

# **The Fatherhood Crisis: Time for a New Look?**

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## Executive Summary

Fatherhood, marriage and related issues of family structure now dominate the domestic policy agenda. In 1995, President Bill Clinton stated, “The single biggest social problem in our society may be the growing absence of fathers from their children’s homes, because it contributes to so many other social problems.” By 2000, nearly a third of children under the age of 18 lived with only one parent, usually their mother.

While Clinton and other politicians attributed the growing absence of fathers from their children’s homes to abandonment, there is no evidence that desertion is increasing. The absence of fathers from the home is principally due to the increase in divorce:

- Half of first marriages and 60 percent of second marriages in the United States now end in divorce.
- About 1.2 million divorces occur each year, involving approximately 1 million children.
- More than half of the children who live with one parent do so because of the break-up of a marriage.

Fatherless families are a growing problem, but the principal cause is not bad behavior or the fault of fathers; it is government policies with respect to divorce and child support. Beginning with California in 1969, every state has adopted “no-fault” divorce, which may be more properly called unilateral divorce — one partner can end a marriage without penalty and without the consent of the other party.

President Clinton and others charged that “deadbeat dads” are willfully failing to meet child support obligations. Consequently, new laws were passed to garnish noncustodial parents’ wages and tax refunds, and criminal penalties for nonpayment were stiffened. These policies continue under the current administration. However, child support levels are set according to inflexible rules that do not consider individual circumstances and are difficult to adjust. Although most fathers make their child support payments, some are simply unable to do so.

A divorce decree is only the beginning of the government’s involvement in a family’s life; until the children reach the age of majority, their lives, and their parents’, are subject to regulation by a growing apparatus of child support

enforcement, family courts and social welfare agencies. This system controls the involvement a noncustodial parent has in his children's lives. For example, a father may be denied access to his children if he does not undergo psychological counseling at his own expense.

If couples were able to make their own marriage or divorce contracts, they could improve the welfare of both parents (and the children), compared to court decrees or the straight-jacket of one-size-fits-all legislation. But for contractual solutions to work, the law must specify the parameters of agreements that the courts must enforce. Provisions of private marriage or pre-nuptial agreements governing children are not enforceable under current law. The child custody system could be reformed through joint custody or "shared parenting" provisions. These proposals have to be debated and enacted state by state. On the national level, the problem could be addressed as one of constitutional rights to due process, and parents' right to involvement in their children's lives.

## Introduction: Fatherhood in America<sup>1</sup>

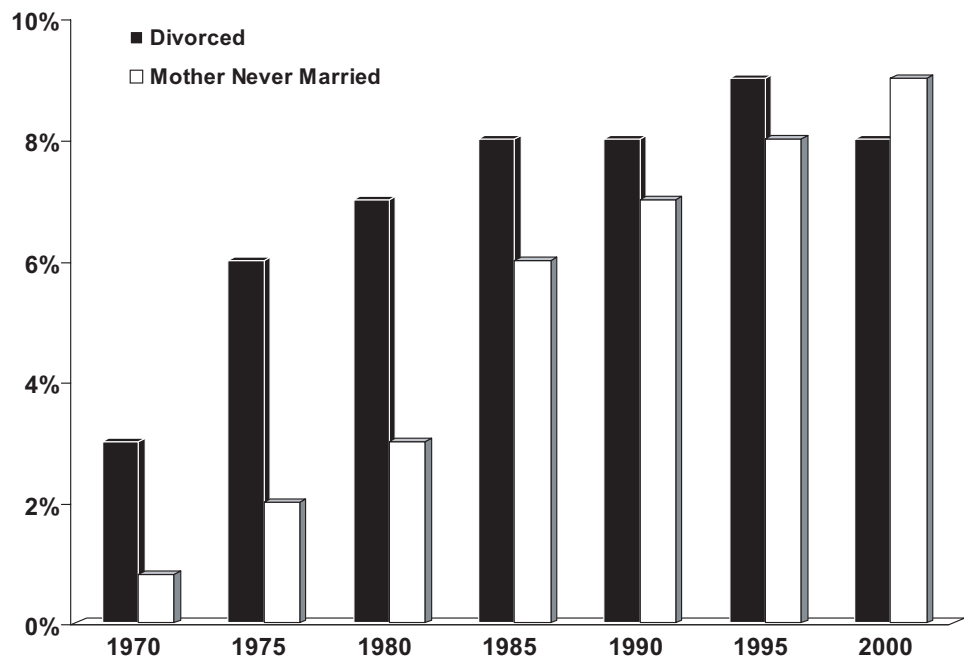
Fatherhood is rapidly becoming the number one social policy issue in America. In 1995, President Bill Clinton stated, “The single biggest social problem in our society may be the growing absence of fathers from their children’s homes, because it contributes to so many other social problems.” In 1997, Congress created a task force to promote fatherhood, and governors’ and mayors’ conferences followed in 1998. In 2002, President George W. Bush unveiled a \$320 million package of initiatives to promote “responsible fatherhood.” Nonprofit organizations such as the National Fatherhood Initiative were formed in the mid-1990s to combat the problem of father absence.

In addition to the growing physical absence of fathers from their children’s homes, President Clinton and others charged that “deadbeat dads” were abandoning their court-ordered child support obligations. The lack of financial support from their fathers was said to leave more children in poverty and more mothers dependent on public welfare. Nonsupportive fathers were said to also be otherwise uninvolved in their children’s lives, encouraging social pathologies associated with child abandonment. New laws were passed

*“The share of children under 18 living in fatherless families has risen continuously since 1970.”*

FIGURE I

### Percentage of Children Living with Divorced and Never-Married Mothers (1970 to 2000)



Source: U.S. Census Bureau.

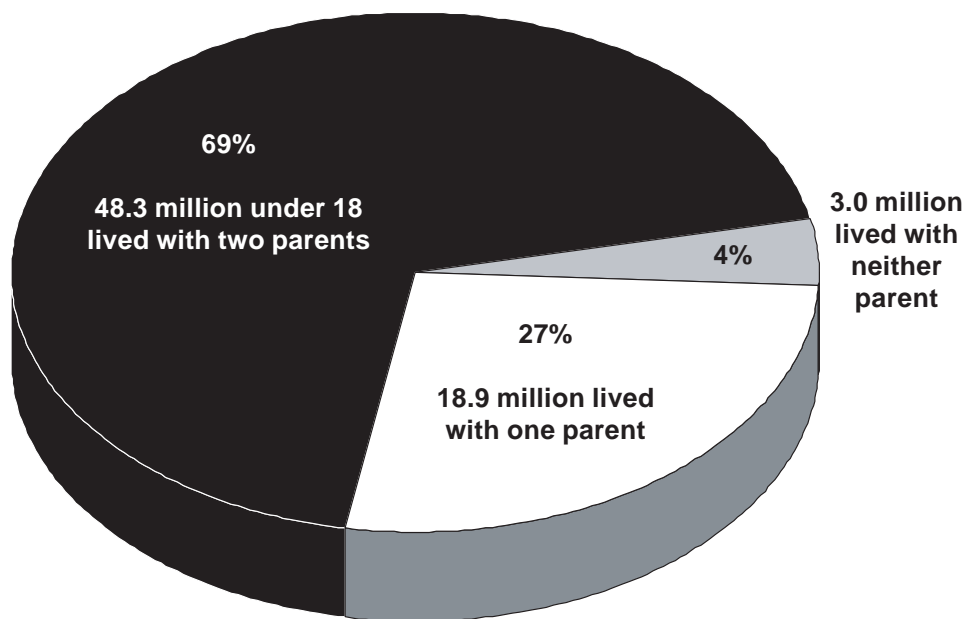
to garnish noncustodial parents' wages and tax refunds, and penalties for nonpayment were stiffened. Federal and state spending on child support collection increased dramatically. And the private sector was enlisted in a growing web of child support enforcement efforts.

Fatherless families are a growing problem, but the principal cause is not bad behavior or the fault of fathers; it is government policies with respect to divorce and child support. In the early 1970s, "no fault" divorce laws replaced the historical fault-based system with unilateral divorce — in which one partner can end a marriage without penalty and without the consent of the other party. Unilateral divorce thus favors the partner who wants to end a marriage over the one who wants to maintain an intact family.<sup>2</sup> In the decades since, state laws regarding child custody, visitation rights, child support and enforcement have undergone a revolution. A divorce decree is only the beginning of the government's involvement in a family's life; until the children reach the age of majority, their lives may be regulated by the growing apparatus of child support enforcement, quasi-judicial family courts and social welfare agencies.

## The Growing Problem of Fatherlessness

FIGURE II

### Who Children Live With (children under age 18 in 2000)

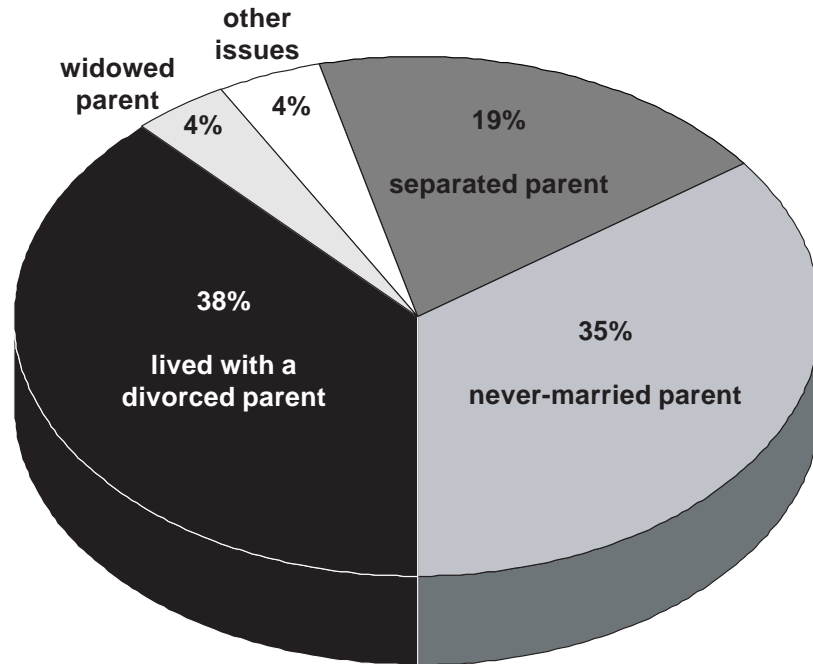


*“Nearly a third of children lived with one parent—usually the mother—in 2000.”*

Source: U.S. Department of Commerce; Bureau of the Census.

FIGURE III

## Reasons Children Live with Only One Parent (children under age 18)



Source: U.S. Department of Commerce; Bureau of the Census.

*“About 1.2 million divorces occur each year, involving approximately 1 million children.”*

Federal statistics show an alarming long-term growth in the proportion of children living in fatherless households. Research has shown the negative effects on children and society of living without fathers.

**The Growth of Fatherless Families.** The proportion of children under 18 years living with their mothers only as a result of divorce or lack of marriage has risen continuously since 1970.<sup>3</sup> [See Figure I.] By 2000, nearly a third of children under the age of 18 lived with only one parent, usually their mother.<sup>4</sup> [See Figure II.] Figure III shows the reason why:<sup>5</sup>

- More than half of the children who live with one parent do so because of the break-up of a marriage — of those children living with only one parent, 38 percent live in a single parent household due to divorce, and 19 percent due to parents separating.
- Another third (35 percent) live with a never-married parent, most of whom are single mothers.
- Just 8 percent of children live in single parent households for other reasons, such as widowhood (4 percent).

This increase in single parent households is due to a number of factors, including the availability of welfare, the growing acceptance of single

motherhood, childbearing outside of marriage and higher divorce rates. But the increase in divorce is the most important factor.

**Divorce and Children.** The number of divorces in the United States involving children doubled from 1960 to the late 1990s as the rate of divorce more than doubled:<sup>6</sup>

- Half of first marriages and 60 percent of second marriages in the United States now end in divorce.
- About 1.2 million divorces occur each year, involving approximately 1 million children.
- More than half of the children who live with one parent do so because of the break-up of a marriage.<sup>7</sup>

By the age of 18, more than 20 percent of American children will experience the divorce of their parents. Most of those children will then live in fatherless homes, with their mother having sole custody.

**Crisis of Fatherless Children.** Virtually every major social pathology — including violent crime, drug and alcohol abuse, truancy, teen pregnancy and suicide — is strongly associated with fatherlessness.<sup>8</sup> For example:

- A majority of prisoners, juvenile detention inmates, high school dropouts, pregnant teenagers, adolescent murderers and rapists all come from fatherless homes.<sup>9</sup>
- The prevalence of delinquency among children from broken homes is 10 percent to 15 percent higher than among children from intact homes.<sup>10</sup>
- Researchers have found that “The likelihood that a young male will engage in criminal activity doubles if he is raised without a father and triples if he lives in a neighborhood with a high concentration of single-parent families.”<sup>11</sup>
- An estimated 70 percent of the juveniles in state reform institutions, 72 percent of adolescent murderers, and 60 percent of America’s rapists grew up without fathers.<sup>12</sup>
- After taking into account race, socioeconomic status, sex, age and ability, teenagers from single-parent households are 1.7 times more likely to drop out of high school than their corresponding counterparts living with both biological parents.”<sup>13</sup>

The connection of social pathologies with fatherless homes is so strong that some researchers have concluded that the likelihood of children’s involvement in crime is determined by the extent of both parents’ involvement in their children’s lives, rather than income or race.<sup>14</sup>

*“Fatherlessness is strongly associated with virtually every major social pathology.”*

## The Myth of the “Deadbeat Dad”<sup>15</sup>

The conventional wisdom — enunciated by political leaders, media commentators, and scholars on both the left and the right — assumes that the problem of fatherlessness stems from paternal abandonment.

**Conventional Wisdom.** David Blankenhorn writes, “The principal cause of fatherlessness is paternal choice...the rising rate of paternal abandonment.”<sup>16</sup> The little work that has been done by political scientists perpetuates this assumption. “Husbands abandon wives and children with no looking back,” writes Cynthia Daniels.<sup>17</sup> “Millions of men walk out on their children,” says Robert Griswold.<sup>18</sup>

Conservatives, who have done the most to call attention to fatherlessness, also accept this explanation. Rutgers University anthropologist Lionel Tiger writes that the abandonment of women by men is responsible for “...much of the 50 percent divorce rate...” and may help “...explain the single-mother rate of over 30 percent of births across the industrial world.”<sup>19</sup> Social philosopher Leon Kass blames feminism for liberating men from their responsibilities.<sup>20</sup>

“Children should not have to suffer twice for the decisions of their parents to divorce,” U.S. Sen. Mike DeWine (R-Ohio) stated in June 1998, “once when they decide to divorce, and again when one of the parents evades the financial responsibility to care for them.”<sup>21</sup>

**Evidence on Divorced Fathers.** All this may seem intuitively correct, but is it true? In fact, no government or academic study has ever shown large numbers of fathers are voluntarily abandoning their children. Moreover, those studies addressing the question have arrived at a rather different conclusion:

- In the largest federally funded study ever undertaken on the subject, psychologist Sanford Braver found the “deadbeat dad” who walks out on his family and evades child support “does not exist in significant numbers.”<sup>22</sup>
- Braver found women initiate at least two-thirds of divorces, and that the cause of action is rarely desertion, adultery or violence.<sup>23</sup>

Other studies found much higher proportions of divorce proceedings are initiated by women:

- Researcher Shere Hite reports that 91 percent of divorces are initiated by wives.<sup>24</sup>
- And David Chambers claims “the wife is the moving party in divorce actions seven times out of eight.”<sup>25</sup>

Women are almost always awarded custody of the children, leading one research team to conclude that “who gets the children is by far the most important component in deciding who files for divorce.”<sup>26</sup> Conversely, this indicates that it is often fathers who want to keep families intact, and that

*“There is no evidence that fathers are voluntarily abandoning their children en masse.”*



aspects of unilateral divorce, such as child custody, favors the wife and mother over the husband and father.

**Evidence on Unmarried Fathers.** Compared with divorced fathers, the circumstances of unmarried fathers, usually younger and poorer, are more difficult to document. Yet here too the evidence contradicts the stereotype of the irresponsible father who abandons his children. For example, according to one study of low-income, unmarried, noncustodial fathers aged 16 to 25:<sup>27</sup>

- Young unmarried fathers are not particularly promiscuous — 63 percent had only one child, 82 percent had children by only one mother, 50 percent had been in a serious relationship with the mother at the time of pregnancy, and only 3 percent knew the mother of their child “only a little.”
- They are involved in their children’s lives — 75 percent visited their child in the hospital, 70 percent saw their children at least once a week, 50 percent took their child to the doctor, and large percentages reported bathing, feeding, dressing and playing with their children.
- They want to fulfill their financial responsibilities — 85 percent provided informal child support in the form of cash or purchased goods such as diapers, clothing and toys.

Furthermore, a study of low-income fathers in England found “the most common reason given by the fathers for not having more contact with their children was the mothers’ reluctance to let them. . . . Most of the men were proud to be seen as competent caregivers and displayed a knowledge of child-care issues.”<sup>28</sup>

*“Unilateral divorce favors the partner who wants to end a marriage over the one who wants to maintain an intact family.”*

## The Role of Government

Some 40 percent of the nation’s children and 60 percent of African-American children live in homes without their fathers.<sup>29</sup> If fathers are not abandoning their children in record numbers, why are so many children without fathers? The growth of divorce described above leads to the absence of many fathers from their children’s homes. Through the courts and child welfare agencies, the government regulates the divorced family, controlling the access of divorced and never-married fathers to their children. It can also impose financial obligations that fathers are unable to meet, adding to the number of “deadbeat dads.”

**Unilateral Divorce.** Divorce traditionally required finding one marriage partner at fault — adultery, cruelty or desertion were common grounds. But beginning with California in 1969, every state has adopted “no-fault” divorce laws that allow the dissolution of marriages with no finding of fault. In 17 states fault is never considered.<sup>30</sup> No-fault divorce might more properly be called unilateral divorce — one partner can end a marriage

without penalty and without the consent of the other party. Unilateral divorce thus favors the partner who wants to end a marriage over the one who wants to maintain an intact family.<sup>31</sup>

**Family Courts.** Over the past 40 years, there has evolved a system of federal, state and local bureaucracies responsible for children's welfare, child protection, child support enforcement and other quasi-police functions related to children. Like the fatherhood problem itself, this apparatus is most highly developed in the English-speaking countries, especially the United States. That is because these countries have a more extensive history of divorce,<sup>32</sup> and their Common Law tradition gives wide discretionary authority to judges. Their legal systems also give attorneys incentives to seek redress through litigation. Today, virtually every democratic country, including those outside of the common law tradition, has special courts and civil service agencies for family issues.<sup>33</sup> Fatherlessness and this judicial-bureaucratic machinery are growing worldwide.<sup>34</sup> The linchpin of this machinery is the judicial system of family courts.

*"The power of family court judges in divorce proceedings is virtually unlimited."*

Although they are set up by the states, family courts are unlike any other government body. Unlike other courts, their hearings are usually closed to the public, they generally leave no record of proceedings, and they keep few statistics on their decisions. In some ways they are closer to administrative agencies than courts; Robert W. Page, Presiding Judge of the Family Part of the Superior Court of New Jersey, describes them as a "social service delivery system."<sup>35</sup>

*Power of Family Courts.* The jurisdiction of family courts includes divorce, custody, child support, child protection, domestic violence and juvenile crime. Their workload is determined by the existence of these problems, all of which are directly connected with fatherless homes. In terms of their ability to regulate the personal lives of citizens, family courts are regarded by many as the most intrusive and powerful. According to Judge Page, "The family court is the most powerful branch of the judiciary." Page approvingly cites a judicial commission to the effect that "the power of family court judges is almost unlimited."<sup>36</sup>

The powers of family courts include removing children from their parents, directing the details of the children's upbringing, and controlling the movements, finances and other details of the parents' private lives. The right of a noncustodial parent to remain involved in his children's lives through visitation is a privilege controlled by family courts and bureaucrats. For example, a father may be denied access to children if he does not undergo psychological counseling at his own expense.<sup>37</sup>

Court-imposed divorce settlements now subordinate the rights of the parents to the "best interest" of the children as determined by the courts. To ensure the children's interests are protected, they may be represented by a court-appointed advocate. The best interest standard — in which the court represents the children's interests — gives the government a continuing

supervisory role over the family that lasts until the children reach the age of majority.

Family courts describe themselves as courts of “equity” or “chancery” rather than “law.” Like other civil courts, the parties have fewer due process rights and the rules of evidence are not as stringent as in criminal courts.<sup>38</sup> In general, parents are not entitled to counsel and the standard of evidence is a “fair preponderance” rather than “beyond a reasonable doubt.” This is a different standard than the administration of justice or settlement of disputes among parties. In situations that are not covered by statutory law or established common law, family court judges may resort to general principles of fairness or equity to prevent or remedy any alleged wrongdoing toward the child. This gives them wide latitude, with few checks and balances.

Family court judges can find parents in contempt of court if they fail to pay ordered child support or attorneys’ or psychotherapists’ fees. Parents jailed for “civil contempt” have the burden of proof to show that they cannot pay.<sup>39</sup> Parents can also be charged with “criminal contempt” for failure to pay. However, as the National Conference of State Legislatures (NCSL) explains, “The lines between civil and criminal contempt are often blurred in failure to pay child support cases...” In theory, a trial must be held on criminal contempt charges, but “not all child support contempt proceedings classified as criminal are entitled to a jury trial.”<sup>40</sup> Further, in apparent contradiction to the Sixth Amendment guarantee of counsel in criminal cases, the NCSL says that “even indigent obligors are not necessarily entitled to a lawyer.”<sup>41</sup>

*“Family court judges issue about 2 million restraining orders each year.”*

*Restraining Orders.* Family court judges may issue restraining orders that limit or prohibit a parent from having contact with their children. Based on counts of restraining orders issued by Colorado family courts, researcher Charles E. Corry of the Equal Justice Foundation, an advocacy group for parents’ rights, estimates that family court judges nationwide issue approximately 2 million restraining orders each year.<sup>42</sup> All that is necessary in most cases is a request by the custodial parent. Claims of threats or abuse need not be investigated in order for a judge to issue such an order. The noncustodial parent must request an evidential hearing and rebut the allegations to have the order lifted.<sup>43</sup>

Based on variations in the number and circumstances of the restraining orders issued by Colorado courts in different jurisdictions, Corry estimates that up to one-third of restraining orders may be issued without an evidential finding of abuse or threats.<sup>44</sup>

*Lack of Appeals.* In theory, family court decisions can be appealed to higher courts, but because family courts are usually not “courts of record,” cases must be re-tried at the next level, and as in other civil proceedings, the appealing party must bear the expense.<sup>45</sup>

Furthermore, federal courts do not exercise constitutional review over

family law cases due to a rule known as the “domestic relations exception” established in the 1992 Supreme Court case of *Ankenbrandt v. Richards*. This decision excluded from federal courts cases “involving divorce, alimony and child custody.”<sup>46</sup> This blanket rule has been vigorously enforced, denying access to federal courts for parents questioning the constitutionality of state laws and procedures regarding child custody, support levels and visitation rights of noncustodial parents.

Thus a parent has fewer constitutional protections with respect to his child than he does with respect to his home or car. If the judge takes property, the parent is entitled to due process of law. But not when the parent’s child is taken.

**Determination of Child Support.** Child support levels once were set individually in each case, but the Family Support Act of 1988 and U.S. Department of Health and Human Services regulations required the states to implement guidelines for determining child support levels that took away much of judges’ discretion. The guidelines were to be specific enough to give judges a formula to compute the amount owed. Since then all 50 states have adopted guidelines based on one of three models. About a dozen states use “percent of obligor income” guidelines that base awards on a fixed percentage of the noncustodial parent’s income but do not consider the custodial parent’s income. About 35 states use “income shares” guidelines which base obligations on a percentage of both parents’ income that is supposed to reflect spending on a child in an intact family. The rest of the states use a hybrid of the two.

State guidelines typically specify the basic support level as a percentage of the noncustodial parent’s adjusted income — or earnings capacity based on career, education and work experience, rather than actual current income. For example, basic child support in the state of Alaska as a portion of the noncustodial parent’s income is 20 percent for one child, 27 percent for two children, 33 percent for three children, and an extra 3 percent for each additional child.<sup>47</sup> Guidelines usually require additional payments for health insurance premiums or child care. For example, in Virginia, a state that uses income shares, court documents show that, with an add-on for day care, a noncustodial parent with two children earning \$38,000 annually must pay somewhat over 50 percent of net pay to a custodial parent earning \$28,000, or \$1,137.50 a month plus health care costs.<sup>48</sup>

Neither the percent of obligator’s income nor income shares guidelines take into account child-rearing expenses incurred by the noncustodial parent, significantly understating that parent’s support of the child.<sup>49</sup> A 1985 national study projected that the application of these models to existing support cases would have increased the average order by 2.5 times.<sup>50</sup> Economist Mark Rogers says that use of the guidelines significantly increased noncustodial parents’ obligations. However, they are not based on studies of what it costs to rear a child. According to Rogers, under these guidelines:

*“A parent has more constitutional rights with respect to his home than to his child.”*

*“A noncustodial parent can pay as much as half of his net income in child support.”*

- The noncustodial parent may pay more than the costs of child rearing.
- In some states, the guidelines require the noncustodial parent to pay the same percentage of *pre-tax* income whether he is a minimum wage worker or middle income earner; thus minimum wage workers are pushed below the poverty line.
- With add-ons for such things as medical insurance, the percentage of net income paid in child support may be as high as 38 percent or more for a worker earning \$36,000 a year. (In fact, it may be well above this.)
- These presumptive awards also ignore the custodial parent’s income, cost-offsetting child-related tax benefits the custodial parent may receive and the noncustodial parent’s direct support of the child when in the noncustodial parent’s care.

Due to these factors, a custodial parent with a significantly lower gross income may have a higher standard of living than the noncustodial parent who has a higher gross income, after taxes and child support transfers. These outcomes conflict with the legal principle that both parents have an equal duty (proportional to income) to support the child.<sup>51</sup>

The income shares guidelines were originally formulated in the 1980s by Robert Williams, a consultant to the U.S. Department of Health and Human Services. Williams himself has stated that “there is no consensus among economists on the most valid theoretical model to use in deriving estimates of child-rearing expenditures” and that “use of alternative models yields widely divergent estimates of the percentages of parental income or consumption allocated to the children.”<sup>52</sup>

Robert Williams is president of Policy Studies Incorporated (PSI), which has become the dominant firm in the child support enforcement business.<sup>53</sup> Thus, as a bureaucrat he helped develop public policies that created the need for a child support enforcement industry. Once in the private sector, he was able to profit from the policies he helped create.

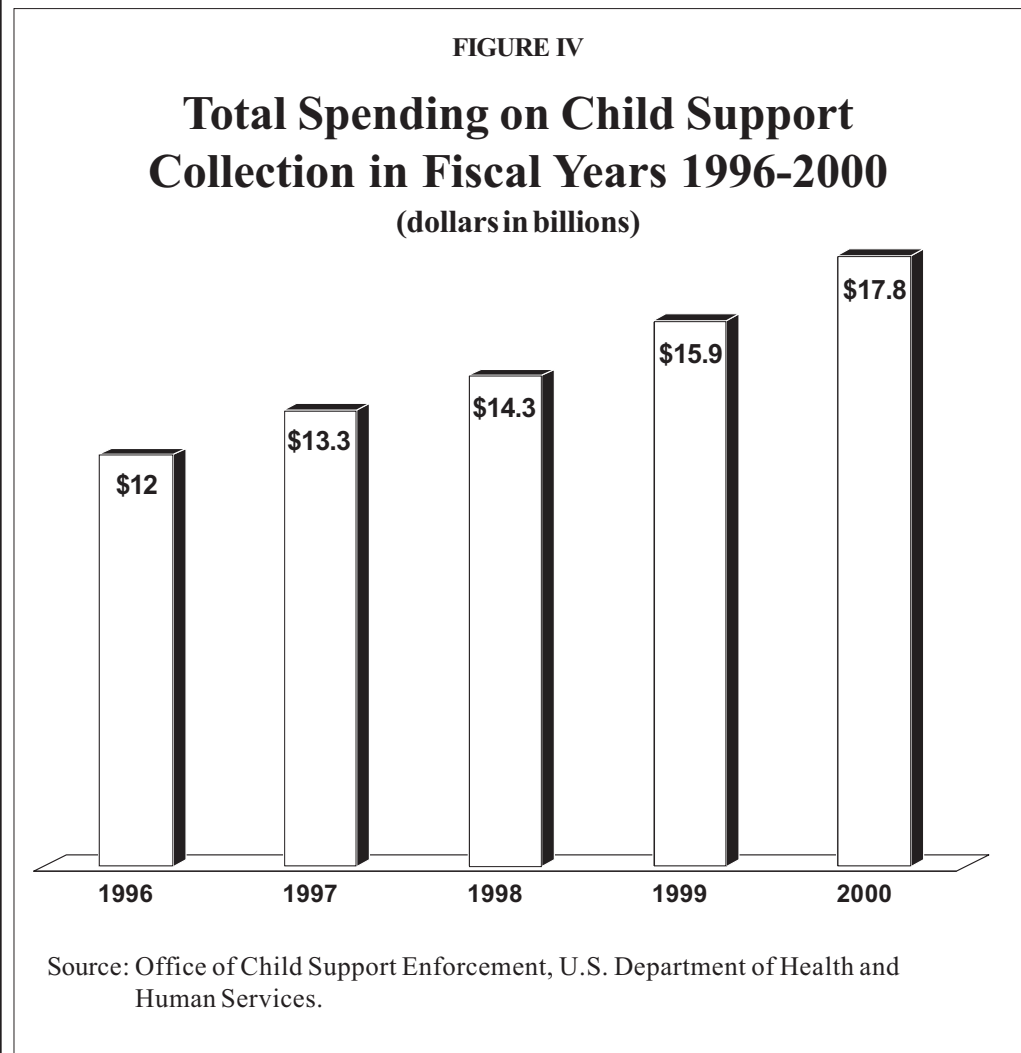
**Reviewing State Guidelines.** Periodic review of child support guidelines is a process controlled largely by the administrators, judges and attorneys who benefit from a system that creates high levels of obligations, leading to increases in unpaid child support and the need for enhanced collection efforts.<sup>54</sup> For example, a 1999 Virginia commission that reviewed child support guidelines consisted of one part-time member representing fathers and 10 full-time lawyers, judges and child support enforcement agents.<sup>55</sup> A commission of similar composition recently recommended a sharp increase in child support levels.<sup>56</sup> Of the 11 Georgia commission members in 1998, District Attorney Williams C. Akins notes, “two were members of the judiciary, two represented custodial parent advocacy groups, four were either present or former child support enforcement personnel and

two were state legislators.”<sup>57</sup>

Many noncustodial parents simply may not be able to pay excessive child support, particularly during periods of unemployment. Child support orders may be modified when the noncustodial parent’s income falls significantly — typically, by 15 percent or more — but this is not always easy in practice and does not apply to past arrearages.<sup>58</sup> Elaine Sorensen of the Urban Institute writes that “Of the 1 million poor nonresident fathers, a quarter pay more than 50 percent of their gross income in support....”<sup>59</sup> Unrealistically high child support orders may explain why an increasing amount of child support awards remain unpaid, despite increased collection efforts.

**Uncollected Child Support.** Child support enforcement is the largest component of government affecting fatherhood. Nationally, there were 17.4 million child support cases in fiscal year 2000. Enforcement involves nearly 60,000 agents throughout the United States — about 13 times the number in the Drug Enforcement Administration (DEA) worldwide. This does not include employees of the rapidly growing number of private enforcement companies.

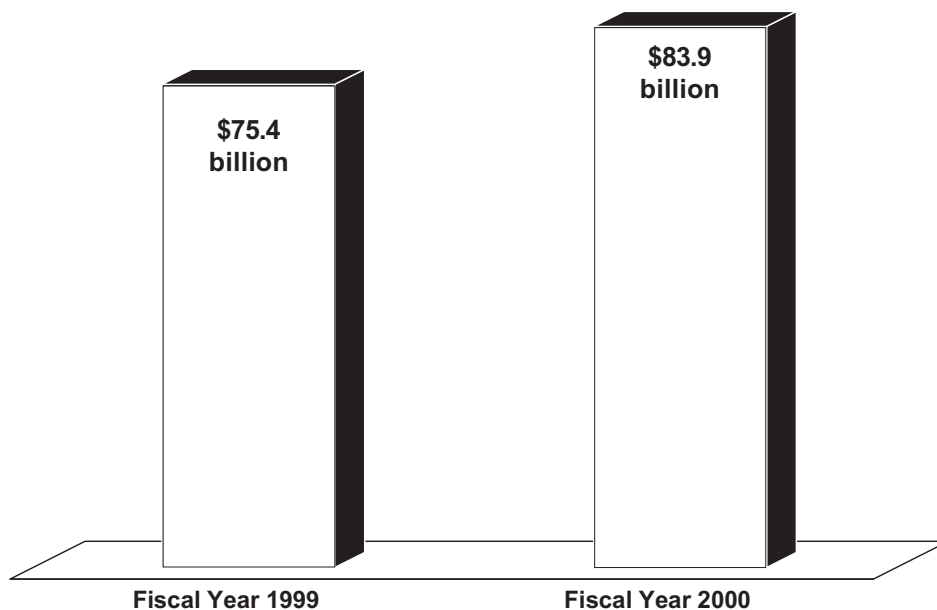
*“Child support enforcement involves nearly 60,000 agents throughout the United States.”*



*“Despite increased enforcement, the government claims that more child support is unpaid.”*

**FIGURE V**

**Unpaid Child Support Claimed by the U.S. Department of Health and Human Services**



Source: Tables 75 and 76, *Annual Statistical Report*, Office of Child Support Enforcement.

Although increased resources are being devoted to enforcement, the amount of uncollected child support claimed by the Department of Health and Human Service (HHS) has grown. Spending on child support enforcement programs grew from \$12 billion in 1996 to \$17.8 billion in 2000.<sup>60</sup> [See Figure IV.] According to HHS, the amount of unpaid child support rose steadily to almost \$84 billion in 2000.<sup>61</sup> [See Figure V.]

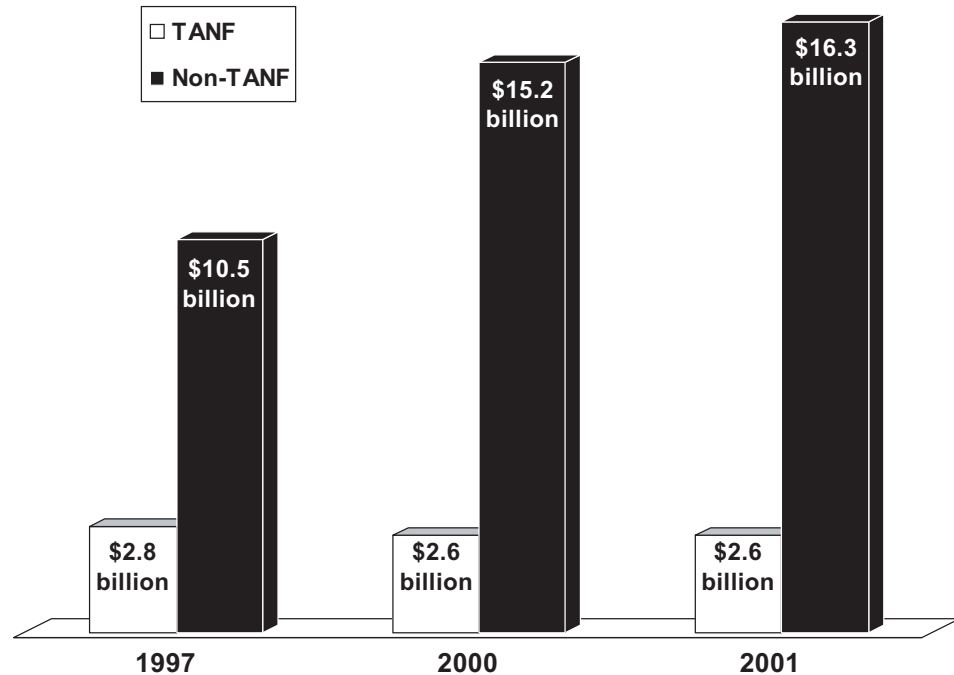
The rising cost of welfare was a specific reason for increased collection efforts under the Clinton administration. For example, states are given financial incentives to increase child support collections. Yet child support collections for clients of Temporary Assistance for Needy Families (TANF) remained steady at around \$2.6 billion for the period 1997 through 2001, while non-TANF collections rose from about \$10.5 billion to \$16.4 billion.<sup>62</sup> [See Figure VI.] Also, government figures do not capture cash child support payments by unmarried fathers made directly to mothers.<sup>63</sup>

## Solutions

No-fault divorce was supposed to reduce litigation by simplifying the

FIGURE VI

## Child Support Collections for Welfare Clients (1997, 2000 and 2001)



*“Divorce by contract would increase the well-being of both parents and children.”*

process of suing for divorce and eliminating the need for findings of fault. But for many couples with children, divorce leads to disputes involving lawyers, court proceedings, and intervention by state agencies. Divorced families may be supervised by officials until the children are grown. Initiating divorce proceedings is easier, but the system retains the adversarial aspects of fault-based divorce: The parties have no more incentive (or power) to settle issues without litigation than they did previously.

**Contractual Arrangements.** Parents might want to work out divorce arrangements that suit their circumstances through mediation, rather than going through adversarial court proceedings. But mediation takes place “within the shadow of the law,”<sup>64</sup> which means that the terms of negotiation and the bargaining strength of the parties are circumscribed by law. And no rational party concedes in mediation what they know they can win in court.

If couples were able to make their own marriage or divorce contracts, they could increase the welfare of both parents (and the children), compared to the straight-jacket of court decrees or one-size-fits-all legislation.<sup>65</sup> But for contractual solutions to work, the law must specify the parameters of agreements that the courts must enforce. One problem that has bedeviled



private marriage or pre-nuptial agreements is precisely that provisions governing children are not enforceable under current law. And child custody has proved to be the most vexatious factor in most modern divorces. Thus we need to address the legal framework within which couples can negotiate. Under the current system, each aspect of the divorce settlement — such as child custody and the level of child support — is subject to dispute in isolation from all other considerations. The law does not assume that parents care more for their children than judges and are more likely than court-appointed *ad litem* attorneys to determine what is in their children’s best interest.

The subject for debate, therefore, is what parameters should be defined by government, after which people may be left alone to arrange their private lives as they see fit. People need to know what they may expect in marriage and divorce. For example, laws could be changed to roll back “no-fault” divorce by making the traditional grounds of “fault” (which varied somewhat, but were generally adultery, desertion, and “cruelty” or violence)<sup>66</sup> a standard or default condition for the dissolution of a marriage. Individual couples could choose to craft their own contractual marriage and divorce agreements to suit their own circumstances. The key factor determining the stability of the solution, whether in traditional fault grounds or private contracts, is that the agreement be enforceable in law.

Similarly, the “winner-take-all” child custody system could be reformed through joint custody or “shared parenting” provisions.<sup>67</sup> By creating a presumption of roughly equal parenting time — all else being equal and absent wrongdoing by one parent — this would preserve the marital environment to the greatest extent possible, with children being raised by both parents and both sharing in decisionmaking. A presumption of equality between parents would also level the playing field in mediation or contract negotiations, giving each party an incentive to negotiate in good faith.

All these proposals have merit and deserve a full public airing and debate. However, because divorce and custody law in the United States is a province of the states, these proposals have to be debated and enacted state by state. Other principles are a more likely subject for national dialogue.

**The Federal Role: Enforcing Constitutional Rights.** On the national level, one option is to address the fatherhood/marriage problem less as an issue of family policy and more as one of constitutional rights. Guaranteeing the right of parents and their children not to be forcibly separated without cause carries few financial costs. It would also reduce the need for expensive and invasive federal programs that thrive on family destruction and address its symptoms rather than its cause.

Increasing the involvement of the federal judiciary in child support and domestic violence cases contributes to what some see as “activist” tendencies. On the other hand, if the federal courts squarely faced the constitutional implications of removing children from legally innocent

*“Parents can better determine their children’s best interest than family courts.”*

parents, they might regain their place as defenders of the Constitution. This would require them to invalidate the “domestic relations exception” and all other barriers to due process in family law. Federal courts would then have to scrutinize family law cases for violations of constitutional rights. However, the federal judiciary is reluctant to engage in such a review.

The legislative and executive branches may be willing to exercise leadership. Federal legislation modeled on the Parental Rights and Responsibilities Act of 1995 could assist in reinforcing existing rights without necessarily establishing new ones. That bill declared that a parent’s right to direct the upbringing of their children is a fundamental right which the government can curtail only for a “compelling interest.” It stipulated “No Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of a parent to direct the upbringing of the child of the parent.”<sup>68</sup> However, the bill specifically exempted parents who lose their children through involuntary divorce. The justification for this exemption is unclear, but given the critical dimensions of divorce and custody today, it may be time to revisit the issue.

*“Government policies may exacerbate the problems of divorce and child custody.”*

## Conclusion

Today’s debate on the family seems to be conducted at cross-purposes. Ironically, conservatives are proposing government programs to address the problems of family breakdown and fatherless children, while liberals insist the family should be free from government intervention. Both avoid the question of the extent to which government policies created the problems in the first place.<sup>69</sup>

While fatherless families lead to social problems, it is not clear that a “fatherhood crisis” exists, other than that created by the government. Elected leaders are proposing to spend hundreds of millions of dollars on federal, state and local programs to promote fatherhood and marriage. But, if fathers are not abandoning their children in record numbers, there would seem to be little justification to discourage them from doing so. Although well-intentioned, it is not clear how government programs can enhance a parent’s relationship with his own children. Those same bureaucracies may have been instrumental in rupturing that relationship in the first place. There are growing indications that such initiatives could instead lead to further government intrusions. At the very least, these issues deserve an open public discussion. If unilateral divorce encourages the breakup of families, and the child protection-legal system is separating divorced fathers from their children, a simpler and more effective approach might be to curtail the power of government.

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## About the NCPA

The NCPA was established in 1983 as a nonprofit, nonpartisan public policy research institute. Its mission is to seek innovative private sector solutions to public policy problems.

The center is probably best known for developing the concept of Medical Savings Accounts (MSAs), now known as Health Savings Accounts (HSAs). *The Wall Street Journal* and *National Journal* called NCPA President John C. Goodman “the father of Medical Savings Accounts” Sen. Phil Gramm said MSAs are “the only original idea in health policy in more than a decade.” Congress approved a pilot MSA program for small businesses and the self-employed in 1996 and voted in 1997 to allow Medicare beneficiaries to have MSAs. A June 2002 IRS ruling freed the private sector to offer a flexible medical savings accounts and even personal and portable insurance. A series of NCPA publications and briefings for members of Congress and the White House staff helped lead to this important ruling. In 2003, as part of Medicare reform, Congress and the President made HSAs available to all non-seniors, potentially revolutionizing the entire health care industry.

The NCPA also outlined the concept of using tax credits to encourage private health insurance. The NCPA helped formulate a bipartisan proposal in both the Senate and the House, and Dr. Goodman testified before the House Ways and Means Committee on its benefits. Dr. Goodman also helped develop a similar plan for then presidential candidate George W. Bush.

The NCPA shaped the pro-growth approach to tax policy during the 1990s. A package of tax cuts, designed by the NCPA and the U.S. Chamber of Commerce in 1991, became the core of the Contract With America in 1994. Three of the five proposals (capital gains tax cut, Roth IRA and eliminating the Social Security earnings penalty) became law. A fourth proposal — rolling back the tax on Social Security benefits — passed the House of Representatives in summer 2002.

The NCPA's proposal for an across-the-board tax cut became the focal point of the pro-growth approach to tax cuts and the centerpiece of President Bush's tax cut proposal. The repeal by Congress of the death tax and marriage penalty in the 2001 tax cut bill reflects the continued work of the NCPA.

Entitlement reform is another important area of NCPA focus. With a grant from the NCPA, economists at Texas A&M University developed a model to evaluate the future of Social Security and Medicare. This work is under the direction of Texas A&M Professor Thomas R. Saving, who was appointed a Social Security and Medicare Trustee. Our online Social Security calculator, found on the NCPA's Social Security reform Internet site ([www.TeamNCPA.org](http://www.TeamNCPA.org)) allows visitors to discover their expected taxes and benefits and how much they would have accumulated had their taxes been invested privately.

Team NCPA is an innovative national volunteer network created to educate average Americans about the problems with the current Social Security system and the benefits of personal retirement accounts.

In the 1980s, the NCPA was the first public policy institute to publish a report card on public schools, based on results of student achievement exams. We also measured the efficiency of Texas school districts. Subsequently, the NCPA pioneered the concept of education tax credits to promote competition and choice through the tax system. To bring the best ideas on school choice to the forefront, the NCPA and Children First America published an *Education Agenda* for the new Bush administration,



policy makers, congressional staffs and the media. This book provides policy makers with a road map for comprehensive reform. And a June 2002 Supreme Court ruling upheld a school voucher program in Cleveland, an idea the NCPA has endorsed and promoted for years.

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