

## DEBT GOVERNANCE, WEALTH MANAGEMENT, AND THE UNEVEN BURDENS OF CHILD SUPPORT

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**ABSTRACT**—Child support is a ubiquitous kind of debt, common to all income and wealth levels, with data showing that approximately 30% of the U.S. adult population has either been subject to paying child support or has received it. Across this field of child support debt, however, unpaid obligations look different for everyone, and in particular the experiences around child support debt diverge radically for low-income populations and high-wealth ones. On the low-income end of the spectrum, child support debt is a sophisticated and adaptive governance technology that disciplines and penalizes those living in or near poverty. Being in child support debt on the high-wealth end of the spectrum, however, produces completely opposite outcomes. Child support payors with wealth have the ability to insulate themselves from debt and the consequences of nonpayment in ways that other families and individuals can never replicate. In this way, child support debt is a legal and financial formation that embodies divergent rules, disparate modes of enforcement, and unequal opportunities. It is a bimodal system that punishes low-income debtors and exculpates high-wealth ones across racialized and differentiated populations. And, understood in this way, the system is an amalgam of oppressive but supple forces that bear traces of the imperial, the colonial, the historical, and the inherited.

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*“It is not credit that we seek, nor even debt, but bad debt—which is to say real debt, the debt that cannot be repaid, the debt at a distance, the debt without creditor, the black debt, the queer debt, the criminal debt. Excessive debt, incalculable debt, debt for no reason, debt broken from credit, debt as its own principle.”*

—Fred Moten and Stefano Harney<sup>†</sup>

INTRODUCTION

Debt is a predetermined and utterly predictable outcome of a political economy that forces low-income families and individuals into various forms of financial obligation just to sustain daily activity and manage the precarities that exist around work, food, and healthcare. Most familiar is the ordinary debt that accrues in service of living, eating, paying for medical care, or buying a home. This is credit card debt, mortgage debt, payday lending debt, and money owed to banks, hospitals, or other finance companies. But many people also have family obligation debt, a special debt which stems from the organization and reorganization of families through marriage and divorce. Family obligation debt differs from ordinary debt in that the obligation, while flowing to a private source, is set by state statutes and courts and subject to governmental oversight and enforcement. In this way, family obligation debt forms the cornerstone of privatized dependency and the backbone of American family governance.

The two principal forms of family debt are spousal and child support. Child support is a ubiquitous kind of debt and is common at all income and wealth levels, with data showing that approximately 30% of the U.S. adult population has either been subject to paying child support or has received it. As a result, “more Americans have been subject to paying child support orders . . . than to any other kind of civil judgment.”<sup>1</sup> Across this field of child support debt, however, unpaid obligations manifest differently for different racial and socioeconomic groups. In particular, the experiences around debt

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<sup>†</sup> Fred Moten & Stefano Harney, *Debt and Study*, E-FLUX J. (2010), <https://www.e-flux.com/journal/14/61305/debt-and-study/> [<https://perma.cc/Q6VZ-UZYG>].

<sup>1</sup> Ira Mark Ellman & Tara O’Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 108 (2008).

collection diverge radically for low-income populations and high-wealth ones.

On the low-income end of the spectrum, child support debt is a sophisticated and adaptive governance technology that disciplines and penalizes those living in or near poverty. As Professor Tonya Brito remarks: “[T]he poorest parents owe more in arrears on an individual basis and owe a disproportionately larger share of the national child support debt. For the poorest parents, the debt is insurmountable and unsustainable.”<sup>2</sup> Money owed in the form of child support arrears, on the low-income end of the wealth spectrum, signifies the perpetual threat of becoming entrapped in the “debt–criminal justice complex, which continues to ensnare the racially and economically marginalized underclasses of the US social system.”<sup>3</sup> When payments are in arrears, low-income payors—most often Black men—are subject to harassment from collections agents, threats of imprisonment, and an entirely new layer of court-ordered debt in the form of legal fines and fees.<sup>4</sup>

Being in child support debt on the high-wealth end of the spectrum produces completely opposite outcomes. While child support debt is criminalized and penalized for those living in or around poverty, child support payors with wealth are insulated from debt and the consequences of nonpayment in ways that other families and individuals are not and can likely never be. High-end trust companies market a range of wealth-preservation mechanisms to their elite clientele, among them the asset protection trust. This type of trust comes in various iterations, but its core function is always the same—to preserve family wealth by barring creditors from access to the assets in trust.<sup>5</sup> Such asset protection mechanisms enable debt holders to legally escape debt enforcement, thereby avoiding asset erosion. Accordingly, while legal rules on the low-income side favor creditors and debt recovery, legal rules on the high-wealth end favor family wealth preservation over creditor interests and claims.

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<sup>2</sup> Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 954 (2019).

<sup>3</sup> Dillon Wamsley, *Neoliberalism, Mass Incarceration, and the US Debt–Criminal Justice Complex*, 38 CRITICAL SOC. POL’Y 248, 250 (2019).

<sup>4</sup> Eleanor Pratt, *Child Support Enforcement Can Hurt Black, Low-Income, Noncustodial Fathers and Their Kids*, URB. INST. (June 16, 2016), <https://www.urban.org/urban-wire/child-support-enforcement-can-hurt-black-low-income-noncustodial-fathers-and-their-kids> [<https://perma.cc/TR4R-STGN>]; see also Tonya L. Brito, David J. Pate Jr. & Jia-Hui Stefanie Wong, *Negotiating Race and Racial Inequality in Family Court*, 36 IRP FOCUS 3, 5 (2020) (“80 percent of the fathers in court for nonpayment of child support were men of color, predominantly Black men.”).

<sup>5</sup> See *infra* Part II; see also Stewart E. Sterk, *Asset Protection Trusts: A Race to the Bottom*, 85 CORNELL L. REV. 1035, 1040–47 (2000) (describing the prominent role trusts play in creditor avoidance).

In both cases, debt-collection patterns and practices look different from those operating in the context of middle-class individuals who owe child support. These payors are neither sufficiently poor to be regularly subjected to violent and authoritarian forms of poverty governance that lead to incarceration, nor sufficiently rich and financially sophisticated to benefit from the use of asset protection trusts for debt avoidance. In this way, the populations at the ends of the spectrum reflect one another in peculiar and distorted modes, defined and consumed by concerns about debt and how to manage it. Nevertheless, while the populations share this focus on debt management, the results of their efforts to manage debt differ significantly. To the question posed: “[W]ho would get to wield debt as a form of power—the wealthy or the working class?”<sup>6</sup> the answer is as obvious as it is predictable. As Drs. Marion Fourcade and Kieran Healey comment, there are clearly “distinctive experiences of debt . . . from the exploitative to . . . the almost liberating. Some feel weighed down or crushed by debt . . . others embrace credit as a means of asset accumulation and mobility.”<sup>7</sup>

This sharply divided way of organizing debt, credit, and obligation penalizes and incarcerates those who can least afford it while providing those who are well-resourced with new and varied opportunities to accumulate wealth. In so doing, the legal regulation of child support debt embodies a system of not only structured inequality but also structured domination. It disciplines low-income payors, often Black men, by stripping them of income and opportunity while facilitating wealth preservation for high-wealth payors, often white men, thereby increasing their financial opportunities. This structuration is what Dr. Ann Stoler calls an “imperial formation” in that it is “defined by racialized relations of allocations and appropriations.”<sup>8</sup> Unlike empire, which is a “fixed form[] of sovereignty,” an imperial or colonial formation is defined by its plasticity and ability to manifest “contested scales of differential access and rights.”<sup>9</sup> Child support rules and child support debt manifest multiple forms of differential access and rights, from the calculation of awards by courts to state enforcement strategies, and ultimately demonstrate a racialized system of debt management. Child support debt is a legal and financial formation that displays divergent rules, disparate modes of enforcement, and unequal opportunities. It is a bimodal system that punishes low-income debtors and

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<sup>6</sup> THE DEBT COLLECTIVE, CAN’T PAY, WON’T PAY: THE CASE FOR ECONOMIC DISOBEDIENCE AND DEBT ABOLITION 16 (2020).

<sup>7</sup> Marion Fourcade & Kieran Healy, *Classification Situations: Life-Chances in the Neoliberal Era, Accounting, Organizations and Society*, 42 HIST. SOC. RSCH. 23, 26 (2017).

<sup>8</sup> ANN LAURA STOLER, IMPERIAL DEBRIS: ON RUINS AND RUINATION 8 (2013).

<sup>9</sup> *Id.*

exculpates high-wealth ones across racialized and differentiated populations. And, understood in this way, the system is an amalgam of oppressive but supple forces that bear traces of the imperial, the colonial, the historical, and the inherited.

The rest of this Article explores in detail the functioning of debt and debt collection in the child support domain. The first Part is an inquiry into debt-collection practices around child support for low-income payors, with a trained focus on how low-income individuals and families are governed and subjected to financial extraction by child support rules that privilege state reimbursement, penalize the under- and unemployed, and fail to recognize myriad forms of family contributions. The second Part explicates the mechanisms that enable high-wealth child support payors to avoid both the financial discipline of child support rules and the actual payment of child support. The final Part explores this disjunctive system of debt and wealth governance, revealing not only a particularly egregious disparity in the opportunities afforded to each population but also the veiled presence of colonialist overlays and calcifications.

#### I. THE SHARP INTEREST OF THE STATE IN CHILD SUPPORT COLLECTIONS

The problems for low-income parents begin with child support calculation. Income calculations are difficult when the payor parent is unemployed or underemployed, because in these cases child support awards can be based on imputed rather than actual income.<sup>10</sup> Thus, an unemployed father might be ordered to pay \$500 a month in child support based on the court's determination of what a similarly situated man could make. These types of income imputations often lead to orders requiring fathers to pay impossible amounts given their work experience and opportunities. This kind of debt is "artificially inflated, largely uncollectible, and potentially destructive," and constructed "partly through laws based on policymakers' 'magical thinking' about what impoverished fathers should earn in the labor market."<sup>11</sup>

Well-known cases—cases that populate legal textbooks—keenly demonstrate this principle. In a much-discussed U.S. Supreme Court case from 1978 (*Zablocki v. Redhail*), Roger Red Hail fathered a child while he was still a minor and a high school student.<sup>12</sup> When the state's Aid to Families

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<sup>10</sup> OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-05-99-00390, THE ESTABLISHMENT OF CHILD SUPPORT ORDERS FOR LOW INCOME NONCUSTODIAL PARENTS (2000), <http://www.oig.hhs.gov/oei/reports/oei-05-99-00390.pdf> [<https://perma.cc/KB7H-RRVR>].

<sup>11</sup> Brito, *supra* note 2, at 955.

<sup>12</sup> 434 U.S. 374, 377–78 (1978). The case turned on the question of access to marriage but implicated child support.

with Dependent Children (AFDC) office brought a paternity action against him to resolve support issues, the court ordered him to pay \$109 per month as support for the child.<sup>13</sup> The amount, legal historians explain, was shockingly high:

To put the amount in its proper context, in 1972 Wisconsin's minimum wage for minors was \$1.45 per hour. A child support order of \$109 per month was equivalent to fifty percent of gross wages for someone like Red Hail working a full-time (thirty-five hours per week) minimum wage job.<sup>14</sup>

Also notable: "The exorbitant size of Red Hail's child support order was especially problematic given his youth, poverty, and employment prospects."<sup>15</sup> What never made it into the Court's analysis were the circumstances around Red Hail's nonpayment. Red Hail grew up in an Oneida Indian family living with eight siblings in poverty, and when Red Hail was around seven years old, he and his siblings were taken by Milwaukee County Social Services.<sup>16</sup> His background was one of poverty and need, missed educational opportunities, and marginalization at the hands of the state and the employment market.

In another case from 1993, *State ex rel. Hermesmann v. Seyer*, the Kansas Supreme Court upheld a lower court ruling that a thirteen-year-old boy was responsible for child support when the child was the result of nonconsensual sexual relations between the boy-father and his babysitter, who was seventeen years old at the time of the child's birth.<sup>17</sup> In affirming the child support order, the court stated:

This State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part

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<sup>13</sup> *Id.* at 378.

<sup>14</sup> Tonya L. Brito, Raymond Kirk Anderson & Monica Ashley Wedgewood, *Chronicles of a Debt Foretold: Zablocki v. Red Hail (1978)*, in *THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES* 240 (Marie A. Failing & Ezra Rosser eds., 2016). What percentage of a payor's income goes to child support varies by state and varies by payor, according to the payor's income. Low-income payors spend a larger percentage of their income on child support than high-wealth ones. Most states work on an income shares model, but some work on a percentage-of-income model. In these states, the amount a payor will spend is set statutorily. For example, Wisconsin, in a shift from the time of *Redhail*, now sets statutory amounts as follows: 17% for one child, 25% for two, 29% for three, 31% for four, and 34% for five or more. For more on the variation among states, see *Child Support Percentage by State 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/child-support-percentage-by-state> [<https://perma.cc/5QUK-B4FZ>].

<sup>15</sup> Brito et al., *supra* note 14, at 241.

<sup>16</sup> *Id.* at 234. "The story behind *Zablocki v. Red Hail* also engages the American Indian experience in the United States, particularly the experience of urban Indians who have been uprooted from their native lands and disconnected from their heritage and history." *Id.* at 232.

<sup>17</sup> 847 P.2d 1273, 1274–75, 1279–80 (Kan. 1993).

of the other parent. . . . This minor child, the only truly innocent party, is entitled to support from both her parents regardless of their ages.<sup>18</sup>

How the thirteen-year-old father would pay \$50 per month to the mother, not to mention how he would reimburse the state’s AFDC program for his portion of the approximately \$7,000 due, were questions that the court did not address. Returning to the *Redhail* case, then, it is perhaps unsurprising that in 2016 Red Hail was still paying on this debt and continues to owe about \$10,000 in child support for the daughter, who is in her forties.<sup>19</sup>

Beyond the “magical thinking” that haunts these cases, another striking feature both cases demonstrate is that child support determinations and enforcement actions are often brought by state agencies seeking to re-situate the financial obligation on the payor parent so as not to burden the governmental purse. With a governmental assistance program like Temporary Assistance for Needy Families (TANF), families are required to sign over to the state their right to child support when they apply for the program, with the result that “[a]ny child support owed while the family receives TANF cash assistance is owed to the government.”<sup>20</sup> Moreover, a court can order a payor parent to reimburse the state for any public assistance benefits incurred for the child. As a result, the payor parent “may be in significant arrears before the initial child support award is even issued and will likely remain in arrears even if the child support award is set at only \$25 per month.”<sup>21</sup> Because of this setup, “[a]pproximately twenty percent of the total arrears are owed to the government,”<sup>22</sup> and the government aggressively pursues these debts.

Underscoring the state interest in reimbursement (and making this system even less productive for the child and custodial parent), once the state recovers the child support arrears, there is no guarantee that any particular percentage of the money recovered will go to the child whose support is in question. Mississippi state law, for example, does not permit households to keep any amount of child support payments if that child is currently receiving TANF, and can also retain a portion of child support payments for a child

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<sup>18</sup> *Id.* at 1279.

<sup>19</sup> Brito et al., *supra* note 14, at 252.

<sup>20</sup> Brito, *supra* note 2, at 960 (quoting OFF. OF CHILD SUPPORT ENF’T, U.S. DEP’T OF HEALTH & HUM. SERVS., MAJOR CHANGE IN WHO IS OWED CHILD SUPPORT ARREARS 1 (Mar. 2014)).

<sup>21</sup> Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1003–04 (2006).

<sup>22</sup> Brito, *supra* note 2, at 960 (quoting Dennis Putze, *Who Owes the Child Support Debt?*, OFF. OF CHILD SUPPORT ENF’T, U.S. DEP’T OF HEALTH & HUM. SERVS. (Sept. 15, 2017), <https://www.acf.hhs.gov/css/ocseblog/2017/09/who-owes-the-child-support-debt> [<https://perma.cc/4WA8-SL3C>]).

who previously received TANF.<sup>23</sup> In a focus group of low-income fathers paying child support, one commented: “When I pay \$300, the mom only gets \$125. The rest goes to pay back TANF.”<sup>24</sup> Professors Keesha Middlemass and Jyl Josephson have pointed out the “policy tensions between society’s interests in supporting poor children and simultaneously protecting taxpayers from supporting the same poor children due to the decision to withhold child support payments to the designated child.”<sup>25</sup> Moreover, these practices have a disproportionate impact on Black children, who generally are much more likely to have received TANF cash-assistance benefits.<sup>26</sup>

Compounding the problem, child support laws do not take into account nonmonetary contributions that payor parents make—such as purchased food, caretaking time, or gifts that include clothes and school supplies—meaning that these kinds of contributions cannot satisfy even a small part of a child support obligation.<sup>27</sup> Studies show that although noncustodial parents frequently make these kinds of contributions, they remain part of a shadow system of child support.<sup>28</sup> Accordingly, fathers who speak about the problems of child support mention not only “the difficulties they had finding steady—or any—employment, scraping by and surviving with little to no income,” but also how the system “seemed to only care about money, at the

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<sup>23</sup> NINO RODRIGUEZ, CTR. FOR FAMILY POL’Y & PRAC., IF I HAD MONEY: BLACK FATHERS AND CHILDREN, CHILD SUPPORT DEBT, AND ECONOMIC SECURITY IN MISSISSIPPI 19 (2016), [https://cffpp.org/wp-content/uploads/If-I-Had-Money\\_Black-Fathers\\_Child-Support-Debt\\_Mississippi.pdf](https://cffpp.org/wp-content/uploads/If-I-Had-Money_Black-Fathers_Child-Support-Debt_Mississippi.pdf) [<https://perma.cc/AG59-833E>]. This money is retained “to recover the cost of the TANF benefits, plus any interest that has accrued.” *Id.* Federal law does not mandate this redirection of child support payments, giving states an option, and Mississippi is one of twenty-nine states that choose to intercept support payments in order to reimburse the state. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Keesha Middlemass & Jyl Josephson, *Child Support Enforcement, Poverty, and the Creation of the New Debtor’s Prison*, 33 FEMINIST FORMATIONS 96, 103 (2021).

<sup>26</sup> See, e.g., RODRIGUEZ, *supra* note 23, at 5 (“Black children in the state [of Mississippi] are more than six times as likely as white children to get TANF.”).

<sup>27</sup> State statutes make no allowance for anything other than monetary contributions, and courts are reluctant to count these contributions as well. See Margaret Rynaz, *In-Kind Child Support*, 29 J. AM. ACAD. MATRIM. LAWS. 351, 358 (2017).

<sup>28</sup> See Steven Garasky, Susan D. Stewart, Craig Gundersen & Brenda J. Lohman, *Toward a Fuller Understanding of Nonresident Father Involvement: An Examination of Child Support, In-Kind Support, and Visitation*, 29 POPULATION RSCH. POL’Y REV. 363, 364–66 (2010); Maureen R. Waller, Allison Dwyer Emory & Elise Paul, *Money, Time, or Something Else? Measuring Nonresident Fathers’ Informal and In-Kind Contributions*, 39 J. FAM. ISSUES 3612, 3615 (2018); Terry-Ann L. Craigie, *Informal Child Support Contributions in Black Female-Headed Families*, 39 REV. BLACK POL. ECON. 259, 261–62 (2011).

expense of [their] well-being and ability to sustain relationships with their children.”<sup>29</sup>

The calculus of child support demonstrates an unrealistic and aggressive governmental approach. Even worse, however, are the mechanisms of enforcement that prioritize punishment and often lead to incarceration. Much current enforcement regulation was introduced in 1996, when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which “dramatically changed the way the federal government funded cash welfare.”<sup>30</sup> Paving the way for this law, then-President Clinton proclaimed, in his 1994 State of the Union address:

We will say to absent parents who aren’t paying child support, if you are not providing for your children, we will garnish your wages, we will suspend your license, we will track you across state lines, and, if necessary, we will make some of you work off what you owe.<sup>31</sup>

President Clinton, four years after this speech, signed into being a new law, the Deadbeat Parents Punishment Act of 1998, which created “new categories of federal felonies for the most egregious child support violators.”<sup>32</sup>

Grounded in this punitive statutory framework, states have myriad enforcement tools—many of the same ones that private lending companies

<sup>29</sup> RODRIGUEZ, *supra* note 23, at 6. “They spoke of taking care of their children—often while the other parent was working—but not getting any credit for the time they spent parenting, or the expenses they incurred.” *Id.* at 7. “The state has a special financial interest in these cases because it seizes child-support payments to reimburse itself for public assistance spending, and so the politics of child support are intimately linked to those of welfare reform, themselves thoroughly shaped by racial antagonism.” 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 (2016).

<sup>30</sup> THERESE J. MCGUIRE & DAVID F. MERRIMAN, NAT’L POVERTY CTR., HAS WELFARE REFORM CHANGED STATE EXPENDITURE PATTERNS? 3 (2006). See Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 158 (describing how PRWORA laid “the expectation that single parents should be able to support their children through work and child support and without public assistance.”).

<sup>31</sup> William J. Clinton, President of the United States, State of the Union Message (Jan. 25, 1994).

<sup>32</sup> Brittany Tucker, *Criminalizing Fatherhood in the Child Support System and the Social Injustice Experiences of the “Childless” and the “Deadbroke”* 2 (2016) (M.A. thesis, Michigan State University), <https://d.lib.msu.edu/etd/4471/datastream/OBJ/view> [<https://perma.cc/HTW7-SAB9>]. The Child Support Performance Incentive Act, enacted in the same year, displayed a focus on “the government’s commitment to reimbursement of its own funds.” *Id.* at 3. As Professor Linda Elrod has written: “The major impetus for increased child support enforcement efforts came from several sources, but in particular from those concerned about the increasing burden on taxpayers and society from the number of welfare recipients, many of whom should have been receiving child support.” Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695, 697. This aligned with Clinton’s promise to “end welfare as we know it.” Martin Carcasson, *Ending Welfare as We Know It: President Clinton and the Rhetorical Transformation of the Anti-Welfare Culture*, 9 RHETORIC & PUB. AFFS. 655, 655 (2006).

use—to recuperate money from individuals in arrears: the suspension of a driver’s license, wage garnishment, the use of debt-collection agencies, civil or criminal contempt of court, and charges of criminal nonsupport.<sup>33</sup> Wage garnishment is one of the most common tactics: when an individual owes child support, the Consumer Credit Protection Act allows for wage garnishments of up to 60% of the worker’s paycheck.<sup>34</sup> While wages are being garnished and the debt is still owed, child support obligations are subject to interest and can accrue at rates of up to 12%, depending on the state.<sup>35</sup>

When wage garnishment fails—which happens most often when the payor parent is unemployed and has no wages to garnish<sup>36</sup>—the state turns to techniques including legal harassment and threats of imprisonment, which are deployed just like with ordinary debts.<sup>37</sup> The only difference is the heightened intervention of the state and the heightened risk of criminalization and imprisonment. Under South Carolina law, for example, if the child’s custodial household receives public benefits, it takes only five

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<sup>33</sup> Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> [<https://perma.cc/KDS7-7L4P>]. Virginia’s enforcement methods are common to most states. *Driver’s License Suspensions and Child Support Enforcement*, VA. DEP’T OF SOC. SERVS. [https://www.dss.virginia.gov/family/dcse/drivers\\_license.cgi](https://www.dss.virginia.gov/family/dcse/drivers_license.cgi) [<https://perma.cc/8WDB-M3DE>]; *Lynchburg Juvenile and Domestic Relations District Court: Show Cause Contempt-Custody, Visitation, Support*, VA.’S JUD. SYS. <https://www.vacourts.gov/courts/jdr/lynchburg/show.html> [<https://perma.cc/2G8D-BNPJ>].

<sup>34</sup> 15 U.S.C. §§ 1673(b)(2). The state can garnish another 5% (for a total of 65%) if the individual is more than twelve weeks in arrears. *Id.* Child support garnishments take precedence over any other income garnishment except for federal tax garnishment or a bankruptcy court order. OFF. CHILD SUPPORT ENF’T, PROCESSING AN INCOME WITHHOLDING ORDER OR NOTICE (May 17, 2017), [https://www.acf.hhs.gov/css/outreach-material/processing-income-withholding-order-or-notice#irs\\_tax](https://www.acf.hhs.gov/css/outreach-material/processing-income-withholding-order-or-notice#irs_tax) [<https://perma.cc/F5FW-X44Y>]. The 65% limit is an aggregate amount. 15 U.S.C. § 1673(b)(2). Accordingly, a private lender cannot collect 25% garnishment on top of the child support garnishment (resulting in a possible 90% garnishment). Ordinary private creditor garnishment will not begin until the child support obligation is totally satisfied. John Coble, *4 Facts About Child Support and Garnishment*, UPSOLVE (Nov. 10, 2021), <https://upsolve.org/learn/child-support-garnishment/> [<https://perma.cc/37R8-GYPE>].

<sup>35</sup> Pratt, *supra* note 4.

<sup>36</sup> See Brito, *supra* note 2, at 965 (“Conventional enforcement tools, such as wage garnishment, liens, and asset seizure, work very efficiently with noncustodial parents who have regular earnings or assets. These methods, however, are practically useless for collecting child support from fathers without stable, consistent employment and financial assets.”).

<sup>37</sup> Matthew R. Bremner, Note, *The Fair Debt Collection Practice Act: The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1553 (2011).

days of a payor parent “falling behind on a payment to trigger a civil contempt hearing that could mean ending up in jail for up to a year.”<sup>38</sup>

The vivid fears and harms associated with nonpayment of child support were tragically illustrated in 2015 when Walter Scott, a Black man in South Carolina, was pulled over by the police and ultimately shot. Scott was pulled over for a broken taillight and subsequently tried to evade the police by running once he had pulled over his car. As Scott ran away, the police officer who had stopped him, Michael Slager, shot Scott five times in the back and killed him.<sup>39</sup> The background to the story, when it came out, centered on Scott’s child support obligations.<sup>40</sup> Scott had long struggled to pay child support, and in 2008, he went to jail for six months for falling behind by \$6,800 in child support payments. In both 2011 and 2012, Scott spent at least one night in jail because of child support arrears. At the time of Scott’s death, there was a warrant out for his arrest due to failure to make child support payments. Knowledge of the warrant, friends and family members suggested, was likely what spurred Scott to run from Slager.<sup>41</sup>

Scott’s story, absent the tragic and public outcome, is not unusual. Around the time of Scott’s imprisonment in 2009, one-eighth of South Carolina’s inmates were in custody because of failure to pay child support.<sup>42</sup> Moreover, most states refuse to modify child support orders even when the

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<sup>38</sup> Irin Carmon, *How Falling Behind on Child Support Can End in Jail*, MSNBC (Apr. 9, 2015, 5:54 AM), <https://www.msnbc.com/msnbc/how-falling-behind-child-support-can-end-jail-msna569311> [<https://perma.cc/A4MN-YL2A>]; see also Elizabeth G. Patterson, *Turner in the Trenches: A Study of How Turner v. Rogers Affected Child Support Contempt Proceedings*, 25 GEO. J. POVERTY L. & POL’Y 75, 82 (2017) (“The primary mechanism for initiating child support contempt proceedings in South Carolina is Family Court Rule 24, under which the clerks of court automatically rule on any obligor whose account is more than five days in arrears.”).

<sup>39</sup> Meredith Edwards & Dakin Andone, *Ex-South Carolina Cop Michael Slager Gets 20 Years for Walter Scott Killing*, CNN (Dec. 7, 2017, 4:10 PM), <https://www.cnn.com/2017/12/07/us/michael-slager-sentencing/index.html> [<https://perma.cc/QUV8-CPBQ>]. Scott’s killing further fueled a national conversation around race and policing, as it was connected to similar controversial police shootings of Black men elsewhere. On December 7, 2017, U.S. District Judge David Norton sentenced Slager to twenty years in prison. Although defense attorneys had argued for voluntary manslaughter, the judge agreed with prosecutors that the “appropriate underlying offense” was second-degree murder. *Id.*

<sup>40</sup> See Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<https://perma.cc/AAK2-Z27U>]; see also Sandhya Somashekhar, Wesley Lowery, Keith L. Alexander, Kimberly Kindy & Julie Tate, *Black and Unarmed*, WASH. POST, (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/> [<https://perma.cc/73QK-GZCK>] (describing many police shootings of people of color that begin with a minor incident like Scott’s broken taillight).

<sup>41</sup> Christopher Mathias, *One-Eighth of South Carolina Inmates Were Jailed over Child Support Payments. Walter Scott Was One of Them.*, HUFFPOST (Apr. 10, 2015, 4:41 PM), [https://www.huffpost.com/entry/walter-scott-child-support-\\_n\\_7036174](https://www.huffpost.com/entry/walter-scott-child-support-_n_7036174) [<https://perma.cc/6HEN-RYEB>].

<sup>42</sup> *Id.*

payor parent is incarcerated, meaning that debt accrues even without the ability to work. The result is that “people can easily leave jail owing \$15,000 to \$30,000 in child support, in addition to other fees related to their incarceration.”<sup>43</sup> This system, according to the former director of the South Carolina Department of Social Services, has created “a modern day debtors’ prison for poor noncustodial parents who lack the ability to pay support.”<sup>44</sup> In this way, “the most economically vulnerable parents in the child support system are trapped in an endless cycle where the threat of jail hangs over them like the sword of Damocles.”<sup>45</sup>

In an effort to circumvent the particular problem of incarceration restricting the payor’s ability to earn wages (that could then be garnished), one court took a different approach. In *State v. Oakley*, David Oakley was charged with seven counts of failure to pay child support and was in arrears of approximately \$25,000.<sup>46</sup> The State requested that Oakley be sentenced to six years in prison, but the lower court declined to do this.<sup>47</sup> Focusing on Oakley’s ability to earn, the lower court instead sentenced Oakley to probation and imposed the condition that while on probation he could not have any more children unless he demonstrated that he had the ability to support them and was supporting the children that he already had.<sup>48</sup> The case went up to the Supreme Court of Wisconsin, which affirmed this lower court ruling.<sup>49</sup> While this approach evades the debtor’s prison problem, it clearly creates new and different concerns centering on bodily autonomy, reproductive freedom, and physical subjection to the state. One scholar writes that the kinds of coercive labor practices that child support enforcement engenders “are redolent of peonage, one component of the Jim Crow South’s broader system of racial labor control . . . and likewise run afoul of the Thirteenth Amendment.”<sup>50</sup> This solution, which avoided actual incarceration, nevertheless involved the exercise of state power in inappropriate ways by creating a new form of bodily discipline.

Ultimately, then, child support debt and the treatment of individuals in arrears for child support debt magnify and amplify the punishing and

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<sup>43</sup> Carmon, *supra* note 38.

<sup>44</sup> *Id.* In a 2011 U.S. Supreme Court case, *Turner v. Rogers*, the Court upheld a South Carolina court’s ruling that the appointment of an attorney is not required when a payor parent faces jail time for child support arrearages as long as the state has in place alternative procedures to ensure a “fundamentally fair” determination of whether the parent is “able to comply with the support order.” 564 U.S. 431, 435 (2011).

<sup>45</sup> Brito, *supra* note 2, at 966.

<sup>46</sup> 629 N.W.2d 200, 202 (Wis. 2001).

<sup>47</sup> *Id.* at 203.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 214.

<sup>50</sup> Zatz, *supra* note 29, at 929, 936.

extractive nature of ordinary debt collection for low-income individuals and families. As one father stated: “A few years ago, I completely ran out of money. They were taking 55% of my unemployment benefits . . . I had maybe \$100 or \$200 a month to live off of.”<sup>51</sup> Policy choices and the legal rules built around them “expose structural inequalities and reinforce economic insecurities that are racialized and gendered, while parents who are or have been incarcerated contend with the most harm.”<sup>52</sup> And these legal rules—written, whether by design or not, to penalize unemployment, underemployment, poverty, and the general failure to shoulder the burden of relentless family debt—maintain structures of power and privilege by maintaining low-income debtors in a perpetual state of financial anxiety and distress.

## II. PROTECTING FAMILY WEALTH FROM CHILD SUPPORT CLAIMS

The nonpayment of child support in the context of wealth differs dramatically from the nonpayment of child support in the context of poverty. In the world of high-wealth payor parents, trust law—a luxury of the ultra-rich—stands behind and supports the nonpaying parent. And while there have always been high-profile examples of rich parents who have failed to pay child support and been penalized,<sup>53</sup> these examples merely deflect attention from the opportunities for child support avoidance and evasion that are available to high-wealth payors. Specifically, high-wealth individuals have at their disposal a range of legal mechanisms that allow them to avoid unwanted creditors, including child support creditors, thereby protecting family wealth from intrusive forms of debt collection.<sup>54</sup> These mechanisms

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<sup>51</sup> RODRIGUEZ, *supra* note 23, at 18.

<sup>52</sup> Middlemass & Josephson, *supra* note 25, at 99.

<sup>53</sup> Some high-profile cases of child support nonpayment have included Charlie Sheen, R. Kelly, and Rob Kardashian. See Sarah Hearon, *Charlie Sheen Hasn't Paid Denise Richards Child Support in '4 Years,' 'Pushed' Court Date So She Couldn't Attend*, US MAG. (Oct. 5, 2021), <https://www.usmagazine.com/celebrity-news/news/charlie-sheen-hasnt-paid-denise-richards-child-support-in-4-years/> [<https://perma.cc/X36X-WHYG>]; Robert Chiarito & Elizabeth A. Harris, *R. Kelly Sent Back to Jail over Unpaid Child Support*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/arts/r-kelly-jail-child-support.html> [<https://perma.cc/EX8F-38MG>]; Lisa M. Schaffer, *Rob Kardashian Can't Afford Child Support*, FINDLAW (Nov. 15, 2018, 3:00 PM), <https://www.findlaw.com/legalblogs/celebrity-justice/rob-kardashian-cant-afford-child-support/> [<https://perma.cc/AU5G-UYT4>].

<sup>54</sup> See Brooke Harrington, *How to Hide It: Inside the Secret World of Wealth Managers*, GUARDIAN (Sept. 21, 2016), <https://www.theguardian.com/business/2016/sep/21/how-to-hide-it-inside-secret-world-of-wealth-managers> [<https://perma.cc/J2XE-QXX3>] (The work of wealth managers “includes the use of trusts, offshore corporations and similar tools to help clients avoid paying tax, debts to creditors or alimony to ex-spouses”); see also BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT 10 (2016) (describing how “[o]rdinarily, wealth managers are

are at the foundation of wealth and estate planning, and they constitute the core products offered by private and boutique financial institutions.<sup>55</sup> This Part focuses on asset protection trusts, a wealth-preservation mechanism that enables high-wealth payors to legally evade debt-collection enforcement.

While rarely exploited by the vast majority of people and little understood by anyone not involved with estate planning and wealth management, the asset protection trust has long been a ubiquitous feature of high-wealth financial planning regularly used by elite families to safeguard their generational wealth.<sup>56</sup> Asset protection trusts take advantage of the split in ownership between the beneficiary and trustee and exploit the loophole that this divided ownership creates in the traditional logic of property ownership.<sup>57</sup> Because beneficiaries do not hold legal title to the assets in trust, they only “own” whatever the trustee is required to distribute by trust terms. Thus, when a trustee has discretionary control over all distributions and is not required to distribute any specific amount of money, the beneficiary has

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employed by clients who have already accumulated their fortunes, so the professional’s job is less to increase the value of those assets than to protect them from dissipation at the hands of tax authorities, creditors, and heirs”).

<sup>55</sup> One commentator notes:

The job of these [wealth] professionals is not only to shelter wealth from taxation, but to ‘obscure concentrations of economic power’ . . . . The use of trusts is particularly common because most jurisdictions do not require them to be registered, and even where registration is required, it is not public information.

Brooke Harrington, *Trust and Estate Planning: The Emergence of a Profession and Its Contribution to Socioeconomic Inequality*, 27 SOCIO. F. 825, 836 (2012) (quoting Yoser Gadhoum, Larry H.P. Lang & Leslie Young, *Who Controls US?*, 11 EUR. FIN. MGMT. 339, 342 (2005)). For some examples from firm advertising, see Laura G. Mandel, *Changing Conversations: Values Driven Estate Planning and the Role of Discretionary Trusts*, N. TR. (May 2013), <https://www.northerntrust.com/documents/white-papers/wealth-management/role-of-discretionary-trustpdf.pdf> [<https://perma.cc/V262-G9WH>] (“Of course, trusts will still remain the cornerstones to fulfilling our clients’ core goals of protecting family members and preserving family wealth.”); and Samuel Back, *Why Use a Discretionary Trust?*, MATTIOLI WOODS (Jan. 19, 2022), <https://mattioliwoods.com/latest-articles/why-use-a-discretionary-trust> [<https://perma.cc/KG8P-X324>] (“Discretionary trusts are often used as an important part of estate planning.”).

<sup>56</sup> Prohibitive costs and thresholds in trust creation and management (such as the threshold amounts some trust companies require to even create these kinds of family trusts) render asset protection trusts unavailable as a planning option for a broad swath of potential clients. This is unlike revocable trusts, which are commonly used as will substitutes. See DEBORAH S. GORDON, KAREN J. SNEDDON, CARLA SPIVACK, ALLISON ANNA TAIT & ALFRED L. BROPHY, *EXPERIENCING TRUSTS AND ESTATES* 581, 633 (2d ed. 2021). In addition, the benefits of asset protection trusts are known to and accessed by few people because, as Professor Brooke Harrington writes, opacity is a part of the industry: “Keeping a low profile publicly, while exercising power behind the scenes, through financial innovation and legal lobbying, is essential to the effectiveness of trust and estate professionals.” Harrington, *supra* note 55, at 827.

<sup>57</sup> The trust is a partitioned asset that separates legal from beneficial ownership: the trustee is the legal owner of the assets and the beneficiary is the “equitable” or “beneficial” owner, the person for whose use the assets are in trust. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 440 (1998).

no present, possessory right in any of the trust assets. Settlers can strengthen asset protection in an irrevocable trust by adding a spendthrift clause, which states that a beneficiary cannot sell or exchange the trust interest.<sup>58</sup> The spendthrift clause acts in a similar way to divest the beneficiary of full ownership.<sup>59</sup> And this is the wealth-preservation magic of the trust: it “provides a way of freeing the property owner from constraints which the ideology of property otherwise imposes on her or him through its logic.”<sup>60</sup>

These asset protection trusts benefit parents seeking to minimize and avoid child support payments in a number of ways, beginning with the child support calculation. Here, the discretionary trust does significant work, exempting trust assets from initial child support calculations when the beneficiary has no present interest in the trust and distributions are not being made. Most states base child support calculations on gross income,<sup>61</sup> and it is not until the payor parent receives a discretionary distribution from the trust—actual trust income—that such income is counted. High-wealth payors, then, are able to artificially deflate their incomes, as long as they minimize the distributions that they receive and use other sources of family wealth (often a spouse’s wealth, which doesn’t enter into support calculations) to sustain their lifestyles.<sup>62</sup> So, while courts routinely impute income to under- and unemployed fathers, courts have also declined to include trust assets as a part of the payor parent’s income as long as the assets are in a discretionary trust, not being distributed to the beneficiary. Moreover, courts will generally not override statutory income-shares calculations by taking the further step of imputing trust income, since income

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<sup>58</sup> GORDON ET AL., *supra* note 56, at 512.

<sup>59</sup> *See id.* at 512–15.

<sup>60</sup> Roger Cotterell, *Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship*, 14 J.L. & SOC’Y 77, 83 (1987).

<sup>61</sup> Gross includes, but is not limited to “salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, [some] social security benefits . . . workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans’ benefits, spousal support, rental income, gifts, prizes or awards.” VA. CODE § 20–108.2(c). For an overview of state rules with respect to support calculations and a discussion of the issues particular to high-wealth families, see Charles J. Meyer, Justin W. Soulen & Ellen Goldberg Weiner, *Child Support Determinations in High Income Families—A Survey of the Fifty States*, 28 J. AM. ACAD. MATRIM. LAWS. 483, 499 (2016).

<sup>62</sup> *See, e.g., In re Marriage of Sharp*, 860 N.E.2d 539, 542–43 (Ill. App. Ct. 2006) (describing multiple methods of circumventing income calculations and affirming that the trust assets constitute reachable income once they are distributed to the beneficiary but not before distribution); *see also Grohmann v. Grohmann*, 511 N.W.2d 312, 314 (Wis. Ct. App. 1993), *aff’d*, 525 N.W.2d 261 (Wis. 1995) (tentatively concluding trust income counted as beneficiary income because it was income under the tax laws, but remanding for further inquiry).

is usually attributed only when the payor parent is voluntarily under- or unemployed.<sup>63</sup>

Another benefit that comes with a discretionary spendthrift trust is that the trust complicates and mostly bars creditor claims—the child being a creditor of the beneficiary like any other—once the debt has been established and is in arrears. The trust works to bar creditor claims on the trust assets based on the notion that the beneficiary has no ownership equivalence in the assets until a distribution is actually made, thereby frustrating attempts to reach money in the absence of such a distribution. The result of this rule has been myriad legal disputes over child support payments that, for the most part, have come out in favor of the trust beneficiary (who is also the indebted parent).<sup>64</sup> It is also worth noting that, because public benefit reimbursement is not at stake, the government does not initiate legal action against high-wealth debtors as it does against low-income debtors with families receiving governmental assistance. High-wealth parents may ultimately turn to the state to help recover child support that is due, but the burden is on the custodial parent and there are no automatic triggers for state action.

In a relatively typical case from Wisconsin in 1995, the court disagreed with the mother-plaintiff who claimed that the father's assets held in a discretionary trust should have been made available for child support payments. The court, upholding the conventional rule of discretionary trusts, concluded that nothing in the statute "authorizes a court to relieve trustees of their discretion over when a trust shall make payments to or on behalf of a

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<sup>63</sup> In high-wealth situations, courts may override the statutory guidelines and impute income in the forms of gifts or other external support. Payor parents generally appeal these upward adjustments successfully. Moreover, because child support is supposed to maintain the child's standard of living but not subsidize whatever a court may deem extravagant, courts frame the result as a benefit to the children. *See Strahan v. Strahan*, 953 A.2d 1219, 1223–24 (N.J. Super. Ct. App. Div. 2008) (declining to adjust a child support payment upward based on the father's income because "a balance must be struck between reasonable needs, which reflect lifestyle opportunities, while at the same time precluding an inappropriate windfall to the child" (quoting *Isaacson v. Isaacson*, 792 A.2d 525, 582 (N.J. Super. Ct. App. Div. 2002))); *Ayres v. Ayres*, 602 N.W.2d 132, 137 (Wis. Ct. App. 1999) (refusing to award child support over the statutory limit when the father's income was outside of the statutory guidelines, stating that excessive amounts of child support would be detrimental to the children and the values that their parents had instilled in them); *Maturo v. Maturo*, 995 A.2d 1, 6, 9 (Conn. 2010) (refusing to include a portion of the father's annual bonus and stating: "Children's economic needs do not increase automatically, however, with an increase in household income.").

<sup>64</sup> *See, e.g., Kolpack v. Torres*, 829 S.W.2d 913, 916 (Tex. App. 1992) (holding that the trial court could not obligate a trustee of a discretionary trust to disburse trust income directly to the child support obligee without imposing that obligation upon the beneficiary-parent); *Smith v. Smith*, 517 N.W.2d 394, 399 (Neb. 1994) (holding that the trustee of a discretionary support trust was not required to distribute trust assets to pay the primary beneficiary's support arrearage); *Doksansky v. Norwest Bank Neb., N.A.*, 615 N.W.2d 104, 110 (Neb. 2000) (holding that a beneficiary's interest in trusts was not a property interest which could have been reached by an equitable assets creditor's bill to satisfy a judgment for child support).

beneficiary, or to substitute its own discretion for that of the trustees. Under the statute, the decision to distribute trust income remains with the trustees.”<sup>65</sup> Once the trustee had made a distribution, the court pointed out, then the mother could go after those funds.<sup>66</sup> Without any other rights, however, she would not only have to wait until a distribution was made but also monitor the payor parent in an attempt to determine the timing of the distribution.

Not all states and not all courts have supported this conventional rule of unfettered asset protection, and there has been particular pushback against the use of spendthrift clauses to avoid the payment of child support debt. In a leading case from 1950, *Seidenberg v. Seidenberg*, the court concluded that a spendthrift provision in a trust that mandated monthly income payments to the beneficiary could not bar collection of child support arrears for the beneficiary’s five minor children.<sup>67</sup> Articulating the strong and deeply gendered public policy in favor of the payment of private family obligations, the court stated:

The duty of a married man to support and protect his wife and children is inherent in human nature. It is a part of natural law, as well as a requirement of the law of every civilized country. It is not an ordinary indebtedness, such as a contractual obligation or a judgment for damages arising out of a tort. It is a responsibility far superior to that of paying one’s debts, important as the latter obligation is. No part of a man’s property or income should be exempt from meeting this liability . . . .<sup>68</sup>

Following this logic, and with the collection of child support becoming a lightning rod for public debate, some states have modified their statutes to reflect a policy preference favoring the payment of child support. California, for example, adopted a statute in 1990 specifically stating that a spendthrift clause in a trust did not bar the distributions being made for child support obligations.<sup>69</sup> This resulted in cases such as *Ventura County Department of Child Support Services v. Brown*, in which a father with six children from three different relationships was forced to use trust assets to pay \$140,000 in past-due support despite a spendthrift clause and trustee discretion written into the trust document.<sup>70</sup> In concluding, the court remarked: “The statute cannot have been intended to allow a beneficiary to defraud support creditors

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<sup>65</sup> *Grohmann*, 511 N.W.2d at 314.

<sup>66</sup> *Id.*

<sup>67</sup> 126 F. Supp. 19, 20, 23 (D.D.C. 1954).

<sup>68</sup> *Id.* at 23.

<sup>69</sup> CAL. PROB. CODE § 15305 (1990).

<sup>70</sup> 117 Cal. App. 4th 144, 155 (2004), as modified on denial of reh’g (Apr. 28, 2004).

by hiding behind the trustee's discretion."<sup>71</sup> The court likewise remarked that, pursuant to the statute, "[a] minor's right to support may not be defeated by a spendthrift provision in a trust instrument."<sup>72</sup>

Adopting these policy exceptions for a wider audience, the Uniform Trust Code (UTC) now categorize children with support orders as exception creditors rather than ordinary creditors, and they benefit from enhanced rights to compel distribution from a trust fund.<sup>73</sup> Enforcing a claim for support by trying to compel a distribution, however, is not always easy.<sup>74</sup> If there is only a spendthrift provision in the trust and there are mandatory distributions, the child's guardian can simply go to court and get an order requiring the trustee to make payment. With a discretionary trust, it is more difficult, and the appropriate parent or other guardian acting on behalf of the child must show that the trustee "has not complied with a standard of distribution or has abused a discretion."<sup>75</sup> If the guardian of the child seeking support is able to surmount that hurdle, the child will recover no more than what the trustee should have distributed in the first place, had the trustee complied with the applicable standard of distribution. For example, a child might be able to recover support arrears if the trustee abused discretion by failing to pay a medical bill for the beneficiary. But the child will only recover the amount that the trustee should have distributed, which may or may not equal the child support arrears.

Discretionary trusts, in this way, remain extremely protective devices that enable heightened asset protection and may still frustrate child support

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<sup>71</sup> *Id.*; see also *Pratt v. Ferguson*, 3 Cal. App. 5th 102, 106 (2016) (holding that the trial court had "discretion to order a trustee to make distributions of income and principal to satisfy the final child support orders").

<sup>72</sup> *Brown*, 117 Cal. App. 4th at 152.

<sup>73</sup> UNIF. TR. CODE § 503 (UNIF. L. COMM'N 2010). Thirty-four states that have adopted the UTC have some protections in place for child support payment when trust funds are involved. See *Trust Code*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d> [<https://perma.cc/26AL-S8A2>] (indicating that thirty-six states have adopted the UTC); BARRY A. NELSON, AM. OF COLL. TRUST & EST. COUNS., SUMMARY OF STATES THAT HAVE ADOPTED THE UNIFORM TRUST CODE AND THOSE STATES' TREATMENT OF EXCEPTION CREDITORS (SECTIONS 503–504) (2013). That is not to say that getting the child support to the custodial parent is easy, but the child does benefit from the status of exception creditor. Not all of the UTC states, however, have adopted this exception creditor provision. And there are still sixteen states that have not adopted any part of the UTC. In the UTC, exception creditors are primarily either children or ex-spouses.

<sup>74</sup> See UNIF. TR. CODE § 504(c) (providing that "[t]o the extent a trustee has not complied with a standard of distribution or has abused a discretion: (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and (2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion").

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

claims. Moreover, despite the UTC trend favoring child support payment from trust assets, the domestic asset protection trust (DAPT) trend has enabled a tight turn in an opposite direction, and states that are pioneering “new and improved” asset protection trusts are including protection against child support claims as a valuable feature. Nevada is the new exemplar of extreme asset protection in this respect. Nevada trust rules do not offer any exception for child support creditors, and trust companies market this protection—albeit sometimes obliquely—without actually mentioning children as exception creditors.<sup>76</sup> One law firm announced:

Many other states, even those which allow asset protection trusts, permit certain classes of exception creditors to have access to the trust even when ordinary creditors do not. These often include divorcing spouses, as well as exceptions for alimony and child support payments. Nevada is unique in that it allows no exception creditors at all.<sup>77</sup>

Another law firm, whose website boasts an image of a monumental safe, mentions “[o]nly two states offer zero exception creditors, including divorcing spouses, and Nevada is one of them.”<sup>78</sup> Most of the companies do not mention child support explicitly, an implicit recognition of the strength of the public policy argument and public sentiment against the nonpayment of child support. Nevertheless, they do point out the “zero exception creditor” rule regularly and include it prominently in their trust services information.

Other states have similarly weak protections for child support creditors. Utah’s statute requires that settlors sign an affidavit, swearing that they are not in default of paying child support at the time assets are transferred into the fund, meaning settlors can create these trusts in anticipation of owing child support in the near future.<sup>79</sup> Before distributions can be made to the settlor-beneficiary, the trustee is obligated to give thirty days’ advance notice

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<sup>76</sup> The Nevada statute reads:

[T]he interest of the beneficiary [shall not] be subject to any process of attachment issued against the beneficiary, or to be taken in execution under any form of legal process directed against the beneficiary or against the trustee, or the trust estate, or any part of the income thereof, but the whole of the trust estate and the income of the trust estate shall go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of and from any and all obligations of the beneficiary whatsoever and of all responsibility therefor.

NEV. REV. STAT. § 166.120.

<sup>77</sup> Keith Fernandez, *How to Keep Your Assets Safe from Creditors (Even if You Don’t Live in Nevada)*, BOHM WILDISH & MATSEN, LLP (June 6, 2019), <https://bohmwildish.com/nevada-asset-protection-trust-attorney/> [https://perma.cc/35J2-8Z4F].

<sup>78</sup> *Nevada Domestic Asset Protection Trust*, DILENDORF, <https://dilendorf.com/asset-protection/nevada-domestic-asset-protection-trust.html> [https://perma.cc/KBR5-XWRR].

<sup>79</sup> UTAH CODE § 25-6-502(5)(h), (l) (2019).

to any child support dependent of the settlor, letting them know of the impending distribution.<sup>80</sup> Nevertheless, the child support creditor has no way to attach the distribution before it happens; nor does the child support creditor have any recourse if the trustee does not make a distribution to the beneficiary. Alaska and Hawaii have similar rules.<sup>81</sup> These kinds of rules have led, as commentators routinely comment, to a vigorous “race to the bottom” among competing jurisdictions.<sup>82</sup> High-wealth trust consumers can assess the benefits of the DAPTs offered by each state—including the treatment of child support creditors—by referring to the DAPT State Rankings Chart, which compares and ranks states from those that are most advantageous to the settlor to those that are least.<sup>83</sup>

However, for those who create these DAPTs in an attempt to preserve the trust assets from creditor claims, the most salient point is whether the trusts will hold up in court. For trust settlors hoping for favorable judicial treatment of DAPTs, the 2017 case *Klabacka v. Nelson* was good news.<sup>84</sup> The case involved Eric and Lynita Nelson, a couple the court characterized—pun clearly intended—as having “substantial trust issues.”<sup>85</sup> Eric and Lynita married in 1983 and ten years into marriage signed a separate property agreement that transmuted their community assets into separate property. After almost another decade, in 2001, the spouses each funded their own DAPTs with separate property.<sup>86</sup> Eight years later, the couple divorced, and Eric was ordered to pay both spousal and child support as part of the divorce settlement.<sup>87</sup>

On appeal, Eric argued that the funds in his separate trust should not have been made available by the lower court to satisfy his child support obligations, which were in arrears.<sup>88</sup> The Supreme Court of Nevada agreed

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<sup>80</sup> *Id.* § 25-6-502(5)(g).

<sup>81</sup> ALASKA STAT. § 09.38.065(a)(1)(A) (2020); HAW. REV. STAT. § 554G-9(1) (2011).

<sup>82</sup> *See* Sterk, *supra* note 5, at 1114.

<sup>83</sup> *See* Trent Maxwell, Comment, *Domestic Asset Protection Trusts: A Threat to Child Support?*, 2014 BYU L. REV. 477, 495–98; ACTEC, TWELFTH ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES (David G. Shaftel ed., 2019), <https://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf> [<https://perma.cc/SU5K-CFWJ>].

<sup>84</sup> 394 P.3d 940 (Nev. 2017).

<sup>85</sup> *Id.* at 943.

<sup>86</sup> *Id.* In Nevada and several other states, self-settled asset protection trusts are called SSSTs (Self-Settled Spendthrift Trusts) as opposed to DAPTs. Both names refer to the same type of trust. Both spouses named the same independent trustee and both spouses retained the right to veto any distribution made from the discretionary spendthrift trusts. From the inception of the trust until Eric filed for divorce in 2009, the spouses made a number of gifts from one trust to the other. *Id.* at 944.

<sup>87</sup> *Id.* at 944–45.

<sup>88</sup> *Id.* at 949.

with him, stating very clearly that Nevada law protected Eric’s trust assets.<sup>89</sup> The court explained:

Despite the public policy rationale used in the other jurisdictions, Nevada statutes explicitly protect spendthrift trust assets from the personal obligations of beneficiaries. . . .

[I]n 2013, the Legislature proposed changes to [this rule] that would have allowed a spouse or child to collect spousal support or child support from otherwise-protected spendthrift trust assets. However, the proposed changes . . . did not pass, and, as a result, the Nevada spendthrift trust statutes were not amended . . .<sup>90</sup>

Whether making a somewhat-useless call to the legislature or just expressing a view from the bench, the court added:

This rigid scheme makes Nevada’s self-settled spendthrift framework unique; indeed, the “key difference” among Nevada’s self-settled spendthrift statutes and statutes of other states with SSSTs, including Florida, South Dakota, and Wyoming, “is that Nevada abandoned the interests of child- and spousal-support creditors, as well as involuntary tort creditors,” seemingly in an effort to “attract the trust business of those individuals seeking maximum asset protection.”<sup>91</sup>

Further favoring trust beneficiaries, two years after *Klabacka v. Nelson*, the South Dakota Supreme Court took up the question of conflicting state laws and policies and concluded that South Dakota was not obligated to extend full faith and credit to California rules.<sup>92</sup> In that case, Cleopatra Cameron, the granddaughter of wealthy oilman Arthur Cameron<sup>93</sup> and the beneficiary of a trust that her father created for her, was at the time of her divorce receiving \$40,000 per month in trust distributions.<sup>94</sup> The trial court granted no custody rights to Cleopatra and ordered her to pay \$8,863 monthly in child support.<sup>95</sup> Furthermore, the California court presiding over the divorce ordered Cleopatra’s trust, which had been created and was being

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<sup>89</sup> *Id.* at 950.

<sup>90</sup> *Id.* at 950–51 (citation omitted).

<sup>91</sup> *Id.* at 951 (quoting Michael Sjuggerud, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 986 (2001)).

<sup>92</sup> *In re Cleopatra Cameron Gift Trust*, 931 N.W.2d 244, 249 (2019).

<sup>93</sup> Holland & Hart, *Cleopatra’s Inheritance Is Safe in South Dakota*, JD SUPRA (Apr. 24, 2020), <https://www.jdsupra.com/legalnews/cleopatra-s-inheritance-is-safe-in-87298/> [<https://perma.cc/7K4R-4QCG>].

<sup>94</sup> *Cleopatra*, 931 N.W.2d at 246.

<sup>95</sup> *Id.*

managed by a California bank, to pay the child support payment directly to the father each month.<sup>96</sup>

Around the time that the divorce was finalized, however, Cleopatra moved the trust to South Dakota and sought a declaration as to whether the trust was obligated to make these direct child support payments to her ex-spouse. And once the trust had been moved to South Dakota, the trial court in that state concluded that no mandatory payments were required.<sup>97</sup> Subsequently, the state supreme court agreed that South Dakota was not required to extend full faith and credit to California's child support order directing the funds to be paid from the trust.<sup>98</sup> In reaching this conclusion, the supreme court observed: "Our Legislature has placed formidable barriers between creditor claims and trust funds protected by a spendthrift provision. More to the point, the Legislature has emphatically rejected even the specter of an argument that would allow a child support creditor to reach trust funds protected by a spendthrift provision."<sup>99</sup>

Under the protection of South Dakota trust law, the trust assets were safe from child support claims, and—as one commentator noted—this outcome was “no surprise, since South Dakota has made a trust industry out of protecting debtors, including child support debtors; the surprise would have been if that court would have ruled any other way.”<sup>100</sup> Consequently, while Cleopatra's child support obligation did not disappear, her ex-spouse was forced to go to court and pay legal fees to make claims to the trust assets; she preserved her own fortune from invasion and erosion, and that fortune was safe as long as the trustee limited future distributions to her.

The rules of high-wealth exceptionalism, perpetually built and rebuilt on the remnants of past inequalities and privilege, discourage onlookers.<sup>101</sup> But when these rules are captured and brought to light, the rare onlooker is

<sup>96</sup> *Id.* at 248.

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

<sup>98</sup> The court reasoned:

Because the means of enforcing judgments do not implicate full faith and credit considerations, the circuit court here was not required to submit to the California order compelling direct payments from the Trust if this method of self-executing enforcement is not authorized by South Dakota law. Based upon a review of our relevant statutes, it is not authorized and is, in fact, expressly prohibited.

*Id.* at 251.

<sup>99</sup> *Id.* (citations omitted).

<sup>100</sup> Jay Adkisson, *California Child Support Order Not Enforced Against South Dakota Trust in Cleopatra*, FORBES (June 27, 2019, 2:26 PM), <https://www.forbes.com/sites/jayadkisson/2019/06/27/california-child-support-order-not-enforced-against-south-dakota-trust-in-cleopatra/> [<https://perma.cc/WG5U-T245>].

<sup>101</sup> See Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 1037 (2020) (describing how rules of family wealth afford high-wealth families benefits of financial privacy).

able to catch a glimpse of the hidden empires of profit and wealth that accumulate unimpeded in secret spaces and behind the protection of seemingly innocuous and arcane trust laws.

### III. FAMILY ECONOMIES AND COLONIALIST REMAINS

The contrasting treatment of those in child support debt reveals a predictable inequality, reflecting past patterns of unequal treatment based on wealth and a legal framework that supports and sustains this inequality. What the contrast also reveals is a legal system that extracts work, bodily terror, and income from individuals and families living in poverty while it enables accumulation and investment for the wealthy. On the one hand, modern forms of debtor's prison for child support arrears are flourishing, populated by low-income individuals unable to break the debt cycle.<sup>102</sup> On the other hand, creditors are barred from recovering debts owed by high-wealth individuals and families, bested by wealth-preservation rules and high-wealth exceptionalism.<sup>103</sup> Quite clearly, the legal rules produce a range of variegated results for families across the wealth spectrum. But the most dramatic results occur on each end of the wealth spectrum while child support payors in the middle avoid aggressive arrears enforcement, which is targeted at those families receiving governmental assistance, but also fail to benefit from sophisticated forms of asset protection designed for the ultra-rich. Accordingly, looking at the extreme ends, it is observable that the legal rules are tailor-made to function one way for those living with wealth and another way for those living in poverty.

This pattern, while thoroughly modern, also has a historical pedigree. By connecting the past forms to the present iterations, we can better understand the colonialist traces that inhere in both the debt governance and the wealth management of child support. What emerges from these connections is the shape of a particular kind of inequality, operative across distinct and differentiated populations, that demonstrates how “colonial

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<sup>102</sup> See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 98 (2008) (“[T]his Article will examine how the child support enforcement system, as currently structured, creates a large pool of indigent obligors with large child support arrearages that they are unable to pay, and presents evidence that large numbers of these persons are being incarcerated for contempt despite their inability to pay.”); Katie Hyson, *The Silent Return of Debtors' Prison: Poor Parents Face Jail Time for Failing to Pay Back the State for Child Support*, WUFT (Sept. 1, 2021), <https://www.wuft.org/news/2021/09/01/the-silent-return-of-debtors-prison-poor-parents-face-jail-time-for-failing-to-pay-back-the-state-for-child-support/> [<https://perma.cc/6K2F-VJPU>] (“Jailed child support debtors are more likely to be poor, unemployed and African American or Hispanic, in what one researcher called a ‘silent return of debtor's prison.’ One study found that 5% of all fathers and 15% of all African American fathers had been jailed for child support.”).

<sup>103</sup> Tait, *supra* note 101, at 995.

constraints and imperial dispositions have tenacious presence” and how today’s inequalities “are not simply mimetic versions of earlier imperial incarnations but refashioned and sometimes opaque and oblique reworkings of them.”<sup>104</sup> From this perspective, the architecture of child support is resonant with past edifices and past practices that stripped wealth from one population while facilitating accumulation for another. Patterns repeat, and “[w]ealth is where the past shows up in the present.”<sup>105</sup>

That child support governance operates within these historical grooves is evident in the way that the divergent financial ecosystems of wealth and want are defined not only by extreme differences in wealth but also by race, ethnicity, and gender.<sup>106</sup> Myriad forms of historical oppression and marginalization are replicated as child support enforcement plays out, revealing traces of collective pasts defined by debt and dispossession. As one scholar has pointed out, “debt has uniquely affected African American communities under neoliberalism.”<sup>107</sup> More specifically, the economic as well as the sociocultural burdens of child support—like the burdens of most debts—uniquely impact payor parents living in poverty, frequently Black men.<sup>108</sup> The main predictor of a payor being subject to a support obligation that is virtually impossible to satisfy and consequently being subject to legal harassment and imprisonment is poverty. Black fathers in particular—because of numerous factors including labor-market discrimination and overcriminalization—are overrepresented in poverty statistics, and one study found that “sixty percent of poor fathers who do not pay child support are

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<sup>104</sup> ANN LAURA STOLER, *DURESS: IMPERIAL DURABILITIES IN OUR TIMES* 4–5 (2016).

<sup>105</sup> Noah Kirsch, *Members of the Forbes 400 Hold More Wealth than All U.S. Black Families Combined. Study Finds*, FORBES (Jan. 14, 2019, 7:00 PM), <https://www.forbes.com/sites/noahkirsch/2019/01/14/members-of-forbes-400-hold-more-wealth-than-all-us-black-families-combined-study-finds> [<https://perma.cc/2XUQ-5T8U>].

<sup>106</sup> CHUCK COLLINS, DEDRICK ASANTE-MUHAMMED, JOSH HOXIE & SABRINA TERRY, *DREAMS DEFERRED: HOW ENRICHING THE 1% WIDENS THE RACIAL WEALTH DIVIDE* 9–15 (2019), [https://ips-dc.org/wp-content/uploads/2019/01/IPS\\_RWD-Report\\_FINAL-1.15.19.pdf](https://ips-dc.org/wp-content/uploads/2019/01/IPS_RWD-Report_FINAL-1.15.19.pdf) [<https://perma.cc/43J3-6U3Y>].

<sup>107</sup> Wamsley, *supra* note 3, at 256.

<sup>108</sup> Pratt, *supra* note 4. In most states, child support orders are based on the parent’s income, with noncustodial parents paying support to the custodial parent. See *Child Support Percentage by State 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/child-support-percentage-by-state> [<https://perma.cc/5QUK-B4FZ>]. In the conventional context of different-sex parenting, because mothers tend more frequently to be the custodial parents, fathers tend to be the support payors. There is little to no data about child support awards, payment, or failure to pay in the context of same-sex or nonbinary parents. Undoubtedly more will appear over time as more same-sex and nonbinary couples become parents and either divorce or choose not to live together.

racial and ethnic minorities.”<sup>109</sup> In a 2010 study from South Carolina, 75% of the parent-debtors “were presently or previously unemployed” or having difficulties finding work, and almost 70% of the parent-debtors were Black even though, in the year the study was completed, less than 28% of South Carolina’s population was Black.<sup>110</sup>

This entwinement of racial politics and child support makes visible the outlines of past and present oppression that subtend current state formations that disadvantage Black fathers, both financially and physically. It is not, then, a stretch of imagination to suggest that “the politics of child support are intimately linked [and] . . . thoroughly shaped by racial antagonism.”<sup>111</sup> Child support is just one piece—albeit particularly notable and cognizable—in the shifting mosaic of obligation and financial extraction that serves as a backdrop to Black labor, spending, borrowing, and consumption.<sup>112</sup> Together, it is a mosaic of “Black debt,” which “represents the negative balance sheet that must be worked through just to get to the starting line” of a race that is up “an eroding hill of sand.”<sup>113</sup> These are the racialized economics of low-income child support.

The treatment of debt in the realm of high-wealth child support, on the other hand, provides evidence of different outcomes and increased opportunity for wealth accumulation for a population that is primarily white. This is particularly true for debt held by those individuals and families already in the high-wealth bracket who use asset protection mechanisms to evade debt.<sup>114</sup> Debt is different for these high-wealth payors in that white debt “sustains” and “magnifies” white wealth.<sup>115</sup> Just as poverty is a predictor of

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<sup>109</sup> Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 646–47, 671–72 (2012). “Their barriers to employment were also considerable: forty-three percent were high-school dropouts, thirty-nine percent had health problems, and thirty-two percent had not worked in three years.” *Id.* at 647.

<sup>110</sup> Mathias, *supra* note 41.

<sup>111</sup> Zatz, *supra* note 29, at 933.

<sup>112</sup> Brito et al., *supra* note 4, at 5.

As in other contexts where debts are unduly burdensome and seem exploitative—such as payday loan and rent-to-own contracts, subprime mortgages, for-profit college student loans, and debts generated through municipal fee and fine schemes—excessive child support debts imposed on poor parents should be challenged and interrogated in both the legal system and in the broader sociopolitical arena.

Brito, *supra* note 2, at 955.

<sup>113</sup> Louise Seamster, *Black Debt, White Debt*, 18 CONTEXTS 30, 32 (2019), <https://journals.sagepub.com/doi/full/10.1177/1536504219830674> [<https://perma.cc/EW7N-8EYV>].

<sup>114</sup> White, middle-class debt is often presented as positive debt because it finances homeownership, education, and other opportunities. As Professor Dorothy Brown has argued in her book, *The Whiteness of Wealth*, the same positive results may not be present for Black middle-class families. DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* 22–23 (2021).

<sup>115</sup> Seamster, *supra* note 113, at 32.

being subject to unrealistic and unmanageable child support debt, extreme wealth is a predictor of being a user and consumer of asset protection trusts for wealth management and debt avoidance.

Extreme wealth is predictably very white. A glance at the *Forbes* billionaire list reveals that out of the 724 billionaires in the United States in 2021, only seven were Black.<sup>116</sup> As one publication pointed out: “That’s just enough to seat at one dining room table.”<sup>117</sup> Moreover, the article states, “[t]his low number comes as no surprise, but it’s an alarming figure that highlights the widening racial wealth gap in this country” and starkly demonstrates how access to wealth-making opportunities is structured along racial lines.<sup>118</sup> Moving down the wealth ladder to the merely ultra-rich, the racial wealth gap persists. About two-fifths of all American household wealth is held by the top one percent of households, and less than 1% of that one percent identifies as Black.<sup>119</sup> In the top 10% of wealth holders, only 3.6% of this population identifies as Black, and while the median net worth for white families in this income group is \$1,789,300, for Black families it is \$343,160.<sup>120</sup> Telescoping further out, a 2019 study found that the 400 richest Americans held more wealth than “all Black households plus a quarter of Latino households [combined].”<sup>121</sup>

Bringing gender into the equation, white wealth is also usually male. On the 2021 *Forbes* billionaire list, out of 724 billionaires in the United States, only eighty-six (12%) were women—only one of whom was Black—and the majority of those women inherited at least a portion of their wealth, usually from a father.<sup>122</sup> This gap is also present within high-wealth marriages and, at least in different-sex marriages,<sup>123</sup> “married households

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<sup>116</sup> See *World’s Billionaires List: The Richest People in the World*, FORBES (2021), <https://www.forbes.com/billionaires/> [<https://perma.cc/4XH9-CKLX>].

<sup>117</sup> Njera Perkins, *Out of 724 Billionaires in America, Only Seven Are Black — What Does It Take to Join the Club?*, AFROTECH (Sept. 20, 2021), <https://afrotech.com/black-billionaires-america> [<https://perma.cc/QMG5-ANK4>].

<sup>118</sup> *Id.*

<sup>119</sup> John Tucker, *The State of America’s Wealthy Black People*, BLACK ENTER. (Nov. 27, 2017), <https://www.blackenterprise.com/its-lonely-at-the-top/> [<https://perma.cc/6QZS-X539>]; Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS (Dec. 9, 2020), <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/> [<https://perma.cc/P5F6-UUPK>].

<sup>120</sup> Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/VEX4-U9X4>].

<sup>121</sup> COLLINS ET AL., *supra* note 106, at 4.

<sup>122</sup> *World’s Billionaires List*, *supra* note 116.

<sup>123</sup> There is less data on patterns of wealth-holding in same-sex marriages and what inequalities exist there.

rarely qualify for one percent status based on women's income alone."<sup>124</sup> This is not only because of the gender wealth gap and the fact that women tend to own less wealth than men but also because, despite some changes in the conventional pattern, women tend to marry men with higher incomes than their own.<sup>125</sup> These studies suggest "a persistent male dominance of income resources in elite families,"<sup>126</sup> as well as a persistent and gendered imbalance of power inside the marriages and families that are most likely to structure their wealth through asset protection trusts.<sup>127</sup>

Looking at debt across the wealth spectrum, then, two points stand out. First, poverty, while varied in its constituents, is both racialized and minoritized, while extreme wealth tends to crystallize in the accounts of white men. And second, child support debt mimics patterns of ordinary debt in that the debt of minoritized and marginalized populations "has negative outcomes" while the debt of the rich, generally white debt, often "has positive outcomes."<sup>128</sup> The debt of the poor, the debt of Black fathers, the debt of minoritized child support payors, results in a cycle of financial distress, legal harassment and, not infrequently, incarceration. This kind of debt tends not only to have negative outcomes for present family flourishing but also to reproduce itself over generations in the form of lost opportunities for accumulation and advancement.

High-wealth debt translates differently, transforming obligation into opportunity. Assets that do not go to pay debt are assets available for investment and inheritance. Assets preserved are assets that transfer through generations and build capacity and success into the family legacy:

One of the primary mechanisms by which this sedimentation [of wealth] occurs is through inheritance. The historical wealth advantage . . . is transferred to the next generation as they inherit wealth of previous generations and use that

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<sup>124</sup> Jill E. Yavorsky, Lisa A. Keister, Yue Qian & Michael Nau, *Women in the One Percent: Gender Dynamics in Top Income Positions*, 84 AM. SOC. REV. 54, 72 (2019) (noting that "[i]n 2016, women's income was sufficient for one percent status in only 1 in 20 elite households. . . . [W]omen's income is not necessary for the vast majority of married households to meet the one percent threshold.").

<sup>125</sup> *Better-Educated Women Still Prefer Higher-Earning Husbands*, INST. FAM. STUD. (Nov. 7, 2016), <https://ifstudies.org/blog/better-educated-women-still-prefer-higher-earning-husbands> [<https://perma.cc/K2BL-EDJD>].

<sup>126</sup> Yavorsky et al., *supra* note 124, at 73.

<sup>127</sup> As Professor Lily Kahng also suggests, women may tend to use these kinds of asset protection trusts less than men even when they do hold wealth because "trusts are used predominantly by wealthy husbands and appear to reflect a 'deeply patriarchal outlook.'" Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 353 (2016) (quoting Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1734 (1998)).

<sup>128</sup> Seamster, *supra* note 113, at 32.

wealth to provide themselves and their children with access to education, capital for entrepreneurship, and opportunities to build more wealth.<sup>129</sup>

Mapping on to these patterns of dispossession, white families are significantly more likely to inherit than their Black counterparts, such that “[t]wenty-eight percent of whites received bequests, compared to just 7.7 percent of black families.” Even among those families receiving inheritances, Black families receive less: “blacks received 8 cents of inheritance for every dollar inherited by whites.”<sup>130</sup>

Accordingly, Black debt, white debt, racialized debt, and gendered debt are indelibly different forms of debt that lead to different outcomes and reproduce patterns of debt, debility, domination, and supremacy. The rules metamorphose on each end of the wealth spectrum, molded to fit a particular model and a specific set of desires framed by the colonialist and oppressive histories of the American political economy. The rules themselves, as well as the financial results, are monuments to a political and economic memory, materializations of power retained and exercised, embodiments of the financial circuits wired into each family home.

#### CONCLUSION

Child support rules for low-income and high-wealth payors differ radically, presenting in certain ways as phantasmagoric and distorted reflections of one another. For payors at both ends of the wealth spectrum, the rules instantiate magical thinking in the calculation of support awards, especially when it comes to recognizing income. Once support payments are in arrears, enforcement also differs as states aggressively pursue low-income payors in order to reimburse governmental funds spent on assistance programs for the family. Low-income payors who are in arrears are therefore more likely to be subject to wage garnishment, civil contempt, and incarceration. High-wealth payors, on the other hand, have the legal ability to manage their assets in such a way as to obscure both their ownership and their property rights through the use of asset protection trusts, consequently insulating assets from creditor claims, including claims for child support.

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<sup>129</sup> INSIGHT CTR. FOR CMTY. ECON. DEV., *LIFTING AS WE CLIMB: WOMEN OF COLOR, WEALTH, AND AMERICA’S FUTURE* 5 (2010), [https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c5c7801ec212d4fd499ba39/1549563907681/Lifting\\_As\\_We\\_Climb\\_InsightCCED\\_2010.pdf](https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c5c7801ec212d4fd499ba39/1549563907681/Lifting_As_We_Climb_InsightCCED_2010.pdf) [https://perma.cc/PNW2-V6SL].

<sup>130</sup> Thomas M. Shapiro, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 69 (2004); see also Karuna Jaggar, *The Race and Gender Wealth Gap*, 15 *RACE, POVERTY & ENV’T* 80 (2008) (“Whites are approximately five times more likely than people of color to inherit after the death of a parent and they inherit nearly three times the value. One quarter of white families received an inheritance averaging almost \$145,000, but only one in 20 African American families inherited, with an average inheritance of approximately \$42,000.”).

This disjunctive and dichotomous system of governance manifests an entrenched set of inequalities that synchronizes with historical patterns of economic oppression that—both historically and presently—privilege and dispossess along lines of class, race, ethnicity, and gender. In so doing, child support rules reanimate and recreate persistent forms of privilege, traces of economic empire, and a landscape of unequal opportunities as well as outcomes.

