

# ENGAGING MEN AS FATHERS: THE COURTS, THE LAW, AND FATHER-ABSENCE IN LOW-INCOME FAMILIES

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## INTRODUCTION

Father-absence is an ever-increasing trend in our country.<sup>1</sup> Exacerbated by poverty, father-absence leaves a disproportionately high percentage of low-income children living with their mothers and enjoying little to no paternal contact. Many sociological, cultural, and economic factors contribute to the likelihood of father-absence and drive fathers away from their children even before they have forged any relationship at all.<sup>2</sup> As such, father-absence is commonly considered to be a non-legal problem. However, the cohort of fathers who become absent only after interactions with the custody and child support systems challenges that characterization and raises questions about the potential relationship between fathers' involvement with the legal system and their subsequent absence.

Engaged fathers can disappear from the lives of their children after custody proceedings or after the imposition or enforcement of child support obligations.<sup>3</sup> Even fathers who litigate aggressively for custody or visitation may retreat from the lives of their children in the aftermath of court proceedings.<sup>4</sup> Mothers who affirmatively support these father-child relationships are left without a meaningful remedy in the face of father-absence. Motions to enforce visitation orders to coerce fathers to spend time with their children rarely prevail in court,<sup>5</sup> nor are they

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<sup>1</sup> See *infra* Part I, notes 15–20 and accompanying text.

<sup>2</sup> See generally STEVEN L. NOCK & CHRISTOPHER J. EINOLF, NAT'L FATHERHOOD INITIATIVE, THE ONE HUNDRED BILLION DOLLAR MAN: THE ANNUAL PUBLIC COSTS OF FATHER ABSENCE 13 (2008), available at <http://www.fatherhood.org/Document.Doc?id=136> (noting the myriad causes of father-absence, including incarceration and poverty); Jessica Dixon Weaver, *The First Father: Perspectives on the President's Fatherhood Initiative*, 50 FAM. CT. REV. 297, 300–02 (2012) (providing a historical overview of the prevailing analyses of father-absence and its causes); Edward Kruk, *Father Absence, Father Deficit, Father Hunger: The Vital Importance of Paternal Presence in Children's Lives*, PSYCHOLOGY TODAY (May 23, 2012), <http://www.psychologytoday.com/blog/co-parenting-after-divorce/201205/father-absence-father-deficit-father-hunger> (asserting that our social institutions devalue and demoralize fathers).

<sup>3</sup> See, e.g., NOCK & EINOLF, *supra* note 2, at 12. I have noted this trend in my own experience as a family law clinician and litigator in the District of Columbia for the past fifteen years.

<sup>4</sup> I have observed this phenomenon both in custody cases I have handled as well as in numerous prospective client interviews in which the client seeks a way to enforce a visitation order against a father who has not taken advantage of his visitation rights.

<sup>5</sup> See, e.g., *In re Marriage of Mitchell*, 745 N.E.2d 167, 173 (Ill. App. Ct. 2001) (holding that the court will not force a father to visit against his will); *McKinley v. Iowa Dist. Court for Polk Cnty.*, 542 N.W.2d 822 (Iowa 1996) (declining to hold a father in contempt for his failure to visit with his children despite a divorce decree granting him visitation); *Loudon v. Olpin*, 173 Cal. Rptr. 447, 449 (Ct. App. 1981) (holding that the court “cannot order [the noncustodial parent] to act as a father”); *Jennifer D. v. Arnold D.*, 589 N.Y.S.2d 554, 554 (App. Div. 1992) (upholding the lower court’s refusal to require visitation against a father’s will); *Dana v. Dana*, 789 P.2d 726, 730 (Utah Ct. App. 1990) (holding that a court may encourage but not compel a noncustodial parent to visit with his children).

likely to achieve positive father-child engagement.<sup>6</sup> Likewise, though judges are far more likely to entertain contempt actions in the child support system, enforcement seeks child support collection but not healthy father-child involvement. As such, father-absence among this cohort of court-involved families largely evades a litigation remedy to encourage and enhance the paternal relationship.

This Article considers the ways that the legal system exacerbates preexisting and erects new barriers to father-presence for nonresident<sup>7</sup> low-income court-involved men. The fathers who constitute the focus of this Article include those who may or may not have married the mother of their children, or may or may not have lived with their children, but who have sought a personal relationship with their children prior to court or child support involvement; but who become distant in the aftermath of that involvement.<sup>8</sup> This Article focuses on low-income fathers; not only because of their disproportionate representation in the group of absent fathers, but also because they face increased barriers to paternal engagement both during and after court action.<sup>9</sup> By affirmatively addressing these barriers, the legal system could enhance safe and positive<sup>10</sup> father-child relationships and move toward changing the social norms surrounding fathers and their children.<sup>11</sup>

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<sup>6</sup> See, e.g., Valarie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. FAM. ISSUES 78 (1994).

<sup>7</sup> For ease of reference, this Article will use the terms “nonresident” and “noncustodial” broadly to refer to fathers who do not have primary physical custody. This includes fathers who have formal joint physical custody, more limited physical custody, and/or who do not have shared custody, but merely have visitation rights.

<sup>8</sup> This Article does not address legal initiatives aimed at engaging fathers who have not otherwise sought a relationship with their children. Instead, the Article focuses on the ways in which the legal system fortifies or erects barriers for fathers who have previously had or sought relationships with their children. In addition, this Article does not endorse programs to strengthen father-child relationships when the mother opposes visitation for her own safety or for the welfare of her children.

<sup>9</sup> See generally Nancy Ver Steegh et al., *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955, 958–59 (2012) (discussing the two-tiered system of justice that has arisen between those who get representation and those who cannot).

<sup>10</sup> It is worth noting that not all relationships between fathers and their children should be supported by the legal system. In some cases, a paternal relationship would not be in the best interest of the child or might be rejected by an adolescent child. Most obviously, where there has been a history or risk of domestic violence or child abuse, the legal system’s efforts would be ill-spent on maximizing contact. All programs and procedures analyzed within this Article that would support paternal engagement would be utilized only when the involvement was likely to be safe and positive.

<sup>11</sup> This Article does not seek to idealize the two-parent family model or to suggest pro-marriage reforms to address father-absence. See generally Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008) (examining the primacy and benefits of the two-parent model). Instead, this Article addresses father-absence in families after the parents have separated and after legal system interventions have begun and seeks to mitigate any further impediments to father-child engagement arising from court involvement.

The legal system's commitment to enhancing fathers' involvement in their children's lives should derive from a number of sources. First, studies indicate that involved nonresident fathers can be critical to child well-being. Engaged nonresident fathers can play an important role in supporting child development, ensuring academic success, and fostering self-esteem in children.<sup>12</sup> Further, studies illustrate a correlation between negative outcomes for children, such as early sexual activity<sup>13</sup> and delinquency,<sup>14</sup> and father-absence. Second, to the extent that the legal system frustrates a father's pre-existing inclination to positively engage with his children, the system cannot serve the best interests of the child by perpetuating and enhancing barriers to that relationship

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See Weaver, *supra* note 2, at 302–04 (critiquing the presumption that the promotion of marriage is a cure-all to father-absence and economic perils for children).

<sup>12</sup> See, e.g., HEATHER KOBALL & DESIREE PRINCIPE, THE URBAN INST., DO NONRESIDENT FATHERS WHO PAY CHILD SUPPORT VISIT THEIR CHILDREN MORE? 1 (Mar. 2002), available at <http://www.urban.org/uploadedpdf/310438.pdf> (“Children who live apart from their fathers are at a greater risk of living in poverty, having low academic achievement, and exhibiting behavioral problems. Frequent contact between children and their nonresident fathers can protect children from some of the negative consequences of parental separation.”); Brent A. McBride et al., *The Mediating Role of Fathers' School Involvement on Student Achievement*, 26 APPLIED DEVELOPMENTAL PSYCHOL. 201, 203 (2005) (“[T]hose studies that have examined the relationship between limited father involvement and/or absence on children's cognitive, social, and emotional functioning and development indicate that children who are deprived of father involvement are more likely to have adjustment problems in school, lower academic achievement, challenges forming peer relationships, and exhibit delinquent behavior.”); cf. Paul R. Amato et al., *Changes in Nonresident Father-Child Contact from 1976–2002*, 58 FAM. REL. 41, 50 (2009) (“Although frequent father contact is not necessarily good for all children, many children with uninvolved fathers would benefit from additional contact and economic support.” (citation omitted)); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 927 (2005) (“[I]ndependent of any correlation between paternal disengagement and children's educational, social, and behavioral development, children's emotional well-being in and of itself may be sufficient reason to encourage paternal contact.”). But see Robert I. Lerman, *Capabilities and Contributions of Unwed Fathers*, 20 FUTURE CHILD. 63, 73 (2010) (noting that some studies have shown little or no correlation between the well-being of children and amount of father presence) (citing Sandra Hofferth et al., *Child Support, Contact, and Involvement with Children After Relationship Dissolution: Race/Ethnic Differences* (Md. Population Research Ctr., Working Paper, 2008)).

<sup>13</sup> See, e.g., Tina Jordahl & Brenda J. Lohman, *A Bioecological Analysis of Risk and Protective Factors Associated with Early Sexual Intercourse of Young Adolescents*, 31 CHILD. YOUTH SERVICES REV. 1272, 1277 (2009) (reporting on a study of risk factors for early sexual intercourse among low-income adolescents and finding that among all of the family processes, father involvement was the only factor that decreased the odds of engaging in sexual activity).

<sup>14</sup> See, e.g., Rebekah Levine Coley & Bethany L. Medeiros, *Reciprocal Longitudinal Relations Between Nonresident Father Involvement and Adolescent Delinquency*, 78 CHILD DEV. 132, 143–44 (2007) (reporting on a study of low-income, primarily minority adolescents aged ten to fourteen years, which found more social encounters and frequent communication with nonresident biological fathers were associated with decreased adolescent delinquency); Elizabeth A. Goncy & Manfred H.M. van Dulmen, *Fathers Do Make a Difference: Parental Involvement and Adolescent Alcohol Use*, 8 FATHERING 93, 102–04 (2010) (reporting on a national longitudinal study that concluded shared communication with fathers and emotional closeness to fathers, but not shared activity participation, reduced alcohol use, alcohol-related problems, and risky behavior co-occurring with alcohol use in adolescents).

without further analysis. If fathers enter the legal system with the intention of maintaining relationships with their children, the system is failing children if the fathers' system interaction unintentionally extinguishes that intention. Finally, when custodial mothers seek support from the court to maintain or increase father-presence in the context of a custody or child support action, the court system has an obligation to the well-being of children to minimize its role in impeding that goal.

Part I of this Article analyzes the nature of relationships between low-income nonresident fathers and their children by looking at national longitudinal research. In addressing what fathers themselves may seek in their paternal relationships both prior to becoming fathers and after a family break up, this Article argues that the dissonance between fathers' hopes prior to birth and the realities after court involvement suggests that the legal system may have adverse consequences on paternal engagement.

Next, in Part II, this Article examines the barriers that most often interfere with court-involved low-income fathers' consistent and positive relationships with their children. In Part III, this Article argues from a normative perspective that the legal system can and should act to address low-income father-absence. Although legal solutions cannot address the myriad forces that distance fathers from their children, the legal system should consider the roles child support law and the court system may play in exacerbating the problem and their potential for genuinely supporting paternal presence. This Part analyzes the feasibility of legislative reform of child support law. Any reform of child support law must preserve sustained efforts to collect payments. However, this Article considers child support initiatives intended to reduce barriers created by the assignment of child support monies to the government and by the ban on informal or in-kind child support payments. In this Part, this Article also considers if and how court procedures and programs could reduce conflict between parents, support fathers, and allow courts to encourage and support fathers in taking advantage of their custodial and visitation rights.

This Article concludes that these legislative, procedural, and programmatic reforms could induce a shift in our social norms, creating expectations that demand more of fathers as caretakers and that validate fathers for the contributions they do make, thereby encouraging their continued active and engaged presence in the lives of their children.

## I. TRENDS IN FATHER-ABSENCE

Although fathers have undertaken increased child-care responsibility over the last four decades,<sup>15</sup> the prevalence of father-absence has been simultaneously increasing.<sup>16</sup> In one large-scale study of the general population of families with nonresident fathers, mothers reported that 34% of the fathers had no contact with the child's household at all.<sup>17</sup> The statistics related to fragile families, in which the parents never marry, paint an even bleaker picture.<sup>18</sup> The Fragile Families Report of 2010 reported that one year after birth, roughly 40% of nonresident fathers did not visit with their children on a regular basis, defined as at least one time a month.<sup>19</sup> As the children grow, fathers in fragile families become less engaged. By the time children turn five years old, nearly 50% of fathers fail to see their children on a regular basis.<sup>20</sup>

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<sup>15</sup> See LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2005/SUMMER 2006 9 (Aug. 2010), available at <http://www.census.gov/prod/2010pubs/p70-121.pdf> ("The rate of care by fathers was around 15 percent between 1985 and 1988, increased to 20 percent in 1991, and settled between 16 and 18 percent beginning in 1993."); GRETCHEN LIVINGSTON & KIM PARKER, PEW RESEARCH CTR., A TALE OF TWO FATHERS: MORE ARE ACTIVE, BUT MORE ARE ABSENT 1 (June 15, 2011), available at <http://www.pewsocialtrends.org/files/2011/06/fathers-FINAL-report.pdf> (asserting that fathers who live with their children now take part in more of their activities than fathers in previous generations); Amato et al., *supra* note 12, at 41 (involving a study comparing father involvement in the 1970s and the 2000s).

<sup>16</sup> See Geoffrey L. Greif et al., *Working with Urban, African American Fathers: The Importance of Service Provision, Joining, Accountability, the Father-Child Relationship, and Couples Work*, 14 J. FAM. SOC. WORK 247, 249 (2011) ("Fathers often lose contact with their children after the breakup of the parenting relationship, leaving children to be raised by single mothers in increasing numbers." (citing U.S. Census Bureau, 2008)); LIVINGSTON & PARKER, *supra* note 15, at 1 (noting that in 1960, 11% of children in the United States lived apart from their fathers compared to 27% of children in 2010).

<sup>17</sup> Lerman, *supra* note 12, at 74 (citing Sandra L. Hofferth et al., *The Demography of Fathers: What Fathers Do*, in HANDBOOK OF FATHER INVOLVEMENT: MULTI-DISCIPLINARY PERSPECTIVES 63, 68 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002)).

<sup>18</sup> See generally Christine Winquist Nord & Nicholas Zill, *Non-Custodial Parents' Participation in Their Children's Lives: Evidence from the Survey of Income and Program Participation*, DEP'T OF HEALTH & HUM. SERVS. (Aug. 14, 1996), <http://fatherhood.hhs.gov/SIPP/noncusp1.htm> [hereinafter HHS STUDY] (arguing that frequency of father contact is correlated to family structure, including whether the parties married or not).

<sup>19</sup> Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE CHILD. 17, 22 (2010); see also Lerman, *supra* note 12, at 73 (noting that, according to the 2006 Current Population Report, of the 3.7 million unmarried mothers surveyed, about 40% reported that the fathers had had no contact with their children within the prior year).

<sup>20</sup> McLanahan & Beck, *supra* note 19, at 22. The population surveyed in the Fragile Families Report is of particular interest because it disproportionately includes traditionally more marginalized members of our society. 70% of African American babies and 50% of Hispanic babies are born to unmarried parents. Sara McLanahan et al., *Introducing the Issue*, 20 FUTURE CHILD. 3 (2010); see also KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 167 (2013) (corroborating this trend among low-income men, noting that "a father's engagement with his children fades rather markedly over time").

Studies generally indicate that father-absence is negatively correlated with a child's well-being, making this a worrisome trend.<sup>21</sup>

Demographics are relevant to father-absence as well. Father-absence is less likely in families with mothers who are college graduates.<sup>22</sup> Further, employed fathers are more likely to have regular contact with their children.<sup>23</sup> Other studies have echoed the finding that fathers at higher socioeconomic levels maintain more consistent contact with their children than their counterparts at lower socioeconomic levels.<sup>24</sup>

Although precise data reflecting the number of fathers who obtain some kind of custody or visitation order and then disappear from the lives of their children are hard to extrapolate, studies suggest that it is a significant cohort. One study of families with custody orders found that 32% of nonresident fathers had not spent any time with their children in the past year.<sup>25</sup> A study of divorced parents, a group likely to have custody orders in place as part of a divorce action, found that two years after divorce, only one-quarter of noncustodial fathers visited with their children once a week or more.<sup>26</sup> The study reported that between 18%

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<sup>21</sup> See *supra* notes 12–14 and accompanying text.

<sup>22</sup> A study in the late 1990s by the Department of Health and Human Services revealed that 82% of college graduate mothers surveyed reported some level of contact with a nonresident father, compared with 57.5% of those mothers with less than a high school education who had father contact. HHS STUDY, *supra* note 18; see also KOBALL & PRINCIPE, *supra* note 12, at 4 (asserting, based on the National Surveys of America's Families of 1997 and 1999, that, among children born to married parents, children whose mothers were more highly educated saw their fathers more frequently than children whose mothers were less educated); LIVINGSTON & PARKER, *supra* note 15, at 2 (noting that 40% of fathers who never completed high school live apart from their children, whereas only 7% of fathers who graduated from college live separate from their children).

<sup>23</sup> McLanahan & Beck, *supra* note 19, at 25.

<sup>24</sup> KOBALL & PRINCIPE, *supra* note 12, at 6 (stating, based on national data that “[p]oor children are much less likely to live with their fathers than are higher income children”); Patrick C. McKenry et al., *Predictors of Single, Noncustodial Fathers' Physical Involvement with Their Children*, 153 J. GENETIC PSYCHOL. 305, 308 (1992). According to the Snapshots of America's Families III Report, “[h]alf of all children with family incomes below the federal poverty thresholds lived with their mothers and had fathers living elsewhere in 2001.” ELAINE SORENSEN, THE URBAN INST., CHILD SUPPORT GAINS SOME GROUND 1 (2003), available at [www.urban.org/UploadedPDF/310860\\_snapshots3\\_no11.pdf](http://www.urban.org/UploadedPDF/310860_snapshots3_no11.pdf).

<sup>25</sup> HHS STUDY, *supra* note 18.

<sup>26</sup> E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 121 (2002). Fathers who have married the mothers of their children may also be less likely to become absent than those who have never married. See generally HHS STUDY, *supra* note 18 (noting that father contact correlates closely with marital status). Therefore, this data may reflect more modest levels of father-absence than actually occurs in less stable families or in the fragile family community. It is also possible that these numbers misrepresent paternal intentions to a certain degree. Some fathers who seek custody may do so absent a sincere desire for a relationship with their children. Instead, a father might fight for custody and visitation out of spite toward the mother, out of a sense of obligation, or in response to family pressure.

and 25% of those children no longer had any contact with their fathers three years following divorce.<sup>27</sup>

In contrast, studies of fathers' expectations for fatherhood prior to birth foreshadow a different father-child relationship. For example, Kathryn Edin and Timothy Nelson's 2013 publication, *Doing the Best I Can: Fatherhood in the Inner City*, which draws on seven years of field work delving into the lives of over 100 black and white inner city fathers, reported that, in general, the men in the study were pleased at the news of an impending birth.<sup>28</sup> They noted that "[u]nadulterated happiness—even joy—was by far the most common reaction[.]"<sup>29</sup> A large-scale study of fragile families in sixteen out of the twenty largest American cities focused on mothers' and fathers' attitudes shortly after the birth of a child and reported that a high percentage of all unmarried fathers in the study stated that they wanted to be involved in raising their child.<sup>30</sup> The study also found that, even according to the reports of the mothers, four out of five fathers provided financial support during the pregnancy.<sup>31</sup> To the extent that financial support serves as a proxy for interest in the child, such a statistic strongly suggests that, prior to birth, men feel a connection with or responsibility toward their children. Further, multiple studies illustrate that many low-income fathers want to be involved but that economic disadvantages hamper their ability to remain engaged.<sup>32</sup>

The dissonance between expectations and reality for this group of fathers further crystallizes that paternal behavior is influenced by factors not present prior to birth. Most obviously, the birth of a child—a major life change for men and women—may well provoke unexpected parental reactions. However, because the cohort of court-involved men who abdicate their visitation and custodial rights are a segment of the

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<sup>27</sup> JOCELYN ELISE CROWLEY, *DEFIANT DADS: FATHERS' RIGHTS ACTIVISTS IN AMERICA* 217 (2008) (citing HETHERINGTON & KELLY, *supra* note 26); Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 *FAM. REL.* 352, 354 (2003) (citing HETHERINGTON & KELLY, *supra* note 26).

<sup>28</sup> EDIN & NELSON, *supra* note 20, at 37, 41.

<sup>29</sup> *Id.* at 51.

<sup>30</sup> SARA MCLANAHAN ET AL., BENDHEIM-THOMAN CTR. FOR RESEARCH ON CHILD WELLBEING, *THE FRAGILE FAMILIES AND WELLBEING STUDY: BASELINE NATIONAL REPORT 9* (Mar. 2003) [hereinafter *FRAGILE FAMILIES REPORT*], available at <http://www.fragilefamilies.princeton.edu/documents/nationalreport.pdf>; EDIN & NELSON, *supra* note 20, at 20.

<sup>31</sup> *FRAGILE FAMILIES REPORT*, *supra* note 30, at 10.

<sup>32</sup> ELAINE SORENSON & MARK TURNER, NAT'L CTR. ON FATHERS & FAMILY, *BARRIERS IN CHILD SUPPORT POLICY: A REVIEW OF THE LITERATURE* 16 (1996), available at <http://www.ncoff.gse.upenn.edu/content/barriers-child-support-policy-review-literature> (noting, after reviewing multiple studies, that "[t]hese studies amply suggest that many fathers do want to be involved, but suffer from economic disadvantages and a lack of skills and resources that inhibit or undermine these desires over time").

growing population of absent fathers, careful analysis of the direct or indirect consequences<sup>33</sup> of interaction with the legal system is merited.

## II. BARRIERS TO PATERNAL ENGAGEMENT

The concept of the absent father conjures up images of men who procreate without regard to consequences and disappear without remorse.<sup>34</sup> Popular culture typically paints the picture of this iconic absent father as a young, low-income African American man.<sup>35</sup> As such, the problem of absent fathers seems to present a values crisis emerging at the intersection of race and poverty, evading a legal response.

In fact, however, statistics on father-absence paint a reality in contrast to this picture, suggesting that the causes of father-absence are significantly more complex and varied than assumptions about cultural values, general paternal apathy, and irresponsibility. In fact, by most accounts, African American men are less likely than Caucasian or Hispanic men to be absent fathers.<sup>36</sup> Further, as mentioned above, data

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<sup>33</sup> Although proof of causation between court involvement and subsequent absence is elusive, the negative effects of what can be significant court involvement by fathers in child support or custody matters are highly suggested by the correlation between noted barriers to father-presence and the operation of the legal system. To the extent that the system entrenches barriers or otherwise extinguishes parental intentions to maintain or pursue a father-child relationship, the legal system merits analysis.

<sup>34</sup> See, e.g., ADRIAN NICOLE LEBLANC, *RANDOM FAMILY: LOVE, DRUGS, TROUBLE, AND COMING OF AGE IN THE BRONX* (2003) (depicting a number of impromptu sexual unions which resulted in a pregnancy and were later denied or ignored by the involved father; most of these fathers are entirely absent from their children's lives throughout); *16 and Pregnant: Chelsea* (MTV television broadcast Mar. 9, 2010) (portraying a teen father's disinterest in both his child and the child's mother due to an unplanned and unwanted pregnancy). See generally Maureen Rosamond Waller, *Redefining Fatherhood: Paternal Involvement, Masculinity, and Responsibility in the 'Other America'* 1 (Jan. 1997) (unpublished Ph.D. dissertation, Princeton University) (citing as an example of this stereotype the 1980s Bill Moyers documentary, *The Vanishing Family: Crisis in Black America*, which featured fathers who "father numerous children outside marriage . . . and then nonchalantly abandon those children to the welfare system").

<sup>35</sup> See Michael C. Lu et al., *Where is the F in MCH? Father Involvement in African American Families*, 20 *ETHNICITY & DISEASE* 49, 52 (2010) (discussing present cultural barriers facing African American fathers, including the popular culture portrayal of black fathers as irresponsible, uncaring, and expendable); Joshua Alston, *O Father, Where Art Thou?*, *NEWSWEEK*, May 19, 2008, at 45 (analyzing the pop culture portrayal of African American fathers as either a highly successful character like Bill Cosby or as low-income deadbeat dads); Waller, *supra* note 34, at 1 (noting that Moyers' documentary focused on young African American men who lacked responsibility); Michael Arceneaux, *Why Maury Povich 'Is the Father' of Black Trash TV*, *THE GRIO* (Sept. 9, 2011, 6:03 AM), <http://thegrio.com/2011/09/09/why-maury-povich-is-the-father-of-black-trash-tv> (discussing the frequency and misportrayal of young African American fathers on the nationally-syndicated Maury Povich "Who's the Father?" paternity episodes).

<sup>36</sup> See EDIN & NELSON, *supra* note 20 at 167 (noting that in their study, black fathers were somewhat more involved with their children than white fathers, especially when children were young); Amato et al., *supra* note 12, at 49 (observing that black mothers report more father

indicate that many fathers who have little contact with their children are not apathetic about their offspring.<sup>37</sup> Instead, research indicates that the concept of fatherhood and the ideal of being an engaged father are important to the vast majority of men. A nationwide study in 2006 that included approximately 800 fathers age eighteen or older with at least one child under the age of eighteen concluded that 99% of fathers agreed that being a father was a very important part of who they were.<sup>38</sup> Studies of low-income fathers noted the emotional distress fathers displayed when discussing their absence from the lives of their children.<sup>39</sup>

This Part analyzes the more common barriers social scientists and fathers themselves identify that impede the father-child relationship and result in paternal absence, including relational and structural barriers and impediments related to role definition and social norms.<sup>40</sup> In this Part, this Article concludes that although a number of these impediments seem, at first blush, unrelated to the legal system, interactions with the legal system as currently configured often exacerbate the barriers that the legal system is well positioned to alleviate.

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presence that Caucasian mothers); Valarie King, *Variation in the Consequences of Nonresident Father Involvement for Children's Well-Being*, 56 J. MARRIAGE & FAM. 963, 966 (1994) (discussing study finding that in fragile families, African American fathers are more likely than Caucasian or Hispanic fathers to maintain contact with their families); KOBALL & PRINCIPE, *supra* note 12, at 4 (same); Lerman, *supra* note 12, at 75 (same). *But see* LIVINGSTON & PARKER, *supra* note 15, at 2 (asserting that, based on their research, black fathers are more than twice as likely as white fathers to live separately from their children). Although some research indicates that African American fathers are proportionately less likely to be absent than Hispanic and Caucasian fathers, much of the data on father-absence has been culled from African American communities. The Article will note where data diverges from outcomes of research of the general population or of the Hispanic or Caucasian populations.

<sup>37</sup> See *supra* notes 27–31 and accompanying text; see also EDIN, *supra* note 19, Table 7 (noting that only 7% of fathers who identified more than one barrier to engaged parenthood noted lack of desire as a barrier).

<sup>38</sup> NAT'L FATHERHOOD INITIATIVE, POP'S CULTURE: A NATIONAL SURVEY OF DADS' ATTITUDES ON FATHERING 3 (2006), available at <http://www.fatherhood.org/Document.Doc?id=139>; see also EDIN & NELSON, *supra* note 20, at 50–52 (characterizing the reactions of the majority of fathers in their study to the news of pregnancy as positive).

<sup>39</sup> One study reported: "We see adult men here cry because they have no relationship with their children." Greif et al., *supra* note 16, at 252. Another researcher remarked on the consistency of the "anguish[ ]" fathers displayed when reflecting on their lack of engagement with their children. JENNIFER HAMER, WHAT IT MEANS TO BE A DADDY: FATHERHOOD FOR BLACK MEN LIVING AWAY FROM THEIR CHILDREN 175 (2001).

<sup>40</sup> Many barriers to paternal engagement that have legal dimensions—such as incarceration, public benefit incentives, and immigration—are not included in this analysis. Although these barriers can be salient and intransigent, they remain outside the scope of this analysis. This Article focuses on the barriers that are identified as both pervasive and potentially addressable by reforms in the family court and child support systems.

A. *Relational Barriers to Paternal Engagement*

The quality and nature of a father's relationship with his children's mother as well as his own perception of the relevance of that relationship most significantly affect paternal engagement.<sup>41</sup> Data on absent fathers repeatedly cite the distancing effect men note as a result of a conflictual relationship with their children's mothers. Edin's study found that one of the most commonly cited barriers for fathers who noted more than one barrier to paternal engagement was conflict with the mother.<sup>42</sup> A study of low- to mid-income noncustodial fathers revealed that fathers identified conflict with their children's mothers as the most significant barrier to an engaged relationship with their children.<sup>43</sup> One of the largest longitudinal studies of absent fathers, including 1,400 families who were studied over three decades, also concluded that fathers who were absent cited conflict with mothers as a significant inhibitor.<sup>44</sup> Indeed, many commentators hypothesize that conflict between parents might be the single most significant correlate to father-absence.<sup>45</sup>

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<sup>41</sup> Throughout this Article, "paternal engagement" refers to a range of father-child relations that involve personal interactions. The nature of that engagement may take culturally and economically specific characteristics or may be characterized by the unique personal preferences of a father or his child. A father's engagement with his children can be impeded or enhanced by his relationships with other individuals as well. For example, a father's relationship with his children in one family can influence his interactions with his children in another family. Fathers report feeling preoccupied by their own new relationships and families and thinly stretched for time and attention. See, e.g., Kelly & Emery, *supra* note 27, at 354. Absent fathers point also to the challenges of maintaining ties to more than one family. HAMER, *supra* note 39, at 191; Jennifer F. Hamer, *What African-American Non-Custodial Fathers Say Inhibits and Enhances Their Involvement with Children*, 22 W. J. BLACK STUD. 117, 125 (1998). It is interesting to note that the body of literature that analyzes inhibitors to paternal engagement fails to make significant mention of the children's relationship with their father. One can imagine that if children harbor hostility toward their fathers, fathers will be less inclined to visit with their children. However, fathers do not identify this relationship as a barrier to visitation.

<sup>42</sup> EDIN & NELSON, *supra* note 20, Table 7.

<sup>43</sup> Hamer, *supra* note 41, at 122; see also *Dana v. Dana*, 789 P.2d 726, 728 (Utah Ct. App. 1990) (citing father's testimony in custody case that "[the mother's] hostility impeded [the father's] efforts to spend more time with his children").

<sup>44</sup> HETHERINGTON & KELLY, *supra* note 26, at 120.

<sup>45</sup> See, e.g., William D. Allen & William J. Doherty, *The Responsibilities of Fatherhood as Perceived by African American Teenage Fathers*, 77 FAMS. SOC'Y 142, 150 (1996) (citing a strained relationship between non-custodial father and custodial mother as a significant barrier to father involvement); Joyce A. Arditti & Michaelena Kelly, *Fathers' Perspectives of Their Co-Parental Relationships Postdivorce: Implications for Family Practice and Legal Reform*, 43 FAM. REL. 61, 64 (1994) (reporting out on a study of 225 post-divorce non-custodial fathers that found a close correlation between positive relationships with ex-spouses and positive relationships between father and children); Lawrence M. Berger & Callie E. Langton, *Young Disadvantaged Men as Fathers*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 56, 63 (2011) ("Involvement on the part of both resident and nonresident fathers has also been linked to the quality of the mother-father relationship and conflict therein."); Hamer, *supra* note 41, at 120

Edin and Nelson's book sheds an interesting light on the relationship between many of these parents, noting that often the parents do not have a significant bond prior to conception. "[T]he speed at which couples break up only reflects the essential truth about these relationships—that beneath the façade of familylike ties, these men seldom have a strong attachment to their children's mothers."<sup>46</sup> As such, they have little basis for negotiating conflict in co-parenting.

The relationship between separated parents is self-evidently prone to inherent conflict. First, co-parenting demands parental interaction. Especially when the children are young, interactions between a nonresident parent and his children are often mediated by and intertwined with the custodial parent from a logistical and emotional perspective. Second, after the dissolution of the relationship between the parents, the interaction between parents is often fraught with an emotional complexity and a struggle for control that almost inevitably affects the children.<sup>47</sup> Third, fathers point to conflict produced by new maternal romantic relationships.<sup>48</sup> New romantic partners introduced into a family dynamic that is already fragile can result in increased tension, resentment on the part of the nonresident father, and the deployment of tighter control by mothers.<sup>49</sup> Finally, the court process itself can enhance conflict.<sup>50</sup>

Apart from overt conflict, lack of support from custodial mothers also hinders fathers' engagement.<sup>51</sup> Fathers report feeling inhibited from

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(1998) (citing the relationship with the mother as the most important factor relating to the frequency of visitation and involvement).

<sup>46</sup> EDIN & NELSON, *supra* note 20, at 77.

<sup>47</sup> See generally Cynthia R. Pfeffer, *Developmental Issues Among Children of Separation and Divorce*, in CHILDREN OF SEPARATION AND DIVORCE: MANAGEMENT AND TREATMENT 20, 23 (Irving R. Stuart & Lawrence E. Abt eds., 1981) (asserting that children are often negatively impacted when exposed to parental conflict as the parents' relationship ends and even after). Indeed, researchers have identified the "package deal" concept that suggests that some fathers conceive of their relationships with their children as connected to the relationships with the children's mother. For men perceiving their children from this perspective, engagement with their children can be seen only as a part of a "package deal" involving a concurrent romantic relationship with their mother. Amato et al., *supra* note 12, at 42 (explaining the theory of Furstenberg and Cherlin who first coined this concept in 1991). *But see* EDIN & NELSON, *supra* note 20, at 85–90 (noting that in their research, there emerged a new conception of the "package deal" that involved the father's real attention centering on the child who inevitably binds the father to the mother in whom he is less interested).

<sup>48</sup> CROWLEY, *supra* note 27, at 219; Kelly & Emery, *supra* note 27, at 354.

<sup>49</sup> See, e.g., EDIN & NELSON, *supra* note 20, at 164 (recounting the example of one mother who told the father of her child that he could not visit the house any more now that she was involved with a new man).

<sup>50</sup> See *infra* notes 162–65 and accompanying text.

<sup>51</sup> One study found that co-parental conflict and support were two very distinct aspects of the parental relationship with differential impacts on father engagement. Moreover, this study reported that lack of support had a more salient effect on father-absence than conflict. Debra A. Madden-Derdich & Stacie A. Leonard, *Parental Role Identity and Fathers' Involvement in Coparental Interaction After Divorce: Fathers' Perspectives*, 49 FAM. REL. 311, 316 (2000).

engaging with their children when mothers fail to support their involvement either explicitly or implicitly.<sup>52</sup> Many fathers complain that mothers act as “gatekeepers,” regulating and influencing the relationship between children and their nonresident fathers, taking advantage of their disproportionate access to the children, and often leaving fathers feeling undermined and helpless.<sup>53</sup> Although mothers have a range of motivations for monitoring and controlling these relationships—many in the best interest of their children and many rationally sparked by the fathers’ poor choices—fathers often experience such interference as undermining and inhibiting.

The parental relationship produces an ever-changing and charged impact on a father’s relationship with his children. Co-parenting requires communication, understanding, and mutual respect. A dissolved parental relationship or one that has never been cooperative, in contradistinction, often features acrimony, silence, and disdain—all of which can pose barriers to paternal relationships.

#### B. *Structural Barriers to Father-Presence*

Fathers in low-income families also struggle with multiple structural barriers that impede their relationships with their children. A father with limited resources may not have access to transportation to facilitate frequent visitation, or may be forced to use unreliable transportation that may make him late for visits or that may not be safe or practicable to use to transport children. One study of nonresident fathers in low-income families concluded that while the majority of fathers choose to use public transportation to save expenses, they find that the time investment it requires is costly.<sup>54</sup> According to the study, “[t]hese fathers explained that a lack of transportation coupled with the

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<sup>52</sup> See CROWLEY, *supra* note 27, at 218 (citing fathers’ resentment at the lack of support they feel from their children’s mothers as a significant inhibitor to an engaged paternal relationship); Madden-Derdich & Leonard, *supra* note 51, at 313 (“[F]athers who do not perceive that the child’s mother is supportive of them as a parent, are less likely to display high levels of parental involvement.”).

<sup>53</sup> EDIN & NELSON, *supra* note 20, at 157 (reporting on one father who complained that whenever he argued with his child’s mother, she would withhold visitation and also noting in Table 7 that 31% of fathers who cited at least one barrier to engaging with their children cited maternal gatekeeping as a barrier); HAMER, *supra* note 39, at 125; Berger & Langton, *supra* note 45, at 64 (citing research that illustrates that “maternal gatekeeping behaviors” heavily influence paternal involvement); Kelly & Emery, *supra* note 27, at 355; *see also* Camacho v. Camacho, 218 Cal. Rptr. 810, 811 (Ct. App. 1985) (involving a father who sought a visitation order after mother remarried and informed father she would no longer permit him visitation with their son).

<sup>54</sup> HAMER, *supra* note 39, at 186.

inability to consistently coordinate their schedules with the mother's hindered their ability to spend time with their children."<sup>55</sup>

Work responsibilities consistently appear on the list of barriers men across the socioeconomic spectrum identify as salient. For example, a large-scale study of approximately 700 men concluded that 47% of fathers noted work obligations are a "great deal" of an obstacle or "somewhat" of an obstacle to being a good father.<sup>56</sup> Barriers posed by work can manifest themselves in various ways in the lives of low-income men. For this cohort, the barriers tend to be more prominent than they are for men at higher income levels since these fathers usually occupy positions with less flexibility, autonomy, and security. Fathers in two studies of low-income fathers noted that work left them with little emotional energy to devote to their children;<sup>57</sup> especially when fathers maintained multiple jobs.<sup>58</sup> Fathers also noted the challenges posed by unpredictable work schedules, given that the schedules for hourly jobs often vary week to week.<sup>59</sup> Many fathers who work hourly jobs tend to work in the evening and weekends,<sup>60</sup> during the most convenient hours to visit with school-aged children. Further, as Edin and Nelson point out, "[a] father who doesn't even have the wherewithal to treat his child to ice cream . . . will often feel that he has no business coming around."<sup>61</sup>

Finally, a father who lacks resources may not have an appropriate home to which to bring his children for visitation. This may be particularly true of fathers who have been living with their children prior to involvement with the legal system. After the dissolution of a family relationship, for example, low-income fathers can struggle to find permanent housing, often sleeping in shelters or at friends' homes.<sup>62</sup> Such residences may be unsafe or inappropriate for children; additionally, fathers may feel ashamed of their impermanence and want

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<sup>55</sup> *Id.* While research has not surfaced data confirming that fathers who are not African American cite financial resources as an impediment to a father-child relationship, there is reason to assume there is something culturally specific to this barrier. See *Dana v. Dana*, 789 P.2d 726, 728 (Utah Ct. App. 1990) (citing father's testimony in custody case explaining that his lack of visitation was "because of his tight budget and the expenses of travelling long distance to see the children"); NAT'L FATHERHOOD INITIATIVE, *supra* note 38, at 2, 16.

<sup>56</sup> NAT'L FATHERHOOD INITIATIVE, *supra* note 38, at 2; see also HAMER, *supra* note 39, at 168-69; Hamer, *supra* note 41, at 124.

<sup>57</sup> HAMER, *supra* note 39, at 185.

<sup>58</sup> Hamer, *supra* note 41, at 124.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> EDIN & NELSON, *supra* note 20, at 168.

<sup>62</sup> See Steve Scauzillo, *Growing Number of Homeless Single Fathers Showing up in Local Shelters*, PASADENA STAR-NEWS (May 14, 2013, 8:28 AM), [http://www.pasadenastarnews.com/ci\\_20872878/growing-number-homeless-single-fathers-showing-up-local](http://www.pasadenastarnews.com/ci_20872878/growing-number-homeless-single-fathers-showing-up-local) (discussing the frequency of homeless fathers residing in shelters, in large part due to family dissolution); cf. Holly S. Schindler & Rebekah L. Coley, *A Qualitative Study of Homeless Fathers: Exploring Parenting and Gender Role Transitions*, 56 FAM. REL. 40, 41-42 (2007) (exploring the prevalence of low-income fathers struggling in the shelter care system due to job loss).

to hide this reality from their children until they have more respectable housing.<sup>63</sup>

Although men across socioeconomic strata may find visitation and custody logistically challenging to negotiate, the additional pressures posed by a lack of resources and social capital exacerbate these challenges and tend to pose more palpable barriers to an engaged paternal relationship.

### C. *Role Barriers to Paternal Engagement*

For fathers who have lived with their children prior to court involvement or child support enforcement, the legal action may involve the dissolution of the family relationship. When a family dissolves, predetermined roles and the family structure are thrown into chaos. For these fathers, role barriers may be a salient impediment to paternal engagement. Role ambiguity, dissatisfaction with the new paternal role, and a father's lack of confidence in his new role pose barriers that have been identified by fathers and researchers alike.

#### 1. Role Ambiguity

When the court adjudicates custody,<sup>64</sup> court orders seek to render explicit the new structure of parenting relationships. However, court orders have their limits. Most court orders merely award joint or sole physical and/or legal custody and set a visitation or parenting schedule.<sup>65</sup> Court orders generally stop there in terms of allocating responsibility within the new family structure. Which parent will help with homework? Attend parent-teacher conferences? Enroll the children in extracurricular activities and support their involvement? Which parent will plan birthday parties? Support the child when his feelings are hurt? With very few exceptions, court orders refrain from divvying up specific parenting responsibilities, and very few separated parents are able to proactively identify and negotiate such issues on their own. As a result, after the family has dissolved, role ambiguity can predominate.

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<sup>63</sup> HAMER, *supra* note 39, at 189.

<sup>64</sup> Court actions adjudicate custody not only within a dissolving marital relationship, but also to resolve disputes over children born to unmarried parents. *See, e.g.*, JACQUELINE D. STANLEY, UNMARRIED PARENTS' RIGHTS (AND RESPONSIBILITIES) 80–89 (3d ed. 2005).

<sup>65</sup> Physical custody dictates where the child will live and legal custody determines who will make major life decisions for the child, such as those involving medical care, religion, and schooling. *See, e.g.*, WILLIAM P. STASKY, FAMILY LAW: THE ESSENTIALS 176 (2d ed. 2004).

Low-income fathers report being unsure of what mothers expect of them.<sup>66</sup> Family systems' theory posits that families are most functional and satisfying for all when roles are well defined.<sup>67</sup> Indeed, researchers hypothesize that role ambiguity drives fathers from their children due to sheer frustration.<sup>68</sup> One social scientist concludes that fathers turn away from parenting relationships due to this ambiguity, and asserts that "[t]he loss of involvement in decision-making related to their children's lives is one of the most significant stressors of the divorce process."<sup>69</sup> Of course, role ambiguity in turn breeds conflict between parents, which, as discussed above, may be the most significant inhibitor for fathers.

## 2. Dissatisfaction with the New Role

Once the father is no longer part of the original family structure, the time he spends with his children necessarily transforms, whether that time is significant or limited. Engagement with his children is no longer casual, unpremeditated, and spontaneous. Instead, it derives either from a court-ordered schedule or an agreement with the mother, and its time parameters are usually circumscribed. The very nature of this interaction profoundly shifts, and though it may absolve a father of some of the more tedious parenting tasks, it can also transform the relationship into a more superficial one.<sup>70</sup> As one father stated, discussing the artificial nature of visitation as it differs from more routine parental interaction, "[m]ost fathers don't spend eight hours eyeball-to-eyeball trying to entertain their children."<sup>71</sup> Another father noted the constraints of visitation made him feel less respected: "It seems like when you don't have custody of your kids and stuff like that, not being there all the time, they don't really give you that respect."<sup>72</sup> Some fathers report feeling like "Disneyland Dads" because visitation gives the opportunity for adventures, but not for real relationship-

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<sup>66</sup> HAMER, *supra* note 39, at 92.

<sup>67</sup> Madden-Derdich & Leonard, *supra* note 51, at 311.

<sup>68</sup> See HETHERINGTON & KELLY, *supra* note 26, at 118 (reporting that the vast majority of men in their studies did not know "how to be a good non-custodial father," and noting the "obstacles and "uncertainty" faced by fathers trying to accomplish this); Madden-Derdich & Leonard, *supra* note 51, at 312 (citing other researchers for the proposition that role ambiguity "increases the likelihood that fathers will withdraw from parental and coparental interaction"); McKenry et al., *supra* note 24, at 314 (arguing that role clarity is important to encouraging father involvement).

<sup>69</sup> Madden-Derdich & Leonard, *supra* note 51, at 311.

<sup>70</sup> See, e.g., TERRY ARENDELL, FATHERS & DIVORCE 169 (1995) (quoting a father from his survey who stated, "I have no authority; I'm just a visitor and a playmate now. Without day-to-day responsibility, my child perceives me to be a secondary parent.").

<sup>71</sup> HETHERINGTON & KELLY, *supra* note 26, at 119.

<sup>72</sup> EDIN & NELSON, *supra* note 20, at 164.

building.<sup>73</sup> As one commentator argues, the artificial nature of what she dubs “vanilla visitation” can drive fathers away from their children.<sup>74</sup>

Fathers also report that the limited nature of non-primary physical custody or visitation causes them emotional pain that can lead them to reject the visitation altogether.<sup>75</sup> Based on the Virginia Longitudinal Study of 1,400 families, researchers report that “a surprising number of men stay away because . . . they find being all the way out of a child’s life less painful than being halfway in it.”<sup>76</sup> A report based on interviews with professionals who work with low-income, urban fathers, for example, noted that many fathers had little contact with their own fathers; those memories of loss are exacerbated by their own relationships with their children and inhibit these fathers—ironically and some would say illogically<sup>77</sup>—from visiting with their children.<sup>78</sup>

Some research suggests that the dissonance between the father’s new role in the dissolved family and the father’s own expectations for his paternal role drives fathers away from engaging with their children. One study found that when low-income fathers were asked to prioritize the aspects of their roles as fathers, they identified spending time with their children and providing emotional support as numbers one and two.<sup>79</sup> Both of these aspects of parenting can be severely impaired by the breakdown of a co-parenting relationship and may be difficult to effectively achieve based on the normal visitation and custody arrangement with nonresident fathers. One study that looked specifically at African American adolescent fathers determined that “the conflict between strong convictions about responsibility to family and

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<sup>73</sup> See Maldonado, *supra* note 12, at 976–77 (discussing the phenomenon of “Disneyland Daddies” and the reduced quality time involved in visitation); Mark D. Matthew, Note, *Curing the “Every-Other-Weekend Syndrome”: Why Visitation Should Be Considered Separate and Apart from Custody*, 5 WM. & MARY J. OF WOMEN & L. 411, 437–39 (1999) (arguing that the traditional “every other weekend” post-divorce visitation standard does not allow for non-custodial parents to develop proper relationships with their children); Susan D. Stewart, *Disneyland Dads, Disneyland Moms? How Nonresident Parents Spend Time with Absent Children*, 20 J. FAM. ISSUES 539, 541–42 (1999) (discussing the emotional pain and difficulty “Disneyland” non-custodial parents experience due to limited access to their children).

<sup>74</sup> Maldonado, *supra* note 12, at 976.

<sup>75</sup> *Id.* at 978.

<sup>76</sup> HETHERINGTON & KELLY, *supra* note 26, at 120.

<sup>77</sup> Custodial mothers who are struggling to perform all parenting roles, support their children, and explain the fathers’ absences can find such rationales unpersuasive and frustrating. See generally Elsa Brenner, *Mothers Struggle to Manage On Their Own*, N.Y. TIMES, June 21, 1992, at 13WC (describing the struggles of single mothers in Westchester County, N.Y.).

<sup>78</sup> Greif et al., *supra* note 16, at 252; see also Hon. Milton C. Lee, Jr., *Fathering Court: A New Model for Child Support Enforcement*, 51 JUDGES J. 24, 27 (2012) (noting that many noncustodial fathers with child support arrearages were raised without a fatherhood role model).

<sup>79</sup> HAMER, *supra* note 39, at 135.

the virtual inability to fulfill those responsibilities drives African American adolescent fathers . . . away from their child.”<sup>80</sup>

Finally, a father’s discomfort with his new role may stem from feelings of inadequacy in the role of sole care-giving parent. Despite changes in family law and changes in women’s employment opportunities, child-rearing remains extremely gender-differentiated.<sup>81</sup> In a home with both a mother and father, the mother ordinarily undertakes a disproportionate share of child-care responsibilities in relation to the father.<sup>82</sup> Consequently, when a father is offered time alone with a child, possibly to even include overnight visitation, he may perceive himself to be incompetent to undertake the task because of inexperience.<sup>83</sup> Anxiety about how to care for children has been cited as a significant barrier to paternal engagement.<sup>84</sup> Indeed, one study concluded that a father’s satisfaction with his own competence as a parent is the factor most highly correlated with paternal involvement with his children.<sup>85</sup>

#### D. *Social Norm Barriers to Paternal Engagement*

Social norms can affect behavior within the parent-child structure. The social norms that interfere with the caretaking efforts of fathers who live with their children prior to court action continue to inhibit men from taking advantage of their custody and visitation rights after the dissolution of the family. Social norms that create expectations that mothers will nurture and fathers will merely provide for their children can dissuade a father from taking advantage of his visitation and custody rights. Gender roles operating in the family have traditionally

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<sup>80</sup> Allen & Doherty, *supra* note 45, at 152.

<sup>81</sup> See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1951 (2000) (“[G]ender norms regulating parenting may be more entrenched and resistant to change than those that shape the spousal relationship.”).

<sup>82</sup> See Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 182 n.21 (2000) (citing various studies of gender differentiation in childcare illustrating that women perform more childcare than men); Nancy E. Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 791 (2003) (“The pattern of custody and care of children remains sharply skewed by gender.”); Charity M. Brown, *At Night, Women Answer the Call*, WASH. POST, Feb. 15, 2011, at E4 (describing a 2011 study which found women are more likely to care for their children at night than men).

<sup>83</sup> See, e.g., Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293, 300 (1997) (discussing fathers’ lack of nurturing skills due to society’s failure to expect the attainment of such skills).

<sup>84</sup> CROWLEY, *supra* note 27, at 218 (citing a study from 2000).

<sup>85</sup> Madden-Derdich & Leonard, *supra* note 51, at 313–15. Indeed, Edin and Nelson’s recent study corroborates this observation, noting that “[p]erhaps the most profound obstacle . . . is that over time a father’s performance scorecard often becomes so littered with disappointment.” EDIN & NELSON, *supra* note 20, at 165.

cast women as nurturers and men as breadwinners. A father's primary role as breadwinner dates far back in our nation's history and is still pervasive.<sup>86</sup> Social norms enforce those roles,<sup>87</sup> and as one commentator writes, "[t]he couple comes to expect of each other and of themselves what their social community seems to expect of married couples."<sup>88</sup> Commentators have written about the entrenchment of these social norms, asserting that gendered parenting roles are internalized by mothers and enforced by community expectations.<sup>89</sup>

At the dissolution of the parents' relationship, social norms persist in dictating parenting behavior. As one commentator argues, "[t]he post divorce father's role basically reprises his role in the unitary family. He no longer lives in the home, of course, but under the unitary family model he was often more like a visitor anyway."<sup>90</sup> Since the community may have little expectation that a father will do more than financially support his child, he may not be particularly inclined to take advantage of any other rights granted to him. Further, social norms influence judicial handling of family law cases, resulting in decisions that may perpetuate role differentiation and fail to support paternal caretaking.<sup>91</sup>

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<sup>86</sup> See Michael E. Lamb & Catherine S. Tamis-LeMonda, *The Role of the Father: An Introduction*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 1, 3–4 (Michael E. Lamb ed., 4th ed. 2004) (tying the breadwinning role back to the industrial revolution and asserting the continuing pervasiveness of that role); see also EDIN & NELSON, *supra* note 20, at 207 ("American society tends to assess the unwed father's moral worth with a single question: how much money does he provide?").

<sup>87</sup> Scott, *supra* note 81, at 1914.

<sup>88</sup> *Id.* at 1923.

<sup>89</sup> Maldonado, *supra* note 12, at 935 (discussing social norms surrounding parenting generally); Scott, *supra* note 81, at 1950 ("Gendered parenting norms continue to be internalized by mothers, self-enforced through guilt, and reinforced by community expectations about parental behavior."). In studying African American men, one clinician notes the "societal perceptions of the 'peripheral' nature of the performance of Black men in their roles as fathers." JANICE M. RASHEED & MIKAL M. RASHEED, *SOCIAL WORK PRACTICE WITH AFRICAN AMERICAN MEN: THE INVISIBLE PRESENCE* 95 (1999).

<sup>90</sup> Stark, *supra* note 83, at 308.

<sup>91</sup> The legal system's differential enforcement of child support obligations versus custody or visitation breaches further entrenches social norms. Visitation and custody are rights to be taken advantage of at a father's discretion. Failure to take advantage of those rights results in a mere admonition about the potential effect on the child. See, e.g., *In re Marriage of Mitchell*, 745 N.E.2d 167, 172–73 (Ill. App. Ct. 2001) (holding that the court will not force a father to visit against his will); *Jennifer D. v. Arnold D.*, 589 N.Y.S.2d 554, 555 (App. Div. 1992) (upholding lower court's refusal to require visitation against a father's will); *Dana v. Dana*, 789 P.2d 726, 730 (Utah Ct. App. 1990) (holding that a court may encourage but not compel a noncustodial parent to visit with his children). On the other hand, failure to comply with a child support obligation can result in sanctions, contempt adjudication, and criminal penalties. See, e.g., 42 U.S.C. § 608(b)(3) (2012); D.C. CODE § 46-225.01 (2013) (specifying that many types of licenses shall be withheld from renewal if the holder is in arrears); *id.* § 46-225.02(b)(1)(A) (authorizing the court to sentence a obligor for willful failure to pay child support for up to 180 days); MICH. COMP. LAWS § 750.165(1) (2013) (establishing failure to pay child support as a felony criminal offense). For a discussion of enforcement by civil contempt, see Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012).

Ultimately, even for fathers who sincerely want to maintain relationships with their children, barriers to engagement can arise from many sources. However, as one study suggests, the existence of these barriers, even those that temporarily contribute to estrangement, need not extinguish a father's relationship with his children. Fathers interviewed in a study analyzing barriers to paternal engagement noted that few fathers who wanted a relationship with their children perceived barriers to be permanent.<sup>92</sup> One father explained: "These things are like small bumps in the road. They might stall me a little, but they ain't gonna keep me from being a daddy."<sup>93</sup> The legal system's response to these barriers has the potential to minimize these bumps and encourage positive paternal relationships.

### III THE LEGAL SYSTEM'S ROLE IN ENTRENCHING AND REDUCING BARRIERS

Many of the barriers to parental engagement stem from roots deep in our society's belief systems and cultural history and are intertwined with the complexities of our economy. However, the legal system can play a role in reducing barriers to fathers and in facilitating paternal relationships, especially for this group of low-income court-involved fathers. For the fathers who have previously shared a home with their children, the court system's involvement occurs at a critical moment of family instability—the time when new family norms take root and there is a high potential for fracture. For many of these fathers, this time also introduces them to the child support system and its requirements. Because the legal system can engage fathers at this critical moment, its role as an inhibitor or facilitator to positive paternal engagement could be influential in arresting the trend of increasing father-absence.

This Part considers what the legal system does to entrench and can and should do to minimize impediments to engaged relationships between fathers and their children both at the critical moment of family dissolution and during the imposition and enforcement of child support obligations. First, this Part considers the child support system and its collateral effects on low-income father-absence. Second, this Part looks to court system's responses, analyzing ways in which the courts can adjudicate cases, support parents, and partner with support services to proactively address potential barriers and support paternal engagement. In this Part, this Article argues that the legal system can and should proactively reconsider its laws, programs, and procedures from the

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<sup>92</sup> Hamer, *supra* note 41, at 126.

<sup>93</sup> *Id.*

perspective of their unintended effects on family welfare.<sup>94</sup> By doing so, the legal system can even facilitate a transition in the social norms regarding fatherhood that compound this problem.

### A. *Child Support and Father-Absence*

The child support system itself, though largely intended to promote child welfare,<sup>95</sup> can also raise collateral barriers to engagement by low-income fathers that merit consideration in any analysis of the legal system's role in addressing father-absence.<sup>96</sup> In the past fifteen years, government programs to collect child support and to establish parentage, as mandated by both federal legislation and local statutes, have become increasingly aggressive.<sup>97</sup> In addition to establishing criminal penalties for failure to pay child support, some jurisdictions have also conditioned the receipt of public benefits on a mother's cooperation with establishing parentage.<sup>98</sup> While renewed efforts at child support enforcement have been successful on several fronts,<sup>99</sup>

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<sup>94</sup> For a discussion about the normative argument that the legal system should support a particular vision of the family or value, see Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1154–55 (2010).

<sup>95</sup> See generally Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007) (analyzing the dual goals of child support—cost recovery and child welfare—and arguing they coexist but are in direct conflict).

<sup>96</sup> Though child support has been extensively analyzed, its effect on paternal engagement has received less attention, meriting analysis within this consideration of the legal system's role in exacerbating barriers to father presence. See SORENSON & TURNER, *supra* note 32 (“Policy research has rarely considered the systemic barriers within child support policy that discourage noncustodial fathers’ involvement with their children.”).

<sup>97</sup> Anna Aizer & Sara McLanahan, *The Impact of Child Support Enforcement on Fertility, Parental Investments, and Child Well-Being*, 41 J. HUM. RESOURCES 28, 28 (2006) (explaining that in response to increasing poverty among children, “and in an effort to compel absent fathers to provide financially for their children, federal and state government officials began pursuing policies designed to strengthen child support enforcement”); I-Fen Lin, *Perceived Fairness and Compliance with Child Support Obligations*, 62 J. MARRIAGE & FAM. 388, 388 (2000) (explaining that in response to the low payment rate of child support obligations, “the U.S. government increasingly has relied on more rigorous methods to collect support from nonresident parents”).

<sup>98</sup> 42 U.S.C. § 608(a)(2) (2012); see also Bridget Remington, *It Takes a Father? Conforming with Traditional Family Values as a Condition of Receiving Welfare: Morals Reform and the Price of Privacy*, 32 STETSON L. REV. 205, 216 (2002) (“States get bonuses for establishing paternities, so they have great incentive to encourage those not receiving public assistance to establish paternities. For those applying for public assistance, however, cooperation in paternity establishment is not optional.” (footnote omitted)).

<sup>99</sup> Research indicates that collections have increased due to more aggressive enforcement. See Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 351 (2005) (asserting that rigorous enforcement has resulted in some improvements in collection) (citing PAUL LEGLER, ANNIE E. CASEY FOUND., *LOW-INCOME FATHERS AND CHILD SUPPORT: STARTING OFF ON THE RIGHT TRACK* 6 (2003) (noting that collections increased from \$8 billion in 1992 to 18 billion in

current enforcement programs can be more problematic than effective in the population of low-income fathers with little ability to pay<sup>100</sup> in terms of both collection and paternal engagement. Indeed, several years after the implementation of aggressive child support enforcement, a national survey revealed that only 63% of children living below the poverty line in a home with only one parent received child support.<sup>101</sup> Further, data indicate that child support enforcement is negatively correlated with visitation by nonresident fathers.<sup>102</sup> As one father noted, child support enforcement was a continual reminder of state intervention into his private life: “Believe me, I’d pay if they’d leave me alone. It’s that I’m ‘ordered to pay’ that I resent.”<sup>103</sup>

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2000)); Vicki Turetsky, *What if All the Money Came Home? Welfare Cost Recovery in the Child Support Program*, 43 FAM. CT. REV. 402, 404 (2005) (asserting that between the welfare reform amendments to child support enforcement in 1996 and 2003, collection rates doubled). Some research also suggests that child support enforcement has increased visitation in some families. For example, one study found that 45% of the increase in visitation is related directly to increased enforcement. Chien-Chung Huang, *Child Support Enforcement and Father Involvement for Children in Never-Married Mother Families*, 4 FATHERING: J. THEORY, RES. & PRAC. ABOUT MEN AS FATHERS 97 (2006). Another study concludes that both formal and informal payments “one year after a child’s birth raise the likelihood of father contact two years later.” Lerman, *supra* note 12, at 77; see also Lenna Nepomnyaschy & Irwin Garfinkel, *Child Support and Father-Child Contact: Testing Reciprocal Pathways*, 44 DEMOGRAPHY 93 (2007). However, there is a dearth of research looking directly at the casual relationship between child support enforcement and visitation. Steven Garasky et al., *Toward a Fuller Understanding of Nonresident Father Involvement: An Examination of Child Support, In-Kind Support, and Visitation*, 29 POPULATION RES. & POL’Y REV. 363, 364 (2010) (“[L]ittle research has simultaneously assessed the receipt of both child support and in-kind contributions, and their relationship to a third aspect of nonresident father involvement—visitation.”); 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) (“Whether stricter child support enforcement will increase or decrease a nonresident father’s involvement with his children cannot be predicted from theory. . . . The correlation between visiting and paying could be spurious; that is, it could be due to a third factor that is causing fathers both to pay support and to visit their children frequently.”).

<sup>100</sup> It is interesting to note that while one researcher looking specifically at the low-income community noted that aggressive enforcement has been successful in parentage establishment in that community, it has been less effective at increasing total formal or informal child support payments. Lerman, *supra* note 12, at 65; see also Murphy, *supra* note 99, at 351 (asserting that more aggressive enforcement has not reduced child poverty for families on welfare). Professor Murphy asserts that this failure to affect child poverty is due to assignment and the limited success in collecting from noncustodial parents who never married the custodial parent, and the reality that many noncustodial parents are unable to pay. *Id.* at 352–54. *But see* ELAINE SORENSON, THE URBAN INST., CHILD SUPPORT PLAYS AN INCREASINGLY IMPORTANT ROLE FOR POOR CUSTODIAL FAMILIES 5 (Dec. 2010), available at <http://www.urban.org/UploadedPDF/412272-child-support-plays-important-role.pdf> (noting that child support enforcement has become more effective at collecting child support debts which “appears to be benefiting poor and deeply poor custodial families”).

<sup>101</sup> SORENSON, *supra* note 100, at 4–5.

<sup>102</sup> See Seltzer et al., *supra* note 99, at 157 (noting the well-documented positive correlation between payment of child support and visitation).

<sup>103</sup> ARENDELL, *supra* note 70, at 89.

Though the child support order for an unemployed father might be as low as fifty dollars per month,<sup>104</sup> such an obligation might still be impossible to meet.<sup>105</sup> Research suggests that the majority of low-income fathers' failure to meet their obligations is not because of their unwillingness to support their children, but because they do not earn enough to satisfy their obligations.<sup>106</sup> When a parent fails to comply with his support obligation, the court can impose job search requirements,<sup>107</sup> require regular enforcement hearings, and ultimately impose sanctions,<sup>108</sup> including criminal contempt. For these fathers, the continual pressure from the government to obtain a job, meet obligations, compensate for arrears, or face sanctions, contempt, or criminal penalties and their collateral consequences can have a significant deterrent effect on paternal engagement. Two specific provisions of child support law, though intended to enhance the support government coffers and to routinize child support payments, also impose particular collateral consequences on paternal engagement that, if addressed, could play a role in reducing the legal system's barriers to paternal engagement. This section considers how the child support rules could be amended to reduce the negative impact of a father's early interactions with the legal system and yet to maintain the highest levels of support for children.

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<sup>104</sup> See, e.g., D.C. CODE § 16-916.01(g)(3) (2013) (imposing a minimum payment of fifty dollars per month); MINN. STAT. § 518A.42(2)(a) (2013) (minimum of fifty dollars per month for one to two children; seventy-five dollars per month for three to four children; 100 dollars for five or more children); VA. CODE ANN. § 20-108.2(B) (2013) (sixty-five dollars per month minimum); WASH. REV. CODE § 26.19.065(2) (2013) (fifty dollars per month minimum).

<sup>105</sup> See Lee, *supra* note 78, at 25 (noting that fathers with a support obligation of fifty dollars per month appropriately ask, "How am I supposed to pay \$50 per month without a job?").

<sup>106</sup> JACINTA BRONTE-TINKEW ET AL., NAT'L RESPONSIBLE FATHERHOOD CLEARINGHOUSE, ELEMENTS OF PROMISING PRACTICE FOR FATHERHOOD PROGRAMS: EVIDENCE-BASED RESEARCH FINDINGS ON PROGRAMS FOR FATHERS 3 (Aug. 15, 2007), available at <http://www.louisvilleky.gov/nr/rdonlyres/424404eb-ed86-4840-a8f9-5bea58a3736d/0/fatherhoodprogram.pdf> (citing NAT'L WOMEN'S LAW CTR. & CTR. ON FATHERS, FAMILIES, & PUB. POLICY, DOLLARS AND SENSE: IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS, AND CHILDREN (2002), available at <http://archive.acf.hhs.gov/programs/cse/pubs/2002/reports/commonground.pdf>); Murphy, *supra* note 99, at 354 (citing Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL'Y ANALYSIS & MGMT. 44, 47 (1998)). But see EDIN & NELSON, *supra* note 20, at 117 (noting that few of the low-income nonresident fathers in their study feel an obligation to be primary providers or even to come up with 50% of support for their children).

<sup>107</sup> See, e.g., COLO. REV. STAT. § 14-10-115(5)(b)(II) (2013) (authorizing the court or child support agency to order unemployed debtor fathers to participate in work activities, including job searches); D.C. CODE § 46-225.02(b)(1)(C) (2013) (under some circumstances, the judge can order debtor parents to "accept appropriate available employment or participate in job search and placement activities").

<sup>108</sup> See, e.g., D.C. CODE § 46-225.01 (2013) (prohibiting debtor parents to obtain or renew driver's and certain professional licenses); VT. STAT. ANN. tit. 15 § 798(c) (2012) (noting the authority of a court to deny the renewal or issuance of a license to debtor fathers). See generally Lee, *supra* note 78, at 25 (discussing child support proceedings).

### 1. Assignment of Child Support to the Government as Reimbursement for Government Benefits

Under federal and state child support law, current and former recipients of Temporary Assistance to Needy Families (TANF)<sup>109</sup> must assign their rights to child support to the government as reimbursement for benefits.<sup>110</sup> The family retains a claim to support monies that exceed the total amount of cash assistance the family has received. Therefore, assuming no arrears, the family on TANF gets any child support payment that exceeds its TANF award. Once the family is off TANF, the right to full child support reverts to the custodial family.<sup>111</sup> Of course, if the nonresident parent has accrued arrears, child support payments will first be diverted to pay off the arrears and then will be paid to the family. Assignment of these monies affects a significant percentage of the families on the child support enforcement rolls. In 2009, for example, 14% of those families in the child support program were former TANF recipients and 43% were current TANF recipients.<sup>112</sup>

Welfare cost recovery negatively affects paternal engagement in several ways. First, noncustodial fathers are denied the opportunity to directly benefit their families, often rendering fathers resentful of the government and their families and incentivized to disappear to avoid

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<sup>109</sup> 42 U.S.C. §§ 601–619 (2012).

<sup>110</sup> See, e.g., 42 U.S.C. § 608(a)(3) (2012); D.C. CODE § 4-205.19(b) (2013); see also *Hearing on the Role of TANF Program Providing Assistance to Families with Very Low Incomes Before the Subcomm. on Income Sec. and Family Support of the H. Comm. on Ways & Means*, 111th Cong. 53 (2010) [hereinafter *TANF's Role*] (statement of Rep. Gwen Moore (Wisc.)) (explaining assignment provisions); LAURA WHEATON & ELAINE SORENSEN, THE URBAN INST., THE POTENTIAL IMPACT OF INCREASING CHILD SUPPORT PAYMENTS TO TANF FAMILIES 1 (Dec. 2007), available at [www.urban.org/UploadedPDF/411595\\_child\\_support.pdf](http://www.urban.org/UploadedPDF/411595_child_support.pdf) (noting the requirement that families receiving TANF must assign their rights to child support collection). Since Congress became involved in child support enforcement in 1974, it has been a program with dual goals. Congress sought, on a federal level, to enhance family self-sufficiency and to create a government reimbursement vehicle for public assistance payments. Turetsky, *supra* note 99, at 402. Welfare cost recovery has also been defended as a program intended to increase paternal responsibility by making it clear to fathers that their contributions are necessary in paying off the family debt. See Hatcher, *supra* note 95, at 1076 (citing IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY 133 (1992) (asserting that imposing a support obligation on low-income men is necessary to convey to them that they have value to offer a child)); *id.* at 1077 (“To the extent non-responsibility is excused, even justified, rather than merely explained, these theories help perpetuate a status quo in which the black father is encouraged not to stand up for his child.” (quoting HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 294 (1981))).

<sup>111</sup> 42 U.S.C. §§ 608(a)(3), 657(a)(2)(A) (2012). See generally Turetsky, *supra* note 99, at 406–07 (explaining the operation of assignment provisions).

<sup>112</sup> *FY 2009 Annual Report to Congress*, OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP'T OF HEALTH & HUMAN SERVS. (Figure 1) (Dec. 1, 2009), [http://www.acf.hhs.gov/programs/cse/pubs/2012/reports/fy2009\\_annual\\_report](http://www.acf.hhs.gov/programs/cse/pubs/2012/reports/fy2009_annual_report).

burdensome and seemingly senseless payments.<sup>113</sup> A large-scale study of noncustodial fathers concluded that assignment was “one of the most alienating features of the current [welfare] system.”<sup>114</sup>

Second, family conflict is specifically kindled, rather than tamped, by assignment rules.<sup>115</sup> The mother may not receive any direct support from the father, even if he is meeting his obligations. Further, she is likely to understand that each month that the noncustodial parent fails to meet his obligation corresponds to a future month of payment being withheld even after she leaves TANF. Noncustodial fathers, likewise, are driven to resent custodial mothers for relying on government support and creating a debt to the state for which the fathers are obligated.

Third, assignment deprives parents of the right to negotiate their own child support arrangements, impeding the ability of a family to effectively meet the needs of the children, and eliminating what is often a powerful bargaining tool for mothers. As one child support expert explained to Congress:

Many TANF mothers and fathers repeatedly re-negotiate their financial arrangements. Sometimes she holds back on formal enforcement. Sometimes, he pays informal financial support for the children. Sometimes, he does not pay regular support, but makes irregular in-kind contributions, such as diapers . . . . Sometimes, he pays out of both pockets—he pays off the state a little and he pays her a little. Sometimes she settles for non-financial support.<sup>116</sup>

Assignment renders all of these negotiations and arrangements untenable, since the right to the support belongs to the government. Decisions by the custodial parent to accept informal payments could amount to welfare fraud.

Finally, assignment drives custodial families further into poverty, putting strain on parental relations and negatively affecting paternal engagement. With TANF payments so low in every state that an average

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<sup>113</sup> See *Hearings on Temporary Assistance for Needy Families Before the S. Comm. on Fin. on Welfare Reform*, 107th Cong. 118 (2002) [hereinafter *Welfare Reauthorization*] (statement of Vicki Turetsky, Center for Law & Social Policy) (explaining that noncustodial parents are driven to the underground economy by child support assignment rules); PETER EDELMAN ET AL., RECONNECTING DISADVANTAGED YOUNG MEN 130 (2006) (arguing that assignment of child support provides a disincentive to low-income men to find work in the formal economy and meet their child support obligations); CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL31025, FATHERHOOD INITIATIVES: CONNECTING FATHERS TO THEIR CHILDREN 13 (2012) (noting that noncustodial fathers complain about assignment because their money does not benefit their children; but rather the government).

<sup>114</sup> Murphy, *supra* note 99, at 372 n.223 (alteration in original).

<sup>115</sup> See Turetsky, *supra* note 99, at 402 (arguing that the concept of assignment as a cost recovery method was unwise and asserting that, as a result, “noncustodial parents sometimes walk away from unpaid child support debt, jobs in the formal economy, and their children”).

<sup>116</sup> *TANF’s Role*, *supra* note 110, at 357; see also *Welfare Reauthorization*, *supra* note 113, at 60–61.

family's income on TANF does not reach 50% of the poverty line and amounts to less than \$300 per month in fourteen states,<sup>117</sup> many mothers are greatly in need of child support payments to make ends meet. Data illustrate that for low-income families, child support can constitute between forty and 63% of a poor family's income.<sup>118</sup> As one commentator calculated, "[t]he financial disincentives facing a low-income father can be substantial. If he pays \$200 per month yet his children gain only \$35 as a result of his contribution, the effective tax rate is 82.5%."<sup>119</sup>

Assignment's myriad negative effects on poor families have not been outweighed by the government's recovery of costs. States must administer the assignment programs and invest funding into enforcement of child support obligations. Reimbursement for government support has been modest because the population of noncustodial parents involved in the assignment program are largely low-income and may have inconsistent or nonexistent formal employment.<sup>120</sup> Significantly, one estimate calculated after the implementation of aggressive child support enforcement suggested that, even if completely effective, assignment of child support to the government would not result in substantial savings in government spending. Even if all child support obligations were to be collected and kept by the state for families on government support, government spending would be reduced only by 8%.<sup>121</sup>

The legal system is poised to eliminate the negative effects of this program. In order to induce custodial parent cooperation in collecting child support, federal and state law created an exception to the full

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<sup>117</sup> IFE FINCH & LIZ SCHOTT, *CTR. ON BUDGET & POLICY PRIORITIES, TANF BENEFITS FELL FURTHER IN 2011 AND ARE WORTH MUCH LESS THAN IN 1996 IN MOST STATES* 4 (Nov. 21, 2011), available at <http://www.cbpp.org/files/11-21-11pov.pdf>.

<sup>118</sup> SORENSEN, *supra* note 100, at 4–5; see also WHEATON & SORENSEN, *supra* note 110, at 1 (asserting that, in the early 2000s, child support constituted about 30% of income for low-income families who received child support payments); Murphy, *supra* note 99, at 372 (asserting that child support constitutes an average of approximately 25% of a low-income family's income).

<sup>119</sup> Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. POL'Y ANALYSIS & MGMT. 89, 97 (2002).

<sup>120</sup> See Hatcher, *supra* note 95, at 1049–50 (explaining that cost recovery through child support assignment is modest since most custodial parents on TANF are owed support obligations from low-income noncustodial parents who have less ability to meet their payment obligations and, if they do, make small payments).

<sup>121</sup> Laura Wheaton & Elaine Sorensen, *Reducing Welfare Costs and Dependency: How Much Bang for the Child Support Buck?*, 4 GEO. PUB. POL'Y REV. 23, 29 (1998) (concluding that if each custodial family received a child support award payment in full, the cost to various government programs would decrease overall by 6%). Child support collections for families currently on welfare have been far outweighed by collections for non-TANF families. See Hatcher, *supra* note 95, at 1066 (asserting that between 2002 and 2006, total distributed child support enforcement collections for TANF families decreased from \$2.9 billion to \$2.1 billion, whereas collections for non-TANF families increased from \$17.2 billion to \$21.8 billion).

assignment of child support money. In establishing a pass-through of some portion of child support payments,<sup>122</sup> the government assumed that a custodial parent—who has an interest in the nonresident parent paying child support—would assist the government in locating a nonpaying or unidentified parent and encouraging payment. The government has experimented with several approaches to pass-throughs,<sup>123</sup> and currently guarantees that the federal government will share the cost with the state for the first \$100 passed through to custodial parents with one child and \$200 to families with multiple children.<sup>124</sup> However, even despite this cost-sharing incentive, fewer than half of the states currently pass-through child support money.<sup>125</sup>

This Article joins the commentators who have critiqued welfare cost recovery for its financial effect on families and who have supported full or partial pass-throughs.<sup>126</sup> This Article adds to the dialogue an argument that pass-throughs should be widely implemented due to assignment's effect on low-income fathers. Two states have experimented with passing through 100% of child support to families and have compiled data that strongly suggest that full pass-throughs are

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<sup>122</sup> See Turetsky, *supra* note 99, at 408 (“The idea behind the federal pass-through policy was to improve cooperation with the child support program by increasing the stake of custodial parents in collecting child support.”).

<sup>123</sup> Over the years, the federal government has changed its policy several times, first requiring states to pass through the first fifty dollars of child support payments to the custodial families who had assigned their rights to payments. *Id.*; see also WHEATON & SORENSEN, *supra* note 110, at 1 (discussing the history of the pass-through and its inception as a fifty dollar pass-through and income disregard). In a subsequent amendment in 1996, Congress eliminated the pass-through requirement; instead, it allowed the states to elect to pass through child support monies. *TANF's Role*, *supra* note 110, at 118–19; WHEATON & SORENSEN, *supra* note 110, at 2. This amendment appeared as part of the major overhaul of the welfare laws under the 1996 Personal Responsibility and Work Opportunity Reform Act. With this amendment, Congress also specified that the states had to absorb the cost in lost revenue of the pass-through. This amendment also changed the financing scheme for pass-throughs. The states bore the entire burden of the money lost in the pass-through; whereas, prior to the amendment, the federal government and the state split the loss of revenue associated with the mandated fifty-dollar pass-through. See WHEATON & SORENSEN, *supra* note 110, at 1–2 (discussing the history of the cost sharing between the federal and state governments and noting that, prior to the 1996 amendments, the state and federal government shared the cost of the pass-through). Given this option, fewer than half of the states opted to pass through any child support money to families who were receiving or had received government support. CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL34105, THE FINANCIAL IMPACT OF CHILD SUPPORT ON TANF FAMILIES: SIMULATION FOR SELECTED STATES 1 (2007) (“[M]ost child support received on behalf of families receiving TANF cash welfare is kept by the federal government and the states, rather than paid to families.”); WHEATON & SORENSEN, *supra* note 110, at 1 n.1 (noting that, by 2004, twenty-seven states and the District of Columbia had stopped passing-through child support to TANF recipients).

<sup>124</sup> *TANF's Role*, *supra* note 110, at 360; WHEATON & SORENSEN, *supra* note 110, at 1.

<sup>125</sup> *TANF's Role*, *supra* note 110, at 367–69.

<sup>126</sup> Edelman, *supra* note 113, at 130 (advocating that the government reconsider assignment of child support payments); Hatcher, *supra* note 95, at 1075 (noting the societal costs of cost recovery); Murphy, *supra* note 99, at 370–74 (critiquing the cost-recovery role of child support enforcement and citing its negative effect on poor families).

beneficial not only to families but to the state. Pilot projects in Wisconsin and Vermont demonstrate that families fare better financially and that noncustodial parents are more likely to engage positively with their children in a full pass-through regime. First, a greater percentage of fathers make child support payments and at greater amounts when the monies are fully passed through.<sup>127</sup> Second, fathers are less likely to revert to work in the informal economy when monies are passed through, allowing fathers to remain more stable and engaged.<sup>128</sup> Finally, data suggest that the pass-through reduced conflict between parents in some families.<sup>129</sup>

Indeed, research on full pass-throughs also demonstrates that the government benefits from the elimination of the requirement.<sup>130</sup> For example, in Wisconsin, researchers found that there was little cost to the government since the cost of passing through was offset by the increased support paid by the fathers and the reduced TANF use by mothers.<sup>131</sup> The child support payments, logically, allowed mothers to transition off of government support more quickly than when all child support was withheld. Further, the researchers concluded that the full pass-through

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<sup>127</sup> See *TANF's Role*, *supra* note 110, at 358 (asserting that the Vermont data revealed a higher percentage of paying fathers at greater average rates and noting that in Wisconsin “researchers found a substantial difference in payments among parents who were new to the welfare system, and had not paid support under the old rules: among those cases in which the mother had not received AFDC during the prior two years, 58 percent of fathers in the full pass-through group paid child support, compared to only 48 percent of fathers in the partial pass-through group” (footnote omitted)); Garasky et al., *supra* note 99, at 364, 366 (citing a study by the Institute for Research on Poverty to assert that noncustodial parents pay a greater percentage of their child support obligations in families in which child support payments are fully passed through, relative to those in families to whom payment is only partially passed through, and that, generally, pass-throughs are correlated with increased receipt of child support); Turetsky, *supra* note 99, at 409 (noting that, in Wisconsin, researchers determined that 100% pass-through results in more noncustodial parents paying more support and in higher payment amounts); *cf.* Brito, *supra* note 91, at 660 (“[A full pass-through] would remove many more families from poverty.”).

<sup>128</sup> Turetsky, *supra* note 99, at 409. Turetsky also notes that “[i]n addition, there was some evidence of higher informal support payments made by fathers in the full pass-through group, suggesting the formal and informal support are complements rather than substitutes.” *TANF's Role*, *supra* note 110, at 358; *see also* Waller & Plotnick, *supra* note 119, at 97 (“The economic disincentive created by assigning child support rights to the state sometimes leads mothers and fathers to plan cooperative arrangements to circumvent the financial penalty they perceive.”).

<sup>129</sup> Turetsky, *supra* note 99, at 409.

<sup>130</sup> Wheaton and Sorensen assert that if all states merely adopted the pass-throughs under the Deficit Reduction Act of 2005 of \$100 for one child and \$200 child, the pass-throughs would cost the government less than 1% of what it incurs in TANF costs. WHEATON & SORENSEN, *supra* note 110, at 1.

<sup>131</sup> DANIEL R. MEYER & MARIA CANCIAN, 1 W-2 CHILD SUPPORT DEMONSTRATION EVALUATION PHASE 1: FINAL REPORT 61 (Apr. 2001), *available at* <http://www.irp.wisc.edu/research/childsup/csde/publications/phase1/vol1-1a.pdf>; *see also* Turetsky, *supra* note 99, at 409 (“More support paid by noncustodial parents and reduced welfare use by custodial parents offset lost state revenue from retained collections.”).

required less oversight and opined that it was less costly to administer.<sup>132</sup> Finally, research revealed that an additional benefit of the pass-through was an improvement in the culture of the child support office and its relationship with parents, which resulted in a financial benefit. When case managers were not withholding child support payments, they noted that “many custodial parents began to take a more active interest in their child support cases. The increased participation by custodial parents often included efforts to address visitation and other issues regarding their interactions with the noncustodial parents.”<sup>133</sup> Though other jurisdictions may differ from the examples of Wisconsin and Vermont, this research suggests that a full pass-through could result in a net financial benefit to the state.

Eliminating the assignment requirements or even merely passing through child support monies appears to be good policy.<sup>134</sup> Assignment’s goal of reimbursing the government for welfare expenditures has not been met.<sup>135</sup> More experimentation is needed to assess the persuasive findings of Wisconsin and Vermont and to further consider if a full pass-through can help families fight poverty, reduce barriers to paternal engagement, and ultimately eliminate an aspect of the low-income father’s interaction with the legal system that results in alienation rather than engagement.

## 2. The Ban on In-Kind Support Payments

A second aspect of child support law merits consideration from the perspective of both child financial wellbeing and paternal engagement. Child support guidelines currently specify that the payor parent derives no credit for in-kind or informal payments.<sup>136</sup> Informal payments,

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<sup>132</sup> See *TANF’s Role*, *supra* note 110, at 358 (“[T]he full pass-through was considerably easier for the state to administer.”); MEYER & CANCIAN, *supra* note 131, at 61 (asserting that a full pass-through in Wisconsin would result in substantial savings in administrative costs).

<sup>133</sup> Turetsky, *supra* note 99, at 410.

<sup>134</sup> However, full pass-through has the potential to incentivize mothers to stay on TANF for longer than they might otherwise. The opportunity to receive both TANF payments and child support simultaneously reduces incentives to transition from TANF quickly. However, since federal welfare law now imposes lifetime limits on TANF recipients, the government’s total TANF liability is constrained. In addition, Wisconsin and Vermont found that recipients shortened their TANF tenure in a full pass-through regime. See *supra* note 131 and accompanying text.

<sup>135</sup> See generally Hatcher, *supra* note 95, at 1073–74 (examining the economics of cost recovery and concluding that it is “at or below the break-even point”). Hatcher also argues that the additional goals of welfare cost recovery—reducing out-of-wedlock births and increasing paternal responsibility—are not substantially met. *Id.* at 1076–81.

<sup>136</sup> See, e.g., *Stewart v. Rogers*, 2004 MT 138, 92 P.3d 615, 619–20 (affirming trial court ruling that Montana’s child support regulations did not permit the father to receive a credit against his child support arrears for the in-kind contributions he provided for his daughter’s benefit); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor*

constituting mere gifts, cannot defray current or past child support obligations. The ban on in-kind payments reflects child support law's unwavering commitment to enforcing monetary obligations against noncustodial parents. While this goal is laudable in seeking to maximize support for children, this inflexible principle can fortify impediments by stoking parental conflict, incentivizing fathers to flee or enter the underground economy, and reinforcing the message that paternal non-monetary contributions are irrelevant. In the end, it likely deprives children of available support.

Child support enforcement of monetary obligations can create or entrench barriers to visitation by fomenting resentment toward the mother and child, especially when a father has no employment or multiple families to support. Parental conflict can be enhanced by aggressive child support enforcement.<sup>137</sup> Interviews with low-income parents about child support led one researcher to report that “[m]any parents suggest that child support rules can pit mothers against fathers and create or exacerbate conflict in their relationships.”<sup>138</sup>

Further, child support enforcement incentivizes some men to simply disappear to avoid excessive work requirements, repeated court appearances, court oversight, or possible incarceration.<sup>139</sup> Without the means to meet their obligations, low-income men report feeling “in an impossible bind.”<sup>140</sup> In lieu of abandoning their children, some fathers also look to illegal income to allow them to circumvent child support garnishment and retain income for themselves.<sup>141</sup> As reported in one study of low-income men: “[S]ome fathers who reduced their work in the formal economy tried to generate more income in the underground economy through under-the-table jobs, selling drugs, stealing, and

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*Fathers*, 39 U.C. DAVIS L. REV. 991, 1007–08 (2006) (noting that in-kind contributions do not satisfy child support obligations).

<sup>137</sup> See generally SOLOMON-FEARS, *supra* note 113, at 14 (reporting that fathers contend that child support enforcement causes conflict between parents); Lerman, *supra* note 12, at 64 (noting that the relationships between fathers and children often “fray” over child support payments).

<sup>138</sup> Waller & Plotnick, *supra* note 119, at 99.

<sup>139</sup> See Chien-Chung Huang, *Mothers' Reports of Nonresident Fathers' Involvement with Their Children: Revisiting the Relationship Between Child Support Payment and Visitation*, 58 FAM. REL. 54, 56 (2009) (noting that studies have shown that “punitive or aggressive child support enforcement may drive some fathers to totally abandon their children, both financially and emotionally”).

<sup>140</sup> Waller & Plotnick, *supra* note 119, at 103.

<sup>141</sup> See Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 15 AM. J. SOC. 1753, 1781–82 (2010) (“[C]hild support payments impose a debilitating debt [on low-income fathers] that discourages legitimate earnings, which would in many cases be garnished.”); Lerman, *supra* note 12, at 70 (“[R]igorous enforcement by the child support system could cause fathers to shift from the formal to the informal, or underground, work sector, where earnings are more difficult for the government to track.”).

gambling.”<sup>142</sup> Increased illegal activity may induce fathers to create more distance from their children and puts fathers at greater risk of incarceration.

The emphasis on formal monetary support can reinforce the message to fathers that their exclusive value lies in their ability to provide. When a father must explain and answer repeatedly for his inability to meet his obligations, his lack of self-esteem may ultimately drive him away from participating in the lives of his children.<sup>143</sup> One father commented: “They ask fathers why they don’t stay more involved? Well the system, the whole system, says to them, ‘All we need is your money, we don’t need you as a person, all we need is your money.’ They drive you away.”<sup>144</sup> A father interviewed in a separate study said, “[f]athers also come to believe that if they cannot bring cash when they see their child, they should not come at all.”<sup>145</sup>

Loosening the absolute ban on in-kind support payments could serve to reduce barriers to paternal involvement and minimize the impact on noncustodial fathers of the collateral consequences of staggering child support arrears.<sup>146</sup> Guidelines that ease these restrictions for a limited period of time while a father searches for employment and documents his efforts could benefit families and incentivize fathers to be more involved with their children.

Easing the blanket ban on informal and in-kind payments would likely increase support payments by low-income fathers. Fathers express an interest in being able to contribute money when they can and to compensate with other contributions when necessary.<sup>147</sup> Those who have researched fathers’ impressions of the ban on in-kind and informal payments have concluded that fathers resent the restriction. For

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<sup>142</sup> Waller & Plotnick, *supra* note 119, at 104; *see also* Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL’Y 313, 315 (2006) (arguing that the child support system “creates a perverse disincentive to participation in the formal economy”).

<sup>143</sup> Greif et al., *supra* note 16, at 248 (“Men of all races are socialized to be the breadwinner in the family and when their ability to earn an income is placed at risk, their self-esteem can decline.” (citation omitted)). *But see* IRWIN GARFINKEL, *ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY* 133 (1992) (asserting that a father who is excused from child support obligations is accorded little respect by the government and given the message that he cannot contribute meaningfully).

<sup>144</sup> ARENDELL, *supra* note 70, at 83.

<sup>145</sup> Greif et al., *supra* note 16, at 252.

<sup>146</sup> *See generally* EDELMAN, *supra* note 113, at 112 (asserting that mounting arrears are particularly destructive to post-incarcerated men); Cammett, *supra* note 142 (discussing the crippling effects of child support enforcement as they particularly affect fathers who are recently released from incarceration).

<sup>147</sup> SOLOMON-FEARS, *supra* note 113, at 14 (“Not surprisingly, noncustodial parents, especially low-income fathers, prefer informal child support agreements between themselves and the child’s mother wherein they contribute cash support when they can and provide noncash aid such as taking care of the children from time to time and buying food, clothing, presents, etc., as often as they can.”).

example, one study of unmarried fathers in six cities across the country revealed that the majority of fathers “contributed to the support of their children informally. Overall, their preference was to purchase goods and services for their children . . . .”<sup>148</sup> For these fathers, making informal payments allowed them to bestow what they felt was a visible symbol of fatherhood and “tangible and gratifying.”<sup>149</sup> Indeed, in-kind payments may be more prevalent than formal child support payments. One survey concluded that less than half of all custodial parents receive formal child support payments whereas “nearly 60% receive in-kind support of some form.”<sup>150</sup>

Mothers express an interest in informal and in-kind payments because many realize they are more likely to receive such support from struggling low-income fathers and because they are able to bargain with noncustodial fathers as necessary to meet their needs.<sup>151</sup> In-kind payments provide a way for noncustodial fathers to contribute when they are financially unable to meet their formal obligations.<sup>152</sup> When fathers are able to meet their formal obligations, research suggests that in-kind payments do not lower formal child support payments.<sup>153</sup>

Eliminating the ban would likely encourage parental contact and positive father involvement. Generally, research indicates that the formal nature and the amount of child support are far less important to

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<sup>148</sup> MARY ACHATZ & CRYSTAL A. MACALLUM, YOUNG UNWED FATHERS: REPORT FROM THE FIELD 98 (1994), available at <http://www.nationalservicerresources.org/files/r0200-young-unwed-fathers.pdf>.

<sup>149</sup> *Id.*

<sup>150</sup> Garasky et al., *supra* note 99, at 364; Waller & Plotnick, *supra* note 119, at 96 (“[M]any parents believe that formal child support is appropriate only when private agreements cannot be established or maintained or when fathers do not accept their responsibility voluntarily.”).

<sup>151</sup> See Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN’S L.J. 375, 423 (1996) (noting that informal means of support allowed mothers to bargain based on a child’s month-to-month needs and use the threat of the formal system as a bargaining tool); Maldonado, *supra* note 136, at 1009–10 (noting that poor African American mothers recognize informal and in-kind contributions as an important form of support); cf. Hatcher, *supra* note 95, at 1046 (citing that both child support and welfare office case workers report a mother’s fear of losing informal support as a main reason for noncooperation with enforcing child support obligations).

<sup>152</sup> In *The Role of the Father in Child Development*, Michael Lamb urges child support enforcement efforts to differentiate between fathers who are unwilling but able to pay and those who cannot pay:

[M]any fathers who would like to support their children are unable to do so because of their circumstances . . . . Social policies do not distinguish between these groups of men and often fail to nurture the continued investment of fathers who are emotionally attached to their children yet unable to provide for them financially.

Michael E. Lamb, *How Do Fathers Influence Children’s Development? Let Me Count the Ways*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 1, 17 (Michael E. Lamb ed., 5th ed. 2010).

<sup>153</sup> One researcher noted that we cannot say with certainty if higher in-kind contributions lower child support payments, though he notes that prior data suggests that is not the case. Garasky et al., *supra* note 99, at 366.

children's well-being than the act of supporting a child.<sup>154</sup> Since low-income fathers are more likely to pay child support in a less formal manner, support for informal payments enhances the likelihood that children will reap the benefits of paternal support. Further, a recent study analyzing the relationship between child support formal payments, in-kind support, and visitation found the strongest correlation between in-kind payments and visitation.<sup>155</sup> The greater self-esteem associated with the ability to provide for a child may lead a father to seek out additional contact with his child. Mothers may well feel more inclined to facilitate visitation with a father who is contributing in some way. Moreover, the legal preference for wage withholding and automated payments of child support<sup>156</sup> requires formal child support to transfer without contact between the payor and family; whereas in-kind payments generally depend on contact.<sup>157</sup>

Of course, the informality of this arrangement poses risks for the family. For custodial parents, payments might be unreliable and the obligation unenforceable. Further, a mother risks making herself vulnerable to manipulation by the noncustodial parent. Particularly when the family has experienced domestic violence, the potential for coercion is significant. For noncustodial parents, the informality of the agreement creates opportunities for enforcement actions with little opportunity to defend themselves. As such, fathers, too, might end up

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<sup>154</sup> Maldonado, *supra* note 12, at 962 (“[A] number of researchers have suggested that the payment of child support is important in and of itself, independent of the amount.”); *see also* Seltzer et al., *supra* note 99, at 180–81 (“Both the instrumental variables models in the cross-sectional analysis and the longitudinal analysis, in which we take account of fathers’ income and many aspects of the quality of family relationships prior to separation, suggest that requiring fathers to pay at least some child support will increase their involvement with their children.”).

<sup>155</sup> Garasky et al., *supra* note 99, at 384, 389. While Professor Garasky acknowledges earlier studies linking formal child support and visitation, he asserts that that link is weaker than the link between informal child support and nonresident father contact. *Id.* at 390; *see also* Nepomnyaschy & Garfinkel, *supra* note 99, at 108 (concluding that there is a minimal link between child support payments and father-child contact but a stronger link between informal contact and support).

<sup>156</sup> *E.g.*, D.C. CODE § 46-218 (2013); FLA. STAT. § 61.1301 (2013); IND. CODE § 31-16-15-3.5 (2013); MINN. STAT. § 518A.53 (2013); TEX. FAM. CODE ANN. § 158.011 (West 2013) (all jurisdictions provide for automatic enforceability through withholding unless the court finds there is good cause not to require immediate withholding or the parties agree to an alternative method of payment).

<sup>157</sup> *See* Garasky et al., *supra* note 99, at 367 (“Compared to current automated methods for paying child support (e.g., wage withholding), the provision of in-kind support more likely depends upon the father seeing the child.”). *But see* ARENDELL, *supra* note 70, at 89 (“[W]hen child support is withheld automatically from wages, higher amounts are paid.”); Huang, *supra* note 139, at 54 (asserting that automation of child support enhances collection, thereby benefiting mothers: “This [child support] enforcement system, which has shown some success, especially for mothers on welfare, has changed...to one in which payment is usually compelled and automatic.”).

vulnerable to manipulation. Further, the family, in general, might be hurt by this arrangement for it might increase parental conflict.

Finally, and not insignificantly, the government would lose the opportunity to track payments and enforce obligations, which it does to assure noncustodial parents fulfill their obligations to their children who otherwise might depend solely on government benefits.<sup>158</sup> It is, of course, also possible that noncustodial parents would contribute less in-kind or informally than they would be obligated to pay in the formal system.

If carefully drafted and piloted, however, child support provisions permitting in-kind and informal payments under some circumstances could benefit families and avoid some of these pitfalls. First, such a program could be available only on a short-term basis to assist parents who are between jobs but actively engaged in job training or employment seeking. Child support guidelines could permit custodial parents to opt into a scheme whereby informal or in-kind payments would be credited against child support obligations.<sup>159</sup> To guard against manipulation in coercive or violent relationships, legislation could specify that the court would be required to ratify that the agreement was in the best interest of the child and that domestic violence was not present. Parties opting in would need to be fully informed that consent to accepting informal and in-kind payments could be withdrawn at any time by returning to court, and that enforcement would be challenging given the informality of the arrangement. Parents would be strongly advised to keep formal records of payments.

On balance, the risks of informal payments, even on a short-term basis, might outweigh the benefits for some families. However, it is worth experimentation, particularly in families in which the noncustodial parent has no income, because the current alternative is untenable, given the imposition of mounting arrears and their collateral consequences<sup>160</sup> and the realities of children not being supported financially or otherwise by their fathers. Any experimentation should be assessed to determine outcomes, consequences, and the potential for replication. Such a child support regime could not only open avenues to greater monetary and informal support, but it could encourage positive father involvement from a cohort of fathers whose interaction with the legal system seems to alienate rather than encourage them.

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<sup>158</sup> If assignment provisions were eliminated, however, the government would have less interest in the collection of monies.

<sup>159</sup> Of course, monetizing in-kind payments would be extremely challenging and would have to be agreed upon in advance at court through a hearing or mediation. *But see* Maldonado, *supra* note 136, at 1019 (arguing that assigning a monetary value to in-kind contributions is not only possible, but may be advantageous from a feminist perspective of valuing care work).

<sup>160</sup> *See generally* Cammett, *supra* note 142, at 315 (discussing the collateral consequences of child support enforcement, particularly on incarcerated parents).

## B. Court System Responses to Father Engagement

Procedural and programmatic initiatives in domestic relations court could address some of the significant barriers to father presence in low-income families. Specifically, court system responses aimed at reducing conflict between separating parents and proactively resolving structural, role-related, and child support-based barriers could reduce the number of fathers disappearing from the lives of their children after winning custody and visitation. These initiatives range from ambitious restructuring of case-handling procedures to more modest programmatic reforms such as collaborations with outside organizations. As with all reform, each initiative has its benefits and its risks. The analysis below considers the value of such initiatives in courthouse responses to father-absence for parents who seek assistance from the court to adjudicate custody and visitation.

### 1. Procedural Responses

Traditionally, courts hear custody matters in an adversarial setting. At the conclusion of trial, the judge must issue an order which, though it might be based on proposals by the parties, is at the discretion of the judicial officer. As the legal profession reconsiders avenues to justice and fairness, much has been written about the perils of the adversarial system generally.<sup>161</sup> Rules of evidence may impede access to the truth.<sup>162</sup> Conflict between parties who are already prone to animosity is stoked by side-taking and the lack of control parties exert over a judicially-imposed resolution.

Adversarial justice may be particularly poorly suited to family law matters<sup>163</sup> due to the complex and dynamic nature of the problems and solutions and because of the long-term intimate relationship between the parties. When parents separate, mother and father are bound to experience friction. However, when the parties come to court to have their separation overseen and adjudicated by a judge, the court is in a

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<sup>161</sup> See, e.g., Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2255–56 (2001) (noting the impediments to race conscious lawyering in the adversarial criminal justice system); Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 557 (2008) (arguing that the adversarial system is particularly complex for post-conviction defendants who maintain their innocence).

<sup>162</sup> See, e.g., Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 918–19 (2011/2012) (setting forth a “record of failure” of the adversarial system in truth seeking).

<sup>163</sup> See Alice L. Blackwell, *Collaborative Law: A Better Way for Families*, 17 BARRY L. REV. 1, 1 (2011) (asserting that family law cases provoke emotional reactions and consequences that courts are not equipped to handle).

position to minimize or exacerbate that conflict.<sup>164</sup> The procedural initiatives herein—alternative dispute resolution techniques, problem solving courts, and post-resolution status hearings—analyzed from the perspective of impediments to father engagement, could address some of the negative consequences resulting from court system interactions.

a. Alternative Dispute Resolution

In response to the potential for harm posed by the adversarial system, there has been a groundswell of support for alternative dispute resolution approaches in domestic relations courts.<sup>165</sup> With an emphasis on reducing conflict between parties, alternative dispute resolution procedures could be a significant step in reducing court-enhanced barriers to paternal engagement.<sup>166</sup> While there are many forms of alternative dispute resolution strategies, mediation, collaborative law, and restorative justice hold the most promise for these purposes.

Proposing mediation to reduce conflict in family law cases is hardly a novel idea. It has been advocated to improve general outcomes in families for many years;<sup>167</sup> indeed, its use is widespread.<sup>168</sup> However,

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<sup>164</sup> The family court system itself can alienate fathers who perceive the court to be biased against men and demeaning in its public nature. See generally Krista Taylor, Book Note, *Fathers' Rights: Hard-Hitting and Fair Advice for Every Father Involved in a Custody Dispute*, 8 J.L. & FAM. STUD. 167, 170 (2006) (asserting that courts have made custody determinations unevenly and inconsistently and arguing that, just as women have faced bias in the workforce, men have faced bias on the home front); Matthew B. Firing, Note, *In Whose Best Interests? Courts' Failure to Apply State Custodial Laws Equally Amongst Spouses and its Constitutional Implications*, 20 QUINNIPIAC PROB. L.J. 223, 259 (2007) (finding that, in order to resolve the family court bias against males, the "judges, mothers, fathers, and society must work diligently to abolish antiquated gender stereotypes that are no longer relevant"). Procedural changes to adversarial justice discussed herein could also address these concerns.

<sup>165</sup> See generally Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 662 (2008) ("Almost nonexistent in the family courts fifty years ago, mediation has since become the workhorse of family dispute resolution.").

<sup>166</sup> Just as parental conflict is identified as the most significant barrier to father engagement, a positive relationship between parents has been identified as the most highly correlated predictor of paternal involvement. Nancy Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 525 (1996); Maldonado, *supra* note 12, at 979 ("Indeed, the relationship between the parents, rather than the level of paternal involvement or strength of the father-child bond during the marriage, is the strongest predictor of frequent paternal contact after divorce.").

<sup>167</sup> The first mandatory mediation statute was adopted in California in 1981 for contested custody matters. DEP'T OF HEALTH & HUMAN SERVS., CHILD ACCESS AND VISITATION PROGRAMS: PARTICIPANT OUTCOMES 15 (2007) [hereinafter CHILD ACCESS], available at [http://www.acf.hhs.gov/sites/default/files/ocse/dcl\\_07\\_15a.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/dcl_07_15a.pdf); see also Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 692 (1985) (arguing for cooperation between parents as a key to better serving children and arguing for mediation to serve this end).

<sup>168</sup> Some states require that parties attempt to resolve custody conflicts through mediation prior to litigation. See, e.g., ALA. CODE § 6-6-20 (2013); CAL. FAM. CODE § 3170 (West 2013); ME. REV. STAT. tit. 19-A, § 1653(11) (2013); N.M. STAT. ANN. § 40-4-8 (2013); N.C. GEN. STAT. § 50-13.1 (2013); S.D. CODIFIED LAWS § 25-4-56 (2013); TENN. CODE ANN. § 36-4-131 (2013); UTAH CODE ANN. § 30-3-39 (LexisNexis 2013); VA. CODE ANN. § 20-124.4 (2013); W. VA.

mediation services traditionally have been aimed at cases on the divorce docket rather than the custody docket, which includes never-married parents litigating custody and child support.<sup>169</sup> Through the mediation, parties seek to resolve disputes without resorting to an adversarial conflict.<sup>170</sup> Prior to trial, the parties meet privately with a neutral mediator, who attempts to craft a settlement that satisfies both parties such that they are willing to surrender their rights to trial. Though programs vary widely in terms of how extensive the services are, mediation generally includes screening to determine the propriety of mediation<sup>171</sup> and one or more sessions of mediation with both parties present or shuttle mediation, in which one party at a time meets with the mediator.<sup>172</sup>

Collaborative law has gained popularity over the last decade and is designed to reduce conflict and promote cooperation between parties.<sup>173</sup> Its use in family law cases has increased as parents have become more aware of the effects of conflict and court battles on children. Conceptually, collaborative law shares much with mediation. However, in collaborative cases, each party is represented by an attorney and all parties and attorneys agree to seek a resolution in good faith out of court.<sup>174</sup> Attorneys are incentivized to resolve the matter through the collaborative process because they agree that neither attorney may represent the parties in subsequent litigation should the process fail.<sup>175</sup> Under the uniform collaborative law guidelines, parties and attorneys

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CODE § 48-9-202 (2013); WIS. STAT. ANN. § 767.405 (2013); *see also* Van Steegh et al., *supra* note 9, at 959 (discussing the prevalence of mandatory mediation as well as mediation at judicial discretion). Other states encourage mediation. *See, e.g.*, IDAHO CODE ANN. § 32-1402(4) (2013); KAN. STAT. ANN. § 23-3502 (2013); MO. REV. STAT. § 452.600 (2013); *see also* CHILD ACCESS, *supra* note 167, at 5 (stating that as of 2001, forty-six states offered mediation in family law cases).

<sup>169</sup> CHILD ACCESS, *supra* note 167, at 15.

<sup>170</sup> *See id.* at 16–18 (describing sample mediation programs reporting success rates from 60% to 80%); DEP'T OF HEALTH & HUMAN SERVS. OFFICE OF INSPECTOR GEN., EFFECTIVENESS OF ACCESS AND VISITATION GRANT PROGRAMS 1, 7 (Oct. 2002), *available at* <http://oig.hhs.gov/oei/reports/oei-05-02-00300.pdf> (asserting that in a four-state survey, “[i]n 76% of cases, mediation facilitated noncustodial parents’ access rights through the creation of mutually agreed upon visitation plans”).

<sup>171</sup> For example, cases involving domestic violence are considered inappropriate cases for mediation. *See generally* Laurie S. Kohn, *What’s So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 542–48 (2010) (discussing the perils of mediation in domestic violence cases).

<sup>172</sup> *See generally* CHILD ACCESS, *supra* note 167, at 16–18 (providing an overview of several government-funded mediation programs).

<sup>173</sup> *See generally* Prefatory Note to UNIF. COLLABORATIVE LAW ACT (2013).

<sup>174</sup> *See generally id.* However, in 2009, an amendment was passed to the Uniform Collaborative Law Act (UCLA) allowing a lawyer or law firm to continue representation of a low-income client if the collaborative process failed, a practice typically banned by the UCLA as it is normally applied. *Id.* § 10.

<sup>175</sup> Blackwell, *supra* note 163, at 3.

are encouraged to abandon puffery, obfuscation, and misrepresentation in favor of disclosure and honesty.<sup>176</sup> In addition, the collaborative law team includes other professionals focused on effective case resolution such as divorce coaches, a parenting coordinator, and mental health professionals.<sup>177</sup>

A final dispute resolution approach, restorative justice, has been gaining in acceptance in the United States over the last several decades, primarily in the criminal justice arena, and focuses on addressing harms caused by legally actionable behavior by engaging the victims and offenders themselves, as well as the community.<sup>178</sup> By addressing the underlying needs of the parties, restorative justice proponents seek to work outside or alongside the traditional criminal and civil justice system to achieve broader and more flexible resolutions. As an advocate of restorative justice explained, “[a]t its core, [restorative justice] emphasizes interdependence between citizens and families and assumes that all cultures will find this approach more emotionally satisfying than retribution.”<sup>179</sup> Restorative justice proponents also seek to provide a forum that offers more holistic healing than the traditional justice system. Using restorative justice techniques to address child custody disputes is a rare practice in the United States, but it is being employed in a few jurisdictions across the nation and in Canada.<sup>180</sup>

Alternative dispute resolution mechanisms hold the potential to reduce some salient barriers to father-presence. A uniform focus across all three programs on non-adversarial resolution serves the important goal of reducing conflict between separating parents. Because researchers and fathers alike have noted that parental conflict creates a

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<sup>176</sup> *Id.* at 4; UNIF. COLLABORATIVE LAW ACT, § 12.

<sup>177</sup> Blackwell, *supra* note 163, at 3–4; cf. Pauline H. Tesler, *Collaborative Family Law, The New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 87 (noting that there is a spectrum of different but related approaches to collaborative family law, including interdisciplinary and referral models that utilize non-lawyer professionals).

<sup>178</sup> See generally Kohn, *supra* note 171, at 530–40 (providing an overview of the general principles of restorative justice).

<sup>179</sup> Peggy Grauwiler et al., *Justice is in the Design: Creating a Restorative Justice Treatment Model for Domestic Violence*, in FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE: A HANDBOOK OF GENDER-INCLUSIVE THEORY AND TREATMENT 579, 580 (John Hamel & Tonia L. Nicholls eds., 2006) (citing John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999)).

<sup>180</sup> A prominent example is the collaboration between the Cook County court system and a law school legal clinical program. See Illinois State Bar Association, *Restorative Justice Program in Cook County Unique in U.S.*, 16 THE CATALYST, 6–7 (Sept. 2010), available at <http://www.isba.org/sites/default/files/sections/womenandthelaw/newsletter/Women%20and%20the%20Law%20September%202010.pdf>. Further, several counties in Indiana have begun using alternative dispute resolution—a combination of mediation, facilitation, and judicial conferencing—in complex custody cases involving low-income families. See IND. FAMILY COURT PROJECT, FAMILY COURT PROGRAMMING: CASE COORDINATION, NON-ADVERSARIAL DISPUTE RESOLUTION, AND SPECIALIZED SERVICES 37–38 (May 1, 2010), available at <http://www.docstoc.com/docs/36728022/Family-Court-Programming>.

significant impediment to the father-child relationship,<sup>181</sup> a program that reduces the conflict at the critical moment of separation might well ease this barrier. In addition, because these resolution techniques occur outside the courtroom in private settings, parties are less likely to leave humiliated by the revelation of private facts or allegations.

Further, alternative dispute resolution procedures could address structural and role barriers to engaged fathers. Less formal proceedings in varying degrees, all three case resolution strategies permit parties to express concerns, proactively address solutions, and make concrete the abstract nature of relationship dissolution. The parties must play a role in creating a mutually beneficial resolution.

Before embracing alternative approaches, one must consider the limitations of these programs. Alternative dispute resolution is inappropriate for some cases, and should not be mandated in these instances. Any informal case resolution may disadvantage women because women may be less comfortable asserting themselves or exerting power in an informal setting.<sup>182</sup> However, allowing parties to opt in to mediation can relieve some of this challenge;<sup>183</sup> as can providing the opportunity for shuttle negotiations in the context of mediation in which the parties are never simultaneously in the room with the mediator. Inherent coercion, however, can still infect the decision to opt into an informal procedure and the procedure itself.

In addition, all three alternative dispute mechanisms have been deemed inappropriate for cases involving domestic violence because of the frequency of power and control dynamics at play.<sup>184</sup> While some

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<sup>181</sup> See *supra* notes 41–53 and accompanying text.

<sup>182</sup> See Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 1009 (2000) (arguing that even trained mediators may not recognize masculine attempts to control a conversation because they are so commonplace and accepted); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (discussing dangers women face in mandatory mediation settings based on gender norms and societal expectations for women). Scholars have debated this issue and data leaves the issue unresolved. HETHERINGTON & KELLY, *supra* note 26, at 121 (debating concerns that mediation might disadvantage women); Nina W. Tarr, *The Cost to Children when Batterers Misuse Order for Protection Statutes in Child Custody Cases*, 13 S. CAL. REV. L. & WOMEN'S STUD. 35, 76–78 (2003) (providing an overview of the debate amongst scholars about the propriety of mediation in cases involving domestic violence); Ver Steegh et al., *supra* note 9, at 968–77 (affirming the propriety of the use of mediation in domestic violence cases but discussing the factors to consider in a specific case involving intimate partner violence before doing so).

<sup>183</sup> But see CHILD ACCESS, *supra* note 167, at 80 (advocating for mandatory mediation to target high-conflict families who may not be open to mediation even though mediation agreement rates and satisfaction levels were higher in their study for those who participated on a voluntary basis).

<sup>184</sup> See UNIF. COLLABORATIVE LAW ACT § 15(a) (2013) (before a prospective client signs a participation agreement, a collaborative lawyer has the responsibility to make “reasonable inquiry” into whether or not a coercive or violent relationship exists); Marjory D. Fields, *Criminal Justice Responses to Violence Against Women*, in PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE 199, 203 (Antony Duff et al. eds., 1994);

scholars now argue that informal case resolutions can be handled in a way that does not disadvantage a domestic violence victim or put her at risk,<sup>185</sup> it is clear that, at a minimum, safeguards such as effective screening and intervention for danger and coercion must be implemented.

All three procedures can also be cost-limiting or even cost-prohibitive. For example, traditional private mediation—with mediators in one California county, for example, charging between \$150 and \$500 per hour<sup>186</sup>—is out of reach of low-income litigants. Due to the many professionals involved and the risk of duplication if negotiations fail, collaborative law can also be extremely expensive.<sup>187</sup> As such, low-income families rarely access collaborative law resolutions.

However, models for making alternative dispute resolution techniques available at little or no cost to low-income individuals have been increasing nationwide. For example, mediation has become accessible to low-income parties and offered free of charge to parties

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Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 42, 51 (Heather Strang & John Braithwaite eds., 2002) (asserting that the restorative justice goals of apology and reparation do not fully address the safety goals of domestic violence victims); Jean Ferguson, *Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation*, 4 AM. U. CRIM. L. BRIEF 3, 16 (2009) (noting that the face-to-face method of many restorative justice techniques can create opportunities for further acts of violence, contribute to the existing imbalance of power, and threaten a victim's feeling of safety when used in a domestic violence relationship); Stephen Hooper & Ruth Busch, *Domestic Violence and Restorative Justice Initiatives: The Risk of a New Panacea*, 4 WAIKATO L. REV. 101 (1996) (asserting that mediation should be used for domestic violence only in rare cases); Tarr, *supra* note 182, at 65 (noting that mediation can become an additional means of abuse and intimidation).

<sup>185</sup> See, e.g., Mary Adkins, *Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22 YALE J.L. & FEMINISM 97, 107–10 (2010) (arguing that the trend in court mediation to follow an evaluative approach lessens the risk of coercion and manipulation in cases of domestic abuse); Kohn, *supra* note 171, at 555–61; Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 159, 204 (2003) (advocating that mediation should be offered as an option in domestic abuse situations because different relationships may require different approaches).

<sup>186</sup> In Riverside County, California's fourth most populous county, the average hourly cost of mediation is between \$150–\$500 per hour. *Family Law Private Mediation – Frequently Asked Questions*, SUPERIOR CT. CAL., COUNTY RIVERSIDE, [http://www.riverside.courts.ca.gov/adr/famlaw\\_pmfqs.shtml#howmuchdoespmcost](http://www.riverside.courts.ca.gov/adr/famlaw_pmfqs.shtml#howmuchdoespmcost) (last visited Aug. 24, 2013). In Minnesota, the cost of mediation appears to be between \$140–\$400 per hour. Jason Kohlmeyer, *Costs Involved in Minnesota Child Custody Litigation*, ROSENGREN KOHLMAYER (Oct. 24, 2011), <http://mankatofamilylaw.com/2011/10/24/costs-involved-in-minnesota-child-custody-litigation>.

<sup>187</sup> See generally Patrick Foran, Note, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 793 (2009) (citing studies that place the cost of a collaborative divorce between \$6,000 and \$19,723, with one study stating that the average cost of a collaborative divorce is \$8,777).

through some court systems.<sup>188</sup> Some of the benefits of formal mediation can also be offered in a more modest format that involves volunteer attorneys or law students.<sup>189</sup>

Similarly, collaborative law initiatives designed for low-income clients have begun to appear across the country.<sup>190</sup> Logically, if alternative dispute resolution procedures increase compliance and decrease barriers to paternal engagement, in the long run, they will reduce the burden on the court system of processing, enforcement, and modification cases. More successful case outcomes, compliance, and paternal engagement will reduce the government's expenditures in supporting children whose fathers have disappeared.

Despite their limitations, each of these procedures has already displayed some promise of delivering on their goals. Mediation in family law cases has been shown to reduce conflict and raise satisfaction levels with case outcomes.<sup>191</sup> Studies indicate that mediation yields high rates

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<sup>188</sup> See, e.g., CHILD ACCESS, *supra* note 167 (analyzing data regarding court-based mediation programs); Multi-Door Dispute Resolution Division, D.C. COURTS, [http://www.dccourts.gov/internet/superior/org\\_multidoor/main.jsf](http://www.dccourts.gov/internet/superior/org_multidoor/main.jsf) (last visited Oct. 28, 2012) (providing an overview of family law mediation provided by D.C. Superior Court).

<sup>189</sup> For example, in the District of Columbia, the Superior Court and the local Bar Association have collaborated on a program that trains and places volunteer attorney-negotiators in domestic relations courtrooms. The volunteers screen for appropriate cases and attempt to resolve those cases through mediation on the day of the scheduled hearing. The goal of the program is to help litigants resolve as many issues as possible, thereby reducing court involvement and giving litigants more control over their cases. Most mediations last twenty to thirty minutes, but some are more complicated or more entrenched and require up to an hour. E-mail from Meg McKinney, Partner at Delaney, McKinney LLP to author (Nov. 1, 2012) (on file with author). More complex or high conflict cases are referred for long-term mediation through the court's Multi-Door Mediation Program, which is also provided free of cost and involves multiple sessions to resolve more complex disputes. See *Multi-Door Dispute Resolution Division*, *supra* note 188 (providing an overview of family law mediation provided by D.C. Superior Court).

<sup>190</sup> See, e.g., MID-SHORE PRO BONO, INC., MID-SHORE PRO BONO ANNUAL REPORT: FISCAL YEAR 2012, available at [http://midshoreprobono.org/Portals/8/MSPB\\_AnnRept2012\\_v7\\_Pages.pdf](http://midshoreprobono.org/Portals/8/MSPB_AnnRept2012_v7_Pages.pdf) (describing a Maryland program offering pro bono and reduced fee collaborative law representation); Kimberly C. Emery, *Assisting Indigent Families in Conflict: A Pro Bono Test Drive for a Family Alternative Dispute Resolution (ADR) Clinic*, 34 WASH. U. J.L. & POL'Y 239 (2010) (describing the Family Alternate Dispute Resolution Clinic at the University of Virginia, which uses mediation and collaborative law to provide pro bono family law dispute resolution services); Jason Brown, *What Is an FENE . . . And Why Do They Work?*, MINN. FAM. L. BLOG (Apr. 20, 2012), <http://www.mnfamilylawblog.com/2012/04/20/hello-world> (noting that several Minnesota jurisdictions have implemented a free program into their divorce proceedings that incorporates collaborative principles); E-mail from Erin Carter Golding to author (June 7, 2012) (on file with author) (explaining that the Collaborative Project of D.C. will be opening in D.C.); COLLABORATIVE PROJECT OF MD., <http://cpcp-md.org> (last visited Oct. 24, 2012) (offering pro bono or reduced fee collaborative law services for family law cases).

<sup>191</sup> See, e.g., Beck & Sales, *supra* note 182, at 1029 (comparing the 60% to 80% likelihood of satisfaction for mediation clients to the 30% to 50% likelihood of satisfaction for litigants); Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 28 (2005) (citing studies showing parents more satisfied with mediation than adversarial settlement); Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 887 (1998) ("Parties

of settlement—between 50% and 85%.<sup>192</sup> Further, studies that have looked specifically at mediation's outcomes for family dissolution have found mediation to be extremely successful at minimizing conflict and maximizing visitation.<sup>193</sup> One of the most significant longitudinal studies of mediation found that after twelve years, the families randomly assigned to mediation to resolve the family dissolution—as opposed to litigation—reported more frequent visitation, that the children were more likely to know when the next visitation would take place, and that there was increased communication between parents than in the litigation group.<sup>194</sup> The study also concluded that after twelve years, the parents who resolved their dispute through mediation communicated more frequently and reported higher levels of cooperation and less conflict between parents.<sup>195</sup> This study's findings were consistent with earlier findings that parents who mediated reported higher levels of mutual support<sup>196</sup> and increased visitation.<sup>197</sup> Because collaborative law

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consistently report high levels of satisfaction with mediation.”); see also David A. Sbarra & Robert E. Emery, *Deeper Into Divorce: Using Actor-Partner Analyses to Explore Systemic Differences in Coparenting Conflict Following Custody Dispute Resolution*, 22 J. FAM. PSYCHOL. 144, 150 (2008) (concluding that coparenting conflict decreased for parents who underwent mediation and increased for litigating parents). A relatively recent study of mediation services funded by the federal government concluded that never-married parents, who are disproportionately low-income parents, yield more successful outcome measures than married parents from interventions in custody and support cases, including greater noncustodial parent-child contact. CHILD ACCESS, *supra* note 167, at 79–80. Men, in particular, have reported a preference for mediation as compared with the adversarial process. See Beck & Sales, *supra* note 182, at 1037 (citing studies that illustrate that fathers consistently prefer mediation to litigation in child custody cases); Emery et al., *supra* note 191, at 28 (noting that fathers felt mediation gave them more of a “voice” in the child custody process). Parties generally report that they feel increased control over the process and that their voices are heard and relevant to the outcome. See Guthrie & Levin, *supra* note 191, at 891 (citing research concluding that parties value the feeling of control in mediation because parties meaningfully participate in the process); see also Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversation with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 652 (recognizing the importance of the perceived procedural justice of mediation for inexperienced disputants, which makes disputants feel that they “deserve to be heard”).

<sup>192</sup> HETHERINGTON & KELLY, *supra* note 26, at 138; see also Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, 24 CONFLICT RESOL. Q. 3, 11 (1989) (comparing the 77% of assigned mediation cases that settled to the 31% of assigned adversary settlement cases that settled out of court); Emery et al., *supra* note 191, at 26 (concluding that cases randomly assigned to continue adversarial settlement instead of mediation were seven times more likely to be settled in court).

<sup>193</sup> See generally DEP'T OF HEALTH & HUMAN SERVS. OFFICE OF INSPECTOR GEN., *supra* note 170, at 2 (analyzing data from four states and concluding, “[o]ur data show a potential relationship between participation in mediation programs funded by the Access and Visitation grant and increased access rights, increased visits, and improved child support payment compliance”).

<sup>194</sup> Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Co-Parenting 12 Years After Initial Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323, 326 (2001); see also Amato et al., *supra* note 12, at 51 (discussing the results of the Emery study).

<sup>195</sup> Emery et al., *supra* note 194, at 327.

<sup>196</sup> Andrew J. Bickerdike & Lyn Littlefield, *Divorce Adjustment and Mediation: Theoretically Grounded Process Research*, 18 MEDIATION Q. 181, 190–98 (2000).

and restorative justice are newer additions to the menu of alternative dispute resolution mechanisms, their success has not been tested on a wide scale;<sup>198</sup> however, the only study of restorative justice used in a family law context suggests it has the potential for success.<sup>199</sup>

In the end, more widespread access to alternative dispute resolution mechanisms could assist low-income parents and their children by providing them with less adversarial and more cooperative and sustainable resolutions to their custody and child support disputes.

#### b. Problem-Solving Courts

Problem-solving courts are an additional procedural response to some of the barriers to paternal engagement that are exacerbated by court involvement. Barriers to paternal involvement rarely surface overtly in an adversarial trial. Instead, they are more likely to arise post-adjudication as a result of trial or of the logistics of implementing a parenting plan. In the context of a traditional adversarial trial, the judge is unlikely to explore possible barriers to success or to consider the case in a contextual fashion. To reduce conflict and to proactively address logistical and role barriers that inhibit paternal involvement, courts with a problem-solving approach to divorce, custody, and child support could play a significant role in solidifying stable and functional post-dissolution families.

Problem-solving courts seek to create and apply collaborative and holistic responses to chronic problems that have proven resistant to conventional legal solutions.<sup>200</sup> Therapeutic courts seek to encourage

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<sup>197</sup> One wide-scale study found that, after mediation, the proportion of noncustodial parents reporting that they saw their children as often as they were permitted to rose from 37% to 59%. CHILD ACCESS, *supra* note 167, at 51. Another analysis of mediation in four states concluded, “[i]n the 6 months prior to the agreement, only 20% of CPs [custodial parents] and 26% of NCPs [noncustodial parents] reported that NCP visits were regularly scheduled. These percentages increased to 44% and 57%, respectively, for our survey respondents in the 6 months after reaching the mediation agreement.” DEP’T OF HEALTH & HUMAN SERVS. OFFICE OF INSPECTOR GEN., *supra* note 170, at 11.

<sup>198</sup> However, data on settlement success is very positive. 86% of all reported collaborative cases settled with an agreement on all issues. LINDA K. WRAY, INT’L ACAD. OF COLLABORATIVE PROF’LS, RESEARCH REGARDING COLLABORATIVE PRACTICE: BASIC FINDINGS 6 (Aug. 26, 2011), available at <http://www.collaborativepractice.com/lib/PDFs/2011-08-26-CollaborativePracticeReport-shortversion.pdf>.

<sup>199</sup> None of the participants in Illinois’s restorative justice program in Cook County for custody and divorce returned to court for enforcement between 2008 and 2010, when the program was studied. *Restorative Justice Program in Cook County Unique in U.S.*, *supra* note 180, at 6. While the program was limited in scope and the reasons the parties failed to return for enforcement could include lack of faith in the system or apathy, rather than satisfaction, this data holds some promise.

<sup>200</sup> See John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 282 (2000) (describing the collaborative approach utilized by judges, lawyers, and service providers in New York’s problem-solving drug courts); *Problem-Solving Justice*, CENTER FOR CT. INNOVATION, <http://www.courtinnovation.org/research/problem-solving-principles?url=research%2F11%2Farticle&mode=11&type=article> (last visited

future law-abiding behavior, ensure community well-being,<sup>201</sup> and address gaps in the legal system by making both courts and defendants more accountable.<sup>202</sup> Problem-solving courts are distinguishable from traditional courts in that they involve collaboration between the court, social services, and litigants. Further, judges take a proactive role in solving underlying family problems on the path to resolving legal issues.<sup>203</sup>

Custody, divorce, and child support cases lend themselves well to a problem-solving approach. These cases generally involve complex parental relationships, long-term risks of conflict between parents, logistical challenges of sharing child custody, a range of possible barriers to low-income parents, and the particular challenges of child support enforcement for financially-strapped fathers. A problem-solving model could address a range of barriers identified as impediments to engaged fatherhood. Problem-solving courts seek to reduce conflict and focus instead on effective resolution. Further, problem-solving courts proactively address barriers and engage litigants and concerned parties in brainstorming successful solutions. Therefore, structural barriers to visitation and custody, as well as role ambiguity and role incompetence, could be addressed in a problem-solving court. Partnerships with resource providers could provide fathers with the support they need to meet their obligations and simultaneously engage positively and consistently with their children.

One model program suggests that a problem-solving court would be successful in meeting these goals. The District of Columbia's Superior Court's Fathering Court Initiative (hereinafter "Fathering Court") provides a problem-solving approach focused not solely on how to maximize child support payments—as a court handling child support matters generally would—but on "the noncustodial parent's ability to provide meaningful monetary support . . . [and] balanc[ing] the need for monetary support with the many other issues necessary to promote co-parenting."<sup>204</sup> The program features a collaboration between the

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Aug. 25, 2013) (examining various shared principles of problem-solving courts, including collaborative responses by members of the legal community).

<sup>201</sup> Feinblatt et al., *supra* note 200, at 282 ("Problem-solving courts broaden the focus of legal proceedings . . . to chang[e] the future behavior of litigants (and the future well-being of communities).").

<sup>202</sup> See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 126 (2001), available at [http://www.courtinnovation.org/pdf/prob\\_solv\\_courts.pdf](http://www.courtinnovation.org/pdf/prob_solv_courts.pdf) (asserting that problem-solving courts are more accountable and responsible to "citizens who use courts every day, either as victims, jurors, witnesses, litigants or defendants"); *Problem-Solving Justice*, *supra* note 200.

<sup>203</sup> See generally Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57 (2005) (providing an overview of the principles behind problem-solving courts); Lee, *supra* note 78, at 25 (discussing the philosophy of problem-solving courts).

<sup>204</sup> Lee, *supra* note 78, at 25. Though the program initially sought to focus on the general

court, private sector partners, and the many state agencies that can play a role in supporting the noncustodial father's efforts to meet his child support obligations and maintain a relationship with his children.<sup>205</sup> The program acknowledges that some fathers need more than a court order to meet their support obligations and to maintain relationships with often estranged children. The various partners assist fathers with job training and placement, budgeting, and parenting skills. Each program participant must enroll in a fathering curriculum focused on the role and importance of a father.<sup>206</sup> An additional aspect of the program even facilitates the father's relationship with his children and their mother by offering all participants regular outings to events such as the circus and baseball games.<sup>207</sup>

Problem-solving courts also have their limitations. Problem-solving courts necessitate extensive court involvement. Multiple court hearings, court oversight, and mandatory referrals are necessary to allow the court to play the constructive role expected of problem-solving courts. For low-income litigants, who often experience extensive government intrusion related to public benefits, such involvement may be unwanted and may interfere too severely with a litigant's work obligations. For this reason, and because problem-solving courts require a longer-term commitment and a certain level of cooperation from the litigants, any problem-solving court handling custody and child support should require express, informed opting in by the parties.<sup>208</sup>

Further, problem-solving courts, with their intensive team approach, can sap judicial resources. However, although problem-solving courts likely require more judicial attention, costs need not be prohibitive, particularly considering the probable cost-saving effects.

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population owing child support obligations, grant funding dictated that the program offer services only to recently released offenders owing child support arrears. *Id.* at 25–26.

<sup>205</sup> These organizations include the Government's child support enforcement agency, its probation office, the Department of Human Services, the Department of Employment Services, and the Criminal Justice Coordinating Council. *Id.* at 25.

<sup>206</sup> *Id.* at 26–27.

<sup>207</sup> Judge Milton Lee, who founded the program, reports that “[s]uch events . . . have produced increased communication between parents on child-related issues and allow both parents to experience their children in a setting designed to promote family bonding.” *Id.* at 28.

<sup>208</sup> In addition, problem-solving court models have provoked resistance in that they reduce the procedural safeguards of adversarial justice. See Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349, 1364 (2011) (citing interviews with defense attorneys who spoke of “the danger of the wholesale waiver of procedural rights, the lost opportunity to challenge the charges by any and all means, and the abandonment of traditional safeguards for what they viewed as an unproven product”). As such, problem-solving courts may disadvantage pro se litigants and those with less social capital; cf. Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 113, 129 (2010) (arguing that, although attorneys feel pressure to conform to judicial pressure in problem-solving courts, counsel remains important at crucial decision-making points so that a client does not make “a bargain beyond her capacity to comprehend the risk”).

Judge Lee explains that the Fathering Court, for example, requires limited expenditures since all partnering programs preexisted the establishment of the court.<sup>209</sup> He notes:

In addition, the use of a problem-solving approach does not even begin to account for the cost savings associated with the endless enforcement process, incarceration for contempt for failure to pay support, and administrative efforts directed toward locating and seizing assets. Moreover, as local jurisdictions struggle with the implementation of TANF back-to-work programs, the proven benefits of a problem-solving approach would be a new asset in reducing reliance on government-sponsored benefits used to raise children.<sup>210</sup>

Finally, because problem-solving courts are resource-intensive, their benefits have limited reach. For example, between its inception in 2008 and June 2012, the Fathering Court processed approximately sixty cases.<sup>211</sup> Its limited scope, however, should not completely negate the positive potential of problem-solving courts to reduce barriers to low-income father presence through the holistic handling of cases involving complex family dynamics. Because not all custody cases are appropriate for a problem-solving approach, such a program could complement other procedural initiatives directed at fostering healthy, engaged families.

### c. Post-Resolution Status Hearings

In many ways, court adjudication of custody and visitation is the first step in the next phase of a family's future.<sup>212</sup> The adjudication might determine primary legal and physical custody, set forth a schedule for visitation, declare the venue for transfer of the children, and establish a required child support payment, but as discussed above, most custody orders are silent about the details such as what happens when one party is sick, if the parent with a child support obligation cannot make payments, or if the children refuse to visit with their noncustodial parent.<sup>213</sup> It is these details and contingencies that can, especially when parties cannot communicate effectively, destroy a parenting plan and cause turmoil in the home. For this reason, ongoing court contact may be critical for some families.

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<sup>209</sup> Lee, *supra* note 78, at 28. Only the private contract with a job training organization and the overhead of family outings are direct costs to the program. *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Courtland Milloy, *Fathering Court Provides Support and Perhaps 'A Little Push'*, WASH. POST, June 18, 2012, at B3.

<sup>212</sup> See generally Schepard, *supra* note 167, at 692 ("Society must view a custody dispute as a phase in the judicially supervised reorganization of the family.").

<sup>213</sup> See *supra* Part II.C.1.

Short of a wholesale transformation into a problem-solving court, a traditional domestic relations court could reap some of the problem-solving benefits by implementing regular post-resolution status hearings. At such hearings, the parties would be expected to report on compliance, assess their satisfaction with the parenting plan, and raise any perceived challenges to effective co-parenting that have become clear after several months of living with a court order. Such status hearings would offer the judge the opportunity to resolve conflicts and adjust any orders with the consent of the parties.

Again, like other procedural reforms discussed, such hearings would assist in reducing structural and role barriers to paternal engagement. Before impediments to the father-child relationship become entrenched in the post-dissolution family, a status hearing could address the impediments and assist the parties in resolving them.

Of course, such status hearings may, in high conflict cases, only aggravate the conflict and encourage ongoing litigation. However, after the first status hearing, the judge could have the discretion to cease future hearings or refer the parties for other services. Further, like the procedure of a problem-solving court, requiring that parties return to court creates ongoing judicial intrusions and could put a burden on parties who must negotiate work responsibilities with court attendance. Courts, however, could schedule one status hearing, which would be a minimal intrusion, after resolution to identify any issues that have arisen or to merely close the case.

Although a post-resolution status hearing may offer the most limited benefits in reducing court-enhanced impediments to engaged fatherhood, its adoption as a mandatory procedure could assist families who leave court with unworkable, impractical, or ambiguous orders.

## 2. Programmatic Responses

In addition to procedural responses, or in lieu of them, jurisdictions could reap some of the benefits of holistic case adjudication aimed at removing barriers to fathers by making referrals to, establishing within the court, or partnering with support programs. Parenting programs, parenting coordination, and visitation support can all proactively address the interpersonal, logistical, and role barriers that interfere with engaged paternal relationships. Such programs are not necessarily utilized for this population of families at risk of father-absence. While the programs exist in varying degrees nationwide, making them more universal and considering them as part of a cadre of intervention strategies to deploy for families at risk of father-absence would help minimize the ill effects of court system intervention during family dissolution.

a. Parenting Programs

Efforts to minimize conflict and the negative consequences of family dissolution on children have included court-based parent education programs designed to inform both parents about the ways to minimize the impact of parental separation. These programs vary by jurisdiction. Some programs are mandatory, while others are not. In addition, some include a companion curriculum for children.<sup>214</sup> Most curricula focus on how to reduce acrimony in separation and how to negotiate time and responsibility without involving the children to their detriment.<sup>215</sup>

Though parents may disagree on their willingness to attend parent education programs and their feelings about the court mandating attendance as a precondition to docketing the case for a hearing, data indicate high levels of satisfaction with the programs.<sup>216</sup> For example, a study of a mandatory program illustrated that that 56% of parents were resentful about having to attend; but that 93% still rated the program worthwhile and 90% stated that the program would strengthen their efforts to cooperate and work well with the other parent.<sup>217</sup> Though requiring parents to attend parent education programs reflects an additional—and often unwanted—intrusion, studies suggest that programs are more successful when attendance is mandatory and when the course is offered at the inception of the family dissolution process.<sup>218</sup> Indeed, one recent large-scale study found that 70% of participants in a range of parent education programs favored mandatory attendance.<sup>219</sup>

In addition, courts can affiliate with or refer litigants to parenting programs that assist fathers in understanding their role and acquiring

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<sup>214</sup> See, e.g., MEGAN KUHFIELD ET AL., AM. PSYCHOLOGICAL ASS'N PRACTICE ORG., PRACTICE UPDATE: THE PROGRAM FOR AGREEMENT AND COOPERATION IN CONTESTED CUSTODY CASES 2007-2009 IMPLEMENTATION AND OUTCOMES EVALUATION REPORT 4 (2009), available at <http://www.apapracticecentral.org/update/2009/11-23/pac-summary.pdf> (reporting that the average age of children who participated in the District of Columbia parent and child education program was 9.7 years old).

<sup>215</sup> See CHILD ACCESS, *supra* note 167, at 18–21 (providing an overview of parent education programs and spotlighting several programs in their study that stress conflict-resolution skills).

<sup>216</sup> See *id.* at 18–19 (reporting that most parents in their study who attended programs report being satisfied and that they use information learned in sessions in their parenting); CROWLEY, *supra* note 27, at 182 (providing an overview of the outcome measures for parent education programs nationally); HETHERINGTON & KELLY, *supra* note 26, at 117 (describing the successful use of behavior modification programs for newly divorced women).

<sup>217</sup> Jeffrey T. Cookston et al., *Prospects for Expanded Parent Education Services for Divorcing Families with Children*, 40 FAM. CT. REV. 189, 189 (2002) (citing K. LOVERIDGE, STATEWIDE MANDATORY DIVORCE EDUCATION PROGRAM EVALUATION RESULTS (1995) (on file with Utah Administrative Office of the Courts)).

<sup>218</sup> MINN. SUPREME COURT, ADVISORY TASK FORCE ON VISITATION AND CHILD SUPPORT ENFORCEMENT: FINAL REPORT, C1-95-2120 53-55 (1997), available at [http://www.mncourts.gov/Documents/0/Public/Court\\_Information\\_Office/Advisory\\_Task\\_Force\\_on\\_Visitation\\_and\\_Child\\_Support\\_Enforcement\\_1997.pdf](http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Advisory_Task_Force_on_Visitation_and_Child_Support_Enforcement_1997.pdf).

<sup>219</sup> CHILD ACCESS, *supra* note 167, at 18.

basic parenting skills—the absence of which impedes visitation.<sup>220</sup> Particularly in low-income communities where multiple generations of father-absence is not uncommon,<sup>221</sup> parenting skills classes can help overcome fathers' feelings of incompetence.<sup>222</sup> At a moment in which the state is already involved with the family—dissolution—a skills training class can assist fathers in filling gaps and support their efforts.<sup>223</sup>

These programs are not scarce,<sup>224</sup> but are certainly not universal. Their success depends on their quality and level of attendance. While mandating that all nonresident parents attend parenting skills would likely amount to an overbroad intrusion, judges could consider the parent's history of involvement and assess whether the program is necessary or would be helpful in engaging a parent who is at risk of disappearance.

#### b. Parenting Coordinators

Parenting coordinators, who can intervene during the adjudicatory or post-adjudicatory phase of a custody case, address the day-to-day issues high-conflict families experience in enacting their parenting plans.<sup>225</sup> With expertise in family dynamics, parenting coordinators can assist the court in determining appropriate parenting plans and later in mediating and resolving disputes, educating parents, and enforcing and modifying that plan when needed. Parenting coordinators can provide individualized case management.<sup>226</sup> A parenting coordinator can offer

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<sup>220</sup> Madden-Derdich & Leonard, *supra* note 51, at 313, 317.

<sup>221</sup> Greif et al., *supra* note 16, at 252; *see also* Lee, *supra* note 78, at 27.

<sup>222</sup> Judge Lee comments of the men in his Fathering Court:

Most were raised without a responsible fatherhood role model. Many became young fathers themselves and believed that being a father was nothing more than what they had experienced during their upbringing: a part-time figure that made no real contribution to their rearing . . . [M]ost participants were ashamed of their behavior and wanted to do better but simply did not grasp the significance of parental obligations. They wanted to be good fathers but needed help learning how to become responsible fathers.

Lee, *supra* note 78, at 27.

<sup>223</sup> Dowd writes that parenting education “can be especially effective at childbirth and divorce, two places where the state already is significantly involved in the family and where men have demonstrated strong interest and commitment to fathering.” Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 137 (2003).

<sup>224</sup> *See* CHILD ACCESS, *supra* note 167, at 5 (reporting that forty-six states offer some sort of education to parents who are litigating custody); Amato et al., *supra* note 12, at 51 (asserting that “half of all family courts mandate parent education”); Stark, *supra* note 83, at 297 (asserting that post-divorce nurturing skills classes had been instituted in more than 600 counties by 1997).

<sup>225</sup> *See* Barbara Ann Bartlett, *Parenting Coordination: A New Tool for Assisting High-Conflict Families*, 75 OKLA. B.J. 453, 453 (2004) (discussing the role of parent coordinators).

<sup>226</sup> *See id.* (providing an overview of the services of parenting coordinators); AM.

high-conflict families quick access to a decision maker who can help resolve daily conflicts.<sup>227</sup> In some states, the parenting coordinator's recommendation is binding upon the parties until vacated or modified by the court;<sup>228</sup> in other jurisdictions, the coordinator merely makes recommendations to the court.

Providing more universal access to parenting coordinators could have a significant effect on dissolving barriers to paternal engagement—especially logistical and role barriers that may not have been transparent to the court or even to the parties during the case. An experienced professional tasked with monitoring the effectiveness of the parenting plan may well be able to intervene before fathers have irretrievably disappeared. Parenting coordination provided during case resolution or post-resolution would assist the court and parents in proactively identifying and resolving barriers to a successful custody resolution.

A parenting coordinator, who has expertise in family dynamics, could assist the parties in anticipating and resolving complications. Parenting coordination, however, can be expensive when it is not subsidized by the court or provided by volunteers.<sup>229</sup> Parenting coordination requires the cooperation of both parents; therefore, its potential for success may be limited for the very families that most need its services.

There is limited data providing insight to the success of parenting coordinators. However, several jurisdictions that have evaluated their programs have found promising results. For example, the District of Columbia<sup>230</sup> found that through a court-sponsored parent coordinator program, couples with higher than average levels of acrimony at the

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PSYCHOLOGICAL ASS'N, THE PARENTING COORDINATION (PC) PROJECT IMPLEMENTATION AND OUTCOMES STUDY REPORT 5–6 (Feb. 26, 2010) [hereinafter PC PROJECT REPORT], available at <http://www.apapracticecentral.org/update/2010/04-29/pc-report.pdf> (discussing the role of parenting coordinators).

<sup>227</sup> Although they are usually appointed by the court and with the consent of the parents, parents may also volunteer to use a parenting coordinator's services. See generally *Frequently Asked Questions*, PARENTING COORDINATION CTR. (2013), <http://www.parentingcoordinationcentral.com/FAQ.html> (discussing the appointment of parenting coordinators).

<sup>228</sup> Daniel Pollack & Susan Mason, *Mandatory Visitation: In the Best Interest of the Child*, 42 FAM. CT. REV. 74, 79–80 (2004).

<sup>229</sup> Several states have codified the use of parenting coordinators. See, e.g., COLO. REV. STAT. § 14-10-128.1 (2013); FLA. STAT. § 61.125 (2013); IDAHO CODE ANN. § 32-717D (2013); LA. REV. STAT. ANN. § 9:358.1 (2012); MINN. STAT. § 518.1751 (2013); N.C. GEN. STAT. § 50-91 (2013); OKLA. STAT. tit. 43, § 120.3 (2013); OR. REV. STAT. § 107.425(3)(a)(D) (2013); TEX. FAM. CODE ANN. § 153.605 (West 2013).

<sup>230</sup> In 2004, the District of Columbia Bar Association launched a parenting coordination program for low-income high-conflict families experiencing dissolution in collaboration with the court and several other partners, including the American Psychological Association and Argosy University. PC PROJECT REPORT, *supra* note 226, at 5. D.C. Superior Court undertook full funding of the project in 2009. *Id.* at 3. Services, which last an average of eighteen months, are offered free of charge to low-income families. *Id.* at 40.

start of the program reported a decrease after the program had concluded.<sup>231</sup> The study also confirmed that levels of parental alliance increased during the program.<sup>232</sup> Studies in Florida, Washington D.C., and California all concluded that those cases involving parent coordinators required fewer court hearings and involved fewer motions for contempt while the parties were working with parent coordinators than before their involvement.<sup>233</sup>

### c. Visitation and Access Centers

Finally, courts can support or sponsor visitation centers to provide a monitored, appropriate venue for short visits. Because pick up and drop off of children can be staggered, monitored, or both, conflict between parents is less likely to erupt during transitions.<sup>234</sup> At visitation centers, parents can visit with their children in child-centered play spaces for up to several hours. Staff monitors visitation to ensure everyone remains safe and keeps track of attendance for the court.<sup>235</sup>

Visitation centers can alleviate the logistical barrier of where visitation will take place for fathers who may not have appropriate housing. When visitation centers are located in low-income neighborhoods, fathers can take advantage of visitation even when their transportation options are limited. Use of a center can also reduce conflict, since visitations are monitored and records are kept that reduce disputes about frequency and details of visitation.

At present, visitation centers offer limited assistance in reducing barriers because they are simply not as accessible as necessary. Centers exist in many jurisdictions,<sup>236</sup> but their presence is not universal, and there is often inadequate space at existing facilities.<sup>237</sup> Further, visitation

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<sup>231</sup> *Id.* at 33–34.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 40; Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 247 (2004) (citing an unpublished study that found that the number of total court appearances for 166 cases decreased from 993 to thirty-seven in the year following the parental coordination appointment); Wilma J. Henry et al., *Parenting Coordination and Court Relitigation: A Case Study*, 47 FAM. CT. REV. 682, 686 (2009) (finding that 61.2% of couples decreased in both the total number of motions filed and the total number of child-related motions filed in the year following the designation of a parent coordinator).

<sup>234</sup> See CHILD ACCESS, *supra* note 167, at 22 (explaining that pick-up and drop-off services can allow high-conflict parents to safely transfer children for visitation).

<sup>235</sup> *Id.* (stating that records are maintained and shared with the court).

<sup>236</sup> *Id.* at 5 (reporting that, as of 2001, forty-five states provide some supervised visitation services).

<sup>237</sup> For example, the District of Columbia's court-run Visitation Center has been at full-capacity and has maintained a lengthy waiting list for two years. E-mail from Courtney Hall, Program Coordinator, D.C. Super. Ct. Supervised Visitation Ctr. to author (June 12, 2012) (on file with author) (“The Center has the capacity for four families on each of the weekday evenings we are open and fifteen families each of the weekend days. We are pleased to report that for the past two years, the Center has operated at capacity; in fact, there is a waiting list of families wanting to take advantage of our services.”).

at a center is hardly intimate. Fathers are monitored by staff and may feel inhibited in their ability to engage with their children.<sup>238</sup> However, safe visitation that actually occurs is usually better for children than no visitation and, in the long run, consistent visitation renders it less likely that a father will become completely absent.<sup>239</sup>

The court system plays a central role in the family at a critical moment of family reorganization. It is in the position to influence relationships and trends that could endure far into a child's future. Taking that responsibility seriously mandates consideration of the overt and covert effects of court action. The court system's effects on low-income positive paternal involvement could be significant. Programs and procedures that enhance conflict or fail to promote realistic and workable parenting plans merely fortify preexisting barriers to paternal engagement. In contrast, a complement of procedures and programs—most of which are readily available to court systems—could not only reduce barriers but encourage the enjoyment of the custody and visitation rights that courts assign.

#### CONCLUSION

By taking its role in influencing paternal involvement at the critical moments of child support enforcement, custody, and visitation adjudication more seriously, the legal system can positively affect the social norms that impede paternal engagement. The social norms embedded in our legal system mandate mothers to nurture and fathers to provide support to children, and generally remain silent on paternal caretaking involvement. By adopting some of the mechanisms discussed above to eliminate barriers to paternal involvement, the law and legal system could further support the social norms that value father-involvement.

Law and social norms enjoy a dialectic relationship, each influencing and being influenced by the other to a certain extent. The extent of those reciprocal influences depends on many factors, including the enforcement of legal rules that announce social norm expectations, how forcefully a community embraces a social norm, and how much the

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<sup>238</sup> See Jessica Pearson & Nancy Thoennes, *Supervised Visitation: The Families and Their Experiences*, 38 FAM. & CONCILIATION CTS. REV. 123, 136 (2000) (noting that almost a third of visiting parents surveyed indicated that they had not been able to enjoy the time with their children because of the presence of a supervisor).

<sup>239</sup> See Rachel Birnbaum & Ramona Alaggia, *Supervised Visitation: A Call for a Second Generation of Research*, 44 FAM. CT. REV. 119, 123 (2006) (citing a study that reported a significant increase in visits between children and the non-custodial parent after six months of supervised visitation).

norm distorts preferences.<sup>240</sup> However, social norms theory acknowledges that law has the potential to influence social norms.<sup>241</sup> As Professor Elizabeth Scott asserts, beyond enforcement, law can influence marriage norms, for example, by announcing specific behavioral expectations, by deregulating and leaving norm establishment up to the community, or by setting norms through expressive function.<sup>242</sup> Law and judicial action may not bring about rapid change,<sup>243</sup> as exemplified by the enduring gender role differentiation in our family structures even after the abolition of the “tender years” presumption.<sup>244</sup> However, law and judicial action together can support the eventual shift in social norms surrounding family.<sup>245</sup>

The social norms implicated by the suggested amendments to child support legislation and reorientations of the legal system would highlight parental engagement and nurturance and, while continuing to express the importance of financial support, would also credit contributions made by fathers who are not able to contribute at the same level of finances at all times. As the court system invests in conflict resolution systems and encourages appropriate families to take advantage of such systems in order to best serve children, judges express the importance of preserving harmony and cooperation in the post-separation family. By creating courts that focus on problem-solving to serve the best interest of the child and address parental concerns, again, courts send the message to litigants and the community involved in the litigation that effective, rather than expeditious, resolution of the matter is of importance.<sup>246</sup>

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<sup>240</sup> Scott, *supra* note 81, at 1970.

<sup>241</sup> See generally Patrick S. O'Donnell, *Social Norms & Law: An Introduction*, 9 THEORY & SCI. 1, 6 (2007) (describing the interrelationship of laws as being multifaceted and discussing laws relating to the creation, maintenance, elimination, and even sublimation of social norms).

<sup>242</sup> Scott, *supra* note 81, at 1926. Others have gone even further in supporting legislative change to bring about social norm change. Professor Maldonado asserts that “by passing legislation requiring fathers to spend time with their children, the law would express a consensus that failure to do so indicates bad parenting. . . . The law can and should clarify behavioral expectations of post-divorce fatherhood.” Maldonado, *supra* note 12, at 1007.

<sup>243</sup> See generally Dowd, *supra* note 82, at 787 (noting the “limited instrumentalism principle,” which explains that, in the absence of cultural support, law has only a limited ability to accomplish social change).

<sup>244</sup> Shepard, *supra* note 167, at 700–01. The “tender years” presumption (that mothers should be granted custody over fathers, due to mothers’ purportedly superior nurturing abilities and biological connection to their children) was formally abolished from U.S. law in the 1960s. See Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 LAW & SOC’Y REV. 769, 770 (2004) (discussing the history of the tender years presumption). However, a 2004 study of family court judges in Indiana revealed that more than half of the judges continued to support the “tender years” presumption in private interviews and that they also imposed that presumption in court. *Id.* at 771.

<sup>245</sup> See Dowd, *supra* note 82, at 791 (noting that law can facilitate social norm change).

<sup>246</sup> See generally Hon. Milton C. Lee, *Fatherhood in the Child Support System: An Innovative Problem-Solving Approach to an Old Problem*, 50 FAM. CT. REV. 59, 63 (2012) (discussing the broad focus of the D.C. Fathering Court on the fathering relationship as opposed to merely the

Other proposed court-based approaches to reducing barriers to paternal engagement such as providing ongoing classes, support services, accessible visitation centers, and post-resolution status hearings directly express the court's investment in successful parent-child relationships and functional court orders. Such approaches also convey the court system's interest in fathers' non-financial contributions. By encouraging fathers to be involved in the family, the court credits their ability to fulfill more than their breadwinning function.<sup>247</sup>

The expressive function of any court involvement depends on the attitude of court personnel involved in the intervention. Therefore, judicial and court system-wide education on barriers to paternal engagement, the importance of the expressive function of court interventions, and the assessment of which families might not benefit from support for paternal engagement, are all key to the social norm setting function of these suggested modifications. A judge who, for example, orders a father to counseling in a punitive fashion or one who mandates that a mother comply with visitation that requires extensive contact when there has been domestic violence, expresses messages unrelated to the importance of positive paternal engagement.

Finally, modifications to child support legislation that reduce or abolish the child support assignment requirements and allow some parents to agree to making and receiving informal or in-kind child support payments can have the expressive function of respecting the rights of noncustodial parents to directly support their children as is appropriate in each family. These child support amendments also express the message that fathers have value even when they are unable to make formal child support payments.<sup>248</sup>

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collection of child support).

<sup>247</sup> Professor Dowd argues that the court system's approach to fathers exacerbates their absence and argues that "[t]he constitutional norm of fatherhood should be nurture." Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1271 (2005). She also proposes a definition of fatherhood as one that benefits children, men, gender equality, and equality among different forms of families. *Id.* at 1312.

<sup>248</sup> The expressive function of the law is most successful when it is consistent with community beliefs. Court system programs and laws that encourage fathers to make non-financial contributions, rather than focusing solely on their financial contributions, appear to be more consistent with the self-identities of low-income fathers. For example, in a study of low-income African American fathers, researchers found that these fathers did not conform to the image of fatherhood that prioritizes economic support. HAMER, *supra* note 39, at 134-35. Instead, they found that the men prioritized the following as the key aspects of their role as fathers: 1) spending time with their children; 2) providing emotional support; 3) providing discipline; 4) being a role model; 5) teaching boys to be men and girls to be "young ladies;" and finally, 6) providing economic support. *Id.* at 135. As sociology professor Jennifer Hamer wrote of this study, "[w]hile the role of provider is a primary element of the Western ideal, it appears to be of the least importance to these black noncustodial fathers." *Id.* Indeed, the Fragile Families Study of 2000, which included a large sample size from sixteen of the largest U.S. cities between 1998 and 2000, echoed these findings both among mothers and fathers. FRAGILE

Of course, the government has an interest in making sure children are supported financially by their parents and do not rely entirely on the state for subsistence, given that state support is insufficient to provide for children's needs. However, relentless focus on financial support without crediting the additional roles fathers can play as important merely alienates fathers and fails to achieve significant additional collections.<sup>249</sup>

Incorporating the importance of non-financial paternal engagement into the court system's expectations for fathers can serve to support fathers in adopting attainable roles in the lives of their children. If fathers are expected only to fulfill roles that they repeatedly fail to fulfill, they may merely be driven away.<sup>250</sup> Ultimately, the law's embrace of the important role of fathers as nurturers and engaged family participants may in turn support the movement of social norms towards the full-scale incorporation of these attributes into the role of the financially supportive father.

The legal system, with few radical changes in law, procedures, and programs, can play an important and yet currently ignored role in facilitating the enjoyment of the rights to custody and visitation it assigns. Many aspects of the child support system and the family law legal system unintentionally fortify impediments to low-income father engagement at a time when families are very fragile. Legal system initiatives that would allow courts to holistically address family needs and permit the child support system to conform to the realities of low-income families have the potential to reverse the trend in father-absence among child support obligors and court-involved low-income men without jeopardizing significant government interests.

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FAMILIES REPORT, *supra* note 30, at 10. When asked to list the most important qualities of a "good father," fathers in the study included: showing love and affection, providing direct care, and teaching the child about life. *Id.* 69% of mothers rated showing love and affection to be the most important attribute for fathers, while only 11% of mothers rated providing financial support as the central paternal role. *Id.* A significant percentage of fathers and mothers (19% and 24%, respectively) rated providing financial support as the *least important* attribute for fathers. *Id.*

<sup>249</sup> See *supra* notes 139–46 and accompanying text.

<sup>250</sup> See HAMER, *supra* note 39, at 210 ("Fathers in this study seemed to discuss fatherhood in a way that best preserved their sense of accomplishment.").