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## ARTICLES

### **Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws**

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*Each year family courts incarcerate thousands of Americans for nonpayment of child support. The vast majority of these parents are not accorded criminal procedure protections because courts have characterized routine child support enforcement as a “civil” matter. The United States Supreme Court has endorsed this approach. In *Turner v Rogers*, the Court began from a premise it regarded as both legally significant and unquestionably true: that child support proceedings are civil.*

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*On that basis, the Court determined that an indigent father facing a year in jail was not entitled to a public defender. The Court's analysis reflects a broader and widespread assumption that family law is a civil field. Recent scholarship has challenged that understanding by examining how criminal law and family law work in tandem to police certain conduct. This Article goes further by demonstrating that modern support duties and the family courts that enforce them evolved from criminal laws and courts.*

*Relying on extensive historical research, this Article argues that child support enforcement is criminal law in a civil guise. Family nonsupport was criminalized around the turn of the twentieth century to permit extradition of offenders. Criminal court judges then tasked newly minted probation officers with reconciling, investigating, and monitoring families—novel state interventions in domestic life. Probation officers, in turn, staffed and promoted specialized criminal nonsupport courts (initially called “domestic relations courts” and later “family courts”) that some cities opened to handle these prosecutions in the 1910s. Beginning in the 1930s, costs and stigma associated with criminal law led legislators to strategically relabel family courts and support enforcement as “civil,” even while retaining procedures, personnel, and powers drawn from the criminal context. Observers found the ongoing use of criminal-derived oversight methods unobjectionable; the decades in which support law was largely criminal law shifted norms about acceptable and desirable state involvement in family relationships. As the number of civil “child support” suits surpassed nonsupport prosecutions (which all states retained) and probation officers disappeared from family litigation, the criminal heritage and continued criminal-law reinforcement of family courts and support laws were obscured.*

*The calculated and incomplete conversion of family support enforcement from criminal to civil undercuts the supposedly distinct purposes, procedures, and penalties associated with the civil and criminal categories. Building on scholarship that critiques the Supreme Court's treatment of statutory schemes that blur the civil-criminal divide, the Article draws from child support history to condemn the Court's strong deference to legislative labels and to propose greater consideration of enforcement methods. If the Court were persuaded to recognize child support incarceration as a criminal sanction, then states would face a difficult choice. They could either allocate the resources needed for constitutionally mandated criminal procedure protections or decriminalize the enforcement machinery—ideally through elimination of most child support incarceration.*

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## INTRODUCTION

In the 2011 case of *Turner v Rogers*, the United States Supreme Court held that a father jailed for a year by a family court judge for nonpayment of child support was not entitled to a public defender.<sup>1</sup> The defendant in that case, Michael Turner, was one of the millions of Americans who are party to a child support order. Today these parents collectively owe more than \$30 billion annually.<sup>2</sup> Over \$100 billion in child support payments is overdue, and thousands of child support debtors are in jail.<sup>3</sup>

Most child support cases are heard in specialized domestic relations or family courts that also have jurisdiction over other family litigation, such as divorce and child custody.<sup>4</sup> Each year there are more than five million domestic relations suits, comprising over 10 percent of state court dockets.<sup>5</sup> Family-related litigation is thus many Americans’ most direct and important contact with the legal system.<sup>6</sup> Scholars and practitioners have found

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<sup>1</sup> *Turner v Rogers*, 564 US 431, 435 (2011).

<sup>2</sup> Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2013* \*11 (United States Department of Commerce, Jan 2016), archived at <http://perma.cc/28UD-59YV>.

<sup>3</sup> Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 Cornell J L & Pub Pol 95, 106–07, 116–17 (2008).

<sup>4</sup> On variations in modern family court jurisdiction, see Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America’s Family Justice Systems*, 46 Fam Ct Rev 230, 232–33 (2008).

<sup>5</sup> Richard Y. Schauffler, et al, *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads* \*3, 10 (National Center for State Courts, 2016), archived at <http://perma.cc/34A6-M2AC> (statistic excludes traffic cases). Around 30 percent of domestic relations matters are support suits or closely related paternity cases. *Id.* at \*10.

<sup>6</sup> Countless other families make decisions without state intervention yet subject to the norms established through litigated cases; in the language of a classic law review article, people who pursue private agreements “bargain in the shadow of the law.” Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J 950, 968 (1979).

that, despite family courts' importance, these tribunals suffer from poor resources, limited access to counsel, low-status judges, and inadequate procedures.<sup>7</sup>

In *Turner*, the justices began from the premise that they were evaluating the procedural protections warranted in a civil proceeding. The Court unquestioningly accepted that Turner's minutes-long appearance before a South Carolina family court was a "civil contempt hearing."<sup>8</sup> On that basis, the justices reasoned that the Sixth Amendment right to counsel did not apply.<sup>9</sup> The majority instead applied a civil balancing test and concluded that the Due Process Clause of the Fourteenth Amendment required only "alternative procedural safeguards."<sup>10</sup> The dissenters likewise found no Due Process right to counsel. Two dissenters went further, critiquing the majority's opinion for insufficiently considering "the interests of the child and custodial parent, who is usually the child's mother."<sup>11</sup> Referring to obstacles to collecting support from "deadbeat dads," they credited states' claim that civil contempt imprisonment is a "highly effective tool for collecting child support when nothing else works."<sup>12</sup>

*Turner* has provided rich fodder for a range of legal commentary that also assumes that incarceration for child support non-payment is civil in nature. The case has become a leading example of the need for improved access to justice and perhaps a civil *Gideon*.<sup>13</sup> It also serves as a centerpiece in family law literature

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<sup>7</sup> Jane C. Murphy and Jana B. Singer, *Divorced from Reality: Rethinking Family Dispute Resolution* 102 (NYU 2015) (noting that a majority of family litigants have no access to counsel); Deborah Chase and Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 *Fam Ct Rev* 209, 212–13 (2009) (summarizing criticism of family courts).

<sup>8</sup> *Turner*, 564 US at 436, 438.

<sup>9</sup> *Id.* at 441–42.

<sup>10</sup> *Id.* at 444–45, 448, citing *Mathews v Eldridge*, 424 US 319, 335 (1976) and *Lassiter v Department of Social Services*, 452 US 18, 27–31 (1981).

<sup>11</sup> *Turner*, 564 US at 458 (Thomas dissenting).

<sup>12</sup> *Id.* at 459–60 (quotation marks omitted).

<sup>13</sup> See generally *Gideon v Wainwright*, 372 US 335 (1963). For a particularly helpful treatment that situates *Turner* in a longer history of related advocacy, see Kelly Terry, *The Movement for a Right to Counsel in Civil Cases: Turner v. Rogers (2011)*, in Ezra Rosser and Marie Failing, eds., *The Poverty Law Canon* 256–73 (2016). See also, for example, Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 *Yale L J* 2260, 2268–72 (2013) ("[T]he *Turner* Court's references to equality considerations reflect the Court's intuitive understanding that inequality in access to the courts might distort the checks and balances underlying our democratic system."); Richard M. Re, "Equal Right to the Poor", 84 *U Chi L Rev* 1149, 1195–96 & n 228 (2017). Civil procedure casebooks include *Turner* in discussing access to

that critiques the harmful consequences of child support enforcement on poor and minority fathers and their families.<sup>14</sup> More broadly, child support enforcement features in discussions of the seeming return of debtors' prison and mass incarceration.<sup>15</sup>

This Article challenges the widespread understanding of child support laws as civil, an intervention with profound consequences for the treatment of support cases and analysis of the civil-criminal divide. Extensive archival research reveals that the civil label obscures a system born in and backed by criminal law. Today's child support obligations are enforced in specialized family courts that retain procedures developed when these tribunals primarily oversaw criminal nonsupport cases.

In the first decades of the twentieth century, lawmakers criminalized family nonsupport, applied probation supervision to offenders, and segregated nonsupport cases in specialized domestic relations courts. Together these developments allowed the state to intervene more directly and coercively in securing family financial support than had previously been possible. Criminal enforcement also brought downsides including costs and stigma that some reformers wished to reduce. Beginning in the 1930s, lawmakers strategically rebranded criminal nonsupport prosecutions and the courts that heard them as "civil." At the same time, they preserved essential elements—state employee monitoring and enforcement, as well as incarceration (technically via civil contempt)—cultivated in the criminal context. States also retained criminal law for deterrence and to use in the most egregious cases. This incomplete shift from criminal to civil set the foundation for today's purportedly civil approach to support

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justice. See, for example, Barbara Allen Babcock, Toni M. Massaro, and Norman W. Spaulding, *Civil Procedure: Cases and Problems* 91–103 (Wolters Kluwer 6th ed 2017).

<sup>14</sup> See, for example, Tonya L. Brito, *Fathers behind Bars: Rethinking Child Support Policy toward Low-Income Noncustodial Fathers and Their Families*, 15 *J Gender Race & Just* 617, 668–69 (2012); Daniel L. Hatcher, *Forgotten Fathers*, 93 *BU L Rev* 897, 911–13 (2013). These articles contribute to a rich and growing literature on law and fatherhood. See generally, for example, Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 *Va L Rev* 79 (2016); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 *Yale L J* 2292 (2016).

<sup>15</sup> See, for example, Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 *Seattle U L Rev* 927, 933–35 (2016) (explaining disproportionate targeting of racial minorities for enforcement of failure to pay); Ann Cammett, *Deadbeats, Deadbrokees, and Prisoners*, 18 *Georgetown J Poverty L & Pol* 127, 142–46 (2011).

enforcement. With its decision in *Turner*, the Supreme Court endorsed this obfuscation, allowing the state's label to limit procedural protections.

In unearthing the criminal origins of family courts and support laws, this Article contributes to historical and modern understandings of family law. While two historians have contributed perceptive work on the passage and enforcement of criminal nonsupport statutes and the related creation of specialized domestic relations courts from the 1890s into the 1930s, these accounts are temporally and geographically limited and have not been incorporated into family law scholarship.<sup>16</sup> Law review articles cover child support in the nineteenth century and then skip to the mid-twentieth, omitting the critical period in which nonpayment often prompted criminal prosecution.<sup>17</sup> Some work condemns early domestic relations courts based on the erroneous claim that these tribunals decriminalized domestic violence.<sup>18</sup> Legal scholars interested in family courts for their procedural innovations have contributed insightful accounts, yet this work does

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<sup>16</sup> Anna R. Igra, *Wives without Husbands: Marriage, Desertion, & Welfare in New York, 1900-1935* (UNC 2007); Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* 128–71 (Cambridge 2003); Anna R. Igra, *Likely to Become a Public Charge: Deserted Women and the Family Law of the Poor in New York City, 1910–1936*, 11 *J Women Hist* 59 (2000); Michael Willrich, *Home Slackers: Men, the State, and Welfare in Modern America*, 87 *J Am Hist* 460 (2000). For an account of midcentury family court development, see J. Herbie DiFonzo, *Beneath the Fault Line: The Popular and Legal Culture of Divorce in Twentieth-Century America* 122 (UVA 1997) (casting family courts as an unsuccessful stop on the road to no-fault divorce). See also Theodore Fadlo Boushy, *The Historical Development of the Domestic Relations Court* (unpublished PhD dissertation, The University of Oklahoma, 1950) (on file with author). Though many scholars cite Willrich's *City of Courts* for general histories of court reform and specialization, Westlaw shows only nine articles citing this book or *Home Slackers* for discussion of nonsupport cases, with eight of these appearing in the *Law and History Review* or *Law & Social Inquiry*. (The only exception is Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 *Yale J L & Humanities* 189, 246 n 210 (2011).) Of the eight history articles, two are the only legal scholarship to cite Igra.

<sup>17</sup> A commonly cited piece on child support history is Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 *Yale L J* 1123 (1999), building on Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 *J Fam L* 807 (1988). While Hansen's Note offers some helpful points, the author's analysis is at times misleading because of the focus on divorced fathers, a small subset of the men held responsible for family support in this period. Hansen, Note, 108 *Yale L J* at 1125 n 14. Moreover, the attention to child support is somewhat anachronistic because more children were supported through undifferentiated awards that also included their mothers.

<sup>18</sup> See, for example, Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 *Vand L Rev* 1015, 1040 (2014) (relying on popular accounts).

not seek to intervene in understandings of family law.<sup>19</sup> These disconnects leave the widespread impression that modern family courts belong under the civil umbrella.<sup>20</sup> Indeed, it is this understanding of family courts as civil that underlies one of the most contentious debates on their jurisdiction today—whether it is appropriate to place domestic violence cases within (implicitly civil) family courts.<sup>21</sup>

By bringing together and greatly supplementing existing historical and legal treatments of child support and family courts, this account embraces and extends scholars' capacious conception of "family law." The family law canon, leaders in the field have persuasively argued, should include topics as wide-ranging as immigration, welfare, and zoning, to name just a few.<sup>22</sup> Though one facet of this broadening effort has been to explore how family law and criminal law have worked in tandem to police certain family-related conduct (especially sexual relations and domestic violence), experts continue to decry an underappreciation of how

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<sup>19</sup> Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J Disp Res 91, 100–03 (2011) (describing family court history in the development of alternative dispute resolution); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 Georgetown J Poverty L & Pol 473, 478–79, 488–94 (2015) (using family court as example of a "quintessential poor people's court" and examining the negative implications of "informality and interventionism"). See also Jane M. Spinak, *Romancing the Court*, 46 Fam Ct Rev 258, 266–68 (2008) (using family court history to question promise of modern problem-solving courts).

<sup>20</sup> See, for example, David W. Neubauer and Henry F. Fradella, *America's Courts and the Criminal Justice System* 97 (Wadsworth 10th ed 2011) ("[D]omestic relations cases constitute the fastest-growing part of the civil caseload."); Lawrence Baum, *American Courts: Process and Policy* 43 (Houghton Mifflin 6th ed 2008) (in table of courts, including "Domestic (civil)").

<sup>21</sup> Many discussants argue that domestic violence belongs in family courts so judges can treat each family holistically, while others insist that these matters should be heard with other assault charges in criminal courts for legal, practical, and symbolic reasons. Some jurisdictions have experimented with courts that hear *only* domestic violence cases. For thoughtful voices in these discussions, see generally Erin R. Collins, *The Evidentiary Rules of Engagement in the War against Domestic Violence*, 90 NYU L Rev 397 (2015); Adi Leibovitch, *Punishing on a Curve*, 111 Nw U L Rev 1205 (2017); and Elizabeth L. MacDowell, *When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism*, 20 Tex J Women & L 95 (2011).

<sup>22</sup> See generally Kerry Abrams, Book Review, *Family History: Inside and Out*, 111 Mich L Rev 1001 (2013); Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan L Rev 825 (2004); Janet Halley, 23 Yale J L & Humanities 189 (cited in note 16); Janet Halley and Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 Am J Comp L 753 (2010).

these areas of law interrelate.<sup>23</sup> Criminal regulation of marital behaviors is still perceived as the exception historically<sup>24</sup> and as a recent, hard-fought change.<sup>25</sup> This Article joins scholarship studying the nexus between family law and criminal law and breaks new ground by showing that criminal law and family law have not merely acted together—some criminal laws and courts *became* family laws and courts.

That criminal law targeted family support obligations also challenges a broader conventional wisdom about “family privacy.”<sup>26</sup> Family law casebooks and scholarship routinely cite a 1953 Nebraska civil case for the proposition that marital finances have been impervious to state regulation because of judicial reticence to meddle in the affairs of intact families.<sup>27</sup> When scholars acknowledge court regulation of family finances, they often emphasize a “dual system” in which poor families are subject to

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<sup>23</sup> Professor Melissa Murray writes that family law and criminal law “are strange bedfellows whose interaction is frequently overlooked.” Murray’s insightful intervention is to examine how criminal law worked “alongside” and “in tandem” with family law to regulate “the normative content of intimate life.” Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 Iowa L Rev 1253, 1255, 1257, 1272 (2009). See also Melissa Murray, *Marriage as Punishment*, 112 Colum L Rev 1, 23–37 (2012) (arguing that marriage operated as a punishment when criminal law fell short in seduction suits). Other scholarship discussing the criminal regulation of intimate life includes Anne M. Coughlin, *Sex and Guilt*, 84 Va L Rev 1 (1998) and Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal L Rev 1373 (2000). For a recent contribution focused on parent-child relationships, see generally Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 Ala L Rev 169 (2017) (challenging limited nexus that scholars have recognized between family law and criminal law by studying corporal punishment and incest laws). Related scholarship studies how family relationships burden or benefit defendants in the criminal justice system—see generally, for example, Dan Markel, Jennifer M. Collins, and Ethan J. Leib, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* (Oxford 2009)—and the negative consequences of criminal law on families—see generally, for example, Andrea L. Dennis, *Criminal Law as Family Law*, 33 Ga St U L Rev 285 (2017).

<sup>24</sup> Murray, 94 Iowa L Rev at 1258–64 (cited in note 23) (identifying and critiquing this perception).

<sup>25</sup> For a challenge to the common claim that criminal law did not address spousal domestic violence until the 1960s, see generally Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 Wm & Mary J Women & L 379 (2015).

<sup>26</sup> This aspect of the Article contributes to Halley’s critique of Family Law Exceptionalism by recovering the “economic family.” Previous contributions to this discussion have not considered criminal law. See Halley and Rittich, 58 Am J Comp L at 758 (cited in note 22).

<sup>27</sup> The case is *McGuire v McGuire*, 59 NW2d 336 (Neb 1953). For a representative example of its use, see Brian Bix, *The Oxford Introductions to U.S. Law: Family Law* 16–18 (Oxford 2013). But see Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U Mich J L Ref 835, 842 (1985) (challenging “the basic coherence of the concepts intervention and nonintervention . . . because the state constantly defines and redefines the family”).



harsher intrusions.<sup>28</sup> This Article's examination of criminal support enforcement—applied to families with varied degrees of togetherness and at a range of income levels—disrupts this neat binary as well as the overall notion of family privacy.<sup>29</sup>

Beyond the family law context, criminal law's formative role in modern family support laws and courts contributes to discussion about the blurring of the civil-criminal divide. Although criminal law (in which the state brings a prosecution to protect the public and rehabilitate/punish a wrongdoer) and civil law (which typically involves a private party initiating suit to seek redress of a harm) are generally discussed and taught as discrete subjects, scholars have identified myriad ways in which the line is sometimes unclear because of government involvement or seemingly extreme consequences in matters labeled "civil." This scholarship often focuses on US Supreme Court cases, emphasizes changes in recent decades (sometimes suggesting this is a contemporary phenomenon), and applies philosophical or other theoretical lenses.<sup>30</sup>

This Article enriches civil-criminal discussions by providing a distinct and concrete example for consideration: state legislatures' deliberate and sustained crafting of a criminal-civil hybrid. The intermingled public and private goals of family support enforcement afforded lawmakers the flexibility to draw their preferred elements from civil and criminal law. They could cite the need to reduce reliance on charity and welfare, reinforce desirable (and in practice gendered) parental and marital behaviors, and

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<sup>28</sup> The classic account is Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status: Part I*, 16 Stan L Rev 257 (1964).

<sup>29</sup> While acknowledging that poor families were disproportionately subject to criminal enforcement of support duties, this Article pushes back against "dual system" descriptions that overlook the state's coercive power over families not on welfare. In doing so, it joins the helpful analyses offered by Dinner, 102 Va L Rev at 82–83 (cited in note 14); Leslie Joan Harris, *The Basis for Legal Parentage and the Clash between Custody and Child Support*, 42 Ind L Rev 611, 618–21 (2009); and Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 Wake Forest L Rev 1029, 1035–44 (2007). See also June Carbone and Naomi Cahn, *The Triple System of Family Law*, 2013 Mich St L Rev 1185.

<sup>30</sup> Commonly cited articles include John C. Coffee Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L J 1875 (1992); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 Buff Crim L Rev 679 (1999); David A. Sklansky and Stephen C. Yeazell, *Comparative Law without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 Georgetown L J 683 (2006); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Georgetown L J 775 (1997).

bolster family relationships—all of which included public and private elements. Through decades of pragmatic and creative blending, lawmakers fashioned a criminal-style law in a civil guise, an exercise that undercuts assumptions about the supposedly distinct purposes, procedures, and penalties in civil and criminal law.

The Article proceeds chronologically, using newspaper articles, court reports, conference proceedings, and cases to recover the criminal origins of family courts and the financial obligations they impose. Because the dates, speed, and comprehensiveness of reform varied by location, this Article focuses on nationwide developments and influential trendsetters, acknowledging variation when doing so adds relevant nuance. The first Part explains that in the late nineteenth and early twentieth centuries, men's increasing mobility prompted charity leaders to advocate for the criminalization of family support duties in order to gain access to extradition. These reformers favored misdemeanors over felonies, initiating a century-long effort to categorize family support duties in whatever manner promised the most advantageous combination of high coercion and reach with low process and cost. Once nonsupport was criminalized, reformers faced the question of how to translate a conviction into financial support for dependents. Here they turned to newly appointed probation officers to investigate, rehabilitate, and oversee offenders.<sup>31</sup>

To facilitate the enforcement of criminal nonsupport laws, Part II continues, many large cities opened specialized "domestic relations courts" beginning in the 1910s. These courts depended on probation officers, who in turn pushed their nascent organizations, most notably the National Probation Association (NPA), to advocate for the spread and expansion of the courts. In this symbiotic relationship, the success of probation as a profession was tied to the scope and resources of the domestic relations courts, while the effectiveness of the courts and power of the judges turned on the availability and abilities of probation officers. Probation-backed, criminal domestic relations courts introduced a greater level of state intervention in family behavior, and especially family finances, than had previously been possible.<sup>32</sup>

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<sup>31</sup> See Part I.

<sup>32</sup> See Part II. The canonical book on probation's early years is inattentive to the categories of adult cases that received probation treatment and therefore misses the crucial role family courts played in employing probation officers and validating probation's methods. David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives*

Part III explores how perceived drawbacks to criminal law inspired innovative approaches from the 1930s through 1950s. New York took the lead by creating a “civil” nonsupport offense that retained criminal enforcement mechanisms: probationary oversight and incarceration. So that these civil statutes could reach across state lines, all states passed reciprocal enforcement laws by the mid-1950s. Under the new civil regime, the state used criminal-style powers and provided multifaceted oversight to ensure compliance, a situation that most observers found unremarkable after becoming accustomed to deep court involvement in the criminal context. The half century in which family support law was largely criminal law had shifted societal norms regarding acceptable intervention of the state in family relationships. Although all states retained criminal statutes for deterrence and to use in the most condemnable cases, the criminal-derived civil law was so efficient that criminal prosecutions were rarely necessary.<sup>33</sup>

Because of their shifting caseload, family courts soon appeared to be civil tribunals. Further disconnecting family courts from their criminal origins, inadequate funding and expanding dockets caused the role of probation officer to gradually dissolve into a bureaucratic and impersonal system that focused solely on overseeing support payments, in contrast to the supposedly rehabilitative oversight of earlier years. The civil facade crystallized just before the Warren Court initiated the criminal procedure revolution, which may explain why family courts missed the scrutiny the Court applied to their cousin institution, juvenile courts.<sup>34</sup> Despite changes in the following decades—most importantly the continued spread and jurisdictional diversification of family

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in *Progressive America* (HarperCollins 1980) (arguing that cities absorbed the costs of probation, despite recognition of the method’s shortcomings, because it facilitated plea bargaining). For perceptive scholarship that discusses the importance and operation of modern probation and relies on Rothman’s account for historical background, see Philip Goodman, Joshua Page, and Michelle Phelps, *Breaking the Pendulum: The Long Struggle over Criminal Justice* 55–56 (Oxford 2017); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 *Georgetown L J* 291, 328–29 (2016); Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 *Punishment & Soc* 53, 67 (2017).

<sup>33</sup> See Parts III.A–B.

<sup>34</sup> In *In re Gault*, 387 US 1 (1967), the Supreme Court looked to history and the overall context of juvenile courts when it found that “civil” juvenile delinquency proceedings that can lead to incarceration do qualify for state-appointed legal counsel. The *Turner* majority distinguished *Gault* with minimal explanation, *Turner*, 564 US at 443, which is especially striking because of the interrelated development of juvenile and family courts. See Part II.

courts, a narrowed focus on child rather than family support, a gradual willingness to treat “illegitimate” children like those born to married spouses, and the growing involvement of the federal government—the blended criminal-civil approach remains in place.<sup>35</sup>

By connecting criminal domestic relations courts and non-support prosecutions to modern family courts and child support proceedings, this Article shows that a substantial component of family law has long been criminal law. Part IV begins with an overview of why the ongoing criminal-style enforcement of child support orders is concerning for practical and principled reasons. Political efforts and *Turner* have proven inadequate to prompt meaningful change, so the Article suggests that asking the Court to recognize the criminal nature of child support incarceration could forge a new path. It is unclear how the Court would respond to this argument. Scholars agree that the Court’s treatment of statutory schemes that blur the civil-criminal divide is flawed. Lessons from the child support account could help improve the Court’s civil-criminal test by counseling against deferring to state labels and by demonstrating the relevance of enforcement machinery to the analysis. The labeling of child support incarceration as a criminal sanction would force states to make a difficult choice. They could either allocate the resources needed for criminal procedure protections or (more productively) truly decriminalize child support enforcement by eliminating the routine use of incarceration.<sup>36</sup>

#### I. THE CRIMINALIZATION OF MEN’S FAMILY SUPPORT DUTIES (1895–1920S)

This Part explains why charity leaders led an effort to criminalize men’s family support duties beginning in the late nineteenth century. Though moral condemnation and a desire for harsher punishment were factors,<sup>37</sup> this Part argues that the primary motivation for criminalization was the need for extradition in order to reach delinquent breadwinners across state lines. While reformers agreed that family nonsupport should be criminalized, they debated whether the offense should be a misdemeanor or

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<sup>35</sup> See Part III.C and Part IV.A.

<sup>36</sup> See Part IV.

<sup>37</sup> Willrich, *City of Courts* at 147–49 (cited in note 16); Willrich, 87 *J Am Hist* at 464, 473 (cited in note 16).

a felony, ultimately favoring the former for strategic reasons. After criminalization, courts turned to newly appointed probation officers to supervise nonsupporters and ensure that the men provided weekly payments to their dependents. Although the criminalization of family support duties appeared problematic to some defendants and judges, nearly every objection to the scheme failed. The blended public-private purpose of family support enforcement seemingly justified the use of states' criminal powers.

#### A. Shortcomings of Civil and Poor Law Support Enforcement

Prior to the passage of criminal nonsupport laws, a wife could obtain financial support from her husband for herself and their children through three legal approaches: the doctrine of necessities, a legal separation, and poor law.<sup>38</sup> Derived from a blend of common law, state statutes, and equity, these options provided remedies to many dependents. Judges and legislators continually revised these laws to better fit evolving social and economic circumstances.<sup>39</sup> Nevertheless, by the late nineteenth century, all three methods failed to secure support from the growing group of men whose only assets were weekly wages and who were increasingly mobile due to improvements in transportation.<sup>40</sup>

The legal starting point for the regulation of marital obligations was the common law doctrine of coverture, under which a

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<sup>38</sup> Because most family support litigation in this period involved spouses and marital children, this account does not directly consider the "bastardy" law that governed support of "illegitimate" children in some states. It is possible the quasi-criminal status of bastardy laws provided comforting precedent to legal reformers who sought a quasi-criminal or fully criminal statute to address the arguably analogous nonsupport of marital children, but reformers did not openly draw this connection and some judges dismissed such comparisons. See, for example, *State v Schweitzer*, 18 A 787, 787–89 (Conn 1889) (bastardy's status as noncriminal did not indicate nonsupport was noncriminal). For representative discussion of bastardy's quasi-criminal status, see *People v Phalen*, 13 NW 830, 831 (Mich 1882) (Bastardy proceedings "cannot be classed as strictly criminal or civil in their nature but partake somewhat of the elements of both. They are *quasi* criminal in so far as the aim is to protect the public.") (emphasis in original). For an overview of bastardy laws, see Chester Vernier, 4 *American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1935)* 206–19 (Stanford 1936). As late as 1940, fewer than 4 percent of births were to unwed mothers. Stephanie J. Ventura and Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1949–99* (Centers for Disease Control and Prevention, Oct 18, 2000), archived at <http://perma.cc/B24V-2RD3>. Legal treatment of children born out of wedlock drew attention in later decades. See, for example, Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 *Tex L Rev* 829, 848–54 (1966).

<sup>39</sup> The most comprehensive overview is L. Neville Brown, *Family Maintenance and Its Enforcement in the United States*, 13 *Intl & Comp L Q* 139 (1964).

<sup>40</sup> See Parts I.A–B.

husband and wife were one legal person. Coverture imposed rights and duties on both members of a couple. The husband, as head of the household, was required to support his family. The wife, in turn, pledged to obey her husband and serve him with her labor.<sup>41</sup> The husband had the right to choose the family's domicile and, because spouses were expected to live together, this meant the wife had to follow her husband to a new home unless his wrongful conduct justified her in living apart.<sup>42</sup>

Because coverture typically did not allow a wife to contract or own property, the traditional way a married woman could make purchases was pursuant to the "doctrine of necessaries." Under a simple application of the doctrine, a wife bought items on credit from a merchant, who then recovered the cost from her husband.<sup>43</sup> "Necessaries" included food, clothing, housing, and household items "such as would be proper for the station, tastes, standing, and financial ability of the husband and wife."<sup>44</sup> The necessaries doctrine benefitted children indirectly, as a mother's necessaries purchases could include items for the couple's children.<sup>45</sup> Whether and to what extent a parent could be held liable for necessaries purchased directly by or for a child was a more difficult question, but judges developed case law that generally held a father liable.<sup>46</sup>

While a commonplace approach, not all women and children benefitted from the necessaries doctrine because it typically required a merchant to trust that a man would pay his dependents' bills. If a husband refused to pay, the merchant sued him to recover. At trial, the merchant bore the risk that a judge or jury would conclude that the items were not actually necessary or that

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<sup>41</sup> Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–13 (Harvard 2000).

<sup>42</sup> James Schouler, *A Treatise on the Law of Domestic Relations* § 35 at 64–65, § 37 at 67 (Little, Brown 1895).

<sup>43</sup> Scholars have argued that the doctrine of necessaries was ineffectual. While my own research challenges this literature, for purposes of this Article, it suffices to observe that the doctrine did not help a growing subset of dependents. See, for example, Hendrik Hartog, *Man and Wife in America: A History* 156–60 (Harvard 2000).

<sup>44</sup> W.C. Rodgers, *A Treatise on the Law of Domestic Relations* § 221 at 183 (TH Flood & Co 1899); Schouler, *A Treatise on the Law of Domestic Relations* § 61 at 99 (cited in note 42).

<sup>45</sup> Schouler, *A Treatise on the Law of Domestic Relations* § 71 at 118 (cited in note 42).

<sup>46</sup> See, for example, *Yarborough v Yarborough*, 290 US 202, 207–08 (1933). See also W.R. Vance, *The Parent's Liability for Necessaries Furnished His Minor Child*, 6 Va L Reg 585, 592–96 (1901) (comparing English and American cases); Case Note, *Parent and Child—Support of Child—Liability of Father—Rogers v. Rogers*, 24 Yale L J 170 (1914).

the wife was not eligible to purchase on the husband's credit because they lived apart for reasons that were her fault.<sup>47</sup> Thus, although courts and legislatures modified aspects of the doctrine to enhance its availability and usefulness, this approach did not uniformly secure access to support.<sup>48</sup> The doctrine provided the greatest benefit to a woman whose husband was a longstanding community member with a good reputation. It was relatively ineffective for a destitute member of a mobile, immigrant, or poor family.

Another option that was available to a wife lacking financial support was to pursue a legal separation that could require her husband to provide periodic or one-time payments.<sup>49</sup> This approach included separate maintenance orders entered by a court, privately negotiated separation agreements, and divorce with alimony.<sup>50</sup> Awarded sums often included support for children, explicitly or implicitly.<sup>51</sup> Still, much like the doctrine of necessaries, a separation was most helpful to a certain type of wife: one who

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<sup>47</sup> Schouler, *A Treatise on the Law of Domestic Relations* § 66 at 108–10 (cited in note 42).

<sup>48</sup> *Id.* at § 72 at 118–19.

<sup>49</sup> A husband could be liable for his wife's attorney's fees and court costs by court order or pursuant to the doctrine of necessaries, though practicalities and legal complexities meant recovery was not assured. See Case Note, *Divorce—Counsel Fees—Allowance to Wife*—Dean v. Dean, 15 Yale L J 376 (1906); *Husband and Wife—Attorney's Fees—Husband's Liability*—Hendrick v. Silver, 19 Yale L J 55 (1909).

<sup>50</sup> Separate maintenance was initially provided under courts' equity power and was later supplemented by statutes. Most states allowed wives to obtain maintenance orders, providing regular payments, by the first decade of the twentieth century. See, for example, *Cureton v Cureton*, 96 SW 608 (Tenn 1906); *Hagert v Hagert*, 133 NW 1035 (ND 1911). Alternatively, couples could privately execute separation agreements. While the enforceability of such contracts was shaky through the mid-1800s, most courts upheld their validity by the end of the century so long as they seemed fair and were executed when a couple had already separated or was separating imminently. Schouler, *A Treatise on the Law of Domestic Relations* § 215 at 324, § 217 at 328–29 (cited in note 42). States also passed statutes permitting divorce and alimony upon a finding of fault against one party, with common permissible bases including adultery, cruelty, and desertion. *Id.* at § 220 at 336–40.

<sup>51</sup> Frederic J. Stimson, *American Statute Law* § 6245 at 698, § 6351 at 710 (Charles C. Soule 1886). See also generally *Support of Children in Absence of Provision Therefor in Decree Awarding Custody to Divorced Wife*, 17 Yale L J 284 (1908) (finding a sharp conflict in authority regarding the liability of a father for support of his children in the absence of a decree, but noting “trend of the decisions” in favor of imposing liability).

could reasonably expect her husband's compliance with a privately negotiated agreement or court order because he had assets, a permanent domicile, and a reputation to maintain.<sup>52</sup>

If a man refused to comply with a support order, the cost, delay, and legal complexity involved in pursuing enforcement were often prohibitive—especially if he fled the jurisdiction.<sup>53</sup> The wife would need to find and follow the man, hire a lawyer and pay court fees, and attempt to persuade a court to hold the man in contempt of court for refusal to comply with a court order.<sup>54</sup> If she succeeded, the husband (or ex-husband) might decide to comply, at least for a time, or he might sit idly in jail.<sup>55</sup> Once the man was released, the process might begin again. In some locations, the wife would have no further recourse. For instance, New York allowed only a one-time, six-month jail term for contempt of an order, and then noncompliance brought no further legal consequences.<sup>56</sup>

The third category of law addressing failure to support was the poor law. Derived from Elizabethan statutes, the poor law traditionally permitted localities to secure fines or payments from certain relatives of people who were at risk of becoming public charges. The poor law was originally unhelpful to wives because

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<sup>52</sup> When men owned assets and especially real property, courts could ensure compliance with support orders through liens, attachment, or security. Stimson, *American Statute Law* at § 6266 at 704 (cited in note 51). These options became less effective over time, as more men worked for weekly wages. See John Lisle, *The Bases of Divorce*, 4 J Crim L & Criminology 30, 45–46 (1913).

<sup>53</sup> William H. Baldwin, *Family Desertion and Non-Support Laws* 13 (Associated Charities 1904) (“Even in the few cases where [the man] has some [property that can be reached by civil suit], the expense and delay of prosecuting the suit in the higher courts make the remedy practically unavailable.”).

<sup>54</sup> For representative examples of matrimonial contempt cases, see *Lester v Lester*, 63 Ga 357 (1879); *Peel v Peel*, 50 Iowa 521 (1879); *Andrew v Andrew*, 20 A 817 (Vt 1890).

<sup>55</sup> Alimony nonpayers in New York were infamously housed together in a jail dubbed the “alimony club.” *Why Not a Hotel Suite for the Alimony Club?*, Brooklyn Daily Eagle 18 (Jan 22, 1908). Nearly all courts held that such jailings did not violate constitutional provisions against imprisonment for debt, often on the basis that support payments were a duty rather than a debt. See Case Note, *Divorce—Alimony—Refusal to Pay Alimony Punished as Contempt*, 30 Harv L Rev 518–19 (1917); *Ex parte Davis*, 111 SW 394, 396 (Tex 1908) (denying a writ of habeas seeking release from jail following a contempt order for failure to pay).

<sup>56</sup> This rule applied to all civil contempt but was particularly problematic in the alimony context, in which some men decided it was worthwhile to spend six months in jail to avoid a lifetime of payments. The legislature changed the law in 1919, so orders requiring repeat payments could result in multiple contempt violations. *New Law Has Teeth That Bite All Joy from Alimony Club*, Brooklyn Daily Eagle 66 (Aug 17, 1919).



many provisions did not apply to spouses and payments reimbursed poorhouses, rather than going directly to dependents.<sup>57</sup> Yet as judges and legislators refined options available to wealthier women, they simultaneously transformed poor law from an outdated method of securing a pittance for destitute kin to a workable approach to enforcing men's marital duties.<sup>58</sup> Most notably, the revised poor law allowed a wife to initiate suit and receive support payments directly.<sup>59</sup> In some respects the revised poor law was even superior to private civil suits, for eligible candidates received government employees' assistance in court proceedings, rather than needing to hire a lawyer or appearing pro se.<sup>60</sup>

Like the necessities doctrine and legal separations, poor law had a serious flaw exposed by men's increasing mobility. The reach of the poor law stopped at each state's borders. Judges deemed the poor law "quasi-criminal," meaning it was penal in nature but not subject to the trappings of criminal law.<sup>61</sup> Crucially, the quasi-criminal categorization meant poor law charges did not qualify for extradition.<sup>62</sup>

## B. Charity Leaders and the Need for Extradition

By the late nineteenth century, the inability of existing family support laws to reach across state lines troubled charity groups, whose limited resources and aversion to almsgiving made

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<sup>57</sup> See Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 Cal L Rev 175, 199 (1955) ("The traditional common law had no occasion to concern itself with the duties of maintenance between husband and wife or parent and child.").

<sup>58</sup> See, for example, *Commonwealth v Teel*, 30 Pa County Ct 566 (1905) (discussing evolution in Pennsylvania nonsupport statutes, from poor law to quasi-criminal to criminal).

<sup>59</sup> There is not a clear line separating traditional poor law from what I am calling "the revised poor law." States continually modified their poor law from the colonial period through at least the early twentieth century. In this Article, "revised poor law" refers to penal but not fully criminal statutes that allowed dependents to initiate proceedings against men to obtain court orders for regular payments.

<sup>60</sup> For a step-by-step account of how this legal machinery worked in New York City, see *The Number of New-York Men Who Pay Alimony Has Increased Since the City Began to Collect It*, NY Trib Illustrated Supp 5 (Apr 12, 1903).

<sup>61</sup> *Duffy v People*, 6 Hill 75 (NY 1843); *State v Miller*, 52 A 262 (Del 1902). But see *Schweitzer*, 18 A at 787 (finding statute penalizing nonsupport of wife a criminal rather than civil prosecution).

<sup>62</sup> Technically, delivery of fugitives between US states is "rendition," but this Article uses "extradition" to reflect the more common usage in the primary sources. On the inaccuracy in terminology, see John Bassett Moore, *Treatise on Extradition and Interstate Rendition, Part II* § 516 at 819–20 (1891).

charitable support of deserted wives unpalatable.<sup>63</sup> Even after a severe economic depression in 1893, charity organizations were reticent to provide support to needy families. The middle-class, white professionals who populated these groups' memberships<sup>64</sup> feared that providing alms would incentivize men to desert or provide an opportunity for collusion, in which "the desertion was purely fictitious, and designed to extort money from the charitably inclined."<sup>65</sup> At the same time, finding a source of family funding seemed vital because charity leaders no longer perceived institutionalizing young children apart from their mothers as acceptable.<sup>66</sup> Together these concerns raised the importance of securing financial support directly from male providers just as doing so became more challenging.<sup>67</sup>

Charity leaders recognized that industrialization, immigration, urbanization, and improved transportation contributed to heightened mobility and anonymity that shielded men from social and legal enforcement of their financial obligations.<sup>68</sup> In 1900, one captured a growing consensus when he described family desertion as "an evil of increasing magnitude and menace," which imposed heavy burdens on public and private charitable resources.<sup>69</sup> What was needed, reformers thought, was federal legislation or, perhaps more achievable, a felony-level offense to qualify for extradition.<sup>70</sup> A turn to criminal law also offered greater deterrence, appropriate moral condemnation of deserters, and the possibility of attractive new enforcement methods.<sup>71</sup>

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<sup>63</sup> This aversion was born from developments in the 1870s. Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* 58, 68–75, 85 (Basic Books 1986); Walter I. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 91–96 (Free Press 6th ed 1999).

<sup>64</sup> Katz, *In the Shadow of the Poorhouse* at 79 (cited in note 63).

<sup>65</sup> *Family Deserters: All Day Conference at Charities Building—Remedies Suggested*, NY Daily Trib 7 (Apr 30, 1903). See also Ada Eliot, *Deserted Wives*, 10 Charities Rev 346, 347–48 (1900) (discussing risk of spousal collusion).

<sup>66</sup> Edward T. Devine, *The Breaking Up of Families*, 10 Charities Rev 461, 461–62 (1900) (original source incorrectly labels page 462 as page 362). For more context, see David S. Tanenhaus, *Growing Up Dependent: Family Preservation in Early Twentieth-Century Chicago*, 19 Law & Hist Rev 547, 549–50 (2001) (discussing a historical trend away from institutionalization and toward family unit preservation).

<sup>67</sup> See, for example, Mary Richmond, *Proper Treatment of Idle or Drinking Men and Their Neglected Families: "Married Vagabonds"*, 4 Charities Rev 401, 401–02 (1895).

<sup>68</sup> Baldwin, *Family Desertion* at 5–9 (cited in note 53).

<sup>69</sup> Devine, 10 Charities Rev at 464 (cited in note 66).

<sup>70</sup> *Id* at 465.

<sup>71</sup> *Id* at 464–65; Eliot, 10 Charities Rev at 348 (cited in note 65).

While making nonsupport extraditable was uncontroversial among charity reformers, the choice between a felony and a misdemeanor spurred debate.<sup>72</sup> For instance, charity leaders at an all-day conference on the subject of “Family Desertions” in 1903 began by reading “extracts from [an] exhaustive memorandum” on the application of extradition law.<sup>73</sup> The ensuing discussion prompted the National Conference of Charities and Correction to issue resolutions that condemned desertion as a “serious evil,” identified extradition as “the most effective remedy and deterrent,” and implored governors to cooperate in submitting and honoring rendition requests.<sup>74</sup> Many charity leaders concluded that a felony law best guaranteed that extradition would occur.<sup>75</sup> By 1904, four states had felony-level offenses in place.<sup>76</sup>

But reformers also realized that felony-level criminalization brought practical, political, and legal challenges. Practical concerns included that a felony might motivate men to desert further away to reduce the likelihood of being caught, impose a harmful stigma on convicts, expose men to corrupting influences in prison,

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<sup>72</sup> See, for example, *Broken Hearted Woman*, Buffalo Evening News 17 (June 21, 1895); *Needy Families in Their Homes*, 9 Charities 17, 18 (1902).

<sup>73</sup> *Conference on Family Desertions: Law to Make Desertion of Wife and Children a Felony Is Advocated in New York*, 10 Charities 483 (1903). Extradition law in the surrounding period was in a state of confusion. In an effort to agree on general principles and procedures, most states sent representatives to the Inter-State Extradition Conference of 1887. During the Conference, participants sought to increase uniformity and reciprocity without requiring extradition of “petty” offenses (even though the Extradition Clause of the Constitution makes no such distinction, as they acknowledged). Though the participants did not discuss nonsupport specifically, they described the somewhat related offense of bastardy as falling in the “petty” category. This discussion likely contributed to the perception that misdemeanor nonsupport might not qualify for extradition. *Proceedings of the Inter-State Extradition Conference, Held at the Rooms of the Association of the Bar of the City of New York, August 23d, 24th and 25th 1887* 24–29, 66–69, 87, 95 (Argus 1887). See also Fred Somkin, *The Strange Career of Fugitivity in the History of Interstate Extradition*, 1984 Utah L Rev 511, 517–18.

<sup>74</sup> *Family Desertion Resolutions*, 10 Charities 488 (1903).

<sup>75</sup> See, for example, Helen Foss, *The Genus Deserter: His Singularities and Their Social Consequences—A Study of Local Fact and Interstate Remedies*, 10 Charities 456, 458–60 (1903).

<sup>76</sup> Baldwin, *Family Desertion* at 15 (cited in note 53). At least two states made nonsupport of wives a misdemeanor in the 1860s, a development that historians have overlooked, but this was a minority approach until the period discussed in this Article. For evidence of these statutes, see *Missouri v Larger*, 45 Mo 510 (1870); *An Act to Protect Married Women from the Willful Abandonment or Neglect of Their Husbands*, Tarborough Southerner (North Carolina) § 2 (May 20, 1869). Some states passed criminal child abandonment laws in the 1870s, but these typically applied to extreme circumstances and were not used to obtain support payments. For example, *Cowley v People*, 8 Abb N Cas 1 (NY 1880) (discussing an 1876 statute).

and perhaps lessen authorities' willingness to enforce the law because of a perception it was too harsh.<sup>77</sup> Recognition that a felony law might be more difficult to pass led some legislators to pursue a misdemeanor instead.<sup>78</sup>

Felony doubters found their champion in William H. Baldwin, a member of the Board of Managers of the Associated Charities of Washington, DC. In 1904, Baldwin published an influential overview of existing nonsupport laws and a model statute to secure extradition and effective enforcement.<sup>79</sup> Baldwin marshalled evidence—from constitutional analysis, case law, and correspondence with state attorneys general—to prove that misdemeanor nonsupport would qualify for and actually receive extradition.<sup>80</sup> Building on existing critiques of felonies, Baldwin added that juries might be less likely to convict on felony offenses and that nonsupport cases should be heard in the “court of lowest rank” (which would not be permissible for a felony offense) to avoid delays and court fees.<sup>81</sup> Baldwin’s proposed uniform law was therefore a misdemeanor.<sup>82</sup>

Baldwin spoke and published widely, persuading many charity workers and legislators across the country that the misdemeanor approach permitted extradition and was preferable for strategic reasons.<sup>83</sup> His vision gained further prominence in 1906, when Congress passed a misdemeanor nonsupport law for the District of Columbia based directly on his proposal.<sup>84</sup> Baldwin’s model and its successes in DC, in turn, were credited as the inspiration for the Uniform Desertion and Non-Support Act (“Uniform Act”) promulgated by the Commissioners on Uniform State Laws in 1910. The Uniform Act led to passage of additional criminal laws, mostly at the misdemeanor level.<sup>85</sup>

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<sup>77</sup> *Should Wife Desertion Be Made a Felony, Punishable by Imprisonment?*, Boston Post 27 (Nov 15, 1903). See also *Extradition of Deserting Husbands*, 14 Charities 773, 774 (1905).

<sup>78</sup> *Make Wife Desertion Criminal*, Pittston Gazette 4 (Feb 11, 1903); *Many Wives Are Deserted Annually in Pennsylvania*, Wilkes-Barre Times Leader 4 (Feb 12, 1903).

<sup>79</sup> See generally Baldwin, *Family Desertion* (cited in note 53).

<sup>80</sup> *Id.* at 30–46.

<sup>81</sup> *Id.* at 15–16, 19, 47, 53.

<sup>82</sup> *Id.* (“A Uniform Law Relative to Family Desertion and Non-Support” in unnumbered appendix).

<sup>83</sup> See, for example, William H. Baldwin, *An Extraditable Offense: Not Necessary for Desertion to Be a Felony to Bring Back Fugitive*, Wash Post 9 (July 17, 1905); William H. Baldwin, *Family Desertion and Non-Support Laws*, 14 Charities 660 (1905).

<sup>84</sup> See *Wife Deserters' Fate: Must Support Families or Go to the Workhouse*, Wash Post 3 (Apr 18, 1906).

<sup>85</sup> National Conference of Commissioners on Uniform State Laws, *American Uniform Desertion Act* 3 n 1 (Railway Printing 1910) (describing influence of Baldwin and DC law);

Importantly, reformers, legislators, and lawyers supported the passage and use of criminal nonsupport laws, even though they knew that the preexisting civil options remained available.<sup>86</sup> Advocates of criminalization explained that the criminal law avoided many of the civil laws' obstacles. In civil cases the wife had to hire a lawyer, pay court fees, clear fault-related evidentiary hurdles, and obtain an initial order for separate maintenance or alimony. These steps all too often culminated in the negligent provider's refusal to comply. The wife then had to pursue another hearing to ask a judge to incarcerate the man for contempt. This outcome provided no financial relief to his dependents.<sup>87</sup> Criminal procedure was more streamlined and cheaper for the wife. Contempt seemed worthwhile only in minor, limited contexts. The Uniform Act, for instance, authorized the use of contempt to enforce an order *pendente lite* (requiring a criminal defendant to support his family until the conclusion of the criminal proceeding).<sup>88</sup> In the words of one state supreme court in 1914, its legislature's decision to pass a criminal nonsupport statute created "a sharper and more effective spear."<sup>89</sup>

By the early 1910s, legislators in nearly every state had criminalized nonsupport.<sup>90</sup> Though misdemeanor statutes were the most popular, many states simultaneously maintained quasi-criminal and felony laws.<sup>91</sup> The existence of several nonsupport statutes was designed to permit prosecutorial discretion and a range of procedural options. For example, when Pennsylvania legislators debated passing a misdemeanor, they explained courts could still use the preexisting quasi-criminal procedure "in all ordinary cases . . . , which would have the advantage of greater

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*Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Fifty-Fourth Annual Conference Meeting* 283 (Lord Baltimore 1944) (listing dates states adopted Uniform Act).

<sup>86</sup> See notes 53–56.

<sup>87</sup> See, for example, Baldwin, *Family Desertion* at 13 (cited in note 53).

<sup>88</sup> Commissioners on Uniform State Laws, *American Uniform Desertion Act* at 6–7, 9 (cited in note 85).

<sup>89</sup> *State v Yocum*, 106 NE 705, 705–06 (Ind 1914). See also *State v Francis*, 269 P 878, 880 (Or 1928) ("[T]he penalty for a contempt is not as severe as for the crime of failure to support; the latter is an extraditable crime."); *State v McMains*, 241 P2d 976, 979 (Okla App 1952) (recounting why civil remedies had proven inadequate against husbands "without estate or honor").

<sup>90</sup> By 1916, every state had criminalized either nonsupport or desertion. Willrich, *City of Courts* at 147 (cited in note 16).

<sup>91</sup> William H. Baldwin, *The Present Status of Family Desertion and Non-Support Laws* 1–3 (2d ed 1912).

speed, since it requires no jury.”<sup>92</sup> In practice prosecutors took this strategy one step further. They extradited using the misdemeanor law, dropped the charges, and proceeded under the quasi-criminal statute.<sup>93</sup>

In states that also included a felony law, prosecutors rarely opted to use it because it brought cumbersome legal machinery, lack of cooperation by wives, and other hurdles.<sup>94</sup> For instance, in New York, felony cases comprised less than 2 percent of the nonsupport suits in 1909 and 1910.<sup>95</sup> Still, having the felony law available seemed beneficial to reformers. Reflecting on the portfolio of legal options maintained by many states, Baldwin “recall[ed] the story of the man who replied to the inquiry of the undertaker, after the death of his mother-in-law, as to whether he should embalm, cremate or bury: ‘Embalm, cremate and bury; take no chances.’”<sup>96</sup>

With criminal nonsupport laws in place, extradition became a reality. From 1906 through 1910, 20 states pursued extradition of nonsupport offenders, totaling 837 requests.<sup>97</sup> In some states nonsupport comprised a significant portion of overall extradition proceedings. In Indiana, New Jersey, New York, Ohio, and Wisconsin, between 15 and 30 percent of extradition requests were for nonsupport.<sup>98</sup> Proponents of nonsupport criminalization therefore perceived that these laws brought real benefits.

### C. The Application of Probation to Nonsupport Cases

A near consensus that nonsupport could and should be criminalized did not answer what punishment should be attached. Charity workers, legislators, and other stakeholders sought a consequence that would maximize deterrence, preserve the family (at

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<sup>92</sup> *Many Wives Are Deserted Annually in Pennsylvania*, Wilkes-Barre Times Leader at 4 (cited in note 78). For an unsuccessful challenge to the denial of jury rights in such cases, see *Commonwealth v Nagle*, 31 Pa Super Ct 175 (1906).

<sup>93</sup> See generally William H. Baldwin, *Is It Lawful to Bring a Man Back to Pennsylvania by Extradition on the Charge of Desertion under the Act of March 13, 1903, for the Purpose of Proceeding against Him under the Act of April 13, 1867?*, 4 J Crim L & Criminology 20 (1913). Pennsylvania apparently still used this trick as of 1922. *Commonwealth v Kenney*, 80 Pa Super 418, 419 (1923).

<sup>94</sup> See, for example, *1,800 Deserted Wives*, 22 Survey 838 (1909) (noting that a NY charity group found that the district attorney’s office disinclined to prosecute desertion cases after the offense was made a felony).

<sup>95</sup> Baldwin, *The Present Status* at 7 (cited in note 91).

<sup>96</sup> *Id.* at 8.

<sup>97</sup> *Id.* at 19.

<sup>98</sup> *Id.*

least in a financial sense), and lighten the burden on charities and the state to support women and children.

Beginning in the 1890s, many charity workers expressed optimism about the usefulness of imprisonment at hard labor for its deterrent value and financial savings. Baldwin was a prominent proponent, further suggesting that a system under which a man's prison labor supported his dependents would safeguard "the unity of the family . . . in spite of the intervening prison walls."<sup>99</sup> But charity workers from other states were less optimistic that this would be feasible because their jurisdictions did not have workhouses or prison farms, or reserved these options for those imprisoned for at least a year. Other locales lacked legal authority to give proceeds to prisoners' dependents.<sup>100</sup> Furthermore, as the first decade of the twentieth century progressed, opposition to prison labor made this option less promising.<sup>101</sup>

Just as imprisonment at hard labor began losing its appeal, a new penal method rose to the fore: conditional release on probation.<sup>102</sup> Probation built on a range of legal and social forerunners, such as suspended sentence and "friendly visiting."<sup>103</sup> The supervisory and suspended sentence components came together in Boston beginning in 1841, and first became formalized in a series of Massachusetts bills beginning in 1869.<sup>104</sup> In the late nineteenth century, Boston's model attracted nationwide attention, touted as "an essential part of the criminal mechanism."<sup>105</sup> From

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<sup>99</sup> Baldwin, *Family Desertion* at 56–57 (cited in note 53).

<sup>100</sup> See, for example, Richmond, 4 *Charities Rev* at 413–16 (cited in note 67); *Wife Desertion*, 15 *Charities* 407 (1905) (explaining that imprisonment would not support dependents, especially after changes to the "prison industry" left prisoners idle).

<sup>101</sup> The Uniform Act drafters noted that some states had abolished or limited prison labor "as the result of the influence of the Labor Unions." Commissioners on Uniform State Laws, *American Uniform Desertion Act* at 5–6 (cited in note 85). See also Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941* 193–238 (Cambridge 2008).

<sup>102</sup> Compare Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890–1990* 35–37 (Chicago 1993) (discussing connection between restrictions on prison labor and rise of parole).

<sup>103</sup> For discussion of "friendly visiting," see Katz, *In the Shadow of the Poorhouse* at 159–66 (cited in note 63).

<sup>104</sup> Charles Lionel Chute and Marjorie Bell, *Crime, Courts, and Probation* 31–66 (MacMillan 1956). Depending on how "probation" is defined, it can be dated to earlier periods. For an excellent treatment of a nineteenth-century version, see generally George Fisher, *Plea Bargaining's Triumph*, 109 *Yale L J* 857 (2000).

<sup>105</sup> "Probation" in *Boston: A System Tried in the Courts of that City with Success*, *NY Daily Trib* 3 (Mar 27, 1899).

1898 through 1903, ten states across the country passed their first probation laws. More soon followed.<sup>106</sup>

Probation, which typically included both preconviction investigation and postconviction supervision by court staff titled “probation officers,” quickly appeared to offer many advantages over imprisonment. In New York, which first authorized probation in 1901, the New York City magistrates identified four benefits: (1) “Punishment without disgrace, and effective without producing embitterment, resentment or demoralization,” (2) judicial discretion to make the punishment fit the crime, (3) “[p]unishment that is borne solely by the guilty and displacing a system that frequently involved the innocent and helpless,” and (4) punishment “attended by increased revenue to the City and by a saving in expense.”<sup>107</sup>

These strengths seemed even more advantageous in the non-support context. In these cases, a probation officer could first attempt to reconcile the couple outside of formal court proceedings. (Many spouses lived together or had a history of separating and coming back together, making reconciliation seem plausible.) The officer’s intervention often included guidance on behaviors technically outside the court’s jurisdiction. For instance, a probation officer might encourage a husband to drink less alcohol and instruct a wife on housekeeping skills. If that failed, the officer investigated the husband’s income and the family’s home conditions, provided this information to the judge, and oversaw the transfer of support payments. Under this method, the male breadwinner would remain out of prison, pursuing an ordinary occupation, yet be forced to turn over money to his dependents.<sup>108</sup> Many nonsupport statutes also permitted a defendant to “consent” to probation with weekly support payments *prior* to conviction.<sup>109</sup>

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<sup>106</sup> Chute and Bell, *Crime, Courts, and Probation* at 73, 84 (cited in note 104).

<sup>107</sup> *Annual Report of the Board of City Magistrates of the City of New York (First Division) for the Year Ending December 31, 1901* 15–16 (JW Pratt 1902).

<sup>108</sup> For descriptions of probation officer tasks in these cases, see “Probation” in *Boston*, NY Daily Trib (cited in note 105); *Aid Deserted Wives: New Laws Are Urged in Book* by W.H. Baldwin, Wash Post 10 (Jan 21, 1912); *Six Hundred Men Are on Probation*, Buffalo Evening News 5 (Oct 31, 1910); *Restoring Peace to Broken St. Louis Homes*, St Louis Post-Dispatch B4 (Feb 20, 1916); Leon Stern and Elizabeth Stern, *Domestic Relations at Par: How Philadelphia Tries to Make Every Marriage Worth Its Face Value to Both Society and the Couple Involved*, 72 Good Housekeeping 65 (1921).

<sup>109</sup> Baldwin, *Family Desertion* at 71, 79, 124, 135 (cited in note 53); Commissioners on Uniform State Laws, *American Uniform Desertion Act* at 7 (cited in note 85).



Court statistics document that judges increasingly relied on probation in nonsupport cases. In New York City, the second most common reason men were placed on probation in 1902 was a nonsupport conviction.<sup>110</sup> States soon amended their laws to explicitly provide for probation in this context.<sup>111</sup> In some places legislatures originally authorized adult probation exclusively or primarily for nonsupport offenders.<sup>112</sup>

Criminal nonsupport cases became the poster crime for adult probation because the financial and moral benefits seemed obvious. Men convicted of nonsupport were not perceived as dangerous. Rather, their conduct violated middle-class, gendered norms in ways that lawmakers and law implementers believed probation officers could fix.<sup>113</sup> In a representative newspaper article from 1903, the author praised “the recent general adoption of probation methods by a number of the more important cities and states,” yet the only specific offense he discussed was nonsupport.<sup>114</sup> In nonsupport cases, probation meant “the husband is sent back to his home and employment under supervision, and, consequently, neither is he kept a burden on the state in prison or are his wife and children thrown upon the public or private charity through the loss of the head of the family.”<sup>115</sup> In addition to financial savings, the article continued, probation supervision was imposed “with the hope of possibly restoring [the man] to a worthy and self-respecting citizenship.”<sup>116</sup>

Probation proponents strategically emphasized the collection of support payments as tangible evidence of probation’s value.

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<sup>110</sup> *Annual Report of the Board of City Magistrates of the City of New York (First Division) for the Year Ending December 31, 1902* 10–11 (JW Pratt 1903).

<sup>111</sup> New York amended its statute in 1903 to explicitly apply to nonsupport, and New Jersey passed a law titled “Deserting Husbands Placed on Probation” in 1905. *Report of the Probation Commission of the State of New York* 232, 240 (Brandow 1906).

<sup>112</sup> *Probation Manual with Analysis of the Probation Laws of Virginia* 4 (St Bd Charities and Correction 1918) (noting that when Virginia authorized probation in 1904, it was “to be used chiefly in case of adults who failed to support their children”).

<sup>113</sup> Throughout the nineteenth and twentieth centuries, there were parallel efforts by affluent women and government officials to enforce gendered expectations on poor women through control over private and public charity. There is a rich literature on this topic. See Willrich, 87 *J Am Hist* at 462 n 4 (cited in note 16) (listing major contributions). On an earlier period, see generally Christine Stansell, *City of Women: Sex and Class in New York, 1789–1860* (Knopf 1986).

<sup>114</sup> William H. Allen, *The Probation System, Its Great Advantages*, *Atlanta Const* C4 (July 5, 1903).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* For examples of similar arguments in the following decades, see *Husbands on Probation*, *San Bernardino County Sun* 4 (Aug 20, 1913); Edwin J. Cooley, *Mending Broken Families*, 4 *Woman’s Home Companion* 4, 152–56 (1925).

The Massachusetts Commission on Probation's Fifth Annual Report pointed out an expansion from 617 nonsupporting husbands providing \$25,218.13 on probation in 1909 to 1,240 nonsupporting husbands submitting \$140,773.96 in 1913.<sup>117</sup> A Massachusetts probation officer who coauthored a book promoting the method reported that officers in his state collected \$219,984 for wives and children in 1915, whereas the whole probation system cost only \$148,000.<sup>118</sup> Similarly, a 1918 Virginia probation manual concluded that probation was "highly economical. Keep a man at work; require him to support his family, and you save the public from supporting the entire family."<sup>119</sup>

Probation officials also stressed the affordability of probation as compared to imprisonment. In a nearly full-page discussion of probation printed in the *New York Tribune* in 1920, New York City's Chief Probation Officer, Edwin J. Cooley, noted: "It costs \$396.56 a year per capita for prison care in New York and only \$22.64 for probation care." Moreover, Cooley continued, "Men on probation support themselves and their families and they are productive factors in the community," rather than their families becoming "a burden upon the public."<sup>120</sup> Economic arguments became more compelling in the heat of perceived crime waves. Advocates emphasized the sizable proportion of uncontroversial and lucrative nonsupport cases to deflect criticism from probation's alleged role in keeping dangerous criminals on the streets.<sup>121</sup>

Unsurprisingly, the men most likely to receive probation sentences were poor and often from immigrant or minority groups, although the populations varied by location. In New York City, probation proponents initially focused on European immigrants,<sup>122</sup> whereas in Southern cities, black-white racial dynamics were more prominent.<sup>123</sup> Although certain groups were more often

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<sup>117</sup> *Proposes Women Probation Officers*, Boston Daily Globe 6 (Jan 28, 1914).

<sup>118</sup> Lewis E. MacBrayne and James P. Ramsay, *One More Chance: An Experiment in Human Salvage* 167 (Small, Maynard 1916).

<sup>119</sup> *Probation Manual* at 3 (cited in note 112).

<sup>120</sup> *Getting Back to the Straight and Narrow Path; One Slip No Longer Makes a Confirmed Criminal*, NY Trib 79 (Oct 17, 1920).

<sup>121</sup> *Defense of Probation*, NY Times 85 (Aug 6, 1922). See also generally NY Division of Probation—Department of Correction, *Probation: Do You Know That* (1928).

<sup>122</sup> *Probation to Be Extended to Higher Criminal Courts*, NY Times X15 (Feb 8, 1925) (discussing earlier probation work).

<sup>123</sup> For example, *Praise: By Judge Wilson for Colored Probation Officers*, Courier-Journal (Louisville, Ky) 10 (Dec 10, 1906).

placed on probation for nonsupport, in large part because of a correlation between nationality or race and poverty, probation rhetoric and justifications turned on the nature of the offense rather than pointing to categories of men warranting supervision.<sup>124</sup> Nevertheless, that men from some groups were more often subject to probation oversight may have eased the method's acceptance. And, over time, probation treatment of these men may have shaped stereotypes about them.

The intervention of probation officers in the behaviors and finances of married couples marked a major change in the state's involvement in family affairs. No government officials were allocated to reconcile couples or assist dependents in pursuing financial support under the guise of necessities cases or in the context of separation agreements, separate maintenance, or divorce with alimony—all of which remained options even as criminal law spread.<sup>125</sup> Officials did facilitate the filing and processing of poor law cases, but in those matters they did not seek to reconcile couples or surveil compliance and other family behaviors. Criminalization accompanied by probation opened distinctly new opportunities for state regulation of family life.

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<sup>124</sup> This assessment is based on the author's review of hundreds of newspaper articles and other primary sources.

<sup>125</sup> There were some efforts to introduce probation-like techniques in divorce suits, but these met with limited success and did not include oversight of support payments. Legislatures in a handful of Midwestern and Western states authorized the appointment of "divorce proctors" in the 1910s and 1920s. Divorce proctors were tasked with ensuring legitimate divorce grounds and attempting to reconcile couples. Their role was justified by the state's interest in preserving marriage. Unlike probation officers, divorce proctors usually had to be lawyers, and they did not oversee compliance with support orders. Based on newspaper accounts, the locations that used divorce proctors most extensively seem to have been Kansas City, Missouri; the state of Kansas; large cities and counties in Tennessee; and Seattle, Washington. For representative articles, see *Proctor as Curb on Divorce Evil for Kansas City*, St. Louis Post-Dispatch 8 (Nov 8, 1911); *Divorce Proctor to Guard State*, Chi Daily Trib I20 (Feb 23, 1913) (reporting on Kansas State). Nationwide press coverage of the first divorce proctors prompted proposals to introduce such officers elsewhere, but the vast majority of states never adopted this method of marital intervention. For example, *Divorce Proctor Urged; Would Cut Decrees in Half*, Chi Daily Trib 1 (Jan 6, 1912); William Hall Moreland, *Five Divorce Remedies*, NY Times 1, 80 (June 5, 1921). Secondary literature also notes similar positions under other names in Arkansas, Nebraska, West Virginia, and Wisconsin. Charles S. Connolly, *Divorce Proctors*, 34 BU L Rev 1, 1 (1954). In later decades, states tried other methods of predivorce reconciliation. One of the more notable examples was the Los Angeles Conciliation Court, which handled divorce-seeking couples who had children in the years after WWII. DiFonzo, *Beneath the Fault Line* at 129 (cited in note 16).

#### D. Legal Challenges to Criminal Nonsupport Enforcement

Though widely praised by charity leaders, lawmakers, and journalists, criminal nonsupport laws faced some opposition focused on their blurring of criminal and civil goals, remedies, and procedures. For instance, one New York City magistrate condemned how in nonsupport cases the court “enforce[d] a civil obligation by criminal procedure, although imprisonment for debt was long ago abolished in every enlightened community.”<sup>126</sup> A New York organization focused on addressing family nonsupport objected to proposals to elevate wife abandonment to a felony because it did not want to allow a scenario in which a wife could initiate a criminal case to extradite her husband “at public expense” to facilitate a civil proceeding, and then use the criminal charge to enhance her bargaining power. While ostensibly satisfying the organization’s main goal, the civil-criminal slipperiness of this scheme struck the group as objectionable “because it gives the wife the indirect power of using the criminal law for private ends.”<sup>127</sup>

Once criminal nonsupport laws were in place, defendants sometimes lodged legal objections. Appeals were relatively infrequent because most convicts lacked resources. Nevertheless, dozens of cases demonstrate that some men had both the means and desire to contest the application or constitutionality of criminal nonsupport statutes. Nearly all of these challenges failed.<sup>128</sup>

One question defendants raised for decades was whether criminal nonsupport encompassed only the public offense of leaving a dependent likely to become a public charge or also reached

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<sup>126</sup> Joseph E. Corrigan, *Corrigan Speaks Out*, NY Daily Trib 7 (Apr 23, 1910).

<sup>127</sup> National Desertion Bureau, *Memoranda in Opposition to Proposed Amendment to the Penal Law and Code of Criminal Procedure in Relation to Desertion and Non-Support and to Repeal Certain Sections in Such Law and Code Relating Thereto, Known as Senate Bill No. 773 \*3-4* (March 15, 1916), Community Service Society Archives, Box 18, Folder 15.23, Rare Book and Manuscript Library, Columbia University.

<sup>128</sup> For examples of courts rejecting challenges to criminal nonsupport laws, see *People v Heise*, 100 NE 1000 (Ill 1913); *Martin v People*, 168 P 1171 (Colo 1917). The most noteworthy case striking down a criminal nonsupport statute was *Ex parte Smythe*, in which the Court of Criminal Appeals of Texas held its entire nonsupport law unconstitutional, despite its “beneficent” purpose. The court found that a provision directing that the defendant’s fine be given to his wife or child violated the state constitution’s ban on “appropriation for private or individual purposes.” The man’s “moral and civil liability to support the wife and child” could not justify circumventing this prohibition. *Ex parte Smythe*, 120 SW 200, 201 (Tex Crim App 1909).

what had been a private duty for a man to support his family according to his means, in line with the doctrine of necessities.<sup>129</sup> Charity reformer proposals and resultant statutory language often left unclear what level of destitution was required for the law to apply, as well as whether a guilty verdict required nonsupport, desertion, or the combined existence of both. (The Uniform Act covered those who “desert *or* willfully neglect *or* refuse to provide” for wives or children “in destitute or necessitous circumstances.”<sup>130</sup>) While some appellate judges construed nonsupport statutes to cover just the public charge scenario on the basis that criminal law could only address public harms,<sup>131</sup> others recognized legislatures’ power to pass criminal legislation to address conduct that carried private and public implications.<sup>132</sup>

Over time, most states’ courts embraced a blended public-private purpose for their criminal nonsupport laws. An influential decision published by the Supreme Court of Kansas in 1911 exemplifies this approach. In construing a criminal statute that applied only when a family was in “destitute or necessitous circumstances,” the court pointed to the doctrine of necessities in

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<sup>129</sup> See, for example, *People v Stickle*, 121 NW 497, 499 (Mich 1909) (construing statutory revision that removed public charge requirement).

<sup>130</sup> Commissioners on Uniform State Laws, *American Uniform Desertion Act* at 3 (emphasis added) (cited in note 85). Some courts got around this uncertainty with broad statutory construction. See, for example, *Welch v State*, 67 So 224, 225 (Fla 1915) (holding that nonsupport itself constituted “desertion”).

<sup>131</sup> Especially where nonsupport laws evolved directly from poor law, judges interpreted them to apply only when dependents were likely to become public charges. An influential early opinion finding a narrow purpose for a quasi-criminal statute is *Douglas v Naehr*, 30 Hun 461, 463 (NY Gen Term 1883) (“The statute was designed to protect the public against the burden of supporting a wife and children . . . It was not intended to give the wife any new remedy either directly or indirectly.”). In jurisdictions with such holdings, wives were expected to seek relief under civil statutes. *Demos v Demos*, 19 NY Ann Cas 171, 100 NY Supp 968 (NY App 1906) (directing wife to pursue separation in civil court rather than criminal nonsupport suit). A 1925 analysis found that judges in states that passed quasi-criminal (revised poor law) or criminal statutes relatively early limited application to public charge situations, but those in states with later statutes interpreted them more generously. W.A.S., Annotation, *Extent or Character of Support Contemplated by Statute Making Nonsupport of Wife or Child Offense*, 36 ALR 866 (1925).

<sup>132</sup> For early examples of state supreme courts upholding criminal nonsupport laws, see *State v Cucullu*, 35 S 300, 302 (La 1903); *Green v State*, 131 SW 463 (Ark 1910). In *Cucullu*, the Supreme Court of Louisiana dismissed a man’s claim that a misdemeanor could not properly address duties that were “essentially matters of a civil character.” The court explained: “The performance by a husband and father of the legal duties which he voluntarily assumed in contracting marriage is a matter which not only affects the particular parties in interest, but the public at large, as affecting the general public welfare.” *Cucullu*, 35 S at 302.

holding that the legislature did not intend to limit the required support to “primitive physical needs.” The court explained:

The law is not a mere poor law. It is a domestic duty law, and was intended to cover the case of a woman who is left destitute according to any just and humane estimate of her situation, although in the eyes of paupers she might appear to be rich.<sup>133</sup>

Acknowledging that some penal statutes “contemplated nothing but redress of the public grievance” of family members becoming public charges, the court observed that others “were designed to aid civil remedies.”<sup>134</sup> In the surrounding decades, most judges and other interested commenters likewise embraced the use of criminal law to enforce public-private family duties.<sup>135</sup>

## II. THE SYMBIOTIC GROWTH OF FAMILY COURTS AND PROBATION (1910–1930S)

This Part investigates how reformers created probation-backed “courts of domestic relations” to pursue robust enforcement of criminal nonsupport laws. Cities first opened domestic relations courts in 1910, as part of a broader Progressive Era movement for court reform. Probation officers were among the most vocal supporters and essential employees of these new tribunals. The National Probation Association (NPA), which included domestic relations judges and probation officers in its ranks, led the effort to spread the domestic relations court idea to new locations. From the late 1910s into the 1930s, the NPA and other probation proponents sought to expand the courts’ jurisdiction into “family courts,” which would encompass juvenile delinquency and divorce hearings. They were less successful in that effort; nonsupport remained the essential core of family-focused courts.

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<sup>133</sup> *State v Waller*, 136 P 215, 216–17 (Kan 1913). See also *Brandel v State*, 154 NW 997 (Wis 1915) (expanding on *Waller*). But see *Stedman v State*, 86 S 428, 431 (Fla 1920) (retaining public charge requirement).

<sup>134</sup> *Waller*, 125 P at 217.

<sup>135</sup> *Ewell v State*, 114 A2d 66, 69 (Md 1955) (explaining that judges commonly “carried over” the standards from the necessities doctrine when construing “destitute” in criminal nonsupport statutes).

### A. The Creation of Domestic Relations Courts

As reformers refined the application of criminal nonsupport laws through the use of probation, they also considered the operation of the courts that had jurisdiction over these cases. They found these criminal courts, as well as the overall court system in many urban locations, lacking in a number of respects. Criminal courts were overcrowded, experienced long delays, offered rushed and unfair hearings, and were sometimes corrupt.<sup>136</sup> Because these courts were one of the primary places the working class and newly arrived immigrants interacted with the American legal system, many judges, politicians, and social welfare leaders thought court reform would aid in inculcating respect for law and Americanizing litigants.<sup>137</sup>

One major facet of early twentieth-century court reform was the specialization of courts. While subsets of courts had long focused on particular subjects,<sup>138</sup> Progressive Era reformers thought further specialization would secure efficiency and expertise.<sup>139</sup> Perhaps most famously, in 1899 they inaugurated a movement for juvenile courts to hear children's delinquency and dependency cases.<sup>140</sup> The juvenile court concept spread quickly, so that by 1917, all but three states introduced these courts for at least some of their cities.<sup>141</sup>

The push for specialization extended to marital litigation, with New York taking the lead. It was not obvious to

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<sup>136</sup> See, for example, Franklin Matthews, *The Farce of Police Court Justice in New York*, 17 *New Broadway Mag* 511 (1907).

<sup>137</sup> "Police Court and the Public": *This Subject Discussed before the People's Institute*, *NY Daily Trib* 4 (Dec 29, 1900).

<sup>138</sup> For histories of specialized courts in New York beginning in the seventeenth century, see *Past State Courts* (Historical Society of the New York Courts), archived at <http://perma.cc/XU4F-BK68>.

<sup>139</sup> Willrich, *City of Courts* at xxxii–xxxix (cited in note 16).

<sup>140</sup> While Chicago is typically credited as opening the first juvenile court in 1899, cities experimented with treating juvenile delinquents differently and apart from adult criminals in earlier decades. There is an extensive literature on juvenile courts. For a helpful historiography, see generally Miroslava Chavez-Garcia, Book Review, *In Retrospect: Anthony M. Platt's The Child Savers: The Invention of Delinquency*, 35 *Rev Am Hist* 464 (2007).

<sup>141</sup> Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 10 (Chicago 2d ed 1977). Another example of specialized courts from this period is "women's courts," which primarily handled prostitution cases. For excellent treatments, see Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 *Tex L Rev* 915, 933–36 (2017); Mae C. Quinn, *Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts*, 33 *Fordham Urb L J* 665, 669–76 (2006).

New Yorkers, however, which categories of cases warranted separate, special treatment.<sup>142</sup> In 1902, lawyers in that state pushed for a “Domestic Relations Court” to hear divorce cases.<sup>143</sup> This effort stalled for political and legal reasons.<sup>144</sup>

Starting around 1905, attention turned to creating specialized “abandonment courts” to tackle the rising number of nonsupport cases. Proponents of this idea, mostly charity leaders, hoped that more systematic treatment of nonsupport offenses by probation officers in specialized courts would secure support, relieve the burden on general criminal courts, keep innocent wives and children from mingling with criminals while awaiting their proceedings, and reconcile families to reduce the divorce rate.<sup>145</sup>

Though judges shared charity leaders’ enthusiasm about the use of probation officers in nonsupport cases, they argued that a specialized court was unnecessary and unappealing.<sup>146</sup> Judges did not want to preside over what they expected would be a tiresome and monotonous docket. The chief magistrate, in a line widely quoted by newspapers, suggested that a judge assigned to the envisioned nonsupport court “will have to be descended straight from the angels.”<sup>147</sup>

Despite some judges’ aversion, the New York legislature designated a branch of New York City’s criminal courts as the country’s first “court of domestic relations” in 1910.<sup>148</sup> The court’s

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<sup>142</sup> In 1894, New York judges unsuccessfully proposed a Court of Domestic Relations with “jurisdiction of all wills, estates, the relations of guardian and ward, the care of lunatics, and divorces.” Untitled Article (beginning with “Several of the jurists . . .”), *NY Daily Trib* 6 (Apr 30, 1894).

<sup>143</sup> *For a Special Divorce Court*, *Baltimore Sun* 1 (July 8, 1902).

<sup>144</sup> *Divorce Cases Clog Courts*, *Atlanta Const* A7 (Jan 16, 1910).

<sup>145</sup> Alfred E. Ommen, *Criminal Courts in General: Some Observations by a City Magistrate*, 43 *J Soc Sci* 38, 40–42 (1905); *An Abandonment Court May Be Created Here*, *Brooklyn Daily Eagle* 18 (May 30, 1907); *A Matrimonial Court to End Domestic Wars*, *NY Times* 6 (Jan 12, 1906).

<sup>146</sup> The specialized court proposal received thorough attention during hearings on reforming New York City’s inferior criminal court system in 1908 and 1909. New York, 1 *Proceedings of the Commission to Inquire into the Courts of Inferior Criminal Jurisdiction in Cities of the First Class* (JB Lyon 1909). For judges’ commentary, see id at 396, 484, 605–06, 639, 649, 672, 724, 744. See also New York, 2 *Proceedings of the Commission to Inquire into the Courts of Inferior Criminal Jurisdiction in the Cities of the First Class* 1408 (JB Lyon 1909).

<sup>147</sup> New York, 3 *Proceedings of the Commission to Inquire into the Courts of Inferior Criminal Jurisdiction in the Cities of the First Class* 2411–12 (JB Lyon 1909); *Want Special Court for Domestic Woes*, *NY Times* 4 (Jan 29, 1909).

<sup>148</sup> *For Court Reform: Commission to Recommend Abandonment of Tribunal*, *NY Daily Trib* 5 (Dec 21, 1909). For more detail, including attention to involvement by religious groups, see Igra, *Wives without Husbands* at 38–44 (cited in note 16).



sole jurisdiction was over quasi-criminal nonsupport, and it relied heavily on probation officers at every step. Soon after the court's opening, articles published across the country described its successes and cast it as "a kind of local Hague tribunal for the home."<sup>149</sup>

Other large cities followed New York's lead. By the end of the decade, domestic relations courts had opened in Buffalo (1910); Chicago (1911); Boston (1912); Detroit (1913); Cincinnati, Philadelphia, and Springfield, Massachusetts (1914); Dayton, Ohio (1915); Richmond, Virginia (1916); Youngstown and Summit, Ohio (1917); Portland, Oregon; Norfolk, Virginia; and Lincoln and Omaha, Nebraska (1919).<sup>150</sup> Probation was a central feature in these courts, too. In the words of an incoming Detroit judge, who had just toured other courts to prepare for his role, a probation system was such "a positive necessity" that to not provide it "would be almost an official sin."<sup>151</sup> Reformers in other cities also proposed domestic relations courts but were unable to overcome political opposition or state constitutions that made altering court jurisdiction too difficult.<sup>152</sup>

While the scope of these new courts somewhat varied, the common thread and most common category on court dockets was quasi-criminal or criminal nonsupport. Many of the earliest adopters followed New York's lead in delegating only nonsupport matters.<sup>153</sup> Others permitted somewhat broader jurisdiction (often concurrent with other courts, a perennial source of tension and confusion), yet records indicate their tribunals focused primarily on nonsupport. For example, the Chicago court had jurisdiction over a range of unlawful adult-child conduct (such as selling tobacco to children and violating child labor laws) but reported in its first year that nonsupport comprised more than

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<sup>149</sup> E.W., *A Domestic Relations Court*, St Louis Post-Dispatch 2 (Apr 14, 1912).

<sup>150</sup> Boushy, *The Historical Development of the Domestic Relations Court* at \*8, 156, 232–33, 256, 317, 411–17 (cited in note 16); *Lincoln's First Domestic Relations Court Begins to Straighten Out Family Tangles*, Lincoln Star 13 (July 20, 1919); Bernard Flexner, Reuben Oppenheimer, and Katharine F. Lenroot, *The Child, the Family and the Court: A Study of the Administration of Justice in the Field of Domestic Relations* 65–67 (Bureau of Publication 1929); *Juvenile and Domestic Relations Court, Norfolk, Virginia: Fifty Year History, 1919 to 1969* 1 (Norfolk 1969).

<sup>151</sup> Arthur J. Lacy, *The Domestic Relations Court of the County of Wayne: Preliminary Observations* 5 (Conway Brief 1913).

<sup>152</sup> For example, *Wants Marital Court*, Baltimore Sun 7 (Jan 16, 1913); *Bill Is Drafted for a Domestic Relations Court*, St Louis Post-Dispatch A12B (Jan 3, 1915); *For Family Wars*, LA Times II2 (Nov 2, 1914).

<sup>153</sup> Edward F. Waite, *Courts of Domestic Relations*, 5 Minn L Rev 161, 164 (1921).

70 percent of its caseload.<sup>154</sup> Statistics collected over the next decade likewise showed that more than half of that court's docket was nonsupport.<sup>155</sup> The two notable exceptions to the nonsupport focus in the 1910s were the Detroit and Ohio tribunals, which included divorce.<sup>156</sup>

Largely because of their focus on nonsupport, domestic relations courts were typically envisioned as "poor people's courts." Poverty made men less able to provide and incentivized wives to pursue formal interventions, so working class families were more likely to fall within the courts' purview.<sup>157</sup> Many legal aid organizations refused to provide assistance for those seeking divorce, leaving criminal nonsupport as the most readily available option for the working class.<sup>158</sup> By contrast, the wealthy could afford to hire lawyers and pay court fees to secure separate maintenance or divorce orders available in higher courts.<sup>159</sup>

Nevertheless, domestic relations courts were not the exclusive domain of the poor. In the context of early twentieth-century urban living, many wives could not afford the costs in higher courts, lacked the grounds necessary to prevail in such proceedings, or were opposed to formal separations for religious or social reasons. And middle- or upper-class husbands might come on hard times or feel justified in refusing to support wives who, without good cause in the men's view, refused to live with them or deprived them of their children's company. For these reasons, as newspaper articles plentifully document, middle-class and even wealthy men were not immune to criminal proceedings.<sup>160</sup> In fact, wealthy men may have been attractive candidates for extradition

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<sup>154</sup> William H. Baldwin, *The Court of Domestic Relations of Chicago*, 3 J Crim L & Criminology 400 (1912); *Sixth Annual Report of the Municipal Court of Chicago for the Year December 4th A.D. 1911 to November 30th, A.D. 1912, Inclusive* 84 (John F. Higgins 1912).

<sup>155</sup> Cora M. Winchell, *A Study of the Court of Domestic Relations of the City of Chicago as an Agency in the Stabilization of the Home* \*2 (unpublished MA thesis, The University of Chicago, 1921) (on file with author).

<sup>156</sup> Arthur J. Lacy, *What the Detroit Court of Domestic Relations Accomplished*, 25 Am Legal News 5, 10-13 (Sept 1914).

<sup>157</sup> See, for example, *Quick Justice for Poor at Low Cost Urged by Hughes*, St Louis Post-Dispatch 3 (Aug 27, 1920); *The Poor and the Law*, Greenville News (South Carolina) 4 (Nov 30, 1919).

<sup>158</sup> Reginald Heber Smith, *Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position before the Law with Particular Reference to Legal Aid Work in the United States* 155 (Scribner 1921).

<sup>159</sup> See Part I.A.

<sup>160</sup> For example, *Broker Must Support Wife*, NY Times 6 (Mar 9, 1911); *M'Donald Heir Gets Delay*, Chi Daily Trib 8 (June 7, 1912); *Dr. Morris Still Held*, NY Times 7 (June 29, 1912); *Ex-Magistrate Jailed*, NY Trib 2 (May 6, 1913).

because of the likelihood that the expense of transporting them would prove worthwhile.<sup>161</sup>

Probation-backed, criminal domestic relations courts greatly improved dependents' ability to secure financial support from delinquent breadwinners, as compared to earlier civil options. According to one expert who studied the administration of justice in the late 1910s, the criminal approach to nonsupport was simpler and cheaper. A wife participating in a criminal case need not hire a lawyer because a court clerk assisted her in completing newly simplified forms to initiate suit, the probation department ("an indispensable adjunct of every domestic relations court"<sup>162</sup>) collected necessary evidence and, depending on location, a probation officer (informally) or a government prosecutor represented the wife's interests during the trial, which was typically quick. Whereas civil orders in other courts "inevitably" led to the additional cost and delay of contempt litigation to secure payments, criminal suits meant a probation officer was tasked with overseeing collection and initiating summary proceedings for noncompliance. The expert thus predicted that "the territorial expansion of domestic relations courts will be rapid."<sup>163</sup>

#### B. Probation Organizations and the "Family Court" Proposal

Because probation officers received significant employment and positive publicity from handling nonsupport cases, they were deeply invested in the success and spread of specialized domestic relations courts. They and their organizations pressed for the opening of these institutions in new locations and, by the late 1910s, for the expansion of the tribunals into "family courts," with jurisdiction over other family litigation as well.

Beginning in the early twentieth century, probation officers began formulating a distinct professional identity and founded

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<sup>161</sup> For examples of wealthy men extradited for nonsupport, see *John A. Farwell Is Arrested as Wife Deserter*, Chi Daily Trib 15 (July 12, 1919) ("Chicago real estate man" whose mother had inherited almost a million dollars); *Brooklyn Pitcher Waives Extradition*, Hartford Courant 17 (Sept 6, 1917); *To Face Wife's Non-Support Charge: Art Dealer Is Taken East after Fight against Extradition*, LA Times 18 (June 18, 1918); *To Extradite Twombly*, NY Times 22 (Dec 1, 1931) ("inventor and millionaire").

<sup>162</sup> Smith, *Justice and the Poor* at 78 (cited in note 158).

<sup>163</sup> Id at 76, 78–80, 82.

organizations to improve and promote their work. The most influential of their associations was the NPA, formed in 1907.<sup>164</sup> From its early years, the NPA supported the establishment of specialized domestic relations courts to better treat nonsupport cases, and many of its members were domestic relations probation officers and judges.<sup>165</sup> By the time of the NPA's annual conference in 1916, the first year for which full records are available, the presidential address described domestic relations courts as "an outgrowth of probation" and suggested: "Any community which has not established a domestic relations court is neglectful of its welfare."<sup>166</sup> During the same meeting, the NPA created the "Committee on Courts of Domestic Relations," then one of only four permanent committees. The organization also enshrined a focus on domestic relations courts in its bylaws.<sup>167</sup>

Newspaper articles, conference proceedings, and commissioned reports demonstrate that the NPA promoted domestic relations courts with probation staffs and worked to strengthen and standardize the tribunals across jurisdictions.<sup>168</sup> By 1920, the NPA president referred to courts of domestic relations as "essentially probation courts," and declared that "probation work in the family courts is really the heart of the probation service in any system."<sup>169</sup>

The NPA and other likeminded reformers were crucial participants in spreading the domestic relations court model, but they were less successful in their effort to expand the courts' jurisdiction to encompass two areas of law they saw as interrelated: juvenile delinquency and divorce.<sup>170</sup> Beginning in the late

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<sup>164</sup> John J. Gascoyne, *The Judge and the Probation Officer*, in *The Progress of Probation: Annual Report and Proceedings of the Eighth Annual Conference of the National Probation Association* 110, 112 (National Probation Association 1916).

<sup>165</sup> See, for example, *Probation for Counties*, Baltimore Sun 5 (May 12, 1915). Probation officers also promoted stronger nonsupport laws. See, for example, *Bill Will Take Care of Deserted Families*, Atlanta Const G5 (Aug 3, 1913).

<sup>166</sup> Frank E. Wade, *President's Address*, in *The Progress of Probation* 12, 18 (cited in note 164).

<sup>167</sup> *The Progress of Probation* at 4, 9, 115, 132 (cited in note 164).

<sup>168</sup> For example, *Would Reorganize Probation Bureau*, Baltimore Sun 28 (Mar 21, 1928); *Social Problems Up for Discussion*, Palm Beach Post 6 (Mar 10, 1929).

<sup>169</sup> Edwin J. Cooley, *Tendencies and Developments in the Field of Probation*, in *Social Service in the Courts: Annual Report and Proceedings of the Fourteenth Annual Conference of the National Probation Association* 19, 31 (National Probation Association 1920); Edwin J. Cooley, *The Administrative versus the Treatment Aspects of Probation*, in *Social Service in the Courts* at 103, 110.

<sup>170</sup> *Asks Wider Courts to Avert Divorces: National Probation Group Urges Tribunals That Can Keep the Family Intact*, NY Times 15 (Apr 26, 1928).

1910s, NPA members argued that combining criminal nonsupport, juvenile delinquency, and divorce into a unified “family court” would reduce jurisdictional overlap and ensure deep, rehabilitative treatment by probation officers across family-related conflicts.<sup>171</sup> Probation supervision was already commonplace in juvenile courts. Judges and commenters typically justified placing children on probation pursuant to the chancery doctrine of *parens patriae*.<sup>172</sup> By contrast, courts rarely used probation officers in divorce—a context in which neither the state’s criminal powers nor *parens patriae* reached. The usefulness of probation in nonsupport led some to envision probation officers performing many of the same duties in divorce cases: attempting reconciliations, investigating home life, and overseeing alimony payments.<sup>173</sup>

Family court advocates encountered strong opposition. Juvenile-focused discussants feared the proposed merger would harm the functioning of juvenile courts by reintroducing the criminal posture they had worked hard to minimize and by diverting precious resources.<sup>174</sup> Legal experts emphasized the difficulty in combining these matters within existing court structures, as the three categories of cases “cut across the arbitrary lines . . . between civil and criminal jurisdiction and between inferior and general jurisdiction.”<sup>175</sup> Lawyers objected to moving divorce litigation because it might hurt their bottom line by rendering their services unnecessary. Others saw political impediments based on cost or general doubt about court reform.<sup>176</sup> Thus, although the

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<sup>171</sup> Charles W. Hoffman, *Developments in Family Court Work*, in *Social Treatment of the Delinquent, Annual Report and Proceedings of the Fifteenth Annual Conference of the National Probation Association* 55 (National Probation Association 1921); Charles L. Chute, *Probation and Suspended Sentence*, 12 *J Crim L & Criminology* 558, 563–64 (1921).

<sup>172</sup> On the use of probation in juvenile courts, see Ellen Ryerson, *The Best-Laid Plans: America’s Juvenile Court Experiment* 63–71 (Hill & Wang 1978).

<sup>173</sup> See, for example, Edward F. Waite, *Social Aspects of Minneapolis Courts*, 6 *Minn L Rev* 259, 269 (1922) (suggesting the “pitiful inefficiency” shown in collecting alimony could be improved by probation).

<sup>174</sup> National Probation Association, *A Standard Juvenile Court Law* 4, 12–13 (1926).

<sup>175</sup> *Editorial*, 3 *J Am Jud Soc* 3, 4 (1919); Smith, *Justice and the Poor* at 82 (cited in note 158) (“There is a gulf, fixed by history and tradition, between civil and criminal matters that will not easily be bridged.”).

<sup>176</sup> James Hoge Ricks, *Report of the Committee on Family Courts*, in *The Social Service of the Courts, Proceedings of the Sixteenth Annual Conference of the National Probation Association* 119, 121–26 (National Probation Association 1923) (discussing reform obstacles, including lawyer opposition, in Virginia).

NPA's family court proposal inspired change in some places, overall it resulted in a splintered view of what family-focused courts could and should do.<sup>177</sup>

The mixed success of the NPA proposal led to variation in the dozens of domestic relations and family courts that were reformed or founded in the 1920s and 1930s,<sup>178</sup> yet the common ingredients remained jurisdiction over criminal nonsupport and the use of probation.<sup>179</sup> So central were these components that locations unable to open specialized courts imported similar approaches. Many places grouped nonsupport cases on designated days or before specific judges and modeled their probation or like services on successful domestic relations court examples.<sup>180</sup> Thus, while there was diversity in the organization and jurisdiction of courts, in the words of the Omaha, Nebraska, family court judge, "the method of handling these family cases is usually similar." More specifically, the judge observed: "Effective probation work is the heart and soul of a successful family court."<sup>181</sup>

### III. FROM CRIMINAL NONSUPPORT TO "CIVIL" CHILD SUPPORT (1933–1950S)

Though criminal family courts with probation staffs rendered nonsupport enforcement more effective than under the preexisting options, critics increasingly identified procedural and practical disadvantages of the criminal law. In 1933, New Yorkers designed a "civil" nonsupport law that mirrored criminal enforcement in its use of probation and incarceration and that retained further state power by allowing judges to revert to criminal law when preferable. This approach, while addressing some problems, did not reach men outside the state. The solution that prevailed by the 1950s was nationwide passage of a uniform reciprocal law that allowed the civil enforcement of family support duties

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<sup>177</sup> Hoffman, *Developments in Family Court Work* at 55–56 (cited in note 171).

<sup>178</sup> A US Children's Bureau publication attempting to summarize the terrain in 1929 identified "at least" five "different types of organization" for institutions labeled "court of domestic relations" or "family court," and each contained its own variation. Flexner, Openheimer, and Lenroot, *The Child, the Family and the Court* at 15–17 (cited in note 150).

<sup>179</sup> See Chester Vernier, *3 American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1935)* 141–43 (Stanford 1935).

<sup>180</sup> See, for example, *Restoring Peace*, St Louis Post-Dispatch at B4 (cited in note 108).

<sup>181</sup> L.B. Day, *The Development of the Family Court*, 136 *Annals Am Acad Pol & Soc Sci* 105, 110 (1928).

across state lines. Reciprocal enforcement required extensive involvement by court staff, a marked departure from the civil options available in prior decades. Because state employee participation and oversight had been normalized in criminal cases, most observers did not find this development problematic. All states retained criminal law for deterrence and to use against the most incorrigible offenders, but civil suits became more attractive and therefore more frequent. Federalization later reinforced the civil-criminal scheme.

As the 1950s progressed, family court dockets became weighted toward civil matters because of the shift to civil nonsupport and incorporation of divorce jurisdiction. Despite these changes, the courts' powers, procedures, and personnel retained elements of their criminal origins. The influence and involvement of the state—cultivated in the context of criminal support litigation and embodied in the probation officer—was preserved in the “civil” family courts. Incarceration for noncompliance was ever-present, either through contempt or under the retained criminal laws.

#### A. “Novel and Ingenious”: “Civil” Support Enforcement

By the early 1930s, social welfare leaders and lawyers identified drawbacks to criminal nonsupport laws and domestic relations courts. At the same time, they wished to preserve the relatively robust staffing and coercive powers developed in the criminal context. New York reformers were again at the forefront, devising a “civil” nonsupport law and court that retained the core components of the criminal approach: probation and incarceration.

Social, economic, and legal developments coalesced to partially undermine the attractiveness of criminal nonsupport laws. Women's increasing political and economic power prompted questions about whether severe sanctions were appropriate when husbands failed to support them.<sup>182</sup> Widespread unemployment during the Great Depression raised awareness that the harshness of criminal law might be unfair or counterproductive.<sup>183</sup> By the late 1920s, social welfare leaders advocated handling nonsupport

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<sup>182</sup> See, for example, Arthur Stringer, *It Is the Man Who Pays and Pays: Modern Woman Is Civilization's Gate-Crasher, Receives More and Gives Less, Breaks Laws, and Depends on Sex-Charm to Evade Justice*, Hartford Courant C5 (Dec 26, 1926).

<sup>183</sup> See, for example, *Domestic Court's Data Lays Strife to Lack of Work*, Brooklyn Daily Eagle 4A (Sept 27, 1931).

as a “social” rather than criminal problem to facilitate rehabilitation<sup>184</sup> and reduce “unnecessary stigma.”<sup>185</sup> Meanwhile, lawyers condemned state-level criminal procedure’s “red tape”<sup>186</sup> and “loopholes” for causing delays.<sup>187</sup> Compounding the pessimistic take on criminal enforcement in New York, an investigation into New York City’s inferior criminal court system—of which the domestic relations court remained part—revealed widespread corruption.<sup>188</sup>

These concerns, in conjunction with the influence of the NPA’s “family court” model, motivated New Yorkers to lobby their legislature to remove the domestic relations court from the inferior criminal court system.<sup>189</sup> In 1933, New York legislators responded by creating a standalone family court they somewhat confusedly called a “Domestic Relations Court.” This court had two divisions: a “Family Court” (focused on nonsupport) and a “Children’s Court” (for juvenile delinquency and some offenses committed against children).<sup>190</sup>

One goal of the Family Court division, as compared to its predecessor domestic relations court, was to lessen the tribunal’s reputation as only serving poor people.<sup>191</sup> The statute removed the public charge requirement for eligibility, allowed judges to grant more generous awards (“a fair and reasonable sum”),<sup>192</sup> and

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<sup>184</sup> See, for example, *Magistrates Urge Sweeping Reforms*, NY Times 1 (Dec 30, 1931); *Charities Bureau Urges Passage of Family Court Bill*, Brooklyn Daily Eagle 6 (Mar 7, 1932).

<sup>185</sup> Committee on Criminal Courts of the Charity Organization Society of the City of New York, *Proposed Changes in Family Court* (Nov 3, 1928), Community Service Society Archives, Box 110, Courts Committee Folder, Rare Book and Manuscript Library, Columbia University.

<sup>186</sup> *American Law Institute Drafts Code for Uniform Laws in the States*, 2 NY St Bar Assn Bull 112, 112 (1930). See also *O’Brien Drafts Bill to Merge 2 Courts*, NY Times 7 (Mar 24, 1933) (litigants in domestic relations courts “were poor and could not afford the delays caused by the present red tape”).

<sup>187</sup> Henry Epstein, *Reforms in Criminal Law: Statutes Enacted at the Special Session of the N.Y. Legislature*, 3 NY St Bar Assn Bull 451, 451 (1931).

<sup>188</sup> *Seabury Describes Abuses in Magistrates’ Courts through Politics and Proposes Reforms*, NY Herald Trib 8 (Mar 28, 1932). There was dissatisfaction with inferior criminal courts in other locations, too. For example, Alan Johnstone Jr, *Suggestions for Reform in Criminal Procedure*, 125 Annals Am Acad Pol & Soc Sci 94 (1926).

<sup>189</sup> Jonah J. Goldstein, *The Family in Court*, 1932 Natl Probation Assn Yearbook 168.

<sup>190</sup> Clarence M. Lewis, *New Domestic Relations Court of New York City*, 5 NY St Bar Assn Bull 484–90 (1933).

<sup>191</sup> For rationales, see Committee on Criminal Courts of the Charity Organization Society of the City of New York, *Proposed Changes in Family Court* (cited in note 185).

<sup>192</sup> Domestic Relations Court Act, 1933 NY Laws ch 482, § 101(1).



absorbed jurisdiction over nonpayment of alimony. Providers submitted both types of payments through a Support Bureau.<sup>193</sup> Still, if a poor person did not seek support, a charitable association or public official retained the right, inspired by the poor law, to file on the person's behalf to protect taxpayers.<sup>194</sup>

The statute also included a dramatic change in the options available to enforce men's support duties. While retaining the criminal nonsupport option, the law additionally permitted judges to enter support orders following civil proceedings. Moreover, judges had the authority to transform matters initially designated as civil into criminal actions or vice versa whenever they believed doing so would be advantageous.<sup>195</sup> State-level criminal procedure protections—such as the right to cross-examine witnesses—remained obligatory only when the court proceeded under the law denominated “criminal.”<sup>196</sup> This gave judges significant discretion. In the words of a New York lawyer reviewing the changes, the 1933 law sought “to create elasticity of procedure and punishment.”<sup>197</sup>

Crucially, the court could use incarceration and probation under both the civil and criminal paths. If a person failed to comply with a civil support order, the court could “commit [him] to jail for a term not to exceed twelve months,”<sup>198</sup> in other words for contempt of court. Or, it could find a defendant “guilty of nonsupport” and “punish [him] by imprisonment in jail for not exceeding twelve months.”<sup>199</sup> Under both options, the court retained the discretion to release the person early on probation in furtherance of “the best interests of the family and the community.”<sup>200</sup> This meant the court's contempt power and criminal sentencing power were virtually identical to each other and to previous

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<sup>193</sup> *Annual Report of the Domestic Relations Court of the City of New York* 62 (1933).

<sup>194</sup> Lewis, 5 NY St Bar Assn Bull at 491 (cited in note 190).

<sup>195</sup> *Id.* A law passed in 1978 added that a judge who converted a civil proceeding into a criminal action must then transfer it to a criminal court. The amended version of the law in force today requires consent from the petitioner for this conversion. NY Family Court Act § 813 (2018).

<sup>196</sup> Lewis, *New Domestic Relations Court*, 5 NY St Bar Assn Bull at 491 (cited in note 190).

<sup>197</sup> *Id.* at 484.

<sup>198</sup> Domestic Relations Court Act, 1933 NY Laws ch 482, § 92(12).

<sup>199</sup> Domestic Relations Court Act, 1933 NY Laws ch 482, § 102.

<sup>200</sup> Domestic Relations Court Act, 1933 NY Laws ch 482, § 92(15). The court also had the power to hear certain criminal family conflicts (including domestic violence) if the parties were already before it for a nonsupport matter. *Annual Report of the Domestic Relations Court* at 33–36 (1933) (cited in note 193).

practice. As one supporter trumpeted, the court could “deal with recalcitrant persons as heretofore.”<sup>201</sup>

Although the text of the Domestic Relations Court Act did not state that the new tribunal was “civil,” officials and observers understood it as such. In the language of the court’s first annual report: “The most outstanding change is the fundamental shift in the character of jurisdiction from criminal to civil.”<sup>202</sup> Adjustments to vocabulary added to the civil veneer; for instance, “respondent” replaced “defendant.”<sup>203</sup>

Proponents and court staff recognized and welcomed the strategic reinforcement of so-called civil law with retained criminal powers. In explanatory publicity materials, social welfare leaders who had helped draft the law cast their blending of civil and criminal components as “novel and [i]ngenious.” The legislation removed the family court from the criminal system and rendered its procedure “almost entirely a Civil One,” a pamphlet explained. Yet “[w]hile the procedure in future will be chiefly civil,” it continued,

the Power to Proceed under Criminal Procedure is Retained as it must be—for, on last analysis, if a husband refuses to obey the orders of the court to support his wife, the only effective way of dealing with him is to send him to jail. To impose a civil judgment upon him that is uncollectible is an empty gesture.<sup>204</sup>

In short, the new court design deliberately blended civil and criminal components in a manner far more explicit and strategic than any previous family tribunal had done. State involvement—primarily through probation oversight, centralized collection and disbursement of payments, and the threat or reality of incarceration—was now a key ingredient in civil support enforcement. The criminal-laced civil machinery nearly eliminated incentives to turn to criminal law. Detailed statistical analyses published in the court’s annual reports in the following years provided no indication that any cases were pursued as “criminal,” even as the

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<sup>201</sup> Charles Zunser, *The New Domestic Relations Court of New York; How Does It Work?*, 14 *Jewish Soc Serv Q* 372, 376–77 (1938).

<sup>202</sup> *Annual Report of the Domestic Relations Court* at 33 (1933) (cited in note 193).

<sup>203</sup> See *id.* at 34.

<sup>204</sup> Committee on Criminal Courts of the Charity Organization Society of the City of New York, *The New Domestic Relations Court Law: Some of its Principal Features* (June 1, 1933), Community Service Society Archives, Box 114, Domestic Relations Folder, Rare Book and Manuscript Library, Columbia University.

court used warrants, probation, and incarceration.<sup>205</sup> A decade into the court's operation, one of its judges explained to employees that though the court was "deemed to be essentially a court of civil jurisdiction," it "savors of the criminal law."<sup>206</sup>

The first New York Court of Appeals case probing the civil-criminal blend offered almost no discussion, deferring to the legislature's removal of such cases from the criminal court system as dispositive evidence of civil character. After acknowledging "there seemed to be some confusion" about whether certain proceedings under the Domestic Relations Court Act were civil or criminal, the court held: "We now say that these proceedings are no longer of a criminal nature as they have shifted to the civil side of the courts."<sup>207</sup>

New York's strategic melding of civil and criminal components became influential.<sup>208</sup> In 1943, the NPA praised New York City as having "among the most progressive" and "best nonsupport laws in the country."<sup>209</sup> Reflecting this view, a Miami family court judge speaking at an NPA conference the following year suggested that "[t]he best thought seems to favor making such courts civil in nature" in order to "escape from the technicalities of criminal courts." Civil contempt offered these courts speed and other procedural advantages, he observed, yet the courts should retain criminal powers to use when civil methods failed.<sup>210</sup> In 1949, the NPA credited and followed New York's approach when crafting a model nonsupport law.<sup>211</sup>

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<sup>205</sup> See, for example, *Annual Report of the Domestic Relations Court of the City of New York* 15 (1938).

<sup>206</sup> W. Bruce Cobb, *The Domestic Relations Court Act*, in *Functions and Procedures of the Domestic Relations Court: Inservice Training Course 2* (Division of War Training 1944).

<sup>207</sup> *Kane v Necci*, 198 NE 613, 615 (NY 1935) (involving stepparent liability for indigent children). Subsequent cases relied on *Kane* without providing deeper analysis. For example, *People v Rogers*, 248 AD 141 (NY 1936). New York practice resources still cite *Kane* in explaining that jail terms for nonpayment of child support are of a "civil nature." See *Callaghan's Family Court Law and Practice NY*, 1 NY Fam Ct Law & Prac § 6:4 (2017).

<sup>208</sup> It would be valuable for future historical studies to trace and compare other states' approaches in greater depth. Initial findings indicate that strategic fluidity between criminal law, civil law, and contempt was common but sometimes followed other patterns. See, for example, *Petition of Kelley*, 197 NE 861 (Mass 1935) (affirming finding of contempt in course of criminal prosecution for nonsupport).

<sup>209</sup> National Probation Association, *A Standard Juvenile Court Act* 14, 28 (1943).

<sup>210</sup> Walter Beckham, *One Court for Family Problems*, in *Social Defenses against Crimes, Proceedings of the Thirty-Sixth Annual Conference of the National Probation Association* 80, 81–83 (National Probation Association 1942).

<sup>211</sup> National Probation and Parole Association, *A Standard Juvenile Court Act* 37–40 (1949).

The legislature in Turner's home state of South Carolina was among those persuaded. In 1935, Charleston followed New York City when it became the first city in its state to open a domestic relations court.<sup>212</sup> Unsurprisingly, South Carolinian judges found that the option to "enforce its decrees by punishment for contempt"<sup>213</sup> reduced their need to turn to the state's preexisting misdemeanor statute.<sup>214</sup> A South Carolina domestic relations judge captured this perspective when he opined in the 1950s: "Contempt is my favorite weapon."<sup>215</sup>

### B. A Civil Alternative to Extradition

Though the relabeling of criminal nonsupport as civil solved some problems, a substantial weakness remained: how to efficiently handle desertion across state lines. Because the criminal laws enacted in earlier decades were not repealed, extradition remained available. In practice, however, the cost undermined the utility. As one family court judge observed in a speech to the NPA in 1942, the expense of pursuing "such a fugitive is frequently greater than the amount to be collected."<sup>216</sup> Similarly, the Brooklyn District Attorney estimated that it would cost \$600,000 per year to extradite all deserting husbands, whereas the entire annual extradition budget was between \$5,000 and \$6,000. Extradition might be a complete waste, as there was no guarantee the men would then support their dependents.<sup>217</sup>

Extradition was also legally complex. Questions arose about whether a man was a "fugitive from justice," as required for the Extradition Clause to apply, if he left his wife for a legitimate, temporary reason (such as looking for work) and only later decided not to return to her.<sup>218</sup> Finally, nonsupport cases became

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<sup>212</sup> Charles H. Miller, *National Probation Association, The Domestic Relations Court and Related Agencies of Charleston, South Carolina* 7–8 (1945).

<sup>213</sup> *Id.* at 6.

<sup>214</sup> South Carolina criminalized family abandonment in 1912. *State v. English*, 85 SE 721, 722 (SC 1915) (discussing misdemeanor statute).

<sup>215</sup> *Lions Club Hears Report on Court in Greenville*, Index-Journal (Greenwood, SC) 1, 10 (Apr 20, 1956).

<sup>216</sup> Beckham, *One Court for Family Problems* at 86 (cited in note 210).

<sup>217</sup> Judith Crist, *Reciprocal Laws in All States Urged to Curb Wife Deserters*, NY Herald Trib A5 (Sept 26, 1948); Katherine Blanck, *Woman A.D.A. Fights for Abandonment Law*, Brooklyn Daily Eagle 7 (June 5, 1941).

<sup>218</sup> See, for example, *Texas Refusal on Extradition Termed Illegal*, Austin Am Statesman 1 (Feb 24, 1925).

tied up in broader disputes about whether extradition was discretionary.<sup>219</sup>

In 1941, Grace Clyde Seaman, the Assistant District Attorney responsible for the Abandonment Bureau in Brooklyn, turned her attention to finding an alternative to extradition. She first proposed a federal criminal law, which she envisioned would be heard in children's divisions within federal courts.<sup>220</sup> After several years of publicizing this approach to no avail, Seaman and her colleagues developed a new idea: civil reciprocal laws enforced in family courts.<sup>221</sup> For a civil suit to be pursuable when litigants were in different states, the legislature needed to expressly provide this jurisdiction to the family court. Moreover, to be worthwhile, states needed to agree in advance that they would cooperate regardless of whether their own court had jurisdiction over the provider or the dependents. Passage of compatible reciprocal enforcement laws could achieve this goal.<sup>222</sup>

The New York legislature led the effort to create a reciprocal enforcement web when it passed such legislation in 1948. This early iteration was tacked onto the 1933 Domestic Relations Court Act but, recognizing that this approach made it difficult for other states to copy and thereby impeded reciprocity, the legislature repealed and replaced it with a standalone act the next year: the Uniform Support of Dependents Law (USDL).<sup>223</sup> The USDL adopted core parts of the Domestic Relations Court Act—such as judicial discretion to award “a fair and reasonable sum,” the involvement of a state attorney to represent the dependent, and oversight by probation officers. The essential provision provided that the family court could now apply the law when a petitioner, respondent, or both were in the state. Although the USDL did not carry over the Domestic Relations Court Act's option of transforming civil suits into criminal petitions (likely because experience showed reverting to criminal law was rarely necessary), it provided that a respondent who willfully failed to comply with a

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<sup>219</sup> For example, *Renew Extradition Row*, NY Times 3 (May 28, 1938). On resistance to extradition on public policy grounds, see generally Christopher N. Lasch, *Rendition Resistance*, 92 NC L Rev 149 (2013); Eric W. Rise, *Crime, Comity and Civil Rights: The NAACP and the Extradition of Southern Black Fugitives*, 55 Am J Legal Hist 119 (2015).

<sup>220</sup> *Mother's Plight Cited in Move for New Court*, Brooklyn Daily Eagle 4 (Feb 16, 1944).

<sup>221</sup> *Dewey Signs Bill to Nip Runaway Husbands*, Brooklyn Daily Eagle 3 (Apr 8, 1948).

<sup>222</sup> Crist, *Reciprocal Laws*, NY Herald Trib at A5 (cited in note 217).

<sup>223</sup> Harold V. McCoy, *Uniform Support of Dependents Law*, 24 St John's L Rev 162, 163–65 (1949).

court order or probation should be punished in the same manner as for noncompliance in other cases.<sup>224</sup> For many states, this included civil contempt imprisonment. Thus, the USDL maintained the probation surveillance and incarceration powers of earlier criminal nonsupport laws but within a civil framing. Moreover, the statute clarified it was “an additional or alternative civil remedy” that should not “affect or impair any other remedy, civil or criminal.”<sup>225</sup>

New York’s civil reciprocal law received nationwide attention, including from the Council of State Governments, and was soon adopted in other states.<sup>226</sup> As more states joined, the law gained momentum with the promise of wider reciprocity. In contrast to the options that predated criminalization, the USDL provided a strong and procedurally clear mechanism for interstate enforcement.<sup>227</sup>

Meanwhile, the Commissioners on Uniform State Laws had begun reevaluating the Uniform Act of 1910, prompted, by their own account, by an article published in *Cosmopolitan Magazine* in 1942.<sup>228</sup> The Commissioners recognized that no state had enacted the Uniform Act for decades and that adopting states had modified it beyond the point of it actually providing uniformity. Thus, the Commissioners considered how to revise the law to fit new circumstances and to settle lingering questions about applicability to dependents not likely to become public charges. They suggested “the better view” was that the criminal statutes should “supplement civil remedies against the husband or father.”<sup>229</sup>

The Commissioners’ discussions in the following years reveal that they still conceived of the solution to interstate enforcement as coming from criminal law. They were deeply troubled, however, by the application of criminal law to mid-century families. While their 1910 predecessors envisioned that extradition would bring a husband back to a home in which he previously lived with

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<sup>224</sup> 1949 NY Sess Laws § 807(6)(m).

<sup>225</sup> 1949 NY Sess Laws § 807. See also *Vincenza v Vincenza*, 197 Misc 1027, 1028–29 (NY Dom Rel Ct 1950) (discussing relationship between 1933 Act and USDL).

<sup>226</sup> Clarence Woodbury, *What to Do about Runaway Husbands*, Minneapolis Star 12 (Aug 22, 1949).

<sup>227</sup> See McCoy, 24 St John’s L Rev at 162 (cited in note 223).

<sup>228</sup> *Report of Uniform Torts and Criminal Law Acts Section on Uniform Desertion and Non-Support Act*, in *Handbook of the Fifty-Second National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting* 233, 234 (1942).

<sup>229</sup> *Id* at 235.

his wife and possibly lead to a reconciliation, the Commissioners of the 1940s thought extradition meant removing a man from a good job and sending him to a state where he perhaps never lived. The wife could, one discussant worried, “go to any one of the forty-seven states that she chooses, and make that man a criminal in the state of her choice.”<sup>230</sup> Aside from providing too much power to the wife, they thought this scenario might not pass constitutional muster. Furthermore, once in the wife’s state, the man would be imprisoned at public expense, helping no one. But if the Commissioners instead created a framework in which a man was prosecuted wherever he was located, that setup incentivized him to forum shop for the state with the weakest law. Unable to identify a clear path forward, they cycled through several drafts.<sup>231</sup>

By their 1949 meeting, the Commissioners had learned about the USDL, which had already been passed in twelve states, raising their interest in a law that included civil enforcement components, too.<sup>232</sup> In 1950, the Commissioners released the Uniform Reciprocal Enforcement of Support Act (URESA).<sup>233</sup> URESA contained both criminal and civil machinery to facilitate enforcement of substantive laws already on the books in adopting states (in contrast to the USDL, which included both substantive law and reciprocity).

The Criminal Enforcement section of URESA was brief and focused on easing extradition by outlining the requirements and procedures. The most innovative provision permitted extradition of a person who was not a fugitive from justice, thus extending extradition to more scenarios than required under the Constitution’s Extradition Clause and requiring proof on fewer points.<sup>234</sup> As the most prominent promoter of URESA later explained, the drafters retained the criminal approach because they were uncertain whether civil suits would cover all situations, and they anticipated that “the *threat* of extradition might be a powerful weapon in the case of shiftless and slippery obligors.”<sup>235</sup>

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<sup>230</sup> *Proceedings in Committee of the Whole: Uniform Desertion and Non-Support Act* 16–17 (Sept 2, 1948).

<sup>231</sup> *Id.*

<sup>232</sup> *Proceedings in Committee of the Whole: Model Reciprocal Non-Support Act and/or Uniform Desertion and Non-Support Act* (Aug 31, 1949).

<sup>233</sup> *Proceedings in Committee of the Whole: Uniform Reciprocal Enforcement of Support Act* (Sept 12, 1950).

<sup>234</sup> *Id.* at 4–5.

<sup>235</sup> William J. Brockelbank, *Interstate Enforcement of Family Support (The Runaway Pappy Act)* 15, 21 (Bobbs-Merrill 1960) (emphasis in original).

URESA's Civil Enforcement portion was far lengthier, covering complex choice of law issues and detailed procedural prescriptions. The URESA framework imposed duties on both initiating and responding states to exchange paperwork; hold appropriate hearings; and accept, track, and transmit payment. The court with jurisdiction over the obligor could require the person to make regular payments to a clerk or probation department and to report to the same regularly. URESA also allowed states or localities to pursue reimbursement of expenditures made on behalf of a dependent. Punishment for noncompliance followed ordinary rules for contempt of court, which could include incarceration.<sup>236</sup>

All forty-eight states and several US territories adopted either URESA or USDL (which were interchangeable for purposes of states being able to cooperate with each other) by 1955, greatly boosting recovery of support under civil law approaches.<sup>237</sup> Civil law now seemed clearly superior to criminal law in most situations. A representative newspaper article summed up the benefits of the civil reciprocal regime: "No criminal action, no extradition, no loss of job."<sup>238</sup> Several cities reported upturns in the number of cases and amount collected.<sup>239</sup> New York City's Domestic Relations Court recorded a major increase, attributed to the reciprocal laws, from \$473,468 in 1953 to \$747,346 in 1954.<sup>240</sup>

Heightened collections helped justify the costs associated with running the civil reciprocal system. The Assistant US Attorney responsible for these matters for DC expected that URESA would permit him to handle around 90 percent of nonsupport cases as more "efficient" civil matters. Though he estimated the larger caseload would require ten people, he reasoned that "the cost of staff to handle the cases might be balanced" by reducing welfare rolls.<sup>241</sup> In this way, the public purpose of support enforcement validated the retention of prosecutorial involvement within

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<sup>236</sup> *Id.* at 85.

<sup>237</sup> *Report of the New York State Joint Legislative Committee on Interstate Cooperation* 281 (1955). Although the procedures did not always work smoothly, state officials began holding annual meetings to work through problems and draft amendments. *Id.* at 286–98.

<sup>238</sup> James Clayton, *Absent Fathers Court Headache*, *Wash Post & Times Herald* D16 (Nov 4, 1956).

<sup>239</sup> *Joint Legislative Committee* at 282–85 (cited in note 237).

<sup>240</sup> *Id.* at 281.

<sup>241</sup> Clayton, *Absent Fathers*, *Wash Post & Times Herald* at D16 (cited in note 238).



a so-called civil scheme.<sup>242</sup> Aiding the prosecutorial staff, courts repurposed probation officers as filers of contempt petitions.<sup>243</sup>

After all states had passed reciprocal laws, an account celebrated how cooperation under civil law “left runaway fathers with no place to hide,” yet offered the option of jail when needed. “While desertion is a crime in every State, the machinery for extraditing and trying a runaway father on criminal charges is cumbersome and rarely invoked,” the article explained. “The great advantage of the new system is that it operates under civil, rather than criminal, procedures.”<sup>244</sup> Similarly, a family law expert at Columbia Law School observed that civil interstate enforcement had, by 1953, “already made the felony proceeding (abandonment) virtually obsolete.”<sup>245</sup> These developments likely help explain the turn to the more civil-sounding terminology “child support,” which entered the lexicon in 1939, grew dramatically in the 1950s, and surpassed “nonsupport” by around 1960.<sup>246</sup>

A series of legal attacks on USDL’s and URESA’s intermingling of civil and criminal components failed. In the first USDL case to reach a state supreme court, the Kentucky Supreme Court upheld the propriety of using public funds to pay prosecutors to represent wives in “private lawsuits” for civil support because it saw “no apparent reason” to distinguish these suits from analogous criminal cases. Both types of proceedings, the court reasoned, shared the same objective: “to coerce the husband or father to comply with an obligation which otherwise would fall on the public generally.”<sup>247</sup> In other words, the public purpose justified reliance on criminal-style personnel, even when the proceedings were “civil.” After a series of legislative refinements and court cases, states reached uniformity in providing the

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<sup>242</sup> Newspaper coverage in some states reported that URESA assigned responsibility for administering the law to state attorneys without a commensurate increase in resources. For example, Percy Hamilton, *‘URESAs’ Ends Refuge for Runaway Fathers*, Pensacola News-Journal 36 (Apr 1, 1962).

<sup>243</sup> For evidence of this role, see *Fathers Cited for Contempt*, Decatur Herald (Decatur, Ill) 3 (Aug 8, 1947); *Furtado v Furtado*, 402 NE2d 1024, 1033 (Mass 1980) (dismissing defendant’s argument that probation officer’s role in filing contempt “complaint” for nonsupport constituted unauthorized practice of law).

<sup>244</sup> Louis Cassels, *Running Fathers Can’t Hide Now*, LA Times A2 (Nov 6, 1957).

<sup>245</sup> Walter Gellhorn to J. Howard Rossbach, April 23, 1953, Walter Gellhorn Papers, Box 19, Rare Book and Manuscript Library, Columbia University.

<sup>246</sup> *Black’s Law Dictionary* (West 11th ed 2019) identifies 1939 as the earliest “child support” usage, though I found a few earlier examples. For example, *“Child-Support” Law Interpreted*, SF Chron 20 (May 3, 1913). On the use of this terminology in later decades, see Google Ngrams on file with author.

<sup>247</sup> *Duncan v Smith*, 262 SW2d 373, 377 (Ky 1953).

assistance of a state attorney “closely akin to the prosecuting attorney,” regardless of whether the beneficiary parent and child received public assistance.<sup>248</sup> Judges justified this result on the basis that “[t]he collection of child support ultimately benefits the State,” even when it is disbursed to a private party.<sup>249</sup>

Despite recognizing parallels between the civil and criminal suits, courts hearing USDL and URESA appeals relied on the civil label to dismiss men’s procedural objections. Judges denied claims that defendants had constitutional rights to receive jury trials and to confront witnesses against them.<sup>250</sup> In 1956, the New York Court of Appeals characterized reciprocal support statutes as “quasi-criminal in nature” but held criminal Due Process inapplicable on the basis that the proceedings were held in “civil court” and did not apply fines or penalties (instead relying on contempt). The US Supreme Court summarily dismissed the case “for want of a substantial federal question.”<sup>251</sup> Thus, under the reciprocal statutes, defendants faced state personnel and powers typical of the criminal context, but without criminal procedure protections.

While reciprocal statutes improved civil enforcement, observers still recognized value in maintaining criminal law. The most prominent group to express this view was the American Law Institute, which met beginning in 1956 to draft the Model Penal Code (MPC), with the goal of standardizing and modernizing state laws.<sup>252</sup> In an outline of the issues the drafters faced, they

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<sup>248</sup> *Arkansas Office of Child Support Enforcement v Terry*, 985 SW2d 711, 714–17 (Ark 1999) (asserting that, as a technical matter, the custodial parent assigns her rights to the state agency, even though the collected money “will ultimately pass from the State” to her).

<sup>249</sup> *Id.* at 716. See also *Haney v Oklahoma*, 850 P2d 1087, 1091 (Okla 1993) (“[T]he State has a pecuniary interest in child-support enforcement regardless of whether or not the custodial parent is [a welfare] recipient.”).

<sup>250</sup> Brockelbank, *Interstate Enforcement of Family Support* at 25–26 (cited in note 235) (noting lawyers’ confusion regarding the criminal versus civil nature of URESA and discussing failed legal challenges). See also R.D. Hursh, Annotation, *Construction and Application of State Statutes Providing for Reciprocal Enforcement of Duty to Support Dependents*, 42 ALR2d 768 (1955). The civil character of URESA suits also meant subsequent criminal actions were not res judicata. *State v Greenberg*, 109 A2d 669, 673 (NJ 1954).

<sup>251</sup> *Landes v Landes*, 135 NE2d 562 (NY 1956), summarily dismissed, 352 US 948 (1956) (per curiam). Other challenges to denial of criminal procedures were dismissed because relevant protections had not yet been recognized or incorporated against the states. See, for example, *Smith v Smith*, 270 P2d 613, 621 (Cal App 1954) (dismissing Fifth Amendment challenges to URESA proceedings).

<sup>252</sup> See generally Paul H. Robinson and Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 New Crim L Rev 319 (2007).

included: “Is it justifiable to preserve criminal non-support, despite general belief that civil (and social service-type) proceedings are preferable, in order to keep the prosecutors in the business as legal aid for indigent wives?”<sup>253</sup> While the question oversimplified the purpose and consequences of criminal nonsupport laws, it captured a key component. Criminal law brought state employee assistance to wives who could not afford lawyers.

The MPC drafters concluded that “ideally” nonsupport would be pursued as a civil matter but that there were “important reasons” not to abandon the criminal option. First, criminal law involved prosecutors in the process. “While this is not a desirable role for prosecutors in commercial transactions,” they acknowledged, “it may be very important” for indigent dependents living far from legal aid offices. Second, criminal law provided extradition, although URESA made this less necessary. And finally, criminal law contributed deterrence. They speculated that the existence of criminal law could both sway individual men’s decisions and “reinforc[e] the moral disapproval” attached to nonsupport.<sup>254</sup>

The blended civil-criminal approach was further bolstered by federal law. Congress had long resisted reformers’ attempts to draw the federal government into family support enforcement<sup>255</sup> and had even caused DC to be the last jurisdiction to adopt a reciprocal law.<sup>256</sup> Yet in the 1950s, Congress slowly began cooperating in the development of a complex federal-state partnership to collect child support.<sup>257</sup> Three elements are most relevant in this decades-long collaboration. First, the federal government introduced or helped spread novel techniques to coerce enforcement, such as revoking professional, occupational, recreational, and drivers’ licenses; denying passport applications; and intercepting

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<sup>253</sup> American Law Institute, *Memorandum to Council*, in *Model Penal Code* ix (1956).

<sup>254</sup> American Law Institute, *Comments to Section 207.16 – Non-Support*, in *Model Penal Code* 255–62 (1956).

<sup>255</sup> For example, *Wife Desertion in Ohio*, Wash Post 6 (Sept 25, 1909) (describing demand for federal criminal statute); *Mother’s Plight*, Brooklyn Daily Eagle at 3 (cited in note 220) (same, decades later).

<sup>256</sup> Cassels, *Running Fathers Can’t Hide Now*, LA Times at A2 (cited in note 244).

<sup>257</sup> The federal government stepped in lightly in 1950, with an amendment to the Social Security Act that required states to inform law enforcement when families received Aid to Families with Dependent Children (AFDC). Hatcher, 42 Wake Forest L Rev at 1041 (cited in note 29). See also Brief for the United States as Amicus Curiae Supporting Reversal, *Turner v Rogers*, No 10–10, \*2–6 (US filed Jan 11, 2011) (available on Westlaw at 2011 WL 108380).

federal tax refunds.<sup>258</sup> Second, Congress added a federal criminal law in 1992, which applies when a parent fails to pay an amount greater than \$5,000 over state lines for a year.<sup>259</sup> And third, Congress bolstered interstate enforcement by changing federal law and by using its spending power to incentivize states to adopt the Uniform Interstate Family Support Act (UIFSA), a modified version of URESA.<sup>260</sup> Overall, federalization made support enforcement more frequent and effective, in large part by refining and enhancing the blended civil-criminal machinery invented by states.<sup>261</sup> Ironically, the federal involvement reformers sought unsuccessfully for so many years now prevents the meaningful experimentation at the local and state levels that identified the practices federal law enshrined.

### C. The Shift to “Civil” Family Courts

As states refined their civil support options, rendering criminal law more a background threat, family courts appeared primarily or exclusively “civil.” Some locations broadened or replaced existing family courts to include civil nonsupport matters through legislative change or judicial interpretation,<sup>262</sup> while others included these laws in creating specialized courts for the first time.<sup>263</sup> When constitutional requirements made combining civil and criminal jurisdiction difficult, lawmakers included only the civil cases.<sup>264</sup> It was unnecessary to retain criminal nonsupport in

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<sup>258</sup> Most scholars date major federal involvement to the 1970s. For a particularly helpful overview, see generally Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 *Cornell J L & Pub Pol* 267 (2009).

<sup>259</sup> Child Support Recovery Act of 1992, Pub L No 102-521, § 2(a), 106 Stat 3403, 3403, codified as amended in various sections of Title 18 and Title 42. See also generally Kathleen A. Burdette, Comment, *Making Parents Pay: Interstate Child Support Enforcement after United States v. Lopez*, 144 *U Pa L Rev* 1469 (1996) (discussing difficulties in interstate enforcement of the 1992 Act).

<sup>260</sup> See Margaret Campbell Haynes and Susan Friedman Paikin, “Reconciling” *FFCCSOA and UIFSA*, 49 *Fam L Q* 331, 351 (2015).

<sup>261</sup> On the federal government’s current role in child support enforcement, see Patterson, 18 *Cornell J L & Pub Pol* at 98–101 (cited in note 3).

<sup>262</sup> See, for example, *Freeman v Freeman*, 76 S2d 414 (La 1954) (construing court’s jurisdiction over “all cases of desertion or non-support of children” to apply to “civil” cases newly brought under URESA).

<sup>263</sup> As of 1950, domestic relations courts existed in around thirty large cities and statewide in a few jurisdictions, leaving many opportunities to open different types of tribunals. Boushy, *The Historical Development of the Domestic Relations Court* (cited in note 16).

<sup>264</sup> For example, F.H. McGregor, *Domestic Relations Court*, 15 *Tex Bus J* 101, 102 (1952) (discussing how after a court with combined criminal and civil jurisdiction was found unconstitutional, the law was amended to remove criminal jurisdiction).

reformed family courts, one expert reasoned, because “the use of the criminal law approach is all but disappearing.” And, in the new civil-dominant scheme, it would be beneficial to exclude criminal matters. “We want to do our best to keep out the penal law atmosphere,” the expert explained, “with all the formal trappings of jury trials and the rest.”<sup>265</sup>

Another influential shift was the transfer of divorce litigation. Attention to the treatment of divorce overflowed in the wake of a post–World War II divorce wave, which merged with ongoing concerns about the fraud and collusion used to satisfy fault grounds.<sup>266</sup> Pointing to juvenile courts (still more common and uncontroversial than adult-focused domestic relations courts) or revisiting the NPA’s proposal for unified family courts, legal leaders proposed family courts with divorce jurisdiction.<sup>267</sup> Though continuing to encounter pushback,<sup>268</sup> this time they met with more success in moving divorce to family courts.<sup>269</sup> By 1960, divorce almost fully eclipsed criminal nonsupport as the primary motivation for promoting family courts.<sup>270</sup>

Meanwhile, probation officers slowly disappeared from marital litigation. Some latecomers to probation never applied the method to family cases, while others phased it out for budgetary reasons.<sup>271</sup> Probation officer functions were curtailed, with the rehabilitative goals and methods eliminated. A 1953 memorandum

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<sup>265</sup> Walter Gellhorn to J. Howard Rossbach, April 23, 1953 (cited in note 245).

<sup>266</sup> DiFonzo, *Beneath the Fault Line* at 112–37 (cited in note 16); Lynne C. Halem, *Divorce Reform: Changing Legal and Social Perspectives* 220 (Free Press 1980); Katherine L. Caldwell, *Not Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State*, 23 *Law & Soc Inquiry* 1, 27–30 (1998).

<sup>267</sup> For a juvenile-court-inspired example, see generally Quentin Johnstone, *Family Courts*, 22 *U Kan City L Rev* 18 (1953). For an NPA-influenced example, see Charles L. Chute, *Divorce and the Family Court*, 18 *Law & Contemp Probs* 49, 51–53 (1953).

<sup>268</sup> Caldwell, 23 *Law & Soc Inquiry* at 31–37 (cited in note 266); Brigitte M. Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 *Utah L Rev* 443, 460–70 (1961).

<sup>269</sup> For example, see Herndon Inge Jr, *Domestic Relations Court in Mobile County*, 9 *Ala L Rev* 26, 27–30 (1956) (describing domestic relations court founded primarily to handle divorce).

<sup>270</sup> See generally *Family Courts: A Symposium*, 27 *Tenn L Rev* 357 (1960) (reporting on first meeting of ABA’s new Family Law Section, during which discussants supported creation of family courts to handle divorce, with no mention of criminal nonsupport). Nine states never combined divorce and other domestic relations matters into a unified court; the continued separation causes racial and class differences in the resolution of disputes. Dale Margolin Cecka, *Inequity in Private Child Custody Litigation*, 20 *CUNY L Rev* 203, 211–12 (2016).

<sup>271</sup> For example, Kentucky lacked a probation department responsible for nonsupport cases, prompting a defendant to argue that the USDL could not be applied to him because

prepared by a social work leader, who was serving as director of a juvenile delinquency project for the US Children's Bureau, captures some of the reasoning behind these changes:

It appears to me that non-support is a civil action. How can a person be placed on probation as the result of a civil action? . . . [P]robation officers are now used primarily to insure payment. This is a great waste of money and skill. We could use a less expensive and less qualified type of personnel to do this work.<sup>272</sup>

Following this logic, support collection and disbursement were increasingly handled by court bureaucrats who only oversaw payments, rather than providing rehabilitative treatment.<sup>273</sup> (For example, a family court clerk initiated the hearing that culminated in Turner's incarceration. The clerk's duties included reviewing delinquent accounts and issuing "show cause" orders for those more than five days behind, regardless of whether the arrears were due to a private party or the state.<sup>274</sup>)

In 1959, the NPA endorsed flexibility in family court employee titles, apparently not perceiving this move as a threat to probation employment or else joining a foregone conclusion. In its modified model Family Court Act, the NPA explained that it used the vague word "assistants," rather than "probation officer[s]," to "permit [ ] each court to adopt a title that seems most appropriate."<sup>275</sup> The result was that court positions were filled by officials who did not have training or professional identities as probation officers.<sup>276</sup> Some probation tasks fell by the wayside, and others were outsourced. Family courts could refer litigants to therapists, for instance.<sup>277</sup> And lawyers jumped in to fill other gaps, such as

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of its apparent reliance on probation enforcement. The Kentucky Court held that the lower court could direct a clerk to perform necessary probation functions. *Duncan*, 262 SW2d at 376.

<sup>272</sup> Bertram M. Beck to Allen T. Klots, July 31, 1953, Walter Gellhorn Papers, Box 19, Rare Book and Manuscript Library, Columbia University.

<sup>273</sup> See J. Leonard Hornstein, *Interrelated Roles in Child Support Enforcement*, 36 *Juv & Fam Ct J* 111, 113 (1985) (describing how probation officers oversaw collection of support payments).

<sup>274</sup> *Turner*, 564 US at 435–36 (quotation marks omitted).

<sup>275</sup> *Standard Family Court Act*, 5 *Natl Probation & Parole Assn J* 99, 113 (1959). The modern organization erased its involvement in family courts from its institutional memory. See National Council on Crime & Delinquency, *History*, archived at <http://perma.cc/P2NB-HL99>.

<sup>276</sup> MacDowell, 22 *Georgetown J Poverty L & Pol* at 495–96 (cited in note 19) (describing modern family court staff and arguing that their discretion leaves litigants "vulnerable to the infiltration of bias").

<sup>277</sup> See *Family Courts Urged*, *Boston Globe* 10 (June 29, 1967).

representing children's interests in divorce and custody disputes in the much-troubled role of *guardian ad litem*.<sup>278</sup> Though some locations retain probation officers for criminal nonsupport matters to this day, these cases are such a tiny portion of litigation that probation is hardly noticeable in modern family courts.<sup>279</sup>

Once divorce and civil nonsupport took over family court dockets, and probation receded to the background, the courts seemed civil, even though many used criminal-style interventions in so-called civil matters and maintained actual jurisdiction over criminal nonsupport. This transition obscured the criminal origins of family courts and the laws they apply.<sup>280</sup>

#### IV. CHILD SUPPORT ENFORCEMENT AND THE CIVIL-CRIMINAL DIVIDE

That child support enforcement machinery is criminal law in a civil guise has serious implications as a matter of principle and practice.<sup>281</sup> There is widespread agreement that modern child support enforcement is flawed.<sup>282</sup> Scholars have raised important questions about the financial usefulness and collateral consequences of incarcerating child support debtors.<sup>283</sup> Careful studies

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<sup>278</sup> This was not a new role, but institutional changes and the growing divorce rate made it more significant. See generally Dale Margolin Cecka, *Improper Delegation of Judicial Authority in Child Custody Cases: Finally Overturned*, 52 U Richmond L Rev 181 (2017); Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, 12 Duke J Const L & Pub Pol 179 (2017).

<sup>279</sup> See, for example, *The Juvenile and Domestic Relations District Court #2*, 9 (Virginia's Judicial System), archived at <http://perma.cc/5Z7U-A4HU>.

<sup>280</sup> See, for example, Nadine Mason, *Hubbub Marks Court of Domestic Relations*, LA Times 16 (Jan 4, 1960).

<sup>281</sup> For a helpful overview of the current operation of the law, published in the late stages of completing this Article, see generally Courtney Lollar, *Criminalizing (Poor) Fatherhood*, 70 Ala L Rev 125 (2018).

<sup>282</sup> See, for example, Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 Fam L Q 157, 161 (2011); Tonya L. Brito, David J. Pate Jr, and Jia-Hui Stefanie Wong, "I Do for My Kids": *Negotiating Race and Racial Inequality in Family Court*, 83 Fordham L Rev 3027, 3036–44 (2015).

<sup>283</sup> See Part IV.A. One of the earliest notable entrants in this discussion was Professor David Chambers, who relied on empirical evidence from Michigan to argue that jail, as part of "[a]n aggressive enforcement system," measurably increased support enforcement. Despite this finding, Chambers questioned whether jail was a wise tactic because he thought it could harm family relationships, looked like imprisonment for debt, and seemed inappropriate for an intrafamily offense that disproportionately implicated poor and alcoholic fathers. David L. Chambers, *Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support*, 75 Mich L Rev 900, 927–34 (1977). See generally David L. Chambers, *Making Fathers Pay: The Enforcement of Child Support* (Chicago 1979). Chambers's work was recognized at the time as informative, but many disagreed with his normative conclusions, including on feminist grounds. See, for example,

have concluded that the *Turner v Rogers* majority's provision of "alternative procedural safeguards"<sup>284</sup> has done little to protect indigent obligors.<sup>285</sup> For these reasons, a new reform approach may be warranted, yet securing change through the political process has proven difficult.<sup>286</sup>

One possible path forward could be to return to the Court to seek a holding that modern child support enforcement is of a criminal nature. Given the *Turner* majority's limitations on the scope of its holding, there will likely be a *Turner* sequel.<sup>287</sup> And the Court previously expressed willingness to look beneath the civil contempt label in the child support context.<sup>288</sup> The proposal to seek a criminal classification is admittedly somewhat unsatisfying, coming after this Article has demonstrated that the civil-criminal line is artificial and malleable. While recognizing this disjunction, the discussion proceeds from the premise that the criminal label is too entrenched in constitutional law to discard.

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Robert Mnookin, Book Review, *Review: Using Jail for Child Support Enforcement*, 48 U Chi L Rev 338, 369 (1981) (stating that Chambers weighed interests of single women and their children "less heavily in his arguments than I would"). Interestingly, more recent feminist scholarship sometimes echoes Chambers in questioning the use of criminal law and imprisonment. For discussion, see generally Aya Gruber, *The Feminist War on Crime*, 92 Iowa L Rev 741 (2007).

<sup>284</sup> The Court required that states better ensure "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings." *Turner*, 564 US at 448.

<sup>285</sup> See generally Elizabeth G. Patterson, *Turner in the Trenches: A Study of How Turner v. Rogers Affected Child Support Contempt Proceedings*, 25 Georgetown J Poverty L & Pol 75 (2017); Ashley Robertson, Note, *Revisiting Turner v. Rogers*, 69 Stan L Rev 1541 (2017). See also Margaret Brining and Marsha Garrison, *Getting Blood from Stones: Results and Policy Implications of an Empirical Investigation of Child Support Practice in St. Joseph County, Indiana Paternity Actions*, 56 Fam Ct Rev 521, 533 (2018) (finding routine use of contempt and concluding *Turner* "had no apparent impact on local contempt practice").

<sup>286</sup> See Brito, 15 J Gender Race & Just at 669–71 (cited in note 14) (discussing institutional and political resistance to change in this context). It remains to be seen whether guidelines passed by the federal Office of Child Support Enforcement in 2017 will result in real changes. On these guidelines, see Patterson, 25 Georgetown J Poverty L & Pol at 109–10 (cited in note 285); Brining and Garrison, 56 Fam Ct Rev at 524 (cited in note 285).

<sup>287</sup> *Turner*, 564 US at 449 (different result may follow if custodial parent has a lawyer, in "unusually complex" cases, or "where the underlying child support payment is owed to the State").

<sup>288</sup> In a child support contempt case that turned on the civil-criminal line to determine whether a statutory presumption (that the parent remained able to comply with a support order) was unconstitutional, the Court held that a "substantiated" challenge could defeat "the labels affixed either to the proceeding or to the relief imposed under state law." However, it remanded the case for further proceedings on that point. *Hicks v Feiock*, 485 US 624, 631 (1988). The lower court then concluded that the contempt proceeding was criminal because the defendant was subject to a probationary term he could not end early through compliance. *In re Feiock*, 215 Cal App 3d 141 (1990).



It is uncertain how the Court would treat the argument that proceedings like those in *Turner* should be classified as criminal. Scholars have roundly condemned the Court for failing to develop a principled approach to analyzing statutes that defy easy civil-criminal labeling. Discussants have responded by offering alternative tests, yet none of the proposals has secured the Court's endorsement or a scholarly consensus.<sup>289</sup> The history of child support enforcement provides a fresh and novel basis to reconsider the Court's current test and suggest improvements.<sup>290</sup>

If the Court were persuaded to categorize child support proceedings like *Turner's* as criminal, state lawmakers would need to change either procedures or punishments to align with constitutional constraints. Because of the particularly counterproductive consequences of incarcerating parents who owe child support, the better approach would be to decriminalize most child support proceedings through elimination of incarceration.<sup>291</sup>

#### A. Criminal-Derived Enforcement Methods Post-*Turner*

Though the full scope of incarceration for child support non-payment is unknown, studies suggest that thousands of debtor fathers have suffered this consequence.<sup>292</sup> Some states' jail populations include large contingents of these men.<sup>293</sup> Most of these incarcerations follow civil contempt proceedings, rather than criminal prosecutions.<sup>294</sup> Family law scholars and sociologists have pointed to the demographic characteristics of child support debtors and other factors to argue that it is unrealistic for some parents to comply with support orders, especially after debts begin to

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<sup>289</sup> See Steiker, 85 Georgetown L J at 809–20 (cited in note 30) (outlining three main approaches pursued by other scholars: following legislative labels, developing a middle ground jurisprudence, or crafting a test to identify a meaningful civil-criminal line).

<sup>290</sup> See Part IV.B. The Part's proposals could improve analysis in other contexts involving "civil" confinement, such as in sex offender cases like *Kansas v Hendricks*, 521 US 346, 361–62 (1997). For helpful criticism of the Court's current analysis in this context, see generally Arielle W. Tolman, Note, *Sex Offender Civil Commitment to Prison Post-Kingsley*, 113 Nw U L Rev 155 (2018).

<sup>291</sup> See Part IV.C.

<sup>292</sup> Elizabeth Cozzolino, *Public Assistance, Relationship Context, and Jail for Child Support Debt*, 4 Socius 1, 2 (2018).

<sup>293</sup> *Id.*

<sup>294</sup> Patterson, 25 Georgetown J Poverty L & Pol at 80 (cited in note 285) (around 15 percent of South Carolina's jail population was being held for child support contempt). See also Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124 Am J Soc 1, 28 (2018); Zatz, 39 Seattle U L Rev at 933 (cited in note 15); Cozzolino, 4 Socius at 13 (cited in note 292).

accrue fees and interest.<sup>295</sup> Most child support debtors live below the poverty line, and parents who earn less than \$10,000 per year owe 70 percent of arrears.<sup>296</sup>

Before resorting to civil contempt incarceration, family courts employ a wide range of coercive techniques, some of which require the involvement of state and federal employees and resources in a manner that far exceeds court involvement in typical “civil” matters. One of the most common methods is garnishment of wages, which can withhold up to 65 percent of fathers’ salaries.<sup>297</sup> For men without steady incomes, this method is ineffectual. Other possibilities include interception of tax refunds, revocation of drivers’ licenses and occupational licenses, and denial of passports.<sup>298</sup> Some sanctions apply automatically when debt reaches a predetermined level. As just one example, Florida suspends child support debtors’ drivers’ licenses when they owe \$400.<sup>299</sup>

Whether these coercive methods are productive, or at least worth the cost of implementation, is unclear. One study found that sanctions “account for only 4% of child support collections.”<sup>300</sup> Another suggested that “probably less than 2% of child support collections can be associated with the threat of incarceration.”<sup>301</sup> Reform proponents suggest that enforcement reduces fathers’ informal contributions of cash and in-kind support by more than the enforcement secures.<sup>302</sup> They also claim that the current approach harms relationships between parents and discourages visits with children.<sup>303</sup> Child support obligors with extreme debt may turn to

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<sup>295</sup> For example, Brito, 15 J Gender Race & Just at 617 (cited in note 14); Cammett, Georgetown J Poverty L & Pol at 142–50 (cited in note 15); Patterson, 18 Cornell J L & Pub Pol at 107–14 (cited in note 3); Haney, 124 Am J Soc at 18 (cited in note 294); Maria Cancian, Daniel R. Meyer, and Eunhee Han, *Child Support: Responsible Fatherhood and the Quid Pro Quo*, 635 Annals Am Acad Polit & Soc Sci 140, 152 (2011).

<sup>296</sup> Patterson, 18 Cornell J L & Pub Pol at 118 (cited in note 3).

<sup>297</sup> Cammett, Georgetown J Poverty L & Pol at 144 (cited in note 15).

<sup>298</sup> Id at 130, 144–45; Patterson, 18 Cornell J L & Pub Pol at 100–01 (cited in note 3).

<sup>299</sup> Haney, 124 Am J Soc at 27 (cited in note 294); Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law and Father-Absence in Low-Income Families*, 35 Cardozo L Rev 511, 531–34 (2013).

<sup>300</sup> Haney, 124 Am J Soc at 27 (cited in note 294). See also Cancian, Meyer, and Han, 635 Annals Am Acad Polit & Soc Sci at 149 (cited in note 295) (collecting studies finding sanctions such as loss of drivers’ license counterproductive).

<sup>301</sup> Carmen Solomon-Fears, Alison M. Smith, and Carla Berry, *Child Support Enforcement: Incarceration as the Last Resort Penalty for Nonpayment of Support* 3 (2012) (this statistic seems to include both criminal and civil methods of incarceration).

<sup>302</sup> Brito, 15 J Gender Race & Just at 657 (cited in note 14).

<sup>303</sup> Cammett, Georgetown J Poverty L & Pol at 130, 144–45 (cited in note 15); Patterson, 18 Cornell J L & Pub Pol at 97 (cited in note 3).

the underground economy or pursue illegal sources of income.<sup>304</sup> Jailed fathers obviously earn little to no income.<sup>305</sup> However, it is unknown what deterrent effect these sanctions may hold for other obligor parents.

The state and federal governments have direct financial stakes or foreseeable interests in the outcome of many support cases because of connections between support enforcement and welfare benefits. When a custodial parent applies for Temporary Assistance for Needy Families (TANF) or other government assistance, the state automatically opens a child support case against the noncustodial parent to seek reimbursement for these costs. Many men's support payments go entirely toward reimbursing the government for these benefits.<sup>306</sup> According to one scholar: "About half of the child support caseload consists of families with histories of current (10 percent) or prior (40 percent) welfare receipt."<sup>307</sup> Between 20 and 25 percent of the more than \$100 billion in child support arrears is due to the government.<sup>308</sup>

All states and the federal government also maintain full-fledged criminal nonsupport laws.<sup>309</sup> These laws provide sanctions similar or even identical to those authorized in family court civil contempt statutes,<sup>310</sup> yet they rarely serve as the basis for child support incarceration.<sup>311</sup> The selective application of criminal

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<sup>304</sup> Haney, 124 Am J Soc at 29 (cited in note 294).

<sup>305</sup> Brito, 15 J Gender Race & Just at 658–59 (cited in note 14).

<sup>306</sup> Cozzolino, 4 Socius at 4 (cited in note 292); Cammett, Georgetown J Poverty L & Pol at 129 (cited in note 15).

<sup>307</sup> Cozzolino, 4 Socius at 3 (cited in note 292).

<sup>308</sup> See id; *Who Owes Child Support Debt?* (Office of Child Support Enforcement, Sept 15, 2017), archived at <http://perma.cc/9Z8V-QDMF>. The *Turner* majority cited a statistic from 2004 that around half of arrears are owed to the government. *Turner*, 564 US at 446–47.

<sup>309</sup> On the retention of criminal law, see Part III.B. For a list of current statutes, see *Criminal Nonsupport and Child Support* (National Conference of State Legislatures, June 6, 2015), archived at <http://perma.cc/9ZJQ-8BCK>.

<sup>310</sup> For instance, South Carolina's criminal nonsupport statute and family court civil contempt statute both provide for incarceration for up to a year and a fine of \$1,500 (though only the contempt statute allows a public works sentence of up to three hundred hours). Compare SC Code Ann § 63-5-20, with SC Code Ann § 63-3-620.

<sup>311</sup> Brief of Center for Family Policy and Practice as Amicus Curiae in Support of Petitioner, *Turner v Rogers*, No 10-10, \*21–22 (US filed Jan 11, 2011) (available on Westlaw at 2011 WL 141222); Steven Cook and Jennifer L. Noyes, *The Use of Civil Contempt and Criminal Nonsupport as Child Enforcement Tools: A Report on Local Perspectives and the Availability of Data* \*12–13 (University of Wisconsin-Madison, May 2011), archived at <http://perma.cc/8SU3-WSR7>.

laws renders them a valuable tool in the child support enforcement arsenal.<sup>312</sup> These laws provide a criminal backbone—deterrence, stigma, extradition, and the possibility of criminal conviction—to the purported civil scheme.

The government's civil and criminal coercive tools are not limited to those cases in which it is the direct beneficiary.<sup>313</sup> Rather, the longstanding entanglement of public and private goals in securing family support has justified substantial overlap in the enforcement options for “private” and “public” cases.<sup>314</sup> The involvement of family court staff and routine use of contempt incarceration, backed by the selective use of nonsupport laws labeled criminal, raises weighty questions about the nature of modern child support law for purposes of assigning procedural protections.

#### B. The Supreme Court's Treatment of the Civil-Criminal Divide

The opinions in *Turner* began from the unquestioned premise that the defendant was subject to incarceration for civil contempt, thus not qualifying for the significant protections required in criminal prosecutions or even the lesser procedures guaranteed for criminal contempt hearings. When the Court revisits child support enforcement, it could instead start by asking whether such enforcement is civil or criminal. A criminal label matters not only for the right to counsel but also for the burden of proof and persuasion, the rights to a jury trial and against self-incrimination, and myriad other reasons.<sup>315</sup>

There are two paths the Court's civil-versus-criminal analysis is most likely to take: a narrow focus on contempt or a broader test that the Court has employed when evaluating the nature of

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<sup>312</sup> See Teresa A. Myers, *Courts Uphold Criminal Penalties for Failure to Pay Child Support* (National Conference of State Legislatures, 2008), archived at <http://perma.cc/6V4H-PL7Y>; Solomon-Fears, Smith, and Berry, *Child Support Enforcement* at 11 (cited in note 301).

<sup>313</sup> Stacy Brustin and Lisa Martin, *Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents*, 67 *Hastings L J* 1265, 1268 (2016).

<sup>314</sup> Cancian, Meyer, and Han, 635 *Annals Am Acad Polit & Soc Sci* at 144 (cited in note 295). See also Hatcher, 42 *Wake Forest L Rev* at 1044 (cited in note 29) (explaining how public and private child support “are now administered under one heavily regulated, government-run system”).

<sup>315</sup> See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 *Georgetown L J* 1, 3–4 (2005).

a sanction. Scholars have identified weaknesses in both approaches.<sup>316</sup> Consideration of how the Court's analyses apply to child support enforcement affirms previous critiques, finds additional reasons for skepticism, and identifies factors that may be useful for future cases.

Beginning with the contempt-precedent approach, the Court has long recognized that “[c]ontempts are neither wholly civil nor altogether criminal.”<sup>317</sup> Nevertheless, contempt is typically divided into criminal and civil classes, with the distinction turning on the reason for the sanction. Criminal contempt imposes a fine or imprisonment as a *punitive measure* “to vindicate the authority of the law.” By contrast, in civil contempt the incarceration is for a *remedial purpose*—to coerce the offender into complying with a court order “for the benefit of the complainant.” In civil contempt, therefore, the person is released upon compliance; in the common phrasing, the contemnor “carries the keys of his prison in his own pockets.”<sup>318</sup>

The contempt evaluation is more complicated when it involves failure to comply with a court order to pay a specified amount.<sup>319</sup> In those cases the “ability to pay . . . marks a dividing line between civil and criminal contempt.”<sup>320</sup> This is because if the person is unable to pay, contempt incarceration is ineffective at coercion and thus cannot be cast as remedial. The *Turner* majority recognized the distinction between civil and criminal contempt for nonpayment but only for the purpose of discussing whether Turner needed a lawyer to assure “accurate decisionmaking in respect to the key ‘ability to pay’ question.” The justices emphasized that “accuracy” regarding ability to pay was particularly important here because it marked the difference between civil and criminal contempt. They explained: “That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the

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<sup>316</sup> For a critique of the broader test, see, for example, *id.* On the unsatisfactory distinction between civil and criminal contempt, see Earl C. Dudley Jr., *Getting beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va L Rev 1025 (1993).

<sup>317</sup> *Gompers v Bucks Stove & Range Co*, 221 US 418, 441 (1911).

<sup>318</sup> *Id.* at 441–42. See also Dudley, 79 Va L Rev at 1025 (cited in note 316).

<sup>319</sup> Relatedly, the ABA's *Turner* amicus brief argued that indigent defendants facing incarceration for contempt warranted counsel “regardless of whether the proceeding is labeled ‘civil’ or criminal” and described contempt for child support as a “quasi-criminal.” Brief for Amicus Curiae American Bar Association in Support of Petitioner, *Turner v Rogers*, No 10-10, \*5–7 (US filed Jan 11, 2011) (available on Westlaw at 2011 WL 118266).

<sup>320</sup> *Turner*, 564 US at 445 (quotation marks omitted), citing *Hicks*, 485 US at 635 n 7.

defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding.”<sup>321</sup> Under this reasoning, the defendant’s financial situation dictates whether he faces civil or criminal contempt, which determines whether he gets appointed counsel, who might have been helpful in navigating the initial civil-criminal contempt question. This scenario demonstrates how poorly the contempt precedent, which was largely crafted on other fact patterns (for example, deliberate disturbance of a trial or insult to a judge),<sup>322</sup> fits a failure-to-pay situation.<sup>323</sup>

The contempt analysis is even more ill-fitting when applied to indigent debtors. Few situations arise in which a person the Court classifies as “indigent” (as they did Turner) could be held liable for contempt for nonpayment. Though some people who are indigent for purposes of qualifying for appointed counsel might be able to afford their child support arrears, an unknown but probably significant portion of indigent people cannot. The latter group is not willfully failing to comply with a court order, as is required for a typical finding of contempt. But in the child support context, parents are legally obligated to pay the amount a judge previously determined they are capable of affording. Thus, a judge can find a child support nonpayer to be both indigent and in willful violation of an order to pay.<sup>324</sup> Still, it is hard to see how a person could

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<sup>321</sup> *Turner*, 564 US at 445.

<sup>322</sup> Joseph H. Beale Jr., *Contempt of Court, Criminal and Civil*, 21 Harv L Rev 161, 162–64 (1908) (“Typical” contempt scenarios include an “actual disturbance made in the court itself which interferes with the process of litigation,” “direct insults to the court itself in its presence,” and “any interference with persons or property which are in the hands of the court.”); *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L J 83, 85 (1947) (defining contempt as generally including acts in “disregard of the authority of the court” or against “the integrity of the court”). See also *Nature of Criminal Contempt*, 25 Harv L Rev 375, 375 (1912) (“A refusal to do justice to other parties in equity suits thus came to be known as civil contempt, although it is not inherently a contempt of court at all. Confusion has inevitably arisen.”). More research is warranted on the seeming expansion of the use of contempt in the twentieth century.

<sup>323</sup> Turner’s brief makes a similar point to support the argument that counsel is needed in order to retain the proceeding’s civil character. Brief for Petitioner, *Turner v Rogers*, No 10-10, \*42 (US filed Jan 4, 2011) (available on Westlaw at 2011 WL 49898) (“[T]he state court’s reasoning is fatally circular: the court relied on the defendant’s presumed ability to purge his contempt to justify the absence of an essential procedural safeguard at the contempt hearing, the very purpose of which was to determine whether the defendant had the ability to purge his contempt.”).

<sup>324</sup> See *Sickler v Sickler*, 878 NW2d 549, 561–62 (Neb 2016) (explaining that “[m]ost courts do not allow ‘nonpayment contempt’” because of state constitutional bans on imprisonment for debt, but child support is excluded from this rule because it is regarded as a public duty rather than a private debt). See also Note, *State Bans on Debtors’ Prisons*

be held in *civil* contempt if he lacks the present means of complying. (Turner, for instance, was classed as indigent and needed to purge arrears of nearly \$6,000.<sup>325</sup>)

One way forward could be for the Court to recognize proceedings like those in *Turner* as *criminal* contempt hearings. Such a holding would attach some criminal procedure protections.<sup>326</sup> Theoretically this would be a step in the right direction, heightening procedural safeguards to match the nature of the proceeding and severity of the sanction. In practice, this move would have undesirable consequences. Either family courts would need to treat all child support contempt hearings as criminal in nature, which is overinclusive based on the definition of criminal contempt, or else they would still face the dilemma of determining obligors' present ability to comply with support orders *prior* to holding contempt hearings.

Given the unconvincing application of the Court's contempt precedent to child support enforcement, the Court might instead look to the test it has developed for distinguishing between civil and criminal statutes more generally. Applying this broader analysis is appropriate because, unlike most contempt scenarios, contempt for child support nonpayment is—in the Court's own words and as supported by this Article—"one part of a highly complex system."<sup>327</sup> It is thus misleading to evaluate the contempt proceeding in isolation.

The Court's test for distinguishing between civil and criminal statutes has been roundly condemned, perhaps most memorably as "a jurisprudential Frankenstein's monster—a patchwork assembled from disparate parts, unwieldy and unpredictable, and suffering from a distressing but justified inquietude about its reason for existing."<sup>328</sup> The test consists of two parts. First, the Court "must ascertain whether the legislature meant the statute to establish 'civil' proceedings." If so, the Court next considers whether the scheme is "so punitive either in purpose or effect" as to negate

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and *Criminal Justice Debt*, 129 Harv L Rev 1024, 1036 (2016). For assessments of other scenarios potentially leading to imprisonment for debt, see generally Lea Shepard, *Creditor's Contempt*, 2011 BYU L Rev 1509; Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 Md L Rev 486 (2016); Tamar R. Birkhead, *The New Peonage*, 72 Wash & Lee L Rev 1595 (2015); Christopher D. Hampson, *The New American Debtors' Prisons*, 44 Am J Crim L 1 (2017).

<sup>325</sup> *Turner*, 564 US at 437.

<sup>326</sup> *International Union v Bagwell*, 512 US 821, 826–27 (1994).

<sup>327</sup> *Turner*, 564 US at 443.

<sup>328</sup> Fellmeth, 94 Georgetown L J at 10 (cited in note 315).

legislative intent, and “only the clearest proof will suffice to override intent and transform what has been denominated a civil remedy into a criminal penalty.”<sup>329</sup> For this analysis, the Court has provided seven non-exhaustive and non-dispositive “guideposts.”<sup>330</sup> Even when first outlining the guideposts, the Court recognized they “may often point in differing directions,” and the Court has subsequently applied them selectively and inconsistently.<sup>331</sup> Thus, it is not clear that the test does more than provide a weak patina of standardized analysis.<sup>332</sup>

Applying the test to the child support context exposes its deficiencies and demonstrates how it may undermine legal principles and procedural justice goals.<sup>333</sup> The problems in application begin from the first step—ascertaining whether the legislature meant to establish civil proceedings. Here the Court often relies on states’ labels or the placement of laws in civil versus criminal codes.<sup>334</sup> Such deference permits legislatures to skirt criminal procedure protections. This concern is not merely hypothetical. As this account details, at least some states recast criminal family support prosecutions as civil proceedings to reduce expensive and time-consuming procedural protections, while retaining criminal-style enforcement powers.<sup>335</sup> The Court’s reliance on state labels could also mean that it would perversely allow disparate procedural protections for identical proceedings held in different states.<sup>336</sup> As a practical matter, the Court should not unquestioningly accept a “civil” categorization on the mistaken assumption

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<sup>329</sup> *Smith v Doe*, 538 US 84, 92 (2003) (quotation marks and citations omitted).

<sup>330</sup> *Kennedy v Mendoza-Martinez*, 372 US 144, 168–69 (1963).

<sup>331</sup> *Id.* at 169. See also, for example, *Smith*, 538 US at 97 (finding only five factors relevant).

<sup>332</sup> Issachar Rosen-Zvi and Talia Fisher, *Overcoming Procedural Boundaries*, 94 Va L Rev 79, 126 (2008) (“Although the multifaceted test has been invoked frequently, it has likely never determined an outcome, not even in [the original] case itself.”).

<sup>333</sup> See Alexandra Natapoff, *Misdemeanors*, 85 S Cal L Rev 1313, 1352, 1362–63 (2012) (identifying “core values served by criminal adjudication . . . legality, evidentiary accuracy, and fair process” and discussing procedural justice implications); Collins, 90 NYU L Rev at 447 (cited in note 21) (discussing criminal law interests in legitimacy and fairness).

<sup>334</sup> See, for example, *Smith*, 538 US at 92–93. But see *Sessions v Dimaya*, 138 S Ct 1204, 1229 (2018) (Gorsuch concurring) (“[T]he happenstance that a law is found in a civil or criminal part of the statute books cannot be dispositive.”).

<sup>335</sup> See Part III.

<sup>336</sup> See *Nowakowski v New York*, 835 F3d 210, 220 (2d Cir 2016) (Variances in state labels for identical offenses “counsel against adopting a purely labels-dependent approach to our analysis. If we were to do otherwise, federal jurisdiction . . . arising from similar or identical conduct and punishment would be controlled by vagaries of nomenclature, not substance.”).



that “civil” law is less harsh.<sup>337</sup> The shift to civil can bring net-widening consequences and attach nearly identical punishments devoid of procedural protections.<sup>338</sup>

Relying less on state labels places more weight on the second part of the test, which scholars have also persuasively critiqued. This step uses seven guideposts to assess the characteristics of the sanction. Applying these factors to child support incarceration illustrates how unhelpful they are for securing predictable and consistent results. The first two guideposts can be addressed together. They are: (1) “Whether the sanction involves an affirmative disability or restraint,” and (2) “whether it has historically been regarded as a punishment.”<sup>339</sup> Incarceration is an affirmative restraint and a classic, paradigmatic criminal sanction, yet the Court has been unwilling to recognize it as such in the contempt context because of the supposedly remedial purpose. Guidepost three, “whether it comes into play only on a finding of scienter,” fits awkwardly here; the Court included this factor to tease out the difference between customs fees and taxes versus monetary penalties, with only the latter requiring scienter.<sup>340</sup> Guideposts four and six can also be taken together: (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence” and (6) “whether an alternative purpose to which it may rationally be connected is assignable for it.”<sup>341</sup> Deterrence has long been a key rationale for incarcerating nonsupporters, and there have been hints of retribution and criminal-style stigmatization (“deadbeat dads”) as well, yet remediation is at least theoretically a core goal. Guidepost five is “whether the behavior to which it applies is already a crime.”<sup>342</sup> The Court’s application of this factor has never been clear, and it is uncertain how it would play out in a situation such as this, when criminal laws addressing the same conduct preceded, were interlaced with,

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<sup>337</sup> See Parts III.A and IV.B.

<sup>338</sup> Alexandra Natapoff offers an analogous argument involving the shift from felonies to misdemeanors. See generally Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vand L Rev 1055 (2015).

<sup>339</sup> *Kennedy*, 372 US at 168.

<sup>340</sup> *Id* (citing cases involving taxes and customs fees for this guidepost).

<sup>341</sup> *Id* at 168–69.

<sup>342</sup> *Id* at 168.

and followed civil support statutes.<sup>343</sup> Finally, the seventh guidepost, “whether it appears excessive in relation to the alternative purpose assigned,” is debatable.<sup>344</sup>

Thus, while there are solid arguments that the Court should and perhaps would classify child support incarceration as a criminal sanction—especially based on the research presented in this Article—the seven factors do not guarantee that result.<sup>345</sup> That the test might not recognize nonsupport incarceration as a criminal sanction effectively endorses legislatures’ ability to relabel their criminal laws as civil, a strategy they could (and arguably do) employ in countless contexts.<sup>346</sup>

While a comprehensive reassessment of the guideposts is beyond the scope of this Article, it is worth drawing from child support history to identify a critical aspect of statutory schemes that these factors omit: the machinery that secures and imposes the sanction.<sup>347</sup> Criminal procedure protections were enacted to protect individuals from the powers of the state.<sup>348</sup> The involvement of government officials from start to finish in child support enforcement, in combination with the admitted public interests at stake, distinguishes this statutory scheme from other types of so-called civil contempt incarceration. In the words of the *Turner* majority: “The Federal Government has created an elaborate procedural mechanism designed to help *both the government and the*

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<sup>343</sup> For an example of how this factor can cut both ways, see *United States v Ward*, 448 US 242, 250 (1980) (When a civil statute applied to the “precise conduct” criminalized in an earlier statute, the fifth guidepost pointed to finding the civil statute “criminal in nature . . . at first blush.” However, “we believe that the placement of criminal penalties in one statute and the placement of civil penalties in another statute enacted 70 years later tends to dilute the force of the fifth . . . criterion in this case.”).

<sup>344</sup> *Kennedy*, 372 US at 168.

<sup>345</sup> In *Smith*, the majority opinion suggests: “A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such.” *Smith*, 538 US at 97.

<sup>346</sup> Fellmeth, 94 Georgetown L J at 5–6 (cited in note 315) (listing examples). Alan Dershowitz describes a “labeling game” from the late 1930s. After the Michigan Supreme Court struck down a criminal-style law that permitted confinement of certain sex offenders without full criminal procedure safeguards, the state legislature essentially passed the law again in a different part of the state code and made various changes that facilitated commitment. The Court upheld this new “civil” law, which “provided far fewer safeguards and far harsher consequences.” Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 Tex L Rev 1277, 1300–01 (1973).

<sup>347</sup> Compare with Brooke D. Coleman, *Prison Is Prison*, 88 Notre Dame L Rev 2399, 2437–38 (2013) (emphasizing “the degree of government power” as relevant to procedural protections but stopping short of recasting child support as criminal).

<sup>348</sup> Klein, 2 Buff Crim L Rev at 691 (cited in note 30).

*custodial parents* to secure payments to which they are entitled.”<sup>349</sup> Especially when the sanction at issue is incarceration, it should be highly relevant whether government officials are literally or effectively the opposing party.<sup>350</sup>

### C. Potential Consequences of the Criminal Label for Child Support Enforcement

If the Court were persuaded to identify modern child support enforcement methods as criminal, that holding would not provide a straightforward solution. Rather, lawmakers would then need to decide whether to attach constitutionally mandated criminal procedure protections or change their statutory scheme to decriminalize child support enforcement. How state legislators could decriminalize child support enforcement would depend on the details of the Court’s decision, but certainly the elimination of incarceration could be a major factor in crafting a “civil” regime. Prosecutors could then still rely on the criminal-labeled laws all states retain to pursue incarceration of the worst offenders; in these proceedings, criminal procedure protections would attach.

Though it is hard to predict which path lawmakers might choose, there is at least some reason to be optimistic that the costs of additional procedures would lead to decriminalization.<sup>351</sup> The clearest evidence may be that states already have criminal (typically misdemeanor) laws on the books for nonsupport and yet

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<sup>349</sup> *Turner*, 564 US at 444 (emphasis added).

<sup>350</sup> Because incarceration is such a severe and paradigmatic sanction, some discussants have proposed that a better approach is for incarceration itself to be the litmus test for the provision of state-appointed counsel. Coleman, 88 Notre Dame L Rev at 2455 (cited in note 347); Brief of Amicus Curiae the Constitution Project in Support of Petitioner, *Turner v Rogers*, No 10-10, \*6 (US filed Jan 11, 2011) (available on Westlaw at 2011 WL 108379). Similarly, a number of state supreme court cases anticipated that *Turner* would come out to the contrary because of the incarceration component alone. For example, *Mead v Batchlor*, 460 NW2d 493 (Mich 1990) (identifying incarceration as most relevant factor in right to counsel and holding that the Fourteenth Amendment precluded incarceration for child support nonpayment by indigent lacking public defender). For a related argument, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground between Criminal and Civil Law*, 101 Yale L J 1795, 1870 (1992) (suggesting procedure should turn on the severity of the sanction). But see Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L J 2446, 2492–96 (2016) (arguing against conflation of punitive/nonpunitive with criminal/civil but also recognizing prison terms as “inherently criminal”).

<sup>351</sup> Compare with Natapoff, 68 Vand L Rev at 1101 (cited in note 338) (describing how resource constraints attach in the criminal context). But see Birkhead, 72 Wash & Lee L Rev at 1653 (cited in note 324) (“[S]tates rarely examine the fiscal and personnel costs incurred by courts and municipalities to administer collection mechanisms that fail to exempt the indigent.”).

rarely use them, presumably in large part because of the added costs and difficulties associated with criminal law and because prosecutors prioritize other types of cases.<sup>352</sup> Whereas states can anticipate recouping or even profiting from “user fees” for public defenders and jail stays after prosecuting other low-level crimes,<sup>353</sup> in the child support context, the profit incentive is undermined by the fact that these offenders already owe large debts, including to the state.<sup>354</sup>

On the other hand, because of the complexities of federal-state cost and benefit sharing in support enforcement, as well as fractured interests at the local level, it is possible that decision-makers would not holistically evaluate the efficiency of the statutory scheme.<sup>355</sup> Since the federal-state partnership began in the 1970s, there have been lengthy periods in which pursuit of public-benefits reimbursements from fathers resulted in a net loss, even as some (but not all) states enjoyed a net gain.<sup>356</sup> Another cost disjuncture may be present specifically for incarceration. Even if incarceration costs more than it prompts parents to pay, the relevant decision-makers may not bear these expenses or be fully

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<sup>352</sup> See generally Cook and Noyes, *The Use of Civil Contempt and Criminal Nonsupport as Child Enforcement Tools* (cited in note 311). See also Ronald R. Tweel, Elizabeth P. Coughter, and Jason P. Seiden, *Family Law*, 46 U Richmond L Rev 145, 165 (2011) (observing that Virginia’s criminal nonsupport statute was “almost abandoned by most courts and litigants” because of “criminal burden of proof problems”). On the other hand, state legislatures could revise criminal statutes to make convictions easier, such as by converting the offenses to strict liability. For discussion of statutory changes along these lines, see *State v Meacham*, 470 SW3d 744 (Mo 2015) (en banc) (construing statutory amendment that converted element “without good cause” into an affirmative defense); *People v Likine*, 823 NW2d 50 (Mich 2012) (construing revised statute containing “no fault or intent element”); *State v Clark*, 24 So2d 72 (La 1945) (construing revised statute that deleted “without just cause”).

<sup>353</sup> Eisha Jain, *Capitalizing on Criminal Justice*, 67 Duke L J 1381, 1404–05, 1423–25 (2018); Wayne A. Logan and Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U Ill L Rev 1175.

<sup>354</sup> See Part IV.A.

<sup>355</sup> Brito, 15 J Gender Race & Just at 668 (cited in note 14) (child support incarceration costs “are partly externalized” by child support agencies because they are born by states’ judicial and criminal justice systems); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 NYU L Rev 870 (2015) (exploring how federal programs can skew the financial incentives of local actors in harmful ways).

<sup>356</sup> These calculations do not take account of the more successful use of the same machinery for families not receiving welfare. Hatcher, 42 Wake Forest L Rev at 1072–73 (cited in note 29).

aware of them.<sup>357</sup> An unknown consideration is what value legislatures place on vindicating the state's authority and inculcating norms about appropriate fatherly behavior.

There is a real risk that if the Court held the current child support enforcement approach to be criminal, some states would not move to decriminalize it. In that scenario, child support debtors could be left in a worse position. Those found guilty would face the stigma, reduced employment prospects, and other collateral consequences of a criminal record, without necessarily gaining meaningful procedural protections.<sup>358</sup> While fully recognizing these harmful consequences, it is worth recalling the downsides to the current legal scheme as well as the broader principles at stake. Recognizing the ongoing criminal character of child support enforcement forces an honest reckoning with the operation of the law.

#### CONCLUSION

It is no longer possible to remain under the delusion that modern child support enforcement is “civil” in a meaningful sense. For more than one hundred years, policymakers have carefully fashioned family support laws, and the courts that enforce them, to maximize compliance with minimal cost and procedure. In this process, they knitted strands of civil and criminal law into an intricate tapestry. Whereas the early twentieth century dressed up what had been civil family support suits with the armor of criminal law, twenty-first-century child support wears civil garb that conceals criminal layers and seams in plain sight. This intricate interlacing is due for unraveling so that a more fair and effective system can be designed.

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<sup>357</sup> Jain, 67 Duke L J 138 at 1425 (cited in note 353) (“[T]he perspective that matters is not that of the ‘state’ in the aggregate. Rather, it is the perspective of the front-line actors responsible for making key decisions.”).

<sup>358</sup> Scholarship on the treatment of misdemeanors—which is likely how this offense would be classified—documents summary proceedings that lack effective procedural protections and impose harmful collateral consequences and costs. See especially Natapoff, 85 S Cal L Rev at 1313 (cited in note 333); Beth A. Colgan, *Paying for Gideon*, 99 Iowa L Rev 1929, 1929–30 (2014); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 BU L Rev 953 (2018).