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## An End to the Deadbeat Dad Dilemma? - Puncturing the Paradigm by Allowing a Deduction for Child Support Payments

Reginald Mombrun

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## ARTICLES

### **AN END TO THE DEADBEAT DAD DILEMMA?— PUNCTURING THE PARADIGM BY ALLOWING A DEDUCTION FOR CHILD SUPPORT PAYMENTS**

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I. INTRODUCTION: THE POLICY RATIONALE  
FOR A CHILD SUPPORT DEDUCTION

Bobby Brown, the once famous R&B singer, is the new symbol of the deadbeat dad, having been arrested several times for failing to pay child support.<sup>1</sup> Could the tax system be used to help fathers like Brown meet their obligations? Would this be a wise redistribution of public assets? Would this be helpful to children? This Article addresses these questions.

Children are our future, literally. We profess this sentiment in our songs,<sup>2</sup> evidencing, among other things, its universality in our collective consciousness. “The duty of parents to provide shelter and sustenance to their dependents . . . [is one of the] most fundamental and necessitous known to society, both animal and human.”<sup>3</sup> The evidence suggests that we are falling short on our obligations to children. While the United States spends \$8 billion per month fighting which many deem an unpopular war in Iraq,<sup>4</sup> tardy child support payments also tally in the

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1. See *Judge Orders Bobby Brown Arrested*, USA TODAY, Oct. 2, 2006, [http://www.usatoday.com/life/people/2006-10-02-bobby-brown-arrest-warrant\\_x.htm](http://www.usatoday.com/life/people/2006-10-02-bobby-brown-arrest-warrant_x.htm) [hereinafter *Brown Arrested*].

2. See DANNY ADLERMAN & KIM ADLERMAN, *SONGS FOR AMERICA’S CHILDREN* (2002).

3. CAROLE A. CHAMBERS, *CHILD SUPPORT: HOW TO GET WHAT YOUR CHILD NEEDS AND DESERVES* 11 (1991) (quoting Justice Richard J. Huttner, New York State Supreme Court) [hereinafter *CAROLE CHAMBERS*]. As the title of the book suggests, this is a self-help book for the custodial parent looking to get child support from the non-custodial parent. The book has some very good suggestions for the custodial parent, such as reminders that she is to put her feelings aside and focus on her children’s needs. However, some of the recommendations, such as when determining how much your child needs “this is not the time to underestimate expenses,” can be misinterpreted. See *id.* at 20-21; see also Martha Minow, *How Should We Think About Child Support Obligations?*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 302, 305 (Garfinkel et al. eds., 1998). Minow summarizes the duty of parents by quoting William Blackstone:

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation . . . laid on them not only by nature herself but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue; if they only gave their children life that they might afterwards see them perish.

*Id.*

4. See Andrew Taylor, *Senate Approves \$70 Billion For War Spending*, S.F. CHRON., Sept. 29, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/09/29/national/w074740d20.dtl>.

billions.<sup>5</sup> Failure to pay child support, called the largest single crime in America,<sup>6</sup> and noted as one of the most pervasive acts of civil disobedience since prohibition and the anti-drug laws, persists.<sup>7</sup> An estimated 75% to 87% of children in single parent households receive no financial support from their non-custodial parent.<sup>8</sup> The scope of the problem is elucidated by the shocking fact that half of our nation's children, at some point in the next decade, will be eligible to receive child support.<sup>9</sup>

The United States is facing a real crisis regarding child support. To borrow an analogy from U.S. Sen. Barack Obama, although this may be a "quiet" crisis,<sup>10</sup> it is nevertheless real and painful to millions of women, children, and men. Public action started in earnest in the 1980s when the federal government began to crack down on parents who do not make their mandated payments.<sup>11</sup> Congress encouraged similar

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5. CAROLE CHAMBERS, *supra* note 3, at 17 (claiming an arrearage of \$4 billion annually as of 1984).

6. *Id.*

7. See William S. Comanor, *Child Support Payments: A Review of Current Policies*, in THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 1, 2 (William S. Comanor ed., 2004) [hereinafter Comanor, *Review of Current Policies*].

8. CAROLE CHAMBERS, *supra* note 3, at 17.

9. See IRWIN GARFINKEL, ASSURING CHILD SUPPORT—AN EXTENSION OF SOCIAL SECURITY 18 (1992) [hereinafter GARFINKEL, ASSURING CHILD SUPPORT]. According to the author, the current divorce rates and the growing rate of out of wedlock births support this claim. Another commentator notes that with one out of every four children being born out of wedlock, the problem is only getting worse. The commentator provides some sobering statistics, such as 25% of custodial parents who were not married at the time of their children's birth obtained child support orders and 75% of custodial parents who were married to non-custodial parents at the time of their children's births received child support orders. See SIMONE SPENCE, DEADBEATS: WHAT RESPONSIBLE PARENTS NEED TO KNOW 15 (2001).

10. Cf. Roland S. Martin, *Obama's "Quiet Riots" Are For Real*, June 11, 2007, <http://www.cnn.com/2007/US/06/07/martin/index.html> (discussing Sen. Obama's speech regarding the "burning anger" among poor African-Americans in the United States, and warning the Bush Administration that it is ignoring the "quiet riots" that are occurring in these communities).

11. See MARCIA MOBILIA BOUMIL & JOEL FRIEDMAN, DEADBEAT DADS—A NATIONAL CHILD SUPPORT SCANDAL 10 (1996). This marked a change from the hands-off approach of the 1950s to the moral outrage of the 1980s. See *id.* Other reasons for this shift in attitude include the rise of the women's movement and "the conservative anti-welfare administrations of the 1980s." *Id.* "The greatest influence, however, is the reality that the ever increasing burden on state and federal social programs require[d] a change in policy." *Id.*

crackdowns at the state level by threatening to reduce federal subsidies.<sup>12</sup> This effort has extended to all segments of the population, including some celebrities.<sup>13</sup> In one high profile case, the irresponsible father went so far as to murder someone in order to shirk his fatherly duties.<sup>14</sup>

This Article does not eschew the term “deadbeat dad” in favor of more politically correct nomenclature (e.g., “deadbeat parent”), because the evidence still shows that the non-custodial parent of children indebted with child support payments remains, in large part, the father of the child.<sup>15</sup> Yet, there exists another side to the story. The reality of the

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12. *See id.* As an incentive, the federal government pays for 66% of the states’ operating costs and 90% of all information technology and genetic testing expenses. JOCELYN ELISE CROWLEY, *THE POLITICS OF CHILD SUPPORT IN AMERICA* 40 (2003). The federal government has used such tactics in the past to coerce states to follow their lead. Another example is the use of federal highway funds to coerce states to increase the legal drinking age to 21.

13. *See Brown Arrested*, *supra* note 1. A famous deadbeat dad and poster child for this group has been Bobby Brown. *See id.* The former R&B singer who was married to Whitney Houston has seen his share of troubles for failing to pay child support. *See id.* He has been threatened with incarceration and has even been incarcerated for failing to pay child support. *See id.* Media reports of middle to high income fathers refusing to pay their child support payments have created the stereotypical deadbeat dad. *Cf. id.* Unwillingness to pay child support, however, is only one reason for non-payments. *See* THEODORA OOMS & JENNIFER WEINREB, *REDUCING FAMILY POVERTY AND CHILD TAX-BASED STRATEGIES* 11 (The Family Impact Seminar 1992). There are other reasons, such as lack of income. *See id.* Nevertheless, claims that there is often no connection between non-payment of child support and lack of income persist. *See* CAROLE CHAMBERS, *supra* note 3, at 19.

14. *See* Dave Andrusko, *Rae Carruth Convicted in Murder of Pregnant Girlfriend*, NAT’L RIGHT TO LIFE NEWS, Feb. 2001, *available at* <http://www.nrlc.org/news/2001/NRL02/carruth.html>. An extreme case of a deadbeat dad-to-be involves Rae Carruth, a former professional football player. *See id.* Unable to convince his pregnant girlfriend to have an abortion, Mr. Carruth conspired to have her killed, and succeeded. *See id.* He is currently serving an 18-year sentence in a North Carolina prison. *Id.*

15. *Cf.* Frank J. Furstenberg, Jr., *Dealing with Dads: The Changing Roles of Fathers*, in *ESCAPE FROM POVERTY: WHAT MAKES A DIFFERENCE FOR CHILDREN* 189, 196 (P. Lindsay Chase-Lansdale & Jeanne Brooks-Gunn eds., 1995). In most cases, the mother is given custody of the children. *Id.* A 1989 survey shows that “close to 90% of children from divorced families initially are in the custody of their mothers.” *Id.* After two years, contact with their father drops off considerably. *Id.* A more recent survey in 1998 shows that fathers make up 18% of all single parents. Ronald K. Henry, *Child Support Policy and the Unintended Consequences of Good Intentions*, in *THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS* 128, 138 (William S. Comanor ed., 2004). Gender biases, however, are not easily erased and there is a continuing gender bias

deadbeat dad might not be that repulsive. He has been described in more human terms as a man trying to make the best of a bad situation,<sup>16</sup> as contemporary literature begins to debunk the myth of the deadbeat dad.<sup>17</sup> Some have argued that the current legal system of child support enforcement is responsible for creating the deadbeat dad.<sup>18</sup> The unique American family law system at the state level often bifurcates the rights and responsibilities of parents.<sup>19</sup> The custodial parent is assigned the right of custody but often bears none of the financial responsibility to support the children, as that responsibility is assigned to the non-custodial parent who is denied the right to participate in the lives of the children.<sup>20</sup> Some experts in the field have advanced the above reasoning as the cause for this large scale civil disobedience.<sup>21</sup>

Clearly, some fathers deserve the “deadbeat dad” moniker. One popular image is, for instance, those fathers who drive luxury cars while their children starve.<sup>22</sup> This, however, is not the norm. The average father is responsible and wants to do the right thing, but there are strong forces against him, like the inability to pay.<sup>23</sup> Survey after survey shows

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against fathers in custody determination. *Id.*

16. *See infra* notes 105-10.

17. *See generally* JOHN CONINE, FATHERS’ RIGHTS: THE SOURCEBOOK FOR DEALING WITH THE CHILD SUPPORT SYSTEM (1989) (discussing how fathers are often unjustly classified as deadbeat dads); EARL JOHNSON ET AL., FATHERS’ FAIR SHARE: HELPING POOR MEN MANAGE CHILD SUPPORT AND FATHERHOOD (1999) (discussing alternative methods of encouraging fathers to pay child support as opposed to the traditional punitive enforcement methods which vilify deadbeat dads).

18. Henry, *supra* note 15, at 139. (arguing that government policy must be examined as the culprit because “[w]e do not have a problem with large numbers of parents who refuse to provide for their children during an intact marriage, yet those same responsible parents become ‘deadbeats’ upon divorce”).

19. *See id.*

20. *See id.*

21. *See id.*

22. OOMS & WEINREB, *supra* note 13, at 9. Non-custodial fathers are seen as “a homogeneous group, at least in terms of their ability to pay.” Irwin Garfinkel et al., *Introduction* to FATHERS UNDER FIRE 1, 6 (Garfinkel et al. eds., 1998) [hereinafter Garfinkel, *Introduction*]. “Hence the term ‘deadbeat dad’ is applied indiscriminately to all nonpaying fathers” regardless of the reason for nonpayment. Garfinkel, *Introduction, supra*, at 6. The truth, however, is that while some fathers have the ability to pay but refuse, some fathers simply cannot afford to pay. *See id.*

23. *See* CROWLEY, *supra* note 12, at 162-63. This is the position that is being advocated by fathers’ rights groups. They argue that the country’s “monomaniacal zeal to catch and punish deadbeat dads has produced a child support enforcement system inherently inequitable and unjust to fathers.” *Id.* at 162. The role of the father is, thus,

that custodial mothers report that the reason for lack of payment from the non-custodial father is that “he can’t pay.”<sup>24</sup> Nevertheless, the authorities blindly continue to enforce child support payment debts and, in some cases, enforce them by imprisonment;<sup>25</sup> in situations where the mother receives public aid, federal and state governments will provide the child support payment to the mother and hold the father indebted to the government for that amount.<sup>26</sup> In cases where the mother is not dependent on welfare, the government has largely stayed out of the fray.<sup>27</sup>

To deal with its new role as creditor, the federal government created the Office of Child Support Enforcement (“OCSE”) to enforce child support payments. By its own estimation, the OCSE has been wildly successful.<sup>28</sup> Independent critics, however, demur, accusing the office of cooking its books.<sup>29</sup> These claims will be analyzed later. Clearly, though, the child support crisis remains a major sociological problem and is intensifying as the number of single-parent households rises. This Article proposes a solution—provide a positive financial incentive to the non-custodial parent to make payments.

Psychologists tell us that to ensure success in modifying behavior, a “carrot and stick approach” is needed.<sup>30</sup> In the child support arena, the

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reduced to one dimension, that of an economic provider. *Id.* Over time, this weakens the father-child bond. *Id.*

24. See Henry, *supra* note 15, at 155. A 1992 survey of the General Accountability Office (GAO) shows that 66% of custodial mothers listed this as the reason they are not getting support from their father’s child. See *id.* But see OOMS & WEINREB, *supra* note 13, at 11 (claiming smaller numbers).

25. See BOUMIL & FRIEDMAN, *supra* note 11, at 85.

26. See CROWLEY, *supra* note 12, at 39. Welfare mothers must assign their support rights to the state, and any support that the state collects on their behalf from their former partners goes back to the state. *Id.* at 42.

27. *Id.* With regard to welfare mothers, they are required by law to register in their states’ child support programs. *Id.* Non-welfare mothers can take advantage of such programs but do not have to. See *id.*

28. See Henry, *supra* note 15, at 128. According to its own data, the OCSE spent \$3 billion in 2000 and reported a cost effectiveness of \$3.95, meaning that it recovered \$3.95 for every dollar it spent. *Id.*

29. *Id.* at 129.

30. Cf. Chennai M. Selvarajamani, *What is the Meaning and Origin of “Carrot and Stick Approach?”*, THE HINDU, Sept. 16, 2003, <http://www.hindu.com/br/2003/09/16/stories/2003091600250300.htm>. The carrot and stick approach has been credited to owners of donkeys who would dangle a carrot on the nose of the donkeys to keep them moving. See *id.* If this strategy did not work, then the stick would be used to strike the



government has used the “stick” approach for the past three decades, with arguably little success.<sup>31</sup> It might be time to adopt a carrot approach. The stick must be retained to address those who will only respond to the coercive power of the state. For the vast majority, positive incentives can be created to push them into the correct behavior.

One of the easiest and least costly ways of ensuring greater discharge of child support obligations is to permit a tax deduction for the payor. Coupled with an inclusion in the income of the payee parent, the government would lose little tax revenue because: (1) the number of women earning compensate wages to their male counterparts is rising, thus, decreasing the tax distortion of a deduction/inclusion regime; and (2) the number of men gaining custody of their children is also rising. Moreover, tax revenue might increase, on balance, through a reduction in administrative costs.<sup>32</sup>

More importantly, because it has been recognized that there is a direct correlation between payment of child support and participation in a child’s life,<sup>33</sup> such an incentive has the added benefit of keeping or reintroducing the father in the lives of his children. This would have important sociological consequences, especially in the Latino and African-American communities where participation of fathers in the lives of their children has been reported to be much lower than that of other communities.<sup>34</sup>

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animal. *See id.*

31. Cf. Irwin Garfinkel & Sara McLanahan, *The Effects of Child Support Reform on Child Well-Being*, in *ESCAPE FROM POVERTY: WHAT MAKES A DIFFERENCE FOR CHILDREN* 211, 222 (P. Lindsay Chase-Lansdale & Jeanne Brooks-Gunn eds., 1995) (discussing the effects of numerical guidelines used to ascertain and preserve adequate levels of child support). Between 1978 and 1985, “the average real value of child support payments has decreased by 25%.” *Id.*

32. *See* Henry, *supra* note 15, at 128 (indicating that if child support payments are voluntarily made, the need for the OCSE would be eliminated or greatly diminished, potentially saving the government—federal and state—\$4.5 billion that it is currently spending on child support enforcement).

33. *See* BOUMIL & FRIEDMAN, *supra* note 11, at 17. “A parent who is able to maintain a meaningful relationship with his children is simply more likely to keep up with his financial obligations.” *Id.* at x.

34. *See* ROBERT JOSEPH TAYLOR ET AL., *FAMILY LIFE IN BLACK AMERICA* 15-17 (1997). According to statistics reported in the late 1990s, only 33.1% of black children live with both parents as opposed to 75.9% of white children and 66.1% of Hispanic children. *Id.* at 15. As a consequence, while only 16.2% of white children live in poverty, 41.9% of all black children are poor. *Id.* at 17. Making matters worse, the poverty of black children appears chronic. *See id.*

Both tax and non-tax commentators have proposed variations on the child support deduction theme.<sup>35</sup> Revenue-oriented schemes normally concern the technicalities of the tax system, such as whether the Internal Revenue Code (“IRC”) would permit this type of deduction—it is a “personal deduction”—or whether the payee parent can receive a deduction for non-payment of child support.<sup>36</sup> Non-tax commentators, on the other hand, mostly analyze the sociological aspect of this debate and address the economic and tax aspects of the debate only in passing. This proposal bridges the gap by marrying the sociological aspects of child support debate with the technicalities of the tax laws. Additionally, this Article will argue the theoretical rationale justifying such a deduction on policy grounds,<sup>37</sup> and will employ the traditional process of evaluating good tax laws: whether it is equitable, efficient and simple, essentially addressing whether the proposal is good tax law.<sup>38</sup>

Part II outlines the history of the problem of non-payment of child support and the evolution of remedial measures. Part III proposes a series of related solutions to the problem, namely setting realistic child support payments in conjunction with permitting a deduction for such payments. Part IV discusses tax deductions in the context of the typical

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35. See, e.g., Irwin Garfinkel et al., *Child Support and Child Well-being: What Have We Learned?*, in CHILD SUPPORT AND CHILD WELL-BEING 1, 23 (Irwin Garfinkel et al. eds., 1994) [hereinafter Garfinkel, *What Have We Learned*] (calling for an assured child support benefit—a new form of social security benefit to serve as a backup for private support); GARFINKEL, ASSURING CHILD SUPPORT, *supra* note 9 (same); Laura Bigler, *A Change is Needed: The Taxation of Alimony and Child Support*, 48 CLEV. ST. L. REV. 361 (2000) (calling for a deduction for child support payments); Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 162 (1989) (arguing that all payments to ex-spouses should be treated as alimony payments unless the parties otherwise agree to a contrary treatment); Wendy Gerzog Shaller, *On Policy Grounds, A Limited Tax Credit For Child Support and Alimony*, 11 AM. J. TAX. POL’Y 321 (1994) (calling for a limited tax credit for alimony and child support payments); *ABA Delegates Adopt Resolution to Equalize Child Support, Alimony Treatment*, Daily Tax Rep. (BNA) No. 154 (Aug. 11, 1989) (calling for legislation to include all family support payments—including child support—in income of payee and provide a deduction to payor).

36. See William A. Klein, *Tax Effects of Nonpayment of Child Support*, 45 TAX L. REV. 259 (1990).

37. *But see* Shaller, *supra* note 35, at 321.

38. Manoj Viswanathan, *Sunset Provisions In The Tax Code: A Critical Evaluation And Presumptions For The Future*, 82 N.Y.U. L. REV. 656, 668 (2007) (quoting MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 27-31 (5th ed. 2005)).

deadbeat dad dilemma, focusing on government expenditure, tax arbitrage,<sup>39</sup> and the societal pressures of non-payment.

## II. THE PROBLEMS OF CHILD SUPPORT

### A. *History of Child Support in the United States*

Today, fathers make most child support payments because mothers usually have custody of children.<sup>40</sup> However, this trend is rapidly changing, as more judges are granting joint<sup>41</sup> and sole custody to fathers.<sup>42</sup> To most people, granting custody automatically to the mother seems natural because she is perceived as the more nurturing parent and hence, most able to raise children.<sup>43</sup> This has not always been the case. In early America, the children stayed with their father if parents divorced.<sup>44</sup> Some attribute this to the prevalent culture at the time, which by definition is a set of internalized values.<sup>45</sup> Thus, attributing

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39. See generally Walter Adams Looney III, *Essays on Tax and Social Policy* (May 2004) (unpublished Ph.D. dissertation, Harvard University) (on file at Harvard University and with author) (expounding an in-depth analysis of tax arbitrage in the family support area). Tax arbitrage is generally seen as an inefficient use of economic resources. It is the notion of allocating resources based on tax consequences and not based on the best economic use. *Id.* In the child support arena, parents exchange child tax exemption, deductions and credits for higher child support payments.

40. See Furstenberg, *supra* note 15, at 196.

41. See BOUMIL & FRIEDMAN, *supra* note 11, at 89-91 (reporting that courts are moving more toward recommending that parents share custody because this is generally better for the child).

42. See Henry, *supra* note 15, at 138. A 2004 survey found that 18% of single parents are men, an increase of 25% over the previous three years. *Id.*

43. BOUMIL & FRIEDMAN, *supra* note 11, at 87. There are also historical reasons why the mother is normally assigned the role of caretaker. Fewer women were employed outside the home and men did not generally participate in the day-to-day care of children. *Id.* Now, women are firmly established in the labor force and have closed in on the wage disparity, so their perception as caretaker has changed.

44. See Henry, *supra* note 15, at 138 (discussing an “early feminist meeting . . . in 1848 . . . [that] included the fact that fathers automatically received custody of children as a principal complaint,” mostly because they needed the help of the children on the farm); SPENCE, *supra* note 9, at xiv (claiming that up until the nineteenth century, fathers were usually awarded custody of children because, since women did not work outside the marriage, they could not afford to take care of children). The two authors have slightly different reasons why men were allowed custody, but both reasons are grounded on economics.

45. See THE RANDOM HOUSE COLLEGE DICTIONARY (revised ed. 1980) (defining

some sociological event to culture begs the question. The answer lies in the economics of the time. Prior to the industrial revolution, the economy of the United States was primarily agrarian. As titular head of the family, the father needed as much help as he could get on the farm. As a result, society in the eighteenth and mid-nineteenth centuries emphasized “the father’s centrality in raising the children and preparing them for the adult world.”<sup>46</sup> As the industrial revolution progressed, fathers tended to work outside the homestead.<sup>47</sup> Henceforth, the image of the father settled into that of the “external wage-earner,” with the mother as “home-bound nurturer,”<sup>48</sup> giving rise to the “cult of motherhood” and the “tender years doctrine” of the early twentieth century.<sup>49</sup>

During these times, child support payment orders were rare, owing to the fact that parents were only charged with providing a home for their children.<sup>50</sup> Further, the divorce rate was extremely low due to both the economically devastating costs of divorce and enormous social pressure against the dissolution of marriage.<sup>51</sup> As we will see later, there were also legal impediments to granting child support.<sup>52</sup> In the

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culture as the sum total of ways of living built up by a group of human beings and transmitted from one generation to another).

46. Henry, *supra* note 15, at 138.

47. See P. Lindsay Chase-Lansdale & Maris A. Vinovskis, *Whose Responsibility? An Historical Analysis of the Changing Roles of Mothers, Fathers & Society*, in *ESCAPE FROM POVERTY: WHAT MAKES A DIFFERENCE FOR CHILDREN* 11, 15 (P. Lindsay Chase-Lansdale & Jeanne Brooks-Gunn eds., 1995) (“[T]he father remained the head of the household and was responsible for the education and well-being of the children. In practice, [his] direct role in family life diminished . . . as his place of work became separated from home.”).

48. Henry, *supra* note 15, at 138. Other reasons have been cited for this change. In the Puritan homes of mid-seventeenth century New England, the father was the early educator of the children owing to church pressure and his own educational superiority in the household. See Chase-Lansdale & Vinovskis, *supra* note 47, at 13. This role of educator was transferred to the mother due to the sudden and unexpected drop in church attendance by Puritan men. See Chase-Lansdale & Vinovskis, *supra* note 47, at 13.

49. Henry, *supra* note 15, at 138.

50. See *id.* at 138-39.

51. See CROWLEY, *supra* note 12, at 57-59. Upon marriage, all of a woman’s assets were transferred to her husband. The early settlers also brought with them from England “the most strictly interpreted traditional and religious ideas concerning the sanctity of marital vows.” *Id.*

52. See CROWLEY, *supra* note 12.

case of death of one or both parents, close relatives provided support to the children.<sup>53</sup>

In the early twentieth century, there was a “reorientation of welfare policy toward children,”<sup>54</sup> which entailed a shift “premised on the belief that the mother-child relationship was fundamental and sacred and that home life should be encouraged and strengthened.”<sup>55</sup> Evidence also suggests that a precursor to our current welfare system was the attempt in the late nineteenth and early twentieth centuries to assist “poor children in their own homes.”<sup>56</sup> Some states made early efforts to criminalize the non-payment of child support.<sup>57</sup> In most states, however, these new criminal laws were only enforced in cases where destitute children were victimized.<sup>58</sup> More comprehensive enforcement of the child support laws was still a few decades away.

### 1. Federal Government Involvement

The record of federal government’s involvement in supporting children extends back to the end of the Civil War. It established the Freedman’s Bureau to support the newly freed blacks and created black schools, particularly in the South.<sup>59</sup> The federal government also provided pensions for “disabled Union soldiers or their widows and dependent children.”<sup>60</sup>

Although the federal government spent large sums on these and other efforts, it did not begin to gain a more central role in welfare and child support until after the Depression with the passage of the Social Security Act and Aid to Dependent Children Act.<sup>61</sup> By the 1960s, the

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53. See Chase-Lansdale & Vinovskis, *supra* note 47, at 17 (stating that close relatives were expected to help children in need, although increasingly indigent families and individuals relied on private and public charity).

54. *Id.* at 19.

55. *Id.*

56. *Id.* at 31.

57. See *id.* at 20.

58. See *id.*

59. See *id.* at 18.

60. *Id.*

61. See *id.* at 22.

Aid to Dependent Children program was intended to cover all needy children in single-mother households, states restricted assistance by insisting that children had to live in a ‘suitable’ home. Children of African-American or never-married mothers were particularly singled out unfairly for exclusion from the program.

*Id.*

federal government assumed the central role. The father, in theory, remained the party responsible for the well-being of his children, but few enforcement efforts were made against him. The last twenty years witnessed an explosion in child support enforcement spurred on, in part, by the bi-partisan Family Support Act of 1988.<sup>62</sup> The Act reflected changes in society's views about child support and greater emphasis on the responsibility of fathers. The greater share of responsibility was advocated as far back as 1949 when former president Gerald Ford introduced a bill (H.R. 4580) on that score as a congressman.<sup>63</sup>

Importantly, the stronger penalties urged by the Act did not produce the desired results.<sup>64</sup> This stems from Congress' failure to address the reasons for fathers' non-compliance, which are diverse and complex. Additionally, as this Article argues, in many cases, there is simply no financial incentive to pay child support.

## 2. Greater Focus on Fathers

The bifurcation of rights and responsibilities discussed above also made it easier for advocates to convince the public that more financial support was needed from fathers. A popular book added fuel to the fire, "claim[ing] that, after divorce, women's standard of living declined by 73% while men's standard of living increased by 42%."<sup>65</sup> Despite being wrong, and acknowledged as such by the author herself, these figures "have been convenient for advocates and have become ingrained in both the popular culture and academic circles."<sup>66</sup>

As one might expect, politics have played and continue to play a major role in shaping child support policy. From the early 1900s to the

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62. Pub. L. No. 100-485 (1988). See Chase-Lansdale & Vinovskis, *supra* note 47, at 25-27. The Family Support Act was a watershed event in the child support collection arena. It was the result of the efforts of Pres. Reagan and Sen. Daniel Patrick Moynihan, who had interest in stronger child support efforts. See Chase-Lansdale & Vinovskis, *supra* note 47, at 25.

63. See CROWLEY, *supra* note 12, at 95.

64. Noted commentator Irwin Garfinkel wrote in 1998 that despite twenty years of increasingly strong legislation—a time span that included the Act—child support collections had not shown much improvement. See Garfinkel, *Introduction*, *supra* note 22, at 3.

65. Henry, *supra* note 15, at 140 (citing LENORE WEIZMAN, *THE DIVORCE REVOLUTION—THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985)).

66. *Id.*

1960s, social workers largely shaped the child support debate.<sup>67</sup> “They proposed offering mothers who received Aid to Families with Dependent Children much more than cash assistance to support their children . . . and direct[ed] them to all of the in-kind benefits for which they qualified, [including] job training and educational programs.”<sup>68</sup> In the 1970s, the social workers lost control in favor of conservatives,<sup>69</sup> who brought enforcement of child support to the forefront “with a single focus: welfare cost recovery.”<sup>70</sup> As the number of female legislators grew in the 1980s,<sup>71</sup> we saw a change of focus back toward the family. Not only did strong enforcement of child support obligations for families on welfare continue, but coverage expanded to non-welfare families.<sup>72</sup> In the case of non-welfare families, financial support was sent directly to the family, instead of going through the state’s hands first.<sup>73</sup>

Today, it is not clear who is at the helm.<sup>74</sup> We are seeing an increase of advocacy on behalf of fathers, which reflects greater concern for the father, including “forgiveness for arrears,” more equitable child support guidelines, and “a revamping of all state award formulas to reflect the true cost of child rearing.”<sup>75</sup> It appears that some states are already responding to these concerns.<sup>76</sup> While it is unclear where the

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67. See CROWLEY, *supra* note 12, at 28.

68. *Id.*

69. *See id.*

70. *Id.* at 29.

71. *See id.* at 28.

72. *Id.* at 30.

73. *Id.*

74. *See id.*

75. *Id.*

76. *See, e.g.*, MD. CODE ANN., FAM. LAW. § 12-204 (West 2007). Maryland has a child support scheme that holds both parents responsible based on their adjusted annual incomes. *See id.* at § 12-204(a). Maryland provides a table much like a tax table, mandating a level of expected child expenditures depending on the parents’ income. *See id.* at § 12-204(e). Each parent is responsible to pay an amount based on his/her percentage of the parents’ combined income. *See id.* at § 12-204(a)(1). Adjustments are made if certain child expenses are paid solely by one parent; adjustments are also made for the amount of time the child spends in each parent’s home. *See id.* at § 12-204(m). Finally, the calculation of child support is subject to court review. Even if one parent does not work (unless physically or mentally unable to work), the Maryland scheme assigns income to the non-working parent based on prior work history, availability of jobs in the area, etc. *See id.* at § 12-204(b). An example of how the Maryland approach works follows: Father and Mother divorce; they each make \$5000 per month. They have one child who stays with the mother full-time. Based on their combined income,

law will eventually settle on this issue, the pendulum appears to be swinging back to the middle.

### 3. The American Legal System

The American legal system has had to adjust to changes in societal attitudes toward welfare and child support. Because there was no legal underpinning for child support in the English system, it was said that the American justice system had to “invent the common law notion of child support.”<sup>77</sup> Apparently, “English law [only] provided . . . that all parents should support their children, [and that] no third party—including a mother—could attempt to collect money from her former spouse to help her raise her children.”<sup>78</sup> This was in essence the concept of joint and several liability. If both parents are responsible to support their children, when one parent discharges their responsibility they forfeit their right to sue for compensation.

The courts first changed their views by recognizing the right of a third-party benefactor to sue a father<sup>79</sup> for necessities that the benefactor provided to a dependent, so long as the benefactor proved that the father failed to provide such resources.<sup>80</sup> The benefactor could be a relative, a family friend, or a merchant.<sup>81</sup> Once this principle was laid out, it was

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the expected combined amount of child support would be \$1040. *See id.* at § 12-204(e). They would share this amount equally—\$520 each. Hence, the non-custodial father would have to pay the custodial mother \$520 per month. Based on his hypothetical income, this is a reasonable amount. If they shared joint custody, neither would be liable for child support payments to the other.

Thirty-three states use the Maryland or income share approach. Fourteen use a flat percentage of the non-custodial parent’s income. Three states use what has been called the Melson formula. Under this formula, an amount of money set at the poverty limit is set aside from the payor’s income before child support is deducted. This way, the payor will not dip below the poverty line due to child support obligations. SPENCE, *supra* note 9, at 10-13.

77. *See* CROWLEY, *supra* note 12, at 54.

78. *Id.*

79. *See id.* at 55. The early law emphasized the responsibilities of the father due to the doctrine of coverture, under which the husband was the lord of the manor and personified the entire marital relationship. *See id.* at 57. This also meant that the husband was responsible for the financial well-being of his children. *See id.*

80. *Id.* at 55.

81. *Id.* An early case so providing is *Van Valkinburgh v. Watson & Watson*, 13 Johns. 480 (N.Y. Sup. Ct. 1816), which involved a suit brought by a merchant to recover the cost of a coat purchased by a child on his father’s credit. Although the



an easy step to extend it to a former spouse.<sup>82</sup> Today, there is no question that a custodial parent can sue the non-custodial parent for failure to pay child support.

*B. The Rise of the Deadbeat Dad*

As the mood of the country turned in the 1970s, the emphasis changed from helping the abandoned woman and child to making the un-supporting father pay. A new moniker was needed because Gerald Ford's "runaway pappy"<sup>83</sup> of the 1950s would not work for the 1970s. The proponents of stronger enforcement needed a battle cry that would capture their frustrations. Hence, the "deadbeat dad" was born, signaling a renewed vigor by the government to chase these men who were avoiding their responsibilities. Use of the term was politically effective because it instantly painted a negative picture of the non-custodial father.<sup>84</sup>

Over the past few decades, we have been experiencing a war against the deadbeat dad, with penalties including felony charges, non-renewal or revocation of professional licenses, jail time,<sup>85</sup> and even

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father was found not liable because he had been supporting his children, the case laid the important principle that "a parent is under a natural obligation to furnish necessities for his infant children" and will be liable if such necessities were provided by a third party. *See id.* (citing *Van Valkinburgh*, 13 Johns. 480).

82. *See Tomkins v. Tomkins*, 11 N.J. Eq. 512 (N.J. Ch. 1858). This case involved a lawsuit brought by a mother against the estate of her ex-husband for the husband's failure to support their children in their prior marriage. *See id.* The court held that "a parent is bound to provide his infant children with necessities; and if he neglect[s] to do so," a third party could recover from the parent. *Id.* at 517. *See also CROWLEY*, *supra* note 12, at 67 (discussing that the principle was not immediately applied to African-Americans). Because of this, African-American fathers, for a long time, did not have to fear enforcement of the child support laws. *See id.* This is partially attributed to slavery, when the white owner was the head of household for his slaves. After slavery ended, there was legal ambivalence as to who was the head of the household. *See id.* The main reason appears to be the prejudice felt against black children—they were not seen as "worth the bother and expense of a legal pursuit." *Id.*

83. *See CROWLEY*, *supra* note 12, at 73.

84. *See MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 14 (2005) (discussing the effective use of labels in politics, citing as examples the pejorative use of the term "liberal" and the use of "death tax" by opponents of the estate tax).

85. *See Shaller*, *supra* note 35, at 331 (stating that "as a significant part of his program, Pres. Clinton [had] declared war on those who [did] not meet their child

offers of government sponsored vasectomies.<sup>86</sup> Proponents of these harsh punishments argued that the father living alone saw a drastic improvement in his lifestyle.<sup>87</sup> They inflamed public outcry by publicizing anecdotes, such as the deadbeat dad driving a Mercedes-Benz while his children starved.<sup>88</sup> As we have seen above, they also used unreliable statistics to make their case.<sup>89</sup> The proponents of stronger child support enforcement laws have been largely successful at painting the deadbeat dad as one of “the worst type[s] of villain.”<sup>90</sup> Some states even have a “most wanted list” for deadbeat dads.<sup>91</sup>

### 1. The Enforcement Rationale: Going After Dad

Increasing child support delinquency coincided with the rise of modern political conservatism in American politics. Some credit former President Gerald Ford for changing the focus of the child support debate away from providing support to the mother and child and more toward actively pursuing the deadbeat dad.<sup>92</sup> Conservatives were greatly concerned about the increase in welfare budgets and considered the rise

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support obligations”); *see also* BOUMIL & FRIEDMAN, *supra* note 11, at 78-80 (discussing that weapons used against the deadbeat dad include wage garnishments, interceptions of income tax refunds, and liens on their property).

86. *See* Andrea W. Fancher, *Thinking Outside The Box—A Constitutional Analysis of the Option to Choose Between Jail and Procreation*, 19 QUINNIPIAC PROB. L. J. 328 (2006) (discussing the constitutionality of offering defendants who are significantly behind in their child support payments the option of going to jail or having a vasectomy). The article concludes that under a strict constitutional analysis standard, the vasectomy option would not pass constitutional muster; however, a lesser standard—the reasonable standard—should be applied and under this standard, the option would pass constitutional muster. *See id.* at 346.

87. *See* DAVID L. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 48-49 (1979) [hereinafter DAVID CHAMBERS] (“By separating himself from his family and hoarding all income to himself, the father improves his standard of living dramatically.”).

88. *See* OOMS & WEINREB, *supra* note 13, at 9.

89. *See supra* note 65 and accompanying text.

90. William S. Comanor, *Preface to* WILLIAM S. COMANOR, THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS xv, xv (William S. Comanor ed., 2004) [hereinafter Comanor, *Preface*].

91. *See* Henry, *supra* note 15, at 131-32 (listing a number of parents whose professions do not provide good remuneration such as bricklayers, pipefitters, carpenters, mechanics, taxi drivers, etc.).

92. *See* CROWLEY, *supra* note 12, at 95.

in the number of deadbeat dads to be a direct result of the “permissiveness” of the system.<sup>93</sup> They charged that Aid to Families and Dependent Children (“AFDC”) rules simply permitted fathers to walk away from their obligations.<sup>94</sup> It also did not help that by the 1970s, social workers no longer controlled the welfare and child support agendas.<sup>95</sup>

Conservatives are right in several respects, notably with regard to their focus on the absentee father, but also by pointing out the link between child poverty—welfare—and broken families. First, the parent overwhelmingly most likely to fail to pay child support is the father.<sup>96</sup> The overall rate of noncompliance with child support can be more than 50%.<sup>97</sup> The dollar amount of this delinquency totals about \$4 billion annually and an accumulated \$34 billion as of 2000.<sup>98</sup> Indeed, providing federal aid to the mother and child does create a disincentive for the father to pay,<sup>99</sup> though cutting aid is not called for by either side of the aisle. Second, a correlation exists between child poverty and the single-parent household.<sup>100</sup> A 1995 survey revealed that only 33.1% of black children lived in a two-parent household, compared to 75.9% of white children.<sup>101</sup> This same survey found that 16.2% of white children

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93. *Id.* at 103.

94. *See id.* at 104.

95. *Id.* at 125.

96. *See* BOUMIL & FRIEDMAN, *supra* note 11, at 108. According to a survey, up to 97% of delinquent parents are fathers. *Id.* There are a number of reasons why fathers fail to make their child support payments, including inability to pay, belief that they are paying too much, seeking revenge against their ex-spouses, and simply being irresponsible. *Id.* at 109-12.

97. *See* Henry, *supra* note 15, at 140 (stating that “child support compliance was only 44.5% where neither joint custody nor access were protected by an order”). There is widespread unhappiness with the current child support system. For example, “a 1996 survey of Florida judges, hearing officers and special masters . . . found that one half of those charged with ordering guideline child support thought the guidelines were unfair. Of that half, 79% felt the guidelines treated the non-custodial parents unfairly.” Robert A. McNeely & Cynthia A. McNeely, *Hopelessly Defective: An Examination of the Assumptions Underlying Current Child Support Guidelines*, in *THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS* 160, 160 (William S. Comanor ed., 2004).

98. SPENCE, *supra* note 9, at xv; *see also* CAROLE CHAMBERS, *supra* note 3, at 17.

99. *See* CROWLEY, *supra* note 12, at 104. “AFDC rules did not require fathers to support their children if the mother claimed ignorance concerning who or where he was. Fathers could, thus, simply walk away from their children with impunity.” *Id.*

100. *See* TAYLOR ET AL., *supra* note 34, at 15-17.

101. *Id.* at 15.

lived in poverty compared to 41.9% of black children.<sup>102</sup> To many, the socially and fiscally responsible approach to the problem was to key in on the fathers.

## 2. A Moment for Pause

What if the Mercedes-Benz stories were not true? A growing contingent of father's rights groups paint a pathetic figure that markedly contrasts with the caricature of the "deadbeat dad" living the high life at the expense of his children. These groups point to statistics indicating that the custodial parent often has a higher standard of living than the non-custodial parent.<sup>103</sup> In part, the standard of living discrepancy is attributed to custodial parents who use solely support money for their children without supplementing it with their own income.<sup>104</sup> Thus, the counter-narrative is written, telling of pitiful fathers living in "a room furnished in early salvation army, an unmade bed, a bare bulb, a john down the hall, and a lonely man choking down meals of crackers and cheese."<sup>105</sup> Fathers' advocates argue that the "deadbeat dad" is largely a myth and that the reality is that a lot of fathers are simply "dead broke."<sup>106</sup> In short, they are claiming that the "country's monomaniacal

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102. *Id.* at 17.

103. See Comanor, *Review of Current Policies*, *supra* note 7, at 11; R. Mark Rogers & Donald J. Bieniewicz, *Child Support Guidelines: Underlying Methodologies, Assumptions, and the Impact on Standard of Living*, in *THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS* 60, 61 (William S. Comanor ed., 2004). In a 1998 study, conducted for the Urban Institute by Laura Wheaton and Elaine Sorenson, it was found that, in order to maintain his lifestyle after paying child support and taxes, a non-custodial parent would have to earn 50% more income in the case of one child and 100% more income in the case of two children. Henry, *supra* note 15, at 137. Unreasonably high support payments also result in a "hidden alimony" for the non-custodial parent even when the custodial parent earns significantly more. See *Sweat v. Sweat*, No. 2000 C 127 (Ga. Super. Ct. Feb. 25, 2002), *rev'd on appeal*, Ga. Dep't of Human Servs. v. *Sweat*, 276 Ga. 627, 580 S.E. 2d 206 (2003).

104. See Comanor, *Review of Current Policies*, *supra* note 7, at 20. Economist Robert Willis suggests that an "overly generous system of child support payments would create an incentive for divorce by the custodial mother." *Id.* at 21. Thus, such provisions may end up hurting children even though their intention was to the contrary. *Id.*

105. DAVID CHAMBERS, *supra* note 87, at 74.

106. See Henry, *supra* note 15, at 137. According to a 1992 GAO report, about 66% of deadbeat dads cannot afford to pay their child support obligations. See DAVID L. BENDER, *CHILD WELFARE: OPPOSING VIEWPOINTS* 75 (1998). As to be expected in the

zeal to catch and punish ‘deadbeat dads’ produced an inherently inequitable and unjust [system],”<sup>107</sup> that does nothing more than “[rob] Peter to pay Paul.”<sup>108</sup>

### 3. Is There a Middle Ground?

The truth might be somewhere in the middle. Taxpayers should not have to foot the bill for fathers who simply refuse to pay their bills. This should not be seen as a conservative position, simply a reasonable one. On the other hand, as we will see later, criminalizing this behavior and spending billions of dollars has not produced the desired results. We should, therefore, look at the reasons why responsible men become deadbeat dads and we should not blindly follow reactionary measures.

One of the major reasons for a man to become a deadbeat dad is the high amount of child support he is forced to pay. In some instances, child support payments and taxes amount to 44% of the father’s income.<sup>109</sup> This puts him in an untenable situation, and should he have a second family, they too are adversely affected.<sup>110</sup> The father, thus, has to choose between paying beyond his reasonable means, and not paying at all.<sup>111</sup> More idiosyncratic rationales for non-payment of support include feelings of being wronged by his previous partner, or that if by paying child support, he tacitly acknowledges responsibility for the failed marriage.<sup>112</sup> In certain situations, some men approach marriage and child support as tantamount to a quid pro quo arrangement in which the husband and father financially supports his wife and children in exchange for the wife’s maintenance of the household and domestic

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lower economic echelon, some fathers simply cannot afford to pay their child support payments. BOUMIL & FRIEDMAN, *supra* note 11, at xi.

107. CROWLEY, *supra* note 12, at 162.

108. Garfinkel, *Introduction*, *supra* note 22, at 4.

109. McNeely & McNeely, *supra* note 97, at 173.

110. *See* Garfinkel, *Introduction*, *supra* note 22, at 4. According to noted commentator Irwin Garfinkel, strong enforcement of child support laws will impoverish the father’s new family. *See id.* In fact, everyone will be worse off by stronger enforcement—the father’s first family, his current family; even the government will collect fewer taxes as the father is forced into the underground economy. *See id.*

111. CAROLE CHAMBERS, *supra* note 3, at 29. According to another commentator, when the father has to pay more than is reasonable, his child support obligation has “exceed[ed] his willingness to pay.” *See* Comanor, *Review of Current Policies*, *supra* note 7, at 10.

112. *See* DAVID CHAMBERS, *supra* note 89, at 73.

companionship. Once this bond is broken, the divorced man sees no reason to continue supporting his children.<sup>113</sup> Still, other men withhold support of their children to take revenge on their former spouses.<sup>114</sup>

In sum, there are many reasons why a man could become a deadbeat dad. We should recognize this fact and also recognize that the war on the deadbeat dad is not working. As we will see later, casualties of this war include the father and his children.<sup>115</sup> It is not idle speculation to suggest that, without negative consequences, some men might never pay their child support. We should, therefore, keep the stick but also provide a carrot to the deadbeat dad.

### C. The Stick Approach—Pros and Cons

Alimony payments are deductible by the payor spouse and includible in the payee's income.<sup>116</sup> The reason for the deduction grew out of concern that the payor spouse would not be able to make these payments due to the high rates of the federal income tax during World War II.<sup>117</sup> While income tax rates have considerably decreased,<sup>118</sup> the favorable tax treatment of alimony payments has remained. Regarding child support payments, such a holistic approach has never been taken. The non-custodial parent is seen as responsible for the economic well-being of his children, and this responsibility does not end when he leaves the home. The enormity of child support delinquency, and corresponding governmental efforts to remedy the problem, resulted in the criminalization of the child support system.<sup>119</sup> This can be considered a war on the deadbeat dad and very little incentive has been given to encourage him to pay his child support; he is only offered a

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113. See *id.* at 74.

114. See BOUMIL & FRIEDMAN, *supra* note 11, at 111.

115. See Garfinkel, *Introduction*, *supra* note 22, at 4. One of the consequences of the war is the disincentive for the deadbeat dad to remarry. See *id.* This means that the deadbeat will not get the benefits of marriage such as greater longevity, lower alcohol consumption and higher earnings. *Id.* The two-parent household may be considered the best child support enforcement program because the resources of both parents will be available to provide for the child. Henry, *supra* note 15, at 145.

116. See I.R.C. §§ 61, 215 (2000).

117. See Shaller, *supra* note 35, at 322 (discussing that post World War II, marginal tax rates were as high as 91%).

118. See I.R.C. § 1 (2007) (indicating that the maximum marginal tax rate is 39.6%).

119. See *supra* note 57 and accompanying text.

stick. The yearly costs of the OCSE are estimated at \$3 billion.<sup>120</sup> Despite massive expense, evidence is mounting that little progress has been made.<sup>121</sup> The GAO's estimate that up to 66% of non-custodial parents simply cannot afford to pay is an indication of why success is slow in coming.<sup>122</sup>

In addition to being ineffective in making the father pay, the stick approach has other negative consequences. For very poor men, the cost of collection is often more than what is owed.<sup>123</sup> Additionally, stronger enforcement efforts force more men into the underground economy, with the resulting loss of taxes for the government.<sup>124</sup> Such efforts also discourage second marriages and take away the benefits of marriage for men, such as decreased mortality, higher income, and lower alcohol abuse.<sup>125</sup> The very purpose of stronger child support enforcement by the federal government—that is, to increase child support payments—has been questioned, because in actuality the government spends more money on collection efforts than it collects.<sup>126</sup> In sum, stronger enforcement efforts do not benefit children and may even leave them worse off.<sup>127</sup> A contrary argument is that fathers who pay more tend to have more contact with their children—which is a good thing.<sup>128</sup> The

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120. See Robert I. Lerman & Elaine Sorensen, *Child Support: Interactions Between Private and Public Transfers* 45 (Nat'l Bureau of Econ. Res., Working Paper No. 8199, 2001), available at <http://www.nber.org/papers/w8199>.

121. Henry, *supra* note 15, at 129 (questioning the effectiveness of the child support collections system and arguing that it is not cost effective); Garfinkel, *Introduction*, *supra* note 22, at 3 (arguing that after more than “twenty years of increasingly strong legislation, child support collections, on average, have not shown much improvement”); Furstenberg, *supra* note 15, at 196 (same); Lerman & Sorensen, *supra* note 120, at 16 (stating that between 1978 and 1997, the percentage of custodial mothers who received child support increased only from 35% to 36%).

122. See *supra* note 24 and accompanying text.

123. Irwin Garfinkel et al., *Conclusion to FATHERS UNDER FIRE* 331, 335 (Garfinkel et al. eds., 1998) [hereinafter Garfinkel, *Conclusion*].

124. Garfinkel, *Introduction*, *supra* note 22, at 4.

125. *Id.*

126. See Garfinkel, *Conclusion*, *supra* note 123, at 335. For fiscal year 1993, administrative costs of the AFDC on child support collection efforts exceeded collections by \$278 million. SPENCE, *supra* note 9, at xv.

127. Garfinkel, *Conclusion*, *supra* note 123, at 333; Garfinkel & McLanahan, *supra* note 31, at 226 (stating that some find greater enforcement leads to increased parental conflict, which decreases the overall well-being of the child).

128. See Garfinkel & McLanahan, *supra* note 31, at 228; see also BOUMIL & FRIEDMAN, *supra* note 11, at x (stating that “a parent who is able to maintain a

trick is to create an environment where men will be more willing to pay their child support obligations. One way to do this is to ensure that child support payments go to the children, as opposed to their mothers.<sup>129</sup> Fathers who are suspicious that some of the money does not go to the child might be right: An estimated \$1 out of every \$5 of child support is actually spent on the child.<sup>130</sup> Additionally, in some cases, the custodial parent can end up having twice the spending money as the non-custodial parent.<sup>131</sup> The system does not make sense because if the child is treated as an economic good, the deadbeat dad bears the burden of paying for the good (child support) and gets no benefit of that good (living with the child).<sup>132</sup>

Clearly, the deadbeat dad is wrong for refusing to pay his child support payments. He should get no sympathy for that. Nevertheless, we have seen that simply punishing the deadbeat dad does not work. We need to offer an incentive to the deadbeat dad. For example, we should permit a deduction for the payment of child support.

### III. PROPOSED SOLUTION

#### A. Review of Previous Proposals

The majority of the many proposals that address the deadbeat dad problem state that the federal government is an essential part of the solution. The solutions range from providing tax deductions<sup>133</sup> or tax

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meaningful relationship with his children is simply more likely to keep up with his financial obligations”).

129. Cf. Robert J. Willis, *Child Support and the Problem of Economic Incentives*, in *THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS* 31, 47 (William S. Comanor ed., 2004). A young father facing steep child support payments came up with the idea of having a credit card system that can only be used for items the child needs. *See id.* This would ensure that child support payments only went toward the needs of the child, not the mother's. *See id.* Researchers say that if the correct matching rate is chosen, custodial mothers “will be motivated to choose an efficient level of child expenditure that reflects [the father's] interest in the child welfare.” *Id.*

130. Comanor, *Preface*, *supra* note 90, at xvi (pointing out that this is an effective tax rate of 400%).

131. Sanford L. Braver & David Stockburger, *Child Support Guidelines and Equal Living Standards*, in *THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS* 91, 93 (William S. Comanor ed., 2004).

132. Comanor, *Review of Current Policies*, *supra* note 7, at 26-27.

133. *See* Schenk, *supra* note 35, at 162 (stating that a child support payment should be treated as alimony so it is deductible).



credits,<sup>134</sup> to treating the incident of single parenthood as a covered incident under the social security system,<sup>135</sup> to providing an assurance program for children in case child support payments are not forthcoming.<sup>136</sup>

### 1. Adoption of New Social Programs

The last two aforementioned proposals do not appear feasible at this time given the country's aversion to new entitlements. Moreover, the United States already has a number of programs addressing child welfare.<sup>137</sup> It is not clear whether the proponents of the new programs are advocating their programs as replacements, or simply additional programs. Skepticism regarding such a program is well-founded as it is tantamount to making the public foot the bill of the deadbeat dad, and should not be done except in situations where the deadbeat dad is incapable of making his child support payments.

### 2. Deduction and Credit Proposal

One proposed solution taxes the recipient on both alimony and child support payments.<sup>138</sup> This proposal would allow private ordering by treating any payments to an ex-spouse as alimony unless the parties agree otherwise. Thus, the parties can either make the payments nondeductible/nontaxable or deductible/includable. Currently, taxpayers can agree to treat payments that qualify as alimony payments as non-

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134. See Shaller, *supra* note 35 (describing that there should be a limited credit for child support payments).

135. See GARFINKEL, ASSURING CHILD SUPPORT, *supra* note 9.

136. See Garfinkel, *What Have We Learned*, *supra* note 35, at 4 (stating a new child support assurance system is the most comprehensive proposal for reform); Daniel Meyer et al., *Who Should be Eligible for an Assured Child Support Benefit*, in CHILD SUPPORT AND CHILD WELL-BEING 175, 176-77 (Irwin Garfinkel et al. eds., 1994) (describing an assured benefit program that would protect eligible families against the insecurity that comes from irregular or late child support payments).

137. See Shaller, *supra* note 35, at 323 n.13 (stating that alimony deduction repeals were unsuccessful).

138. See Bigler, *supra* note 35, at 363 (stating that recipient's of alimony and child support should be taxed); Schenk, *supra* note 35, at 162 (stating that the author would allow a deduction/inclusion approach unless the parties agree otherwise); see also Marci Kelly, *Calling a Spade a Club: The Failure of Matrimonial Tax Reform*, 44 TAX LAW. 787, 810-11 (1991) (explaining that taxing the recipient for alimony and child support removes the incentive for taxpayer manipulation).

alimony payments. This option would permit taxpayers to do the reverse.<sup>139</sup> Proponents assert that it would make tax arbitrage less common in the divorce setting, soften the blow of the IRS, and simplify the tax system.<sup>140</sup> The proposal has several flaws, however. First, the private ordering would create new opportunities for the wealthy to realize tax savings.<sup>141</sup> Second, the proposal fails to address the treatment of child support payments in non-divorce cases.

The credit proposal, by creating a tax incentive for the payor of child support, is similar to the deduction proposal. It recognizes that tax rate manipulation would be the best way to achieve its objectives.<sup>142</sup> Here, child support and alimony payments received by the recipient would be taxable even if such payments exceed the amount of credit that can be claimed by the payor.<sup>143</sup> The proposed credit would be computed at the 15% rate on the sum of alimony and child support for up to \$15,000. This would be a change from current law which imposes almost no restriction on alimony payments so long as the definitional requirements are satisfied.<sup>144</sup>

The credit proposal purports to benefit all taxpayers at the same rate without regard to the individual's tax bracket. The full proposal also advocates for a limited exclusion for low income recipients of child support and alimony, or a lower income tax bracket for low income individuals.<sup>145</sup> Yet, in addition to the complicated manner in which this solution attempts to protect the low income taxpayer by placing the tax burden on the higher income taxpayer, the major flaw in this proposal is that it, too, fails to address the non-divorce context.

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139. See Bigler, *supra* note 35, at 363.

140. See *id.* at 377-82 (explaining the benefits of taxing a child support and alimony payment recipient).

141. The proposal would essentially render the rules under § 71(f) ineffective and would create opportunities to disguise property settlements as alimony; mainly benefiting wealthy taxpayers. Taxpayers will normally enter into private ordering or tax arbitrage only when it benefits them economically. Those with higher income are subject to higher tax rates and, thus, have the most to gain from tax arbitrage. See, e.g., Looney, *supra* note 39, at 6-7.

142. See Shaller, *supra* note 35, at 341 (stating that lowering tax rates could be the ideal tax relief for low income individuals).

143. See *id.* at 337 n.85.

144. See I.R.C. § 71(a), (f) (2000).

145. See Shaller, *supra* note 35, at 338 ("A limited exclusion section could be enacted for low-income recipients of child support and alimony . . .").

*B. A Proposal for Fair Child Support Laws**1. Setting Realistic Child Support Awards*

Before changes to the federal tax code can be truly effective, state legislatures must enact reasonable child support guidelines. This Article examines two disparate examples—Maryland and Massachusetts—in order to illustrate the point. Maryland’s rules are an example of sensible child support guidelines. Massachusetts’s are not.

Under the Maryland statute, a non-custodial parent of one child who makes \$60,000 would be liable for a basic child support payment of \$520 per month if the custodial parent also makes the same income.<sup>146</sup> On the other hand, in Massachusetts, under similar facts, the non-custodial parent is required to pay more than twice this payment.<sup>147</sup> It is no wonder that Bobby Brown could not keep up with his Massachusetts child support payments.<sup>148</sup> Perhaps adding insult to injury, an expensive child support payment often causes the custodial parent to maintain a higher standard of living than the non-custodial parent.<sup>149</sup>

The Maryland statute is an attempt to hold both parents liable for the support of the child. The Maryland statute strikes a balance between the need of the child and the ability of the non-custodial parent to pay, with the need of the child taking center stage, as it should.<sup>150</sup> This is very important because unrealistic child support awards result in excessive payments and delinquent fathers. In addition, the statute

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146. See MD. CODE ANN., FAM. LAW § 12-204(e) (West 2007) (summarizing Maryland’s calculation of child support). Other factors impact this calculation, including the amount of time the child spends with each parent. The current calculation assumes that the child spends all of her time with the custodial parent.

147. See MASS. ANN. LAWS CONSOLIDATION OF CASES CHILD SUPPORT GUIDELINES, § III(A) (LexisNexis 2006), available at <http://www.mass.gov/courts/formsandguidelines/csg2006.html>. According to the Massachusetts guidelines, the parent would have to pay child support in the amount of \$167 plus 25% of the parent’s monthly income, for an amount of \$1217.

148. See *Brown Arrested*, *supra* note 1.

149. See Comanor, *Review of Current Policies*, *supra* note 7, at 11.

150. See MD. CODE ANN., FAM. LAW § 12-204(e). First, the Maryland statute provides a table listing the amount of money both parents will be presumed to spend on their children. This amount fluctuates with the income of the parents. As the amount of parental income increases, the amount of child support payments rises also but not proportionally. For example, an increase in parental income of 11.11% (from \$9000 per month to \$10,000) will only produce an increase of 5.5% in child support payment (from \$989 to \$1040). See *id.*

imposes a child support obligation on non-working parents who are unemployed due to “voluntary impoverishment.”<sup>151</sup> The Maryland statute strikes the right balance between the needs of children and the ability of parents to pay child support. Coupled with a tax incentive to the payor, this set of circumstances would go a long way to eliminating the “deadbeat dad” from our lexicon.

The Massachusetts guidelines, by contrast, award child support based upon the parent’s income.<sup>152</sup> This distorted focus on the needs of children is a direct result of the “best interests of the child principle” imbedded in family law.<sup>153</sup> By stipulating child support payments that can exceed a parent’s ability to pay, the Massachusetts law and corresponding guidelines fail to serve the best interests of the child.<sup>154</sup> In fact, a Georgia court specifically made such a finding regarding excessive child support payments because the non-custodial parent was not sufficiently able to provide for the children while in her care.<sup>155</sup> In short, the percentage of income statutes shift the burden of child raising to the non-custodial parent without taking into account the ability to pay.

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151. See MD. CODE ANN., FAM. LAW § 12-204(b). Under the statute, if a parent is voluntarily impoverished, child support payments are calculated based on the potential income of that parent. A parent will be deemed to be voluntarily impoverished if the parent is not working, unless this is due to a physical or mental disability, or the parent is caring for a child under the age of two years, for which the parents are jointly and severally responsible. *See id.*

152. MASS. ANN. LAWS CONSOLIDATION OF CASES CHILD SUPPORT GUIDELINES, § III(A) (LexisNexis 2006), available at <http://www.mass.gov/courts/formsandguidelines/csg2006.html>.

153. See, e.g., MASS. ANN. LAWS ch. 119, § 1A (LexisNexis 2007).

It is hereby declared to be against the public policy of the commonwealth for a court of competent jurisdiction to enforce an agreement between parents if enforcement of the agreement prevents an adjustment or modification of a *child support* obligation when such adjustment or modification is required to ensure that the allocation of parental resources continues to be fair and reasonable and in the *best interests of the child*.

*Id.* (emphasis added).

154. See CHILD SUPPORT GUIDELINES § III(A); see also Shaller, *supra* note 35. Massachusetts is recognized as one of the states that has not struck a good balance between the non-custodial parent’s needs and his children’s needs. The state simply requires the non-custodial parent to pay a percentage of his income in child support. See CHILD SUPPORT GUIDELINES § III(A). As a result, in states like Massachusetts “the majority of custodial parents have higher standards of living than their matched non-custodial parents.” Comanor, *Review of Current Policies*, *supra* note 7, at 11.

155. See *Sweat v. Sweat*, No. 2000 C 127 (Ga. Super. Ct. Feb. 25, 2002), *rev’d on appeal*, Ga. Dep’t of Human Servs. v. *Sweat*, 276 Ga. 627, 580 S.E. 2d 206 (2003).

Guidelines should begin with a reasonable determination of the needs of children, followed by a determination of the economic standing<sup>156</sup> of both parents, apportioning obligations based upon the proportionate percentage of such economic standing. Ultimately, whatever scheme a state enacts, it must be based on strict economic analysis as required by federal mandate.<sup>157</sup> This economic analysis should be premised on the notion that both parents are responsible for the care of their children and ought to pay a proportionate share of such costs based on their income.<sup>158</sup> As part of the analysis, state-enacted guidelines should consider the large tax-related benefits that the custodial parent receives.<sup>159</sup>

## 2. Proposed Legislation on Child Support Payments

Section 71 of the I.R.C. is reproduced below to illustrate the change in the law advanced by this Article.

Section 71—Alimony, ~~and~~ separate maintenance payments **and child support payments**.

(a) General rule.—Gross income includes amounts received as alimony or separate maintenance payments **and child support payments**.

(b) Alimony or separate maintenance payments defined.—For purposes of this section—

(1) In general.—The term “alimony or separate maintenance payment” means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his

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156. For this purpose, any type of economic benefit, such as receipt of a substantial gift, should be taken into account. Basing child support payments strictly on income is, however, a reasonable solution.

157. See 42 U.S.C. § 651 *et seq.* (2000); see also 45 C.F.R. §§ 302.55-.56.

158. See *Orr v. Orr*, 440 U.S. 268 (1979) (holding that any guideline discriminating against either parent would be found constitutionally defective).

159. Such benefits include head of household status, child exemptions, child tax credits, child care credits, and earned income credits.

spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

(2) Divorce or separation instrument.—The term “divorce or separation instrument” means—

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(B) a written separation agreement, or

(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

(e) Payments to support children.—

—(1) In general.—Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.

**The term child support payment means a payment that meets the requirements of local law. Payments that exceed the guidelines under local law shall not be considered child support payments to the amount of such excess. Child support payments shall be includible in the income of the payee and deductible by the payor.**

—(2) Treatment of certain reductions related to contingencies involving child.

For purposes of paragraph (1), if any amount specified in the instrument will be reduced

—(A) on the happening of a contingency specified in the **instrument** relating to a child (such as attaining a specific age, marrying, dying, leaving school, or a similar contingency), or

—(B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A),

an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

—(3) Special rule where payment is less than amount specified in instrument

For purposes of this subsection, if any payment is less than the

~~amount specified in the instrument, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.~~

(d) Spouse.—For purposes of this section, the term “spouse” includes a former spouse.

(e) Exception for joint returns.—This section and section 215 shall not apply if the spouses make a joint return with each other.

(f) Recomputation where excess front-loading of alimony payments—

(1) In general.—If there are excess alimony payments<sup>160</sup>—

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Section 71 would, thus, be streamlined. The major complications of the section—the recapture rules—would remain. Recapture rules for child support payments are not appropriate because the danger of excess child support payments is much less due to the longer duration of child support payments. More importantly, the proposed language mandates consistency with local requirements. Child support payments would have to meet applicable guidelines, meaning that like alimony, taxpayers would not be able to decide on an amount of child support.

Section 71(c)(2) and (3) would be excised due to the elimination of the distinction between child support and alimony, thereby rendering the priority given child support payments unnecessary. While the distinction remains important for state purposes, it would not be appropriate for a federal statute to address this matter.

#### IV. OFFERING A CARROT TO THE DEADBEAT DAD: REVIEWING THE PROPOSAL

##### *A. Is It Time to Make Peace with the Deadbeat Dad?*

The current system of penalizing deadbeat parents was born out of frustration regarding the ineffectual policies of the 1950s and 1960s.<sup>161</sup>

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160. Section 71(f) and (g) should remain intact. The concerns with respect to excess alimony payments are not as acute in the context of child support payments because such payments have to meet state law guidelines. If a concern arises regarding disguise of property settlements as child support payments, application of § 71(f) can be made to child support payments simply by inserting “or child support payments” in § 71(f)(1).

161. See CROWLEY, *supra* note 12, at 29. Conservatives were worried that the

Today we have to conclude that the penalty approach is not working either, but it does not mean we should resort to the previous unsuccessful approach. Rather, it is time to change the paradigm by seeking to punish the truly deadbeat dad who refuses to pay, while at the same time offering an incentive to the dad who wants to pay but cannot.

From an economic standpoint, the deadbeat dad has little positive incentive to pay his child support payments.<sup>162</sup> Although paying child support is morally correct, the reality is that we cannot rely solely on morality to ensure that payments are made. Some simply do not rise to this moral standard, whereas others justify their non-payment on wholly separate moral grounds.<sup>163</sup> Hence, we need to make it economically rewarding for the deadbeat dad to pay his debts. This is consistent with the general approach—providing tax breaks—that we take regarding behavior that we want to encourage.<sup>164</sup> This approach is also bound to provide better success in changing the behavior of the deadbeat dad because a positive incentive would complement the current system, which provides only punishments for not paying one's child support.<sup>165</sup>

There are many potentially positive consequences for including a carrot in this discussion. The proposals calling for tax incentives to the deadbeat dad<sup>166</sup> tend to limit their discussion to the tax code.<sup>167</sup> There are, however, significant non-tax goals that should be taken into consideration.<sup>168</sup> For example, the qualitative impact of child support

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“liberalization of welfare laws . . . was contributing to a . . . rising tendency of single mothers to rely on welfare for financial support in lieu of private support,” namely fathers of their children. *Id.*

162. *Cf.* Comanor, *Review of Current Policies*, *supra* note 7, at 25 (discussing a California rule, which “requires courts to adjust [child support] awards in relation to the amount of time spent with the child”).

163. *See* DAVID CHAMBERS, *supra* note 87, at 73 (accepting responsibility for the divorce).

164. *See, e.g.*, I.R.C. §§ 162-63 (2000) (permitting a deduction for business expenses and certain interest payments).

165. *Cf.* George K. Yin et al., *Improving The Delivery of Benefits to the Working Poor: Proposals To Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL'Y 225, 287 (1994) (discussing that to reform the Earned Income Tax Credit program, certain incentives should be provided to employers and recognizing that “duties mandated by law without incentives could well prove counter productive”).

166. *See generally* Bigler, *supra* note 35 (discussing the possibility of child support payments being made tax deductible).

167. *Id.*

168. *See* Klein, *supra* note 36, at 260 (indicating that in determining the tax treatment of child support payments, one must look at other issues relating to the



payments in terms of things like the child's earning potential and a general sense of "well-being" far outweighs income from other sources.<sup>169</sup> Allowing a deduction is also bound to increase the amount and frequency of child support payments.<sup>170</sup> Research has shown that this will positively impact children in two ways. First, this will increase contact with their fathers because the dad who pays child support will also visit more.<sup>171</sup> Second, when child support payments are made, they are a significant source of net income to the custodial parent.<sup>172</sup>

### B. *Is the Proposal Good Law?*

Our income tax system is a voluntary system and will be obliterated if taxpayers refuse to comply.<sup>173</sup> To the taxpayer caught in an IRS audit, the system might not seem so voluntary, but the reality is that the system

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"support of children" that would be "irrelevant to other tax disputes"); Jean T. Adams, *Reconciling Family Law With Tax Policy: Untangling The Tax Treatment of Parental Trusts*, 46 TAX L. REV. 107, 100 (1990) (examining the role trusts "play in the lives of the family members who create and enjoy them").

169. See William S. Comanor & Llad Phillips, *Family Structure and Child Support: What Matters for Youth Delinquency Rate?*, in THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 269, 271 (William S. Comanor ed., 2004). It has been argued that every \$1 of child support payment is worth \$22 of income from other sources. Comanor & Phillips, *supra* at 271 (citing Sara S. McLanahan et al., *Child Support Enforcement and Child Well-Being: Greater Security or Greater Conflict?*, in CHILD SUPPORT AND CHILD WELL-BEING 239, 249-50 (Irwin Garfinkel et al. eds., 1994)). This is because by paying child support, the child benefits by "picking up some unobserved characteristics of the father, such as 'family commitment' or the fact that child support dollars have a symbolic value that enhances children's well-being." McLanahan et al., *supra*, at 250.

170. Cf. I.R.C. § 215 (2000) (stating that alimony payments are deductible from the payor's gross income). One of the reasons we do not have a "deadbeat ex-spouse" problem in this country is due to the deduction that the payor receives. Despite such payments being made directly to a party with whom the payor spouse often no longer has a positive relationship, getting a deduction for such payments make things easier. It is also true that alimony payments are normally for a shorter duration.

171. See Lerman & Sorensen, *supra* note 120, at 38. Unfortunately, while the researchers report a positive correlation between child support payments and visitation, they also report a positive correlation between visitation and conflicts between parents. *See id.* at 39.

172. *See id.* at 19.

173. See Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 83 (2007).

will grind to a halt if taxpayers refused to comply. To ensure compliance, Congress has to ensure that the laws it passes are good laws and, thus, will be respected by taxpayers. A good law must meet the following criteria: it must be equitable, efficient and simple.<sup>174</sup> To be equitable a tax must affect similarly situated taxpayers in the same manner (horizontal equity), and disparately impact taxpayers that are not similarly situated (vertical equity). The current system of child support taxation is not equitable because it can cause taxpayers having the same income to pay tax in vastly different amounts.<sup>175</sup> Also, savvy taxpayers and those who have a collegial relationship with their ex-spouses or custodial parents might be able to pay fewer taxes by engaging in tax arbitrage.<sup>176</sup> The current proposal would be more equitable than the current system because it would tax every taxpayer receiving child support payments and would reduce or eliminate tax arbitrage with regard to child support payments.

A good tax is also an efficient tax. An efficient tax interferes with economic behavior minimally. Thus, “under a completely efficient system of taxation, a taxpayer’s behavior would be identical to that of a perfectly functioning market.”<sup>177</sup> The concept of efficiency is closely related to neutrality. A neutral tax would not affect taxpayer behavior. Some have argued that requiring that a tax be efficient is nonsensical because society needs government to function, which requires funding,<sup>178</sup> meaning that any form of taxation imposed by the government would impact taxpayer behavior. The current proposal is designed to affect the behavior of the deadbeat dad and is more economically efficient than the status quo because it would cause an increase in child support payments while taxing the party who receives the benefit of the income.

Finally, a good tax is simple. If a tax rule is complex, it naturally raises the costs of compliance. Complexity is generally determined under the following three criteria: rule, compliance and transactional

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174. See Viswanathan, *supra* note 38, at 668; see also Krisanne M. Schlachter, *Repeal of the Federal Estate and Gift Tax: Will It Happen and How Will It Affect Our Progressive Tax System?*, 19 VA. TAX. REV. 781, 792 (2000) (describing a good law as meeting four requirements: fairness, neutrality, efficiency, and simplicity).

175. See *supra* Part IV.C.4.

176. Viswanathan, *supra* note 38, at 668.

177. *Id.*

178. *Id.* at n.79 (citing MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 27 (5th ed. 2005)).

complexity.<sup>179</sup> Rule complexity refers to the problems of understanding and interpreting the law; compliance complexity means the difficulty in complying with the law (forms, records etc.); and transactional complexity relates to the expense taxpayers undergo structuring their transaction to minimize the impact of the law.<sup>180</sup> The revisions to § 71 simplify the law by eliminating the different tax treatment of alimony and child support payments.<sup>181</sup> The proposed rule would also cause a decrease in transactional costs. It would make the taxation of divorce less complex, spurning savings by taxpayers, lawyers and the court system.<sup>182</sup>

### C. Arguments Against Deduction/Inclusion

#### 1. The Tax Code Should Be Used Only For Economic or Fiscal Policy Reasons

“The Rule of Law is, in the final analysis, nothing more or less than an orderly and equitable means for achieving society’s economic, political, social and moral objectives.”<sup>183</sup> Despite philosophical disagreements respecting the use of the tax code to advance social ends, Congress “shows little appetite for ending the use of the tax system to enforce or encourage compliance with national objectives.”<sup>184</sup> Moreover, every deduction and credit provided by the tax code is arguably social engineering in furtherance of some type of direction that

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179. See *id.* at 669.

180. See *id.*

181. See Bigler, *supra* note 35, at 372-73. The current law’s complexity is reflected by the difficulty courts have had deciding which types of payments are child support or alimony. See *id.* at 372. This is because sophisticated taxpayers could disguise property settlement as child support or alimony payments. See *id.* at 372-73.

182. See *id.* at 377-78.

183. Reginald Mombrun, *The Relevance of Federal Income Tax Courses in the Law School Curriculum and in Law Practice: Now More Than Ever*, 59 THE TAX LAW 1079, n.115 (quoting Letter from N. William Hines, President, Am. Ass’n of Law Schools, <http://www.aals.org/am2006/theme.html>).

184. See Schenk, *supra* note 35, at 148. In addition to the tax system, Congress uses whatever tools it has at its disposal to achieve social ends. See Stephen Barr, *Congress Weighs Using Nest Eggs as Agents of Change*, WASH. POST, June 4, 2007, at D10. For example, regarding the current genocide in Darfur, Congress is contemplating proposals to dissuade the Thrift Savings Plan (a \$210 billion retirement savings plan) from investing in companies whose businesses in Sudan are deemed to directly or indirectly support the genocide in Darfur. See Barr, *supra*, at D10.

the government wants the country to take.<sup>185</sup> Many taxes, such as “sin taxes” on tobacco and alcohol are forms of social engineering.<sup>186</sup> If the power to tax is the power to destroy, then sin taxes are designed to help destroy the sin. In short, social engineering through the tax code is pervasive and appropriate.

The deductibility of alimony expenses under § 71 provides an analogy to the proposed child support deduction.<sup>187</sup> Some argue that the alimony deduction lacks any policy or philosophical underpinnings.<sup>188</sup> This might be a fair criticism because other personal expenses, such as child support, for which there could be a more urgent policy justification, are not deductible.<sup>189</sup> The reality remains that with respect to § 71, Congress made a determination that a particular constituency should enjoy this tax benefit. The policy justification for Congress is to protect payees—usually women—by providing payors with incentives to make their payments.<sup>190</sup> Such types of policy consideration are routinely entertained by Congress.

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185. See JAMES J. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION, CASES AND MATERIALS* 29 (14th ed. 2006).

186. See David J. Depippo, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 545-49 (2002) (discussing history of “sin taxes”). Justice Felix Frankfurter also recognized the social engineering aspects of taxes when he stated, “[A] tax can be a means for raising revenue, or a device for regulating conduct, or both.” See *Jones v. City of Opelika*, 319 U.S. 105, 134 (1943) (Frankfurter, J., dissenting).

187. I.R.C. § 71 (2006).

188. See Lee A. Sheppard, *Safe Harbor Divorce*, 33 TAX NOTES 531 (1986) [hereinafter Sheppard, *Safe Harbor Divorce*] (describing § 71 as creating a safe harbor for the conversion of property settlement into deductible alimony). Congress, in finding the line between property settlement and alimony, rejected a two-year alimony period because this would have allowed a payor to meet his two-year period by making a December payment followed one month later by a January payment, resembling a property settlement. *Id.* at 532. Instead, Congress chose the current three-year payment scheme. *Id.*

189. See Lee A. Sheppard, *Divorce In America Is Not So Simple*, 23 TAX NOTES 1014, 1016 (1984) [hereinafter Sheppard, *Divorce in America*].

190. Cf. Shaller, *supra* note 35, at 323 n.13 (1994) (citing Marjorie A. O’Connell, *The Domestic Relations Tax Reform Act: How We Got It and What We Can Do About It*, 18 FAM. L.Q. 473, 494 (1985)) (stating that during the Reagan era, repeal of the alimony deduction was briefly considered but quickly dropped due to opposition by women’s groups, who believed that “elimination of the alimony deduction would be a disincentive to the alimony payor”).

The major problem with tax code social engineering is the staying power of government taxation edicts that eventually cost the government revenues beyond its original expectations.<sup>191</sup> This Article's proposal avoids this problem because it does not eliminate revenue, but rather shifts the tax burden to the correct party; in this case, the taxpayer who is also the custodial parent.

## 2. Shifting the Child Support Burden to Taxpayers

It is hard to quantify the costs of the proposal. Because the payor is normally in a higher tax bracket than the payee, the government might lose revenue on the resulting income shift. This might facilitate tax savings to higher-income individuals, in addition to the so-called "divorce bonus."<sup>192</sup> There are fallacies inherent to this argument, however. First, partly to the closing of the gender income gap, "the difference between the economic status of men and women after divorce is negligible."<sup>193</sup> Second, even if gender income disparities persist, the government's loss is mitigated by the growing prevalence of joint custody where child support payments are lower and increasing grants of custody to the father.<sup>194</sup> Third, the government would recognize significant savings when it becomes free of chasing the deadbeat dad.<sup>195</sup> Although higher income tax payers would recognize most of the tax savings from such a program, the lower income families, who are more likely to receive government benefits, will also benefit by the creation of an environment where more child support payments are made, a result sorely needed.<sup>196</sup>

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191. See Viswanathan, *supra* note 38, at 674-76 (stating that the home mortgage interest deduction persists despite its ineffectiveness (as evidenced by the total revenue lost to the deduction, which is estimated to be over \$100 billion, while home ownership has only increased from 63.4% to 68.9% over the past forty years)).

192. See Shaller, *supra* note 35, at 328. A divorce bonus is recognized due to the shifting of income from a high bracket to a lower bracket. See *id.* Additionally, the custodial parent also benefits by qualifying as a head of household. See *id.* Shaller, however, fails to recognize that the divorced or unmarried couple does not benefit from the economy of scale enjoyed by married couples.

193. See Bigler, *supra* note 35, at 386.

194. See BOUMIL & FRIEDMAN, *supra* note 11.

195. See Henry, *supra* note 15, at 128. The cost savings of the government include amounts spent by the OCSE, in addition to enforcement costs incurred by the police and the court system.

196. See Looney, *supra* note 39, at 6 (child-related tax benefits sometimes do not

Additionally, there are already significant opportunities for arbitrage in the current system since taxpayers can swap higher child support payments for child deductions and credits, something that the IRS has recognized and respected.<sup>197</sup> Therefore, the new proposal would not worsen the problem. Finally, this solution will cost a lot less than proposals that have called for adding single parenthood as a social security benefit,<sup>198</sup> or devising a new “child assurance” federal entitlement program.<sup>199</sup>

### 3. The Proposal Will Create a Loophole for Wealthy Taxpayers

Supporters of this argument rely on alimony statistics that indicate a majority of tax benefits are enjoyed by high income taxpayers. They cite to this evidence to suggest that the public will perceive this as another tax shelter for the rich.<sup>200</sup> The dissimilar tax treatment of child support

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benefit poor families).

197. See, e.g., IRS form 8332, available at [www.irs.gov](http://www.irs.gov) (allowing the custodial parent who by law is entitled to claim the child dependency exemption to release such exemption to the non-custodial parent).

198. GARFINKEL, ASSURING CHILD SUPPORT, *supra* note 9, at 51.

199. Ron Haskins, *Losing Ground or Moving Ahead?*, in ESCAPE FROM POVERTY: WHAT MAKES A DIFFERENCE FOR CHILDREN 241, 266 (P. Lindsay Chase-Lansdale & Jeanne Brooks-Gunn eds., 1995). It appears that the child support assurance program would be in addition to existing federal programs that provide help to children of the poor. Proponents of the assurance system cite many differences from the traditional programs, such as the fact the assurance program would not just be for the poor; it would cover anyone entitled to receive child support. Also, unlike the AFDC, the assurance program would not be a disincentive to work. *Id.* at 50. It is questionable whether the public will have the stomach to handle what appears to be another costly federal program, in light of the myriad of programs already available to support children (the AFDC, the food stamp program, Medicare and Child Health, Housing programs, school lunch programs, WIC, Headstart, tax credits, etc.), and the amount of money spent on these programs (\$131 billion in 1990 alone). See JANET M. CURRIE, WELFARE AND WELL-BEING OF CHILDREN 1 (2001).

200. Shaller, *supra* note 35, at 337.

To illustrate, for 1990, although taxpayers with adjusted gross incomes of \$100,000 or greater represented only a little more than 15% of the returns claiming an alimony deduction, the amount they deducted represented more than 36% of the alimony deductions claimed by all taxpayers. Further, while taxpayers with incomes of \$200,000 or more represented approximately 5% of the returns claiming the alimony deduction, they claimed approximately 20% of the total alimony deducted.

*Id.*

and alimony payments is the source of many difficulties.<sup>201</sup> There are significant differences between alimony and child support payments that would make sheltering of taxes through child support payments less likely. The opportunity for disguised property settlements is lower in the child support area because child support installments tend to cover a longer period of time than do alimony payments. Further, most states stipulate the minimum support payments based on the parent's income,<sup>202</sup> making it easier to monitor abuses. Moreover, § 71(f) of the IRC monitors excesses in alimony payments.<sup>203</sup> The same concepts could be applied to child support payments.<sup>204</sup>

#### 4. A Deduction Will Lack Horizontal Equity

Another argument against the deduction/inclusion proposal is that unmarried couples are favored over married couples.<sup>205</sup> For example, a married couple with a yearly income of \$80,000, who spends \$10,000 on their child, will not receive a deduction for such expenses aside from the various child credits allowed by the code.<sup>206</sup> But, if the couple divorces and the payor ex-spouse is allowed an overall deduction for child support, the divorced couple would get a deduction for all child related expenses that they could not deduct while married.

This analysis is incorrect. This proposal merely shifts income. The couple will continue to pay income tax on their total earnings. The sole modification is that the payee must report whatever income the payor

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201. See Schenk, *supra* note 35, at 161-62 (describing that the differentiation between child support and alimony has created problems regarding earned income and child care credits); see also Bigler, *supra* note 35, at 337 (stating the distinction between alimony and child support is responsible for the complexity in the current taxation of divorce).

202. See SPENCE, *supra* note 9, at 10.

203. See I.R.C. § 71(f) (2000).

204. For example, one of the dangers in disguising property settlements into inflated alimony payments is that the payee spouse might argue for alimony at a later time based on this inflated amount. The same can be true for inflated child support payments. The payee also takes a risk in accepting delayed property settlement payments because the financial position of the payor could change over time.

205. Shaller, *supra* note 35, at 327-28 (stating that under the Revenue Act of 1969 and the progressive rate structure, divorced persons who split income under current alimony provisions fare better than married couples).

206. Child Tax benefits include the child exemption, the child care deduction and the child tax credit.

can deduct. If the proposal allowed a deduction without an inclusion in income, arguably, the divorced or unmarried couple would not be in a better financial position than the married couple. The unmarried couple would incur duplicate expenses, such as separate homes, telephone services, utilities payments, car payments, insurance payments, health insurance, and gym memberships.<sup>207</sup>

The status quo lacks horizontal equity.<sup>208</sup> Currently, the non-custodial parent is the only party taxed on the income that is routed into child support payments. Further, a taxpayer who receives child support payment is in a better position than a taxpayer who earns the same income but does not receive child support payments.<sup>209</sup> For example, a taxpayer with a yearly income of \$40,000, who does not receive child support, will be taxed on her entire income, while another taxpayer who makes \$30,000 per year and receives \$10,000 in child support payments will only be taxed on \$30,000, effectively boosting her income by \$1500—assuming they both pay a tax rate of 15%.<sup>210</sup>

#### 5. A Deduction/Inclusion System Would Create Hardships for Women

Some argue that one of the negative aspects of the no-fault divorce laws is the loss of bargaining power for women.<sup>211</sup> There is no incentive to negotiate prior to signing divorce papers. The only bargaining chip for women is their control over child tax credits and deductions.<sup>212</sup>

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207. Cf. I.R.C. § 1 (2000). This is the problem with the notion of the so-called “marriage tax.” Taxing married couples at a higher rate was not horizontally inequitable because married couples benefited from economies of scale, and, thus, could afford to pay more in taxes. Nevertheless, the opponents of this marriage tax had a good story, a good slogan, and were able to change the law. *See id.*

208. *See* JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY 22 (2d ed. 1999) (describing the definition of horizontal equity).

209. Bigler, *supra* note 35, at 382 (“A taxpayer who receives payments as excludable child support is better off than a taxpayer with the same gross taxable income who does not receive such payments.”).

210. *See id.* (describing a similar scenario with two single mothers who have yearly incomes of \$60,000).

211. *See* ANNE CASE ET AL., NAT’L BUREAU OF ECON. RES., UNDERSTANDING CHILD SUPPORT TRENDS: ECONOMIC DEMOGRAPHIC AND POLITICAL CONTRIBUTIONS 5 (2000), available at <http://www.nber.org/papers/w8056> (stating that the switch to “no-fault” divorce in the 1970s reduced women’s bargaining power in divorce negotiations).

212. Parents are aware of such benefits and often exchange them for higher child support payments. If the parties have two or more children, the bargaining is simpler as each party can split the tax benefits associated with children.



Therefore, the current proposal will significantly decrease or even terminate such arbitrage. Although it appears that the custodial parent will not benefit from this system, negotiation is possible if the parties choose to do so.<sup>213</sup> The custodial parent will continue to be entitled to the various child deductions and credits currently available. More importantly, the custodial parent has an increased chance of actually receiving the child support due. As discussed above, taxing the recipient would make the system horizontally equitable.<sup>214</sup>

Finally, some argue that women will be adversely affected by this model because they would bear the burden of taxes for child support payments.<sup>215</sup> This analysis is faulty because most women<sup>216</sup> are not receiving child support payments that are due, and increasing the flow of payments offsets any potential increase in tax.

#### *D. Arguments In Favor of the Proposal*

In addition to the social benefits of the deduction/inclusion approach discussed above, the approach would benefit the tax system. There are three major benefits to the proposal: (1) tax simplification, (2) incentives to pay, and (3) income being taxed to the party who has dominion and control over the income.<sup>217</sup> The first benefit is based on

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213. See Bigler, *supra* note 35, at 380.

For example, suppose that Jack and Jill are in the process of getting a divorce. Jack, if single, would be in the 39.6% marginal rate bracket, and Jill would be in the 15% marginal rate bracket. They are negotiating child support payments, and Jill would like \$500 per month. If the \$500 were nondeductible by Jack and excludable by Jill, then Jill's after-tax benefit would be \$500. Thus, \$500 would be available for child support. However, if the payments are deductible by Jack and includable by Jill, then Jack should be willing to agree to, say, a \$600 payment, since the after-deduction cost of that payment would be approximately \$360 ( $\$500 \times 40\% = \$240$  deduction). Jack is much better off under this approach. However, Jill is better off as well. The after tax benefit to her of \$600 includable payment is \$510 ( $600 \times 15\% = 90$ ;  $600 - 90 = 510$ ). In sum, \$510 would be available for child support.

*Id.* (internal notations altered).

214. See *supra* Part IV.C.4 (stating that horizontal equity is a necessary component of the tax system).

215. See Bigler, *supra* note 35, at 364 (“[T]axing the recipient is unfair because it intensifies the economic hardship of women after divorce [and] is based upon empirical evidence that has been recently disproved.”).

216. See CAROLE CHAMBERS, *supra* note 3, at 17 (stating 75% to 87% of children do not receive child support payments); see also Bigler, *supra* note 35, at 379 (“Sixty-five percent of absent fathers do not contribute alimony or child support.”).

217. See Bigler, *supra* note 35, at 376-82 (stating tax simplification, elimination of

tax policy, the second benefit is based on public policy, and the third benefit rests on dual policy and technical grounds.

### 1. Tax Simplification

The current income tax system has long been recognized as unnecessarily complex.<sup>218</sup> Such complexity harms the economy because taxpayers, their attorneys, and the court system must wrestle with complex tax rules.<sup>219</sup> One of the causes of tax complication is the differing treatment of items that should have the same treatment. If preferential treatment is granted to one item over another, taxpayers would naturally attempt to identify their transactions with the lower tax option.

The distinction between child support and alimony is the cause for much of the complexity.<sup>220</sup> If alimony and child support payments are treated the same, most of § 71 definitional rules would be obsolete.<sup>221</sup> The current proposal provides unambiguous rules that would benefit the tax system, taxpayers, their attorneys, and the courts.<sup>222</sup> In addition, the proposal would eliminate traps for the unwary.<sup>223</sup> Under § 71(c)(2), child support payments take priority over alimony payments. Thus, if a taxpayer makes a payment that is less than the combined alimony/child support that he owes, he has an incentive to adjust the child support

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traps for the unwary, elimination of taxpayer manipulation, incentives to pay child support, overall tax savings, payment as income to the recipient, and the application of the assignment of income doctrine are the benefits associated with a proposal that taxes the recipient on alimony and child support payments).

218. *Id.* at 372 (citing STAFF OF JOINT COMM. ON TAXATION, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISION OF THE DEFICIT REDUCTION ACT OF 1984 715 (Comm. Print 1984)) (“[C]omplexity in some areas may be justified because the underlying transactions themselves are complex and the transactions are likely to be supervised by experts. That is not [the case with] divorce.”).

219. *See* Bigler, *supra* note 35, at 378 (stating the current system has complex rules that require extensive court interpretation).

220. *See id.* at 337.

221. *See id.* (“Treating alimony and child support the same for tax purposes eliminates this complexity. . . . The complex definition rules of [§ 71] can be completely disregarded.”).

222. *See id.* at 377-78 (stating that the simplification of the system will benefit three main groups: taxpayers, attorneys and courts).

223. *Id.* at 378 (“The proposal also eliminates the traps for the unwary that plague the current system. The exact language to differentiate the payments required by the current system is what traps many taxpayers.”).

portion downward and claim a higher alimony payment deduction.<sup>224</sup> For the payee taxpayer the reverse is true. Therefore, the government is at the mercy of taxpayers classifying payments as alimony or as child support. The revisions to § 71 eliminates the ambiguous code language that instigates this problem.<sup>225</sup> In short, a deduction/inclusion rule would terminate taxpayer's manipulation of the alimony/child support payment rules.

## 2. An Incentive to Pay

Providing a financial incentive in the form of a tax deduction will encourage deadbeat dads to pay their child support obligations.<sup>226</sup> Yet, it also creates an emotional incentive. The government's refusal to allow the father to deduct child support payments reinforces the feeling that his contributions are meaningless.<sup>227</sup> If a father can deduct child support payments, he will feel that his contributions are valuable and necessary for his children.<sup>228</sup> It is easy to speculate that over time this would increase societal pressure on men to pay their child support obligation and create an environment where payments are consistently made.

It should be noted that the deduction for child support rests on stronger policy grounds than the deduction for alimony payments.<sup>229</sup>

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224. See I.R.C. § 215(a) (2000).

225. Bigler, *supra* note 35, at 378 (“[T]here will no longer be the chance that one party will fail to report a payment (thinking it is child support) that the other party deducts (thinking it is alimony). Both forms of payment will be includable and deductible.”).

226. See *id.* at 379 (stating that providing a financial incentive may encourage deadbeat dads to pay child support). Payors should not need an incentive to support their own children; however, when the parents do not share the same household, the non-custodial parent, for a myriad of reasons, needs incentives to provide long term support to his children.

227. *Id.* (“By not allowing the father to deduct child support, it ‘reinforce[s] the already existing feeling that he is no longer regarded by the state as an important part of the child’s life, and that his contributions are meaningless.’”).

228. *Id.* (“The allowance of a deduction child support will allow the non-custodial parent to feel as if his contribution is valuable. Such a simple change as allowing a tax deduction will allow a non-custodial father to support his children without discouragement or resentment.”).

229. See Sheppard, *Divorce in America*, *supra* note 189, at 1016 (stating that a tax break for child support has a greater public policy justification than an alimony deduction).

The high income tax rates that set the stage for alimony payment deductions have been lowered.<sup>230</sup> Still, the deduction persists. A deduction for child support payments should achieve the important policy of providing more money to custodial parents without unduly sacrificing revenue, and might have the ancillary benefits of promoting amicable relations between divorced couples while increasing contact between parent and child.

### 3. Taxing the Right Party

Classifying child support payments as income to the recipient is necessary. As it stands, the recipient obtains the funds tax-free and enjoys all available child tax deductions and credits. Under assignment of income principles, the payor and payee are “arms’ length economic antagonists.”<sup>231</sup> By not recognizing this, the IRC fails to recognize the economic implications of marriage and divorce.<sup>232</sup>

The problem might lie in viewing child support payments as solely a “personal, living or family expense.”<sup>233</sup> As tautological as it might be, both child support and alimony payments are personal expenses because they are not business expenses under § 162 or expenses incurred in the production of income.<sup>234</sup> Moreover, neither case law, nor the legislative histories of §§ 162, 212 and 262 adequately define “personal, living or family expenses.”<sup>235</sup> Still, there are a number of code sections that

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230. See Shaller, *supra* note 35, at 322 (explaining the history of the alimony deduction/inclusion provisions).

231. *Id.* at 381 (quoting Michael Asimow, *The Assault on Tax-Free Divorce: Carryover Basis and Assignment of Income*, 44 TAX L. REV. 65, 108 (1988)).

232. See Schenk, *supra* note 35, at 164 (stating that despite the end of the marital relationship, the economic relationship continues and the taxation of earnings should not change).

233. See I.R.C. § 262 (2000); Schenk, *supra* note 35, at 163 (stating that child support is classified as a personal expense).

234. Schenk, *supra* note 35, at 163 (stating both child support and alimony expenses are personal). There are four main approaches to determining whether an expense is a personal expense: (1) inherently personal expense such as fees for doctor visits, (2) excess costs (whether costs incurred by the taxpayer are job related), (3) whether expenses can be allocated between their business and personal components, and (4) whether an expense is primarily for business or profit-oriented activities. See BITTKER & LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 20.2.1, available at <http://checkpoint.riag.com> (last visited Sept. 19, 2007) (explaining that some business expenses that are inherently personal are non-deductible).

235. See BITTKER & LOKKEN, *supra* note 234, at ¶ 20.2.1 n.10 (stating that the cases,

provide deductions for personal expenses,<sup>236</sup> including alimony payments, despite the lack of any economic difference between alimony and child support.<sup>237</sup> The rationale supporting the distinction is that while the marital relationship has ended, the non-custodial parent's relationship with his children does not terminate.<sup>238</sup>

Absent the drafting of a deduction via "legislative grace,"<sup>239</sup> there is another way to view the income-deduction conundrum. Currently, child support payments are not recognized as taxable income to the payee.<sup>240</sup> In light of the provision of § 71 that excludes child support payments from the payee's gross income because the payor may not take a deduction under § 215,<sup>241</sup> the receipt of child support should be considered a taxable event. Once a child support payment is made, the payor has little dominion or control over the payment. He could hope that the money goes toward supporting his child, but this might not always be the case. Thus, an argument can be made that, pursuant to § 61, the recipient of support payments has accession to wealth and, therefore, income.<sup>242</sup>

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rulings, and legislative history of §§ 162, 212, and 262 fail to clarify the meaning of personal, living, or family expenses).

236. See, e.g., I.R.C. § 213 (2000) (deduction for medical expenses), see also *id.* § 163 (deduction for certain interest payments).

237. Bigler, *supra* note 35, at 381 ("Child support and alimony should both be treated as under the control of the recipient since there is essentially no economic difference between child support and alimony payments.").

238. Schenk, *supra* note 35, at 163 ("The Treasury Department and others have stated that alimony is deductible because the marital relationship has terminated and, thus, the payment is no longer personal."); see also Louis Alan Talley, *Tax Implications of Divorce: Treatment of Alimony, Child Support and the Child's Personal Exemption* (Cong. Res. Serv., RS 20004, Dec. 28, 1998); Bigler, *supra* note 35, at 382 ("One way to view child support is as payments made to a custodial parent to help fulfill her obligation of support to her children.").

239. See *Interstate Transit Lines v. CIR*, 319 U.S. 590 (1943) (citing *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934)); *Deputy v. Du Pont*, 308 U.S. 488, 493 (1940) ("[A]n income tax deduction is a matter of legislative grace . . ."). But see Erwin N. Griswold, *An Argument Against the Doctrine That Deductions Should Be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142, 1142 (1943) (stating the strict literal construction of tax statute's rule that favored taxpayers was not rational).

240. See I.R.C. § 71(c) (2000).

241. See *id.* §§ 71, 215.

242. See *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (defining income as "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion"). To date, § 61 does not contain specific language

## V. CONCLUSION

The deadbeat dad phenomenon causes both short-term and long-term social and economic problems. In the short term, it is one of the causes of childhood poverty. In the long term, it denies economic opportunities to children and deprives them of developing a bond with their fathers. As argued above, a strong bond with parents is greatly beneficial to children. As a society, we have advanced from ignoring the problem to attacking it, and neither approach has worked. There are numerous reasons for this failure.

We are faced with a quandary that we must resolve. It is time for a new approach. This new approach is the offering of a carrot to the deadbeat dad. Along with the stick that we adopted in the 1980s, it is our best hope to erase the deadbeat dad from our lexicon.

In this Article, I have argued that the current governmental approach to addressing the deadbeat dad problem is simply not working because the problem is worsening. The Article has provided ample evidence of this worsening situation. There are many reasons why a dad would refuse to pay his child support obligations, but the root cause of the problem is that the typical deadbeat dad feels that he has gotten the raw end of the deal. That is, he is bearing the economic burden of child-rearing while getting few of the benefits (i.e., actively participating in child-rearing). Although some may argue that this feeling is not well-grounded and is only a perception, as far as the deadbeat dad is concerned, this is reality. If we want to change the current situation, we must change the perception of the deadbeat dad.

This Article provides a three-prong approach to solving the problem: (1) set realistic child support payments, (2) provide a deduction for the payor of child support payments (payee will take payment into income), and (3) retain the penalties for failing to pay child support. The purpose of the first two prongs of this approach is to create incentives for the deadbeat dad to pay his child support obligations because, often, he does not pay because he cannot afford to pay. Setting realistic child support payments would go a long way to addressing ability to pay. States such as Maryland have adopted a shared income model where both parents are responsible for the support of their children. In addition to making payments by the non-custodial parent more affordable, such an approach is also seen as more equitable as it

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regarding income treatment for child support payments. *See* I.R.C. § 61 (2000).

puts the burden on both parents. Coupled with the added deduction incentive, my proposal would create an environment where there will be little excuse for not paying child support obligations and, thus, societal pressure on the deadbeat dad to pay his obligations will increase. The proposal recognizes that the proposed incentives will not work in all cases; hence, the current penalties for failing to pay child support obligations must be retained.

To be sure, some will particularly oppose the second part of this proposal on many grounds but, as argued in this paper, the benefits of the deduction/inclusion approach outweigh its costs. A particularly potent argument against the deduction/inclusion approach is that it will hurt mothers because the tax burden will be shifted to them. This argument, however, fails to note that mothers that need the support payments, but do not receive them, will see an economic benefit by receiving regular payments regardless of the potential tax liability. A by-product of increased child support payments will be increased visitations by dad and increased psychological benefits for the children.

Finally, this Article provides proposed language to § 71 that would result in simplification of the section and easier administration by the IRS. This proposed language should be embraced by tax simplification advocates. Tax simplification would be achieved by the proposed changes giving similar treatment to both alimony and child support payments. Hence, § 71(c)(2) would be entirely eliminated because the concern of disguising child support payments as alimony payments would no longer exist. Moreover, child support payment would be defined according to state law with the result that the complicated rules under § 71(f) to guard against disguising non-deductible property settlements as deductible alimony payments would not spill over to the child support area, since state law zealously patrols the definition of child support.