to provide assistance for health and dependent care expenses. Currently, individuals can contribute money, at significant tax savings, into accounts from which medical expenses or expenses for the care of a dependent can be paid. Flexible Spending Accounts ("FSAs") are the most common and allow an employee to fund, with his or her own pre-tax earnings, an account that is later used to reimburse that employee for medical or dependent care expenses.<sup>180</sup> Additionally, Health Savings Accounts ("HSAs") are used for individuals who participate in high-deductible health care plans and allow an individual to deposit money into a tax-deductible account that can be used for medical costs.<sup>181</sup> Because of the rising costs of health care and the need to assist the ailing and the dependent, Congress created programs to earmark a portion of an individual's earnings, at significant tax savings, for these important purposes. Providing for a child of a broken home should enjoy the same tax benefit.

Government-recognized savings accounts are not new to the United States Code. Dependent care FSAs and health care FSAs are provided by employers to their employees as a savings benefit to pay for

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180. See 26 U.S.C. § 105 (2000) (health care FSA); *id.* § 129 (dependent care FSA).

181. See 26 U.S.C. § 223 (Supp. IV 2004) (establishing deduction for payments made to HSAs). Contributions into the HSAs are tax deductible, any earnings in the account are tax deferred, and qualified distributions are tax free. *Id.* § 223(a), (f).



dependent or health care expenses.<sup>182</sup> The employee's income does not include amounts that are funneled into the FSA; therefore, the employee does not pay income tax on these earnings.<sup>183</sup> Funds accumulate in the FSA, and the employee can seek reimbursement from the account for qualified medical expenses or dependent care expenses.<sup>184</sup> From an administrative standpoint, the employer or a third party maintains the funds and distributes money to the employee after each expense is substantiated.<sup>185</sup> The one downside of a FSA account is that funds that are not spent on qualified expenses by the end of the calendar year are forfeited, the so-called "use-it-or-lose-it" rule.<sup>186</sup>

An HSA is a similar savings vehicle that is available to individuals who participate in high-deductible health plans.<sup>187</sup> Although the premiums are low for high-deductible health plans, the deductibles can be prohibitive. To encourage participation in private health insurance, Congress authorized the creation of a trust to pay the qualified medical expenses of participants in a high-deductible health plan.<sup>188</sup> Trustees of the plan are generally financial institutions, which operate the account like a general savings account with check-writing and debit card functions.<sup>189</sup>

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182. See *supra* note 180 and accompanying text.

183. 26 U.S.C. § 129(a)(1) (2000) ("Gross income of an employee does not include amounts paid or incurred by the employer for dependent care assistance . . ."); *id.* § 105(b) ("[G]ross income does not include amounts . . . paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by him for . . . [his] medical care . . .").

184. The amount that can be excluded for dependent care assistance is subject to a limitation of \$5,000 for any taxable year (\$2,500 in the case of a separate return filed by a married individual). *Id.* § 129(a)(2)(A). The distributions made from the fund to the employee are also excludable from income. *Id.* §§ 105–06.

185. For example, for a dependent care FSA, the employee must provide the name, tax identification number, type, and amount of the requested expense before receiving a distribution. *Id.* § 129(e)(1), (9).

186. See *id.* § 125(d)(2)(A) (prohibiting cafeteria plans that allow "deferred compensation" from being eligible for exclusion from gross income); Treas. Reg. § 1.125-1, Q&A 7 (1984) (stating that money that is rolled over to the next year is considered deferred compensation); see also Cheryl Geerhold, *Establishing Dependent-Care Programs Through Cafeteria Plans: Fulfilling the Need for a Well-Balanced Benefit Menu*, 25 SANTA CLARA L. REV. 455, 468 (1985) (suggesting that the "use-it-or-lose-it" rule be abandoned to allow employees to roll over their unused nontaxable benefits).

187. 26 U.S.C. § 223(c)(2) (Supp. IV 2004) (defining high-deductible plans).

188. 26 U.S.C.A. § 223(d)(1) (West 2003 & Supp. 2006).

189. *Id.* § 223(d)(1)(B) (providing that the trustee of the health savings account must be a bank, an insurance company, or other qualified entity).

The contributions made into an HSA are tax deductible to the account holder.<sup>190</sup> Additionally, any amount paid out of an HSA that is used to pay for qualified medical expenses is not included in gross income.<sup>191</sup> In other words, monies saved and spent for qualified medical expenses are not taxable. An HSA is distinct from an FSA because the funds contributed into the account are not forfeited if unused by the end of the year. Rather, the funds remain in the account even after the holder no longer contributes into it.<sup>192</sup> As long as the funds are used for qualified medical expenses, they are nontaxable.<sup>193</sup>

Conceptually, the CSSA would operate like an FSA or HSA, but logistically, some differences would exist. Like the FSA and HSA, the funds would be withdrawn from the noncustodial parent's earnings and deposited into an account. Similar to the HSA, the amount deposited in the account would be tax deductible to the payor.<sup>194</sup> As is the case under present law,<sup>195</sup> the amounts paid to the custodial parent for the benefit of the child would be tax free as well. The account would be maintained by a financial institution that could accommodate a debit card and check-writing function on the account for the use of the custodial parent. Rather than the noncustodial parent drawing funds from the account, as would be the case for an FSA or HSA to which he contributed, the custodial parent would have sole access to the funds. Any expense necessary to maintain the account could be offset by interest earned on the deposited funds.<sup>196</sup>

The attributes that would not apply in a Child Support Savings Account include the reimbursement/substantiation function and the use-it-or-lose-it status of the account. Reimbursement is not functional because the noncontributing parent is using the funds, not the contributing parent. The contributing parent is not getting

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190. *Id.* § 223(a). There is a limit on the amount allowable as a deduction, which, for an individual, is the lesser of either the annual deductible under the health insurance coverage or \$2,250. *Id.* § 223(b).

191. *Id.* § 223(f)(1).

192. I.R.S. Notice 2004-2, 2004-1 C.B. 269.

193. 26 U.S.C. § 223(f) (Supp. IV 2004). "Qualified medical expenses" are defined in the statute. *Id.* § 223(d)(2).

194. Health Savings Accounts operate the same way. The amount paid into an HSA is tax deductible to the individual making the payments. *See id.* §§ 62, 223(a). Alimony is also treated as a deduction to gross income. *Id.* § 62(a)(10).

195. *See id.* § 71(c).

196. Financial institutions currently manage Health Savings Accounts and have mechanisms in place to administer the accounts. Although a monthly maintenance fee is charged to the user of the account, *see* Telephone Interview with Dana Moore, *supra* note 162, banks could consider using the interest earned on overnight funds in the accounts to offset any fees associated with maintaining it.

“reimbursed”; the noncontributing parent is getting paid. The detailed reports generated from the debit card account would provide substantiation for the expenses but would be available only to the custodial parent.<sup>197</sup> No additional recordkeeping or request for payment would have to be made.

Additionally, the idea that any amounts unspent are forfeited would be counterproductive in providing for the child. That feature has been criticized in the context of FSAs.<sup>198</sup> Because amounts can be forfeited at the end of a calendar year, employees who use FSAs underestimate their needs, causing inadequate coverage for care. This feature should not be applied to CSSAs. Rather, relying in part on the attributes of an HSA would complement the features of the FSAs. Money for the needs of a child can be unpredictable and forfeiting those funds hurts the child, not the parent. In a CSSA, the money should accumulate in the account to be spent on the child at any time, with any remainder being released to the child at his majority.<sup>199</sup>

This proposal is not an attempt to handcuff custodial parents by forcing them to nickel and dime every purchase made for a child. A parent need not divide groceries in the grocery line or make clothing purchases separately for children receiving child support. Custodial parents would still be free to make decisions about their children's needs and how and when to pay for them. In fact, custodial parents should enjoy greater access to funds. Noncustodial parents may be more likely to use CSSA accounts because they feel more confident that a record is being kept of the purchases made for the child and because they no longer have to physically give or write the check to the other parent. Even if the custodial parent uses the account to pay solely for the rent or mortgage payment, the noncustodian—in the event of challenge—will be able to see that his support is not being used for the needless wants of the custodian.

### C. Congress Should Offer Tax Benefits to a CSSA

The second step in improving child support collection is federal legislation offering tax benefits to noncustodial parents. As noted above, programs already exist that provide tax benefits to individuals who set aside funds for medical and dependent care expenses. An

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197. If state law permits an accounting, the report could be sought by the noncustodian. *See supra* notes 170–72 and accompanying text.

198. *See* Geerhold, *supra* note 186, at 468; *Conable Proposes Cafeteria Plan Rules*, 23 TAX NOTES 567, 567–68 (1984).

199. Limitations should be placed on the account to ensure that taxpayers do not use a CSSA as a tax-free vehicle to accumulate savings for the child.

account to pay for the care of a child of a broken home is a natural derivative. Contemporary social policy demands it.

Since enacting the Internal Revenue Code of 1939, Congress has created a myriad of deductions and credits to accomplish societal goals.<sup>200</sup> Currently, the Internal Revenue Code contains at least three tax benefits available to parents with children.<sup>201</sup> First, 26 U.S.C. § 151 allows taxpayers a deduction for qualifying dependents.<sup>202</sup> The exemption applies generally for each child who is a student or who has not yet reached the age of nineteen and who receives more than half of his financial support from the taxpaying parent.<sup>203</sup> This deduction applies to all taxpayers with children and assists parents in providing for those children.<sup>204</sup> For those parents who are living apart, the custodial parent is entitled to take the personal exemption for the child, unless the parties agree otherwise.<sup>205</sup>

Section 21 of the Internal Revenue Code allows a credit for working parents for expenses for household and dependent care services that are necessary for the taxpayer's gainful employment.<sup>206</sup> The dependent must be under the age of thirteen, and the credit is limited to a certain percentage of expenses incurred based on the taxpayer's adjusted gross income.<sup>207</sup> If the parents are living apart, only the custodial parent may claim the child care credit.<sup>208</sup> This credit was

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200. See Norman Y. Mineta, *Federal Child Care Income Tax Provisions: Legislative Initiatives in the Ninety-Ninth Congress*, 25 SANTA CLARA L. REV. 395, 397 n.12 (1985) (citing deductions created to promote corporate charity as well as investment in federal debt obligations).

201. See *infra* notes 202–12 and accompanying text. The Earned Income Credit is available to individuals with and without children. See 26 U.S.C. § 32 (2000 & Supp. III 2003) (providing a credit against tax for individuals with a qualifying child and certain other individuals without children).

202. 26 U.S.C. § 151(c) (2000). This exemption is currently valued at \$2,000 per child, with a phaseout for taxpayers who exceed a threshold amount of adjusted gross income. *Id.* § 151(d).

203. See *id.* § 152 (establishing the criteria for a dependent).

204. See Mineta, *supra* note 200, at 405–09 (discussing the personal exemption and its problems).

205. 26 U.S.C. § 152(e). The custodial parent must sign a written declaration that she will not claim the child as a dependent and the noncustodial parent must attach the declaration to his return. *Id.* State law may also prescribe when a noncustodial parent is entitled to the dependency deduction. See e.g., LA. REV. STAT. ANN. § 9.315.18(B) (2000 & Supp. 2007) (providing that the noncustodial parent who pays 50% or more of the child support obligation may be entitled to the dependency deduction).

206. 26 U.S.C. § 21 (2000 & Supp. III 2003).

207. *Id.* § 21(a)(2), (b)(1).

208. *Id.* § 21(e)(5).

passed in response to the growing number of working parents and the need for affordable child care.<sup>209</sup>

Likewise, § 129 of the Internal Revenue Code provides for flexible spending accounts to be used by working parents with children to save for dependent care expenses on a tax-free basis.<sup>210</sup> Section 129 was passed as an additional tax incentive for workers caring for a dependent. Although parents are unable to take advantage of both § 21 and § 129 benefits simultaneously,<sup>211</sup> Congress has established ways to subsidize childcare for working parents.<sup>212</sup>

Congress should respond through tax legislation to the growing number of parents collecting financial support for their children. Over the years, Congress has responded to the needs of parents to provide for their children. This response expanded as women entered the workforce and child care was unaffordable for many families. Providing a tax-free vehicle in which noncustodial parents can deposit child support will filter more dollars to children and their custodians, enriching this congressional policy of aid to parents and children.

Currently, child support payments are not deductible to the noncustodial parent and are not included as income to the custodian.<sup>213</sup> Alimony payments, on the other hand, are deductible from gross income to the payor<sup>214</sup> and are includable as income to the recipient.<sup>215</sup> This distinction has been criticized as inequitable,<sup>216</sup> and proposals have been made to treat alimony and child support similarly, in part to

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209. See Mineta, *supra* note 200, at 397–405 (discussing the household and dependent care credit).

210. See 26 U.S.C. § 129 (2000) (establishing a deduction for dependent care assistance programs).

211. See *id.* § 21(c) (providing that the dollar limit allowed under a § 21 credit “shall be reduced by the aggregate amount excludable from gross income under section 129 for the taxable year.”)

212. Mineta, *supra* note 200, at 396 (“[T]he largest federal subsidy for child-care expenses is provided by the Internal Revenue Code.”)

213. 26 U.S.C. § 71(c). Child support is excluded from the definition of alimony, and any payment that is reduced when a child attains a specific age, marries, dies, or similar contingencies, will be treated as support. *Id.*

214. *Id.* § 215.

215. *Id.* § 71(a). Alimony is defined as any cash payment made pursuant to a written divorce or separation agreement as long as there is no liability to make the payment after the death of the payee spouse and the spouses are not members of the same household at the time the payment is made. *Id.*

216. Wendy Gerzog Shaller, *On Public Policy Grounds, A Limited Tax Credit for Child Support and Alimony*, 11 AM. J. TAX POL’Y 321, 330 (1994). As a result of these distinctions, parties often attempt to classify child support as alimony to shift the tax burden to the party in the lower tax bracket, generally the custodial, recipient parent. See *id.* at 330–31 (noting that although legislation has made it more difficult, such manipulation is still possible).

encourage the payment of child support.<sup>217</sup> In 1989, the ABA House of Delegates adopted a resolution to allow a deduction for “family support” to include both alimony and child support.<sup>218</sup> Rather than a deduction, one scholar has proposed a limited credit for alimony and child support payments that would not exceed \$2,250.<sup>219</sup>

Similar to these proposals, under a CSSA, if a noncustodial parent paid child support into the account, he would receive a deduction for the amount paid.<sup>220</sup> Some may argue that any tax benefit to noncustodial parents unfairly discriminates against custodial parents or parents of intact families who also “pay” to support their children.<sup>221</sup> Raising children is an expensive endeavor, and some may insist that any parent with a child should enjoy the benefit of additional tax savings.<sup>222</sup> As compared to the custodial parent, however, giving the noncustodial parent a tax benefit appropriately equalizes the tax benefits for raising the child in separate households. Under present law, the custodial parent is entitled to the personal exemption for the child on her tax return.<sup>223</sup> Even though the noncustodian pays support, only one parent can claim the child’s personal exemption.<sup>224</sup> Allowing the noncustodian to pay his support tax free provides him with a similar tax benefit in raising the child.

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217. *Id.* at 335–37. Professor Shaller’s proposal stemmed from social policy concerns about unpaid child support should be paid. She explained: “With respect to *both* alimony and child support, nonpayment effectively means more individuals who need public support subsidies. In order to provide taxpayers with an incentive to modify their behavior and make private payments, Congress should legislate a credit for both types of personal payments.” *Id.* at 341; *see also* Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 162 (1989) (suggesting private ordering by spouses such that any amounts would be treated as alimony unless the parties agreed otherwise in writing); Laura Bigler, Note, *A Change Is Needed: The Taxation of Alimony and Child Support*, 48 CLEV. ST. L. REV. 361, 378–39 (2000) (proposing a deduction for the payor parent for alimony and child support as an incentive to pay).

218. Daily Tax Rep. (BNA), at G-1 (Aug. 11, 1989).

219. Shaller, *supra* note 216, at 337. Professor Shaller suggested a limited credit, rather than a deduction, so that all taxpayers would enjoy the same benefit and taxpayers with high incomes would not have an additional opportunity to save taxes through income shifting. *Id.*

220. As under current law, *see* 26 U.S.C. § 71(c), child support payments paid out of the CSSA would not be included as income to the custodian.

221. *See* WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 308 (13th ed. 2003) (“The idea behind the denial of a deduction for child support is that if the payor had custody of, and supported, the children, there would be no deduction for the cost of the support, so there is no justification for deduction of similar amounts when made to a former spouse.”).

222. *Id.*

223. 26 U.S.C. §§ 151, 152(c), (e) (2000 & Supp. IV 2004).

224. *See* 26 U.S.C. § 152(e) (Supp. IV 2004) (providing specific rules for which a parent is entitled to the dependency deduction when the parents are divorced).

As for parents of intact families, Congress has passed several tax benefits for parents with children.<sup>225</sup> Children of broken homes or single-parent households, as a matter of social policy, deserve additional protection because of their unchosen, unfortunate circumstances. The United States Government has identified specific groups of people who deserve governmental assistance because of their status. Programs such as Medicare and Social Security provide elderly Americans with public funds because of their age and health. Through no fault of their own, children of broken homes are forced to deal with the economic consequences of divorce and living in a single-parent home. It is indisputable that divorce creates a change in the family's economic circumstances.<sup>226</sup> Putting aside the psychological stresses children are forced to endure, maintaining two households for a child inevitably will strain a family's finances. Providing a tax benefit to these parents is a valid social policy.

#### CONCLUSION

Over the last two decades, the child support enforcement paradigm has begun a gradual shift. Rather than implementing measures to deal with collection after default, state and federal legislators have focused on laws that prevent parents from defaulting on child support in the first place.<sup>227</sup> A Child Support Savings Account supports that objective. Income withholding, data collection, and license revocation have improved child support collection,<sup>228</sup> but a gap still exists. Closing the gap by providing positive motivation for maintaining child support may be the answer.

A Child Support Savings Account will permit direct deduction from the payor's wages, establish a deposit account to be accessed by the payee, and provide tax benefits to both parents. A CSSA targets previously unaddressed causes of nonpayment, which should increase the collection of child support. Although nearly impossible to ease the tension between two parents caring separately for the child, a mechanism that limits interaction about finances and provides equal tax benefits to the parents may improve the parent-to-parent relationship and positively impact the child.

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225. See *supra* notes 201–12 and accompanying text.

226. Three-fourths of women in the Wallerstein and Kelly study reported a notable decline in their standard of living. WALLERSTEIN & KELLY, *supra* note 77, at 23.

227. KRAUSE, *supra* note 137, at 1104.

228. See *supra* Part I.B.

Every branch of government has made clear that enforcement of child support is a top priority. President Clinton aptly stated, “[I]f you owe child support, you better pay it. If you deliberately refuse to pay it, you can find your face posted in the Post Office. We’ll track you down with computers. . . . We’ll track you down with law enforcement. We’ll find you through the Internet.”<sup>229</sup> Passing legislation at the state and federal level is another avenue to increase collection of child support, albeit with a more positive tone. Implementing a Child Support Savings Account that can provide financial as well as psychological benefits is a goal worth pursuing.

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229. President William J. Clinton, Remarks on Child Support to the Citizens of Denver (July 18, 1996) (U.S. Newswire July 23, 1996) (on file with the North Carolina Law Review).