WELFARE DEBT

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ABSTRACT

Past-due child support debt cannot be forgiven, or discharged, in bankruptcy. This policy is grounded in the assumption that all child support debt goes to a parent taking care of a child. However, billions of dollars of unpaid child support debt are not owed to the parent, but instead to the government. The government is owed this debt through a welfare cost recovery system which requires custodial parents that file for welfare benefits to pursue child support from noncustodial parents and assign those rights to the government. This debt, which I coin "welfare debt," oftentimes results in an increased interaction with the criminal justice system, including a cycle of incarceration and criminal fines and fees. The individuals that are stuck in this welfare debt-incarceration cycle follow recognizable racial and socioeconomic lines of vulnerability and marginalization. For the bankruptcy system to uphold its normative principle of forgiving burdensome debt for the most economically vulnerable individuals, welfare debt must be forgiven.

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INTRODUCTION

"Most stereotypes originate from a kernel of truth, but that kernel becomes so overwrapped with layers of myth that the stereotype often outgrows or outlives the underlying reality."[1]

The trope of the "deadbeat dad" skirting his financial responsibilities at the expense of his children has historically garnered bipartisan criticism.[2] This image has been the impetus for decades of Congressional bankruptcy reforms which have made it increasingly difficult for individuals to discharge, or receive debt forgiveness, for child support debts in bankruptcy.[3] Understandably, policymakers and scholars do not want the custodial parent or children to be in a worse financial position after allowing a debtor to receive forgiveness for past-due child support debt.[4] However, this trope does not necessarily map the realities of how this debt is accumulated. There is an oft-overlooked type of child support debt that necessitates examination and reform: child support debt that is owed not to the custodial parent or children but to the government, which I coin "welfare debt."

Over a million parents owe over $20 billion of welfare debt directly to the government rather than to children.[5] The government is owed this debt

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[1] Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT, 33 (2000).

[2] *See infra* Part I.A; *see also* H.R. Rep. No. 103–835, at 34 (1994) (The Congressional Committee as part of the Bankruptcy Reform Act of 1994 explained that "pertaining to consumer bankruptcies, including . . . ensuring that the bankruptcy process cannot be utilized to avoid alimony and child support obligations"); Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 Virginia L. Rev. 79, 86 (2016) ("By the early 1980s, divorced women activists, fiscal conservatives, and social conservatives shared overlapping interest in . . . privatizing responsibility for dependent children.").

[3] *See infra* Part II.B.; *see also* Fabian N. Marriott, *No Disclaimer for the Domestic Support Evader: Why Alimony and Child Support Obligors Should be Barred from their Right to Disclaim Inheritances*, 71 Rutgers L. Rev. 1097, 1116 (2000) ("Congress first enacted this provision with the Bankruptcy Reform Act of 1994 when it 'sense[d] that bankruptcy was dealing too liberally with 'deadbeat' parents and ex-spouses.'") citing Timothy D. Kline, *The Present Interplay between Family Law and Bankruptcy Law*, 1996 Norton Ann. Surv. of Bankr. L. 5 (1996) ("The plight of vast numbers of American children entitled to but not receiving adequate support by noncustodial parents has not failed to attract the attention of Congress. The economic disadvantage experienced by some former spouses of bankruptcy debtors has likewise created an impetus for change. Congress's response to these perceived inequities was part of the Bankruptcy Reform Act of 1994.").

[4] H.R. Rep. No. 103–835, at 34 (1994) (During the 1994 Bankruptcy Reform, Congress was concerned about "ensuring that the bankruptcy process cannot be utilized to avoid alimony and child support obligations."); *supra* note 3; *see also* Lynne F. Riley, *BAPCPA at Ten: Enhanced Domestic Creditor Protections and Enforcement Rights*, 90 Am. Bankr. L.J. 267, 268 (2016) (explaining that at the time of BAPCPA's passage, Congress was concerned about "parents who can afford to pay for their children's support to shirk these obligations" and "bankruptcy was cited as a major loophole to closing this gap.") citing Remarks of Rep. Roukema, 145 Cong. Rec. H2660-H2661 (May 5, 1999); *but see* Riley *supra* note 4, at 268 (finding "that in the decade since passage of BAPCPA, the percentage increase in government support collections on average has declined as compared to the 10-year period prior to BAPCPA).

[5] *See* Office of Child Support Services, U.S. Department of Health & Human Services, *Most Arrears Were Submitted to OCSE More than Five Years Ago* [hereinafter OCSE Report] (Sep. 2, 2021) ("In January 2021, a total of $21.1 billion of certified arrears were TANF arrears, representing

through a "welfare cost recovery" system which requires custodial parents that file for welfare benefits to pursue child support from noncustodial parents and assign those rights to the government.[6] Because of the decline in welfare benefits for poor families in recent years, 92% of welfare debt arrears were due more than five years ago and almost half were due more than twenty years ago.[7] The welfare recovery program also assigns the child's right to child support to the government when that child is placed in foster care, in order to reimburse the government for providing foster care services.[8] This system makes the

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19% of total certified arrears owed at that time") https://www.acf.hhs.gov/css/ocsedatablog/2021/09/most-arrears-were-submitted-ocse-more-five-years-ago#:~:text=About%2088%25%20of%20that%20amount,collected%20the%20older%20they%20get.&text=Child%20support%20arrears%20reflect%20unpaid%20child%20support; *see also* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 Wake Forest L. Rev. 1029 (2007) (citing a 2006 study where almost half of all child support arrears were owed to the government).

The author is unaware of any data on the exact number of individuals that currently carry welfare debt or the average amount to debt owed. A 2021 report for the U.S. Department of Justice explains that the difficulty of collecting data on how much this population of parents owe in child support is due, in part, to "the enormous variation among states in how support debt accumulates overall and for incarcerated parents." However, the 2021 U.S. Department of Justice report did estimate that the number of previously incarcerated parents with child support debt and criminal justice backgrounds is over one million, and, at the individual level, the average debt for incarcerated parents was between $20,000 and $36,500 with some incarcerated fathers owing as much as $500,000 in child support. *See* Lynne Haney, PhD., and Marie-Dumesle Mercier, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *Child Support and Reentry*, https://www.ojp.gov/pdffiles1/nij/300780.pdf (Sept. 2021).

[6] Hatcher, *supra* note 5, at 1030 ("Our current welfare program . . . requires custodial parents applying for benefits to . . . assign the resulting child support payments to the government. . . . This system of welfare cost recovery is a side of child support that is largely unknown to the public."); Allison Anna Tait, *Debt Governance, Wealth Management, and the Uneven Burdens of Child Support*, 117 Nw. U. L. Rev. 305, 311 (2022). ("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"); Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. Irvine L. Rev.953, 960 (2019) ("Any child support owed while the family receives TANF cash assistance is owed to the government.") citing DENNIS PUTZE, OFFICE OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH AND HUMAN SERVS., WHO OWES THE CHILD SUPPORT DEBT? (Sept. 15, 2017), https://www.acf.hhs.gov/css/ocsedatablog/2017/09/who-owes-the-child-support-debt [https://perma.cc/8DF5-Y55T].

[7] *See, e.g.,* Office of Child Support Services, U.S. Department of Health & Human Services, *TANF Arrears Continue to Decline*, https://www.acf.hhs.gov/css/ocsedatablog/2019/10/tanf-arrears-continue-decline (Sept. 2019) ("Between FY 2008 and FY 2018, TANF arrears declined by 32%, while total arrears increased by 14%"); Aditi Shrivastava and Gina Azito Thompson, Center on Budget and Policy Priorities, TANF Cash Assistance Should Reach Millions More Families to Lessen Hardship, https://www.cbpp.org/research/family-income-support/cash-assistance-should-reach-millions-more-families#:~:text=In%2014%20states%2C%20for%20every,states%20with%20the%20lowest%20TPRs (Feb. 18, 2022) (explaining that TANF's reach declined significantly since 1996); *see also* OCSE Report, *supra* note 5 ("Only $1.6 billion of TANF certified arrears, or 8%, are owed on cases submitted to OCSE in the last five years.").

[8] Hatcher, *supra* note 5, at 1030 ("[W]hen a child enters foster care, the child's rights to child support are assigned to reimburse the government's cost of providing foster care services."); *see*

noncustodial parent the debtor and the government the creditor.[9] The government then calculates what the noncustodial parent's monthly payment to the government should be based on an income calculation.[10] If, however, the noncustodial parent is unemployed or underemployed, the government uses a rubric based on what policymakers think that the parent could make in the workforce to determine their monthly payments to the government.[11] This number is often inflated, higher than anything the parent can realistically afford to pay, and characteristically uncollectible.[12] For example, for parents that make less than $10,000, the median child support order represents 83 percent of their income.[13] Consequently, men with incomes less than $10,000 account for 70% of child support arrears.[14]

Welfare debt arrears can negatively affect an individual's credit and job prospects, can cause the loss of driver's and professional licenses, can result in additional government fines and fees, and oftentimes can lead to incarceration with its own attendant consequences.[15] Coined the "debt-criminal justice

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also Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 Cardozo L. Rev. 1797, 1807 (2006) ("In addition to the revenue maximization strategy of recovering foster care costs by taking children's Social Security benefits, states also seek reimbursement from the biological parents by establishing child support obligations with payments assigned to the state rather than being owed to the children.").

[9] Hatcher, *supra* note 5, at 1030 ("Mothers, fathers, and children all become government debtors—the mothers and children owe their child support rights and the fathers owe the payments until the welfare benefits are repaid in full.").

[10] Tait, *supra* note 7, at 309 (explaining that when a noncustodial parent is unemployed or underemployed the child support order is calculated "based on the court's determination of what a similarly situation man could make." These types of income imputations often lead to orders requiring fathers to pay impossible amounts given their work experience and opportunities.").

[11] Tait, *supra* note 7, at 309 (explaining that when a noncustodial parent is unemployed or underemployed the child support order is calculated "based on the court's determination of what a similarly situation man could make."

[12] Tait, *supra* note 7, at 309 ("These types of income imputations often lead to orders requiring fathers to pay impossible amounts given their work experience and opportunities."); *id.* at 313 ("The calculus of child support demonstrates an unrealistic and aggressive governmental approach."); Brito, *supra* note 7, at 955 ("[C]hild support debt . . . for many families, particularly families living in deep poverty, this debt is artificially inflated, largely uncollectible, and potentially destructive."); OCSE Report, *supra* note 5 ("Research shows that [child support] arrears are less likely to be collected the older they get."); *see also* Christopher D. Hampson, *Harsh Creditor Remedies & The Role of the Redeemer*, 92 FORDHAM L. REV. _ (forthcoming 2023) (exploring third parties' role as redeemers who "offer funds (or lend money) to repay the debt" in response to "harsh creditor remedies," like imprisonment).

[13] Jennifer Ludden, F*rom Deadbeat to Dead Broke: The 'Why' Behind Unpaid Child Support*, NPR (Nov. 19, 2015).

[14] Dinner*, supra*, note 2, at 148.

[15] *See infra* Part III.A. It was widely reported that Walter Scott L. Scott, who was shot in the back while fleeing from the police on April 4, 2015 in North Charleston, South Carolina and his killing set off nationwide protests after a video was released of the shooting, fled from the police because he owed child support and feared reincarceration for the debt. See Michael S. Schmidt and Matt Apuzzo, THE NEW YORK TIMES, South Carolina Officer Is Charged With Murder of Walter Scott, https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html, (April 7, 2015) ("Mr. Scott had been arrested about 10 times, mostly for failing to pay child support or show up for court hearings . . . Mr. Scott's

complex," this system traps poor, Black men into in a cycle of debt, government harassment, and incarceration.[16] Despite these negative outcomes, welfare debt cannot be forgiven in bankruptcy.[17]

In comparing the bankruptcy system's treatment of welfare debt with income tax debt—another government-owed debt that tends to be borne by wealthier, white demographic and that is partially dischargeable—this Article questions whether there is a legitimate policy rationale for the different treatment of these debts.[18] Income tax debt is subject to a three-year nondischargeability period prior to the bankruptcy filing, however income debts older than three years can be forgiven in bankruptcy.[19] For a myriad of reasons, including how low income workers are paid, low income workers do not typically carry unpaid income tax debt into bankruptcy.[20] Further compounding the varying treatment of these debts is the attendant collateral consequences that stem from the nondischargeability of each. Incarceration is oftentimes used for debtors carrying unpaid welfare debt.[21] Although incarceration can be a consequence for unpaid income tax debt, this consequence is rare.[22] Despite not facing the dire incarceration consequences that debtors carrying welfare debt encounter, debtors carrying income tax debt can generally get relief through the bankruptcy system.

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brother, Anthony, said he believed Mr. Scott fled from the police on Saturday because he owed child support. . . . [A] lawyer for Mr. Scott's family [explained] 'He had a job; he was engaged. He had back child support and didn't want to go to fail for back child support."); Frances Robles and Shaila Dewan, THE NY TIMES, *Skip Child Support. Go to Jail. Lose Job. Repeat. - The New York Times*, https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html (April 19, 2015) (detailing Mr. Scott's brother's belief that "[t]he warrant, the threat of another stay behind bars and the potential loss of yet another job caused him to run").

[16] Tait, *supra* note 7, at 307; *id.* at 331 ("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."); *see also infra* Part III.A.

[17] 11 U.S.C. § 523(a)(7) (excepting from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit").

[18] *Id.*

[19] 11 U.S.C. § 523(a)(1)(B)(ii) (A discharge . . . does not discharge an individual debtor from any debt with respect to which a return, or equivalent report or notice . . . was filed or given after the date on which such return, report, or notice was last due . . . and after two years before the date of the filing of the petition"). There is a potential fourth year capture for income taxes depending on when a debtor files bankruptcy. However, this Article will refer to the standard three year look back period for income tax discharge. Property taxes are dischargeable with the exception of a one year period prior to a debtor's bankruptcy filing. *See* 11 U.S.C. § 523(a)(1). Any reference to taxes in this Article will be a reference to income tax debt and not property tax.

[20] Shu-Yi Oei, *Taxing Bankrupts*, 55 Boston College L. Rev. 375, 420 (2014) ("Payroll taxes are withheld from employee income and paid over to the IRS by employers, and state sales taxes are likewise collected and paid over by the seller. These taxes, which are likely to be regressive, are therefore relatively difficult for employees and purchasers, respectively, to avoid, and are likely to have been withheld by the employer or seller regardless of whether the withholding agent actually hands over the collected amount to the IRS.").

[21] *See infra* Part III.A.

[22] *See infra* Part III.B. In the rare circumstance that incarceration is used for tax debtors, it is only for debtors that can afford to pay but choose not to. For debtors that cannot afford to pay tax debt, incarceration is a nonexistent consequence.

More broadly, through its examination of the bankruptcy system's fresh start principles, this Article engages with larger questions of the costs of nondischargeability provisions on the most economically vulnerable individuals.[23] This is an often-overlooked policy consideration by bankruptcy scholars as we think about ways to reform the consumer bankruptcy system to ensure that the most financially vulnerable individuals can receive the benefit of debt forgiveness. Abbye Atkinson has highlighted many of the collateral consequences of the nondischargeability of penal debt, a likely consequence of unpaid welfare debt, including job loss, loss of licenses, the inability to meet other financial obligations while imprisoned, and loss of privileges and rights.[24] Ann Cammett has also chronicled how penal debt is an "insurmountable obstacle to the resumption of voting rights and broader participation in society," since a rising number of states require repayment of penal debt for re-enfranchisement of felons.[25]

Tonya Brito has prolifically criticized the welfare cost recovery system and the impact of this system on regulating the poor.[26] June Carbone and Naomi Cahn have written extensively about the intersection of the criminal justice and child support systems, and for decades have criticized the government's welfare assistance policies which divert welfare aid from children to other government interests.[27] Daniel Hatcher has criticized the government policy of seeking reimbursement of welfare costs through child support enforcement.[28] While bankruptcy scholars have identified places where debt traps people into cycles

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[23] *See infra* Part III.

[24] Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 962-63 (2017).

[25] Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 Penn St. L. Rev. 349, 385-86 (2012); *see also* Ann Cammett, *The Shadow Law of Child Support* , 103 BOSTON U. L. REV. 2237, 2255 ("the laws and policies that have emerged from welfare reform and mass incarceration aimed at the poor have actually created a body of shadow jurisprudence that has particular economic effect on these parents—one that has outsized consequences, including potential reincarceration.").

[26] *See*, *e.g.*, Tonya L. Brito and Kathleen Wood, *Litigating Precarity: Low-Wage Workers and Child Support Enforcement*, 101 N.C. L. Rev. 1495 (2023); Brito, *supra* note 7; Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 Iowa J. Gender Race & Just. 417 (2012); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. Kan. L. Rev. 229 (2000).

[27] Naomi Cahn & June Carbone, *Supporting Families in a Post-Dobbs World: Politics and the Winner-Take-All Economy*, 101 N.C. L. REV. 1549, 1565- 66 (2023) ("This devolution of power, not just over basic needs but over the administration of federal funds specifically designed to benefit the needy, undercuts any kind of national support for children. . . . Instead, [ ] it increases the ability of state officials to divert resources away from the poor and politically powerless to state officials' preferred activities."); *see also* June Carbon, *Out of the Channel and Into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 Hofstra L. Rev. 859, 869 (2011) ("courts expressing disapproval of the underclass and imposing punitive measures on welfare recipients and prison inmates who fail to conform to middle class standards"); Naomi Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 Mich. L. Rev. 965, 965 (1997) (criticizing the use of child support enforcement to reimburse the government for welfare costs); June Carbone, Symposium, *Age Matters: Class, Family Formation, and Inequality*, 48 Santa Clara L. Rev. 901, 937 (2008) (chronicling the history of welfare and the government's use of the welfare system to promote paternal support).

[28] Hatcher, *supra* note 5, at 1029.

from which recovery is virtually impossible and social policy and family law scholars have analyzed welfare cost-recovery policies, these two conversations have not been connected.[29]

This Article proceeds in four parts. Part I traces the history of child-support debt, the current state of welfare debt in this country and explores how the trope of the "deadbeat father" was rooted in the government's concern about the rising cost of welfare. Part II provides a brief overview of the consumer bankruptcy system and the treatment of welfare debt by the bankruptcy system. It also examines the consumer bankruptcy system's fresh start and nondischargeability theories and engages with the larger debate about the government's ability to absorb nonpayment of debt, primarily in the tax realm, and concludes that the government's supposed inability to absorb nonpayment of debt disproportionately applies to economically vulnerable debtors. Part III criticizes the nondischargeability of welfare debt and attendant penal debt in the consumer bankruptcy system and argues that nondischargeability exacerbates cycles of debt and leads to devastating collateral consequences including incarceration. Part IV proposes targeted reforms to the nondischargeability provisions to lessen the harm of the current system on those who are economically vulnerable. This Part argues that, at the very least, Congress should reform the Bankruptcy Code to treat welfare debt similar to dischargeable tax debt. And it engages the broader question of whether there should be any nondischargeable debts. Part IV concludes by considering potential opposition to these reforms, including potential moral hazard concerns about discharging additional debts in the consumer bankruptcy system and systematic barriers to debt forgiveness for economically marginalized debtors.

I. WHAT IS WELFARE DEBT?

Child support has historically been used to reimburse third parties for the care of children. This continued to be a motivating factor as federal child support law was developed with the goal of lessening the financial pressure of welfare on the government. Currently, this has resulted in over $20 billion of welfare debt arrears, half of which was owed to the government over 20 years ago. The historical treatment of child support debt as a way to reimburse the government, and the rhetoric surrounding its "deadbeat" dads and welfare, helped shape the bankruptcy system's treatment of this debt.

A. Brief Overview of the History of Child Support

Child support law in America was first established through common law.[30] The earliest line of cases in the 1800s allowed enforcement of child

[29] Consumers can be indebted to the government debt for a myriad of reasons including loans from the government, like student loans and U.S. Small Business Administration loans. For a further discussion of these debts, and the government's role as a creditor, *see* Nicole Langston, *The Government Creditor* (on file with author).

[30] Hatcher, *supra* note 5, at 1035.

support to reimburse third parties for "necessaries" provided to children.[31] This right, however, only applied to third parties that provided for abandoned children to pursue reimbursement from the noncustodial parent.[32] The mothers and children themselves did not have the right to pursue the noncustodial parent for child support directly.[33] There was another line of cases during the 1800s that allowed custodial parents and children to pursue child support against the noncustodial parent.[34] Many states also established divorce codes that required noncustodial parents to pay child support as part of divorce proceedings, and by the 1930s, all states had these requirements.[35] Common law was, therefore, a benefit to third parties, whereas state statues were for the benefit of children.

Child support matters were initially under the state purview. It was not until the 1950s that the federal government began to assert control over child support matters. One of the primary goals of the federal government during the 1950s was to reduce the cost of welfare on the government.[36] For example, the 1935 Social Security Act included Aid to Families with Dependent Children ("AFDC"), which authorized states to provide cash welfare payments for children that have an absent parent.[37] However, as part of the federal government's increasing role in child support matters, in 1950 the government amended the Social Security Act to require states to notify law enforcement agencies when a family received AFDC for a child that had an absent parent.[38]

However, it was not until the civil rights and welfare rights movements of the 1960s that Black mothers could obtain welfare benefits.[39] As a result, there was a fivefold increase in welfare cases.[40] Predictably, the increased use of welfare by Black mothers led to a conservative backlash.[41] In 1974 Congress enacted Title IV-D of the Social Security Act which created a partnership between the federal and state governments to collect child support.[42] This legislation established the framework for the "welfare cost recovery program" and included a requirement that welfare recipients pursue child support from noncustodial parents and assign those rights to the government.[43] The welfare

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[31] Hatcher, *supra* note 5, at 1036 (citing a string of cases where the court found the right of third parties to reimburse them for necessaries to an abandoned child).
[32] Hatcher, *supra* note 5, at 1036.
[33] Hatcher, *supra* note 5, at 1036.
[34] Hatcher, *supra* note 5, at 1036.
[35] Hatcher, *supra* note 5, at 1036.
[36] Hatcher, *supra* note 5, at 1041.
[37] HHS Office of the Assistant Secretary for Planning and Evaluation, *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) – Overview* [hereinafter TANF Overview], https://aspe.hhs.gov/aid-families-dependent-children-afdc-temporary-assistance-needy-families-tanf-overview.
[38] Hatcher, *supra* note 5, at 1041. AFDC was established by the Social Security Act of 1935 but was amended in 1950.
[39] Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C.J.L. & SOC. JUST. 233, 255 (2014).
[40] *Id.*
[41] *Id.* This backlash included the now infamous Moynihan Report, *The Negro Family: The Case for National Action*. Cammett, *supra* note 44, at 255.
[42] Hatcher, *supra* note 5, at 1041.
[43] Hatcher, *supra* note 5, at 1041. It also required welfare recipients to cooperate and establish child support against the noncustodial parent.

cost recovery program made the government the creditor of the noncustodial debtor parent, since the custodial parent assigned his or her right as a creditor to the government.

The Congressional rhetoric surrounding the passage of the 1974 Social Security Act was that it was for the benefit of children that did not live with both parents, to ensure that children "receive support from their fathers."[44] Functionally, however, Congress enacted the welfare cost recovery legislation to reimburse the government for the cost of welfare assistance.[45] Congressional reports indicate that this was one of the motivating factors for the passage of this Act.[46] The Senate Finance Committee report on the legislation characterized the provision requiring welfare recipients to assign the right to child support to the government as "a debt owed by the absent father to the State."[47] Notably, the Senate report on the 1974 Social Security legislation also referenced the bankruptcy system and argued that the provisions were in place "to assure that the rights of the wife and child are not discharged in bankruptcy merely because the support obligation is a debt to the State."[48] Congress did not consider this debt an obligation owed to the custodial parent as a creditor, but to the government as a creditor. The rights of the wife and child could not realistically be discharged in bankruptcy since they had to assign those rights to child support as a debt to the government.

During this same time, the image of the "deadbeat" dad, as the counterpart to the "welfare queen" trope, became a racialized metaphors for social and fiscal conservatives to shrink the social safety net for Black families. Ann Cammet explains that "[t]he political backlash over expanded access to assistance for Black mothers evolved in tandem with the identification of Deadbeat Dads as the engines of child poverty, even when fathers are poor themselves."[49] As a result, in the 1980s there continued to be increasing pressure from a convergence of bipartisan political and social interests to make the child support system stricter.[50] While social conservatives were worried that rising welfare costs would lead to the demise of marriage,[51] fiscal conservates were concerned about the cost of AFDC on the government.[52] In line with these views, then President Ronald Reagan changed the basic structure of AFDC by dramatically reducing or eliminating welfare benefits for the "working poor."[53] President Reagan revived the old concept of the "deserving poor" or "truly needy" as those who are old or ill and cannot work, and opposed what he saw

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[44] Hatcher, *supra* note 5, at 1042; Dinner, *supra* note 2, 112 ("Congressional amendments to the Social Security Act in 1975 created the Federal Child Enforcement Program, which supervised the collection of monies from fathers to reimburse states for welfare expenditures.").
[45] *Id.*
[46] Hatcher, *supra* note 5, at 1042
[47] *Id.*
[48] Hatcher, *supra* note 5, at 1042.
[49] Cammett, *supra* note 44, 237-38.
[50] Dinner, *supra* note 2, at 135-36
[51] *Id.*
[52] *Id.*
[53] Robert Pear, *REAGAN'S SOCIAL IMPACT; News Analysis*, THE NEW YORK TIMES https://www.nytimes.com/1982/08/25/us/reagan-s-social-impact-news-analysis.html (Aug. 25, 1982).

as ADFC recipient families that received cash assistance but could work on the theory that "the Government should not provide an income supplement to people who work."[54]

As a result, Congress enacted the 1984 Child Support Enforcement Amendments to create a federal funding scheme to incentivize states to enforce child support.[55] This funding scheme utilized several mechanisms to collect child support.[56] For example, the 1984 Amendments authorized the government to garnish a noncustodial parents' wages.[57] These Amendments likewise permitted state agencies to intercept income tax refunds from noncustodial parents to reimburse the federal government for welfare benefits, instead of distributing this money directly to children.[58] The 1984 Amendments also required custodial mothers, as a condition of receiving welfare benefits, to not only assign their right to child support to the government, but to help states identify the paternity of the noncustodial parent.[59] This was likely part of the government's effort to ensure noncustodial parents reimburse the government for the cost of welfare.[60]

Another major change to the welfare cost recovery system came in 1996 when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").[61] The primary purpose of PRWORA was to reform the welfare system so that an individual is required to work to receive welfare benefits.[62] June Carbon explained that PRWORA "centered on the parameters of permissible motherhood."[63] The preamble of PRWORA states that one of the primary policy reasons for the Act is the "very important Government interests" of the "prevention of out-of-wedlock pregnancy and

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[54] *Id.* Another result of this shift is that many of these former welfare recipients also lost Medicaid benefits since, at this time, individuals could not receive medical assistance if they were not on welfare benefits. *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 138.

[58] Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20 Geo. J. on Poverty L. & Pol'y 1, 51 (2012) ("Tax intercepts were codified into federal law as an enforcement measure under the 1984 Child Support Enforcement Amendments. State agencies were permitted to use this money to reimburse the federal government for current TANF payments for ANF arrearage."). The 2005 Deficit Reduction Action authorized states to instead send these tax refunds directly to children and custodial parents and not to the government. However, as of 2012, very few states opted to send this money directly to families. *See* Brustin, *supra* note 63, at 41.

[59] Dinner, *supra* note 2, at 138.

[60] Katharine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 329 (stating that the federal government required states to adopt child support guidelines in order to "secur[e] more private funds for low-income children so that those children would be less of a financial burden on the government").

[61] *See also* Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 Cal. L. Rev. 1647, 1677 (2005) ("The thrust of PRWORA and related state legislation is to alleviate governmental responsibility where it can be privatized through the family.").

[62] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101–116, 110 Stat. 2105, 2110–85 (1996).

[63] Carbone, *supra* note 32, at 937.

reduction in out-of-wedlock births." Carbone notes that PRWORA also sought to promote paternal support. As part of that aim, PRWORA replaced AFDC with Temporary Assistance for Needy Families ("TANF") which prioritized ensuring that the government was reimbursed for welfare benefits by the noncustodial parent.[64] For example, both AFDC and TANF require the welfare recipients to cooperate with the government by establishing paternity and enforcing the assignment of child support obligations, but TANF is more punitive if the welfare recipient does not comply.[65] Under AFDC the failure to cooperate resulted in a reduction in benefits.[66] Under TANF, welfare recipients that do not cooperate with the government can lose all of their benefits.[67] Furthermore, states that receive TANF grants are required to deny welfare assistance to families who do not sign over their right to child support to the government.[68]

Compounding this problem, the Deadbeat Parents Punishment Act of 1998 established felony punishment for unpaid child support debt.[69] Under this Act, a first offense for unpaid child support can carry up to six months imprisonment, and the second offense and any subsequent offenses carry up to two years of imprisonment.[70] This was in part based on the growing concern about the burden on taxpayers for welfare benefits.[71] As Naomi Cahn explains, "[m]ore vigorous child support enforcement has become an increasingly important component of federal welfare reform bills over the past two decades because of the twin hopes of fiscal and parental responsibility: first, that child support will reimburse welfare costs, and second, that the fathers will take more responsibility for their children."[72]

Historically, the government has been primarily concerned with holding parents financially responsible and with reimbursing third parties, taxpayers, and the government for welfare benefits.[73] The government's concern that children receive the financial support they need has, at times, come second. Custodial

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[64] TANF Overview, *supra* note 42 (TANF also " include[d] a lifetime limit of five years (60 months) on the amount of time a family with an adult can receive assistance funded with federal funds, increase[d] work participation rate requirements which states must meet, and broad[ened] state flexibility on program design").

[65] Hatcher, *supra* note 5, at 1045.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] 112 STAT. 618 PUBLIC LAW 105–187—JUNE 24, 1998; 105th Congress; *see also* Tait, *supra* note 7, at 313.

[70] 112 STAT. 618 PUBLIC LAW 105–187—JUNE 24, 1998.

[71] Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695, 697 ("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."); *see also* Dinner, *supra* note 2, at 138 ("The image of the 'deadbeat dad' formed the counterpart in the Reagan era to that of the 'welfare queen."); 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) (explaining the rhetoric surrounding welfare recipients during the Reaghan era).

[72] Cahn, *supra* note 32, at 965.

[73] *Supra* notes 54-59.

parents are faced with the choice of applying for welfare benefits for their children and helping the government pursue noncustodial parents for welfare reimbursement, without regard to whether the noncustodial parent can afford to reimburse the government, or risk losing the welfare benefits that their children need.[74] This perverse arrangement has led to the current state of welfare system where noncustodial parents owe millions of dollars of child support debt to the government.

B. Current State of Welfare Debt

Child support is currently still structured by federal law and requires states to seek reimbursement of welfare funds from noncustodial parents.[75] As of 2021, there is $113.5 billion dollars of child support arrears and $21.1 billion of those arrears are owed to the government. The United States Department of Justice estimates that 5.5 million parents owe child support debt, including over one million who owe child support debt directly to the government.[76] And 70% of these parents have incomes of $10,000 or less.[77] Of the arrears owed to the government, almost half were owed to the government on cases initially submitted over 20 years ago.[78] This is likely, in part, due to the declining role of welfare in recent years.[79]

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[74] Dinner, *supra* note 2, at 149 ("[E]nforcement mechanisms that require women to cooperate with state welfare agencies as a condition of receiving benefits generate conflict between mothers and fathers that interferes with father-child contact."); Hatcher, *supra* note 5 at 1031 ("Poor mothers are forced to name absent fathers, and then sue them—and sue them again and again").

[75] Emily J. Stolzenberg, *The New Family Freedom* , 59 B.C. L. Rev. 1983, 2008 (2018). There is a body of scholarship that believes the current welfare reimbursement system has a more nefarious purpose that is rooted in racism. *See*, *e.g.*, Tait, *supra* note 7, at 139 ("the politics of child support are intimately linked [and] . . . thoroughly shaped by racial antagonism."); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991,994 (2006) ("Why are policymakers unaware of the higher rate of paternal involvement amongst low-income, nonresident African American fathers? Because, when measuring responsible fatherhood, only formal child support payments count."); Jill Elaine Hasday, *Parenthood Divided: The Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 357 (2002) (describing how intrusively the child support system polices non-intact families).

[76] Lynne Haney, PhD., and Marie-Dumesle Mercier, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *Child Support and Reentry*, https://www.ojp.gov/pdffiles1/nij/300780.pdf (Sept. 2021).

[77] *Id.*

[78] TANF Overview, supra note 42.

[79] *See* Congressional Research Service, *Temporary Assistance for Needy Families: The Decline in Assistance Receipt Among Eligible Individuals*, https://crsreports.congress.gov/product/pdf/R/R47503 (April 10, 2023) ("The decline in the number of families and individuals receiving family cash assistance is a distinctive characteristic of the period after enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996"); Amy Goldstein, *Welfare rolls decline during the pandemic despite economic upheaval*, THE WASHINGTON POST, https://www.washingtonpost.com/health/2021/08/01/welfare-roles-during-the-pandemic/ (Aug. 1, 2021) ("The scant federal focus on the welfare system fits a pattern in which TANF has shriveled over the years. Caseloads fell dramatically during the program's early years and have kept dwindling."); Kathryn J. Edin and H. Luke Shaefer, *20 Years Since Welfare 'Reform,'* THE

An individual can owe child support payments directly to the government in a few circumstances. One way is to reimburse the government if a child is placed in the foster care system.[80] By way of example, when a child is placed in foster care, the child's right to child support is assigned to the government, which becomes the creditor, and the parents are in debt to the government to reimburse the government's costs of providing foster care benefits.[81] The government also becomes the creditor of parents when there are debts owed to wardship units and in the case of debt arising from court appointed attorneys or mental health experts in family law cases.[82]

The major system that indebts individuals with welfare debt is TANF. Under TANF, when individuals file for welfare benefits, like food stamps, the government can mandate that the noncustodial parent, regardless of the individual's employment status, refund the government for these benefits.[83] Individuals filing for TANF benefits are required to sign over to the government (state) their right to child support.[84] The court orders the noncustodial parent to reimburse the government for any public assistance benefits that it pays on behalf of the child.[85] The government then becomes the creditor of the noncustodial parent's debt. This means that if a noncustodial parent was able to make child support payments, these payments could not go directly to the child because the government has the right to these payments.[86] There is also not any mandate that once the government recovers the child support arrears that any portion of the money recovered goes to the child, further underscoring the reimbursement to the government is the driving force for the welfare-cost-recovery system over direct financial support from the noncustodial parent.[87]

ATLANTIC, https://www.theatlantic.com/business/archive/2016/08/20-years-welfare-reform/496730/ (Aug. 22, 2016) (describing how TANF "essentially kill[ed] the U.S. cash welfare system"); Kathryn J. Edin and H. Luke Shaefer, *'$2.00 a Day,'* THE NEW YORK TIMES, https://www.nytimes.com/2015/09/06/books/review/2-00-a-day-by-kathryn-j-edin-and-h-luke-shaefer.html (Sept. 2, 2015) (explaining that since the passage of TANF there are over a million households "living in $2-a-day poverty" and not receiving any welfare assistance).

[80] *See* 42 U.S.C. § 671(a)(17) (2000) (Federal law requires that "where appropriate, all steps will be taken . . . to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments."); Hatcher, *supra* note 5, at 1032 ("[S]tate governments also engage in the questionable practice of seeking foster children's Social Security benefits in order to reimburse the cost of foster care."); *see also* Hatcher, *supra*, note 8; Daniel L. Hatcher, *Stop Foster Care Agencies from Taking Children's Resources*, 71 Florida Law Rev. Forum 104 (2019).

[81] Hatcher, *supra* note 5, at 1030. The government has also been criticized for seeking foster care reimbursement from foster children's social security benefits; *see also* Hatcher, *supra* note 8.

[82] *See supra* notes 126-128.

[83] Tait, *supra* note 7, at 311 ("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."); Stolzenberg, *supra* note 80, at 2008 (The federal standards require states to 'establish a comprehensive system to establish paternity, locate absent parents, . . . help families obtain support orders," and "collect overdue support payments.").

[84] Tait, *supra* note 7, at 311.

[85] Tait, *supra* note 7, at 311.

[86] Tait, *supra* note 7, at 311.

[87] Tait, *supra* note 7, at 311 ("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

And in some states, the state government is prohibited from transferring any money to the household if the child is receiving TANF.[88] The reality, however, is that a noncustodial parent that owes the government child support likely does not have enough money to pay the welfare debt, let alone additional money to go to the child.[89] This is because of how the government calculates the debt owed.

When the government pursues a noncustodial parent for welfare reimbursement, the government calculates what the noncustodial parent's monthly payments to the government should be based on an income calculation.[90] However, this calculation is difficult when the parent is unemployed or underemployed.[91] In these cases, the government uses a rubric based on what policymakers think that the parent could make.[92] As a result, this number is often inflated and higher than anything the parent can afford to pay.[93] Brito's 2023 empirical study found that predominately Black, low-wage noncustodial fathers in the government child support system have difficulty obtaining and retaining stable jobs, and the inflated child support orders bear little relationship to their actual earnings.[94] As Brito explains, "child support debt is not owed by noncustodial parents who 'won't pay'; instead, it is owed by parents who 'can't pay.'"[95] Since the vast majority of noncustodial parents that owe the government reimbursement for their welfare recipient children are also poor, the majority of child support debt owed to the government goes unpaid.[96]

Brito further explains that "the 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."[97] Despite the fact that 70% of child support arrears are owed by men with incomes less than $10,000, and these parents can never afford to pay these debts, the government expends resources to aggressively pursue these debts.[98] As a result, Hatcher explains that "the net financial benefit to the government resulting from welfare cost recovery is minimal and may actually be negative."[99] The government is likely losing money pursuing debt that can never be paid.[100]

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support arrears, there is no guarantee that any particular percentage of the money recovered will go to the child whose support is in question.").

88 Tait, *supra* note 7, at 311 ("Mississippi state law, for example, does not permit households to keep any amount of child support payments if that child is currently receiving TANF.").

89 Dinner, *supra* note 2, at 149 ("[P]oor fathers forced to make formal child support payments will no longer be able to afford the in-kind contributions that lead to more frequent visits and greater paternal involvement.").

90 *See supra* notes 10 - 12.

91 *Id.*

92 *Id.*

93 *Id.*

94 Brito & Wood, *supra* note 31.

95 Brito, *supra* note 7, at 960.

96 *Id.*; *see also* Hatcher, *supra* note 5, at 1032.

97 Brito, *supra* note 7, at 954.

98 Tait, *supra* note 7, at 311.

99 Hatcher, *supra* note 5, at 1032.

100 *Id.*

Thus, the current welfare reimbursement scheme has created an underclass of economically marginalized noncustodial parents, most often Black men, who are caught in a cycle of debt that is seemingly impossible to escape.[101] Debt relief can typically be found in the bankruptcy system.[102] However, as the next Part explains, the consumer bankruptcy system's treatment of child support debt has historically mirrored the federal government's treatment of this debt and made it impossible for debtors carrying welfare debt to achieve any debt relief.

II. NONDISCHARGEABILITY OF WELFARE DEBT

The consumer bankruptcy system is founded on the principle of forgiving debts through a bankruptcy discharge.[103] Fundamental to the consumer bankruptcy system is the "fresh start" that a debtor achieves through the discharge of debt.[104] Discharge is, at its core, effectively debt forgiveness or

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[101] Tait, *supra* note 7, at 327 ("[M]odern forms of debtor's prison for child support arrears are flourishing, populated by low-income individuals unable to break the debt cycle"); *id.*, at 331; Clare Huntington, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 104 (2014) (describing the current child support enforcement regime as "a vicious cycle, where fathers who are behind in their child-support payments face sanctions that virtually ensure that they will fall even farther behind"); 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-silentreturn-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.").

[102] Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV 229, 240 (2001) ("The traditional view tells us that, for a family with insurmountable debts, debt forgiveness is financial rehabilitation that enables the family to become an income-producing and consumer spending economic unit."); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 414 (2005) ("The fresh start principle captures the notion that substantive relief should be afforded in the form of forgiveness of existing debt, with relinquishment by the debtor of either existing nonexempt assets or a portion of future income, in order to restore the debtor to economic productivity."); *see also* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 Ohio St. L.J. 1047, 1048 (1987) (advocating for a "functional economic theory of discharge: that discharge should be broadly available in order to restore the debtor to participation in the open credit economy, limited only as is necessary to prevent the skewing of economic decisions, whether to lend or to borrow, by the intrusion of irrelevant noneconomic factors.").

[103] *Id.*; *see also* ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 6 (Erwin Chemerinsky et al. eds., 7th ed. 2014) ("[W]hile there is no serious challenge in this country to the fundamental idea of the discharge of debt, there has been hot debate over its scope").

To note, the discharge of debt that is fundamental to the consumer bankruptcy system, and the subject of this Article, is the discharge of unsecured debt.

[104] The term "fresh start" was noted by the Supreme Court in *Local Loan v. Hunt* as the concept of providing "to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *see also Grogan v. Garner*, 498 U.S. 279, 287 (1991) ("[I]n the same breath that we have invoked this 'fresh start' policy, we have been careful to

debt relief.[105] The government determines which debts can and cannot be forgiven through bankruptcy, and when the government is the creditor, those debts may not be forgiven.[106]

Through tracing the fresh start theories, how the nondischargeability provisions infringe on the fresh start, and the history of child support debt in bankruptcy, this Part argues that the treatment of child support debt in bankruptcy has become stricter over time and overemphasizes the need to balance repayment to the government over a fresh start for some of the most financially vulnerable debtors. When comparing welfare debt with dischargeable government-owed income tax debt, there is a strong racial and economic correlation between the demographics of the debtors that carry nondischargeable welfare debt and those that carry dischargeable tax debt. Notwithstanding arguments, primarily found in the tax discharge scholarship, that the government is unable to absorb the cost of nonpayment of debts, income tax debt is dischargeable and welfare debt is not, despite the unique nature of this debt that it is characteristically uncollectable.

A. The Bankruptcy Fresh Start and Nondischargeability

In consumer bankruptcy, most debts owed by people filing for bankruptcy can be forgiven. For instance, credit card debt, past-due rent payments, medical bills, and past due cellphone and utility bills are typically dischargeable. This means that an individual that files for bankruptcy carrying these debts can turn over all of their nonexempt assets in exchange for the

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explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'"); Jacoby, *supra*, note 105, at 239 ("Providing a discharge to honest and unfortunate debtors has long been understood to be an important function of our bankruptcy system."); *see also* H.R. REP. No. 95-595, at 128 (1977) ("Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge."); Teresa A. Sullivan, *Debt and the Simulation of Social Class*, A DEBTOR'S WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT 48 (2012).

[105] Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE. L. REV. 515, 516 (1991) ("[Discharge] changes the legal relationship between a debtor and his former creditor and gives the debtor the beginnings of a fresh start by immediately freeing all or a portion of his future earnings potential ('human capital') from his past financial obligations."); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1396 (1985) ("Our bankruptcy statutes have always taken 'discharge' to mean, essentially, that an individual's human capital (as manifested in future earnings), as well as his future inheritances and gifts, are freed of liabilities he incurred in the past.").

[106] *Bruning v. United States*, 376 U.S. 358, 361 (1964) (explaining that the Bankruptcy Code section containing the exceptions to discharge "demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start"); *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) ("The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start'" (quoting *Grogan*, 498 U.S. at 287); *see also* Pardo & Lacy, *supra* note105, at 417 ("In effect, society has determined that a debtor's fresh start should not be absolute: Our interest in the repayment of certain types of debts outweighs our interest in forgiving debtors").

forgiveness of these debts.[107] This is based, in part, on one of the primary principles of the consumer bankruptcy system: a "fresh start" through debt forgiveness or discharge.[108]

The term "fresh start" was described in 1934 by the Supreme Court in *Local Loan v. Hunt* as the concept of providing "to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[109] Congress has similarly recognized the significance of the fresh start for the consumer debtor. Congressional debate surrounding the 2005 BAPCPA reform indicated that Congress placed a premium on the fresh start for individual debtors. Some congressional leaders felt the fresh start was so paramount to the consumer bankruptcy system that they went so far as to say that "[t]he fresh start will be available to every American who needs it."[110] Other Congressional leaders emphasized the fresh start but noted that the desire to give consumers a fresh start must also be balanced with "some accountability for those who can and should pay."[111] Still, Congress noted that the fresh start was the "most

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107 Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1061 (2017) ("In chapter 7, the debtor receives a relatively quick discharge in exchange for turning over all non-exempt assets, which are sold for the benefit of creditors."); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 116 (2011).

108 *See* H.R. REP. No. 95-595, at 128 (1977) ("Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge."); SULLIVAN, et al, *supra* note 1, at 13 ("[T]he 'fresh start' . . . is the traditional objective of American bankruptcy law, with ... future income free of old debts."), at 48 (highlighting the "loss of social status, sometimes in severe ways" that is historically associated with debt); WARREN, et al, *supra* note 106 ("Comparatively, the United States has always been, and remains, more committed to the fresh start idea for consumers who file bankruptcy than any other country in the world"); Flint, *supra* note 108 at 529 ("'The soul of debtor financial relief' is the 'fresh start'").

109 The phrase "fresh start" comes from *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915))); *see also Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) ("[I]n the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'"); Jacoby, *supra*, note 105, at 239 ("Providing a discharge to honest and unfortunate debtors has long been understood to be an important function of our bankruptcy system.").

110.Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. H9826 (Daily Ed. Oct. 12, 2000) ("Everyone and anyone who becomes so flooded with and burdened with and overextended by reason of obligations for a variety of reasons, whether it be divorce or drinking or gambling or overextension of credit in it many different forms, whatever the reason might be that someone became hopelessly indebted and found no reason to do anything except to file bankruptcy, that person, who I so overburdened will find at the hands of the bankruptcy system a fresh start."); *see also* Consideration of H.R. 975, 149 Cong. Rec. H1981 (Daily Ed. Mar. 19, 2003) ("[F]or centuries American bankruptcy law has had the principle that if a person ever gets over their head in debt, they can cash in all their assets, pay off the debt that they can, and get a fresh start.").

111. *Id.*

important" theme in the consumer bankruptcy reform effort.[112] The importance of the fresh start for a consumer debtor is unequivocal.[113] However, there are inconsistent justification and policies that underlie varying fresh start theories and shape the scope of the discharge for consumer debtor.[114]

Historically, the promise of a fresh start was used to incentivize debtors to cooperate with the insolvency process in order to increase the assets available for creditors.[115] A related theory is that the fresh start preserves social order and peace by providing a civil law solution to private financial disputes.[116] There are also historical philosophical justifications for a fresh start, which are based on biblical and moral notions of forgiveness.[117] One of the earliest justifications for the fresh start was based on the moral belief that the fresh start should be afforded to debtors because, as Richard E. Flint explains, "human dignity is of higher value than the economic benefits or costs associated with achieving a desired economic result."[118] Along those same lines, some scholars believe the fresh start is essential to promote the physical and mental health of debtors who are burdened by financial stress.[119]

112.Remarks of Rep. Gekas, 147 Cong. Rec. H133 (Daily Ed. Jan. 31, 2001) ("The first theme, and the most important one, is that it is tailored to make certain that anyone who is so overwhelmed by debt, so swamped by the inability to pay one's obligations that that individual after a good close look at his circumstances would be entitled to a fresh start, to be discharged in bankruptcy, to be free of the debts that so overwhelmed him.").

113 *See*, *e.g.*, WARREN, et al, *supra* note 106 at 306 ("[W]hile there is no serious challenge in this country to the fundamental idea of the discharge of debt, there has been hot debate over its scope.").

114 Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. Rich. L. Rev. 49, 96 (1986) ("the 'fresh start' has long incorporated and been shaped by a complex multiplicity of policy concerns"); Howard, *supra* note 105 at 1048 ("a number of different, sometimes mutually inconsistent, policies have developed to justify isolated aspects off the Bankruptcy Code's discharge rules").

115 Jonathon S. Byington*, The Fresh Start Cannon*, 69 Fla. L. Rev. 115, 122 (2017) ("Although it is a bit of a paradox, a historical purpose of the fresh start was to increase assets available for distribution to creditors by giving debtors a discharge to incentivize them to cooperate."); Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debt*, 59 Geo. Wash. L. Rev. 56, 90 (1990) ("The debtor cooperation theory justifies the discharge as a carrot dangling in front of debtors to induce them to cooperate with the trustee and the creditors in the bankruptcy case in the location, collection, and liquidation of the debtor's assets.").

116 Byington, *supra* note 118, at 120 ("A basic theory suggest that the fresh start preserves social order and peace."); G. GRISEZ, THE WAY OF THE LORD JESUS, VOL. I, CHRISTIAN MORAL PRINCIPLES, at 280 (1983) ("Civil law provides a public facility for regulating private affairs according to the public purpose of mutual justice and common peace.").

117 Flint, *supra* note 108 at 519-20 (arguing that "the central justification for the debtor financial relief provisions of the Bankruptcy Code is founded in the natural law of morality"); *id.* at 521, n. 27 (explaining that "the year of the Jewish Jubilee established the 'germ of an equitable principle founded on ethics, humanitarianism, and wise statesmanship' from which debtor relief evolved") citing Hirchberg, *Bankruptcy Jurisprudence*, 64 ALB. L.J. 232, 232 (1902).

118 Flint, *supra* note 108 at 525.

119 *See* Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J.L. MED & ETHICS 560, 560-61 (2002) (exploring the effect of indebtedness on debtors' health); Deborah Thorne, *Women's Work, Women's Worry? Debt Management and Financially Distressed Families*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 136, 142-46 (Katherine Porter ed., 2012).

Advocates of this theory also emphasizes that society has a duty to treat debtors with humanity.[120] This "humanitarian response to the financially downtrodden" was central to the earliest bankruptcy laws in this country.[121] Charles Tabb explained that in response to the Panics of 1792 and 1797, which saw the imprisonment of thousands of wealthy financiers and speculators who were imprisoned because they could not repay their debt, led to the earliest bankruptcy laws in this country, the Bankruptcy Act of 1800, which provided relief for those who had lost their liberty.[122]

Still more traditional views of the fresh start are based on economic principles. One theory is that the fresh start encourages people to take financial risks, or engage in new business ventures, without the fear of lifelong-financial failure or debt servitude. Another theory is the economic rehabilitation theory of the fresh start which emphasizes that an important goal underlying the fresh start is "to restore the debtor to economic productivity."[123] This theory emphasizes that an individual who achieves a discharge of debts can reenter the economic marketplace and become (or resume being) a consumer-spending economic unit.[124] Connected to that theory is the idea that a fresh start may decrease the need for debtors to rely on public social services and welfare.[125] The social-insurance theory is a combination of various concerns and considers the fresh start as an important societal debt relief, or a type of insurance, for consumers facing financial disaster.

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[120] Byington, *supra* note 118, at 121;

[121] Flint, *supra* note 108 at 521; *see also* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1999).

[122] Tabb, *supra* note 124, at 14-15; *see also* BRUCE H. MANN, REPUBLIC OF DEBTORS 102 (2002) ("The imprisonment of 'wealthy debtors'—and the deaths of some of them—confounded the normal expectations of social and economic status and altered the political dimensions of debtors' relief."); MANN, *supra* note 125, at 99 ("the collapse of large scale speculation schemes in the 1790s resulted for the first time in the imprisonment of large numbers of what one might call 'wealthy debtors'").

123.Pardo & Lacy, *supra* note 105, at 414 ("The fresh start principle captures the notion that substantive relief should be afforded in the form of forgiveness of existing debt, with relinquishment by the debtor of either existing nonexempt assets or a portion of future income, in order to restore the debtor to economic productivity."); *see also* Howard, *supra* note 105 at 1048 (advocating for a "functional economic theory of discharge: that discharge should be broadly available in order to restore the debtor to participation in the open credit economy, limited only as is necessary to prevent the skewing of economic decisions, whether to lend or to borrow, by the intrusion of irrelevant noneconomic factors").

124.*See* Byington, *supra* note 118, at 121 n. 31 (2017) (outlining the literature for the economic rehabilitation theory of discharge); *cf.* Jacoby, *supra*, note 105, at 240 ("The traditional view tells us that, for a family with insurmountable debts, debt forgiveness is financial rehabilitation that enables the family to become an income-producing and consumer spending economic unit."); Flint, *supra* note 108 at 515-16 ("The discharge of a consumer debtor frees the debtor from the shackles of existing debt and places him on the economic treadmill once again—to earn, consume, and borrow.").

[125] *See*, *e.g.*, Jackson, *supra* note 108, at 1402 ("If there were no right of discharge, an individual who lost his assets to creditors might rely instead on social welfare programs.").

There are, however, twenty-one types of debt that are categorically or presumptively nondischargeable, or unforgiveable, under bankruptcy law.[126] Nondischargeable debts encroach on the debtor's ability to achieve a fresh start free from his or her prepetition debts.[127] Because of the importance of the fresh start for consumers, the Supreme Court has repeatedly explained that Congress was intentional when it provided exceptions to discharge because Congress determined that repayment to creditors for a particular debt outweighs achieving a fresh start for the debtor.[128] Nondischargeable debts range from child support debt and penal debt to tax debt and unpaid condominium association fees.[129] Congress ostensibly carved out these debts because Congress determined that the need for a debtor to achieve a fresh start was outweighed by repayment to the creditor.[130] Typically, these debts fall into three categories: the debt was based on the debtor's bad actions or culpable conduct, the debt should be repaid for a public policy reason, or a combination of the two.[131]

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126 *See* 11 U.S.C. § 523 (listing exceptions to discharge).

127 *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed. . . .").

128.*Bruning v. United States*, 376 U.S. 358, 361 (1964) (explaining that the Bankruptcy Code section containing the exceptions to discharge "demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start"); *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) ("The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete 'fresh start.'" (quoting *Grogan*, 498 U.S. at 287)); *see also* Pardo & Lacy, *supra* note 105, at 417 ("In effect, society has determined that a debtor's fresh start should not be absolute: Our interest in the repayment of certain types of debts outweighs our interest in forgiving debtors.").

129 Byington, *supra* note 118, at 145 ("This is the statutory implementation of the fresh start policy's 'honest' but unfortunate debtor.") citing *Local Union Co. v. Hunt*, 292 U.S. 234, 244 (1934); Atkinson, *supra* note 29, at 928 ("The conventional wisdom is that categorically nondischargeable debts are treated as such because they fall into three broad categories: they stem from debtor misconduct; they implicate an issue 'thought to be particularly important,' 'where the public policy at issue outweighs the debtor's need for a fresh start'; or they represent some 'mixture of both.'").

130 *Bruning v. United States*, 376 U.S. 358, 361 (1964) (explaining that the Bankruptcy Code section containing the exceptions to discharge "demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start"); *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) ("The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start'" (quoting *Grogan*, 498 U.S. at 287); *see also* Pardo & Lacey, *supra* note 105, at 417 ("In effect, society has determined that a debtor's fresh start should not be absolute: Our interest in the repayment of certain types of debts outweighs our interest in forgiving debtors"); *but see* Nicole Langston, *Discharge Discrimination*, 111 Cal L. Rev. 103 (arguing that the treatment of these debts are inconsistent based on bankruptcy's own purported internal principles of misconduct); Atkinson, *supra* note 29 (interrogating the lack of theoretical foundation for certain nondischargeability provisions).

131 Atkinson, *supra* note 29, at 929 ("Public policy, misconduct, and federalism, either singularly on in some combination, have functioned to frame the exceptional treatment of other nondischargeable debts in consumer bankruptcy."); Tabb, *supra* note 118, at 97-98 (noting that "some exceptions [to discharge] focus on the creditor's 'worthiness'" like taxes or child support

The public policy category has been used by Congress and bankruptcy scholars to justify the nondischargeability of government-owed debt.[132] As the Supreme Court explained, there are certain public policies, like "those of financing government [that] override the value of giving the debtor a wholly fresh start."[133] As Jonathon Byington explained, debts like those "relating to taxes, domestic support obligations, government fines, educational loans, and orders of restitution," are excepted from discharge because they are debts that are deemed "important to society."[134]

It is important to note that there is no constitutional or fundament right to bankruptcy discharge.[135] Congress determines dischargeability of different debts because "bankruptcy legislation is in the area of economics and social welfare."[136] Congress also has the power of the purse and can levy taxes and tariffs to provide funding for essential government services.[137] It would seemingly follows then, that Congress would not want debtors to discharge any debt that they owe to the government, especially tax debt, because, as the next section will discuss in more detail, uncollected public funds can harm programs for the common good and shift the burden on other taxpayers. However, income taxes are dischargeable, whereas welfare debt is not.

Therefore, debtors that carry nondischargeable welfare debt into the bankruptcy system are less likely to achieve a fresh start than their income tax counterparts because they are unable to discharge all of their debts.[138] As Mechele Dickerson explains, "because virtually all . . . domestic support debts

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and alimony, while others "are directed against debtors who have committed intentional misdeeds causing financial or other injury."); Byington, *supra* note 118, at 117 ("Some of the exceptions to discharge are based on the debt's importance to society, such as taxes or domestic-support obligations. Other exceptions to discharge are based on reprehensible conduct by a debtor, such as embezzlement or fraud.");

132 Byington, *supra* note 118, at 145 ("[I]t demonstrates congressional judgment that certain problems—*e.g., those of financing the government*—override the value of giving the debtor a wholly fresh start.") (internal citation omitted) (emphasis added); *see also* Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 Harv. Women's L.J. 19, 34 (2002), ("[A]limony and child support, taxes and federally guaranteed educational loans all survive a bankruptcy filing without being discharged. These exceptions to discharge represent a national value judgement . . . . They represent our collective value as a country, *a concern that everyone contribute to the public fisc* and that everyone meet support obligations to children and ex-spouses.") (emphasis added).

133 *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

134 Byington, *supra* note 118, at 144 – 45.

135 *Garner*, 498 U.S. at 286 ("[A] debtor has no constitutional or 'fundamental' right to a discharge in bankruptcy" quoting *United States v. Kraus*, 409 U.S. 434, 445-46 (1973)); *Kraus*, 409 U.S. at 446 ("Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling government interest before they may be significantly regulated.").

136 The Bankruptcy Clause of the Constitution grants Congress the authority to establish bankruptcy law. *See* U.S. CONST. art. I, § 8, cl. 4. As long as there is a rational justification. *Kraus*, 409 U.S. at 446.

137 26 U.S.C. §§ 7403–7405.

138 Langston, *supra* note 133, at 1157 ("[I]ndividuals carrying nondischargeable debt into bankruptcy, who tend to be part of an economically lower class, are unable to achieve an economic fresh start.").

are nondischargeable, it is even more important that the post-BAPCPA Ideal Debtor have only dischargeable debts."[139] The definition of domestic support debt, evolved over time in response to the continued rhetoric about deadbeat fathers, the government continued to reform bankruptcy's debt relief provisions to ensure that the government's interest in repayment for welfare benefits was prioritized over the debtor's ability to achieve a fresh start.

C. Treatment of Welfare Debt in Bankruptcy

As early as 1903, bankruptcy law has provided that child support debt is nondischargeable.[140] Since the enactment of the modern Bankruptcy Code in 1978, domestic support debts have continued to be nondischargeable.[141] Although nondischargeable, domestic support debts were not given priority status in the 1978 Code.[142] The priority scheme in bankruptcy prescribes the order in which creditors are paid, and since domestic support debts were not given priority status, they could be subject to preference attacks by other creditors who claim the first right to payment.[143]

The 1994 Amendments were enacted on the heels of the 1980s trope of the "deadbeat dad" and the 1984 Child Support Enforcement Amendments which created systems for the government to seek reimbursement for the cost of welfare from noncustodial fathers.[144] This rhetoric about "deadbeat fathers," and the notion that the bankruptcy system was letting them avoid liability for child support and alimony obligations, guided the development of the 1994 Amendments' treatment of child support debt in bankruptcy.[145]

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[139] A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 Mo. L. Rev. 919, 954 (2006); A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 Wash. & Lee L. Rev. 1725, 1743 (2004) ("[T]he Ideal Debtor should have few (if any) nondischargeable debts, including student loans or alimony or child support obligations."); *see also* Dickerson, *Race Matters in Bankruptcy*, *supra* note 142, at 1726 (Dickerson defines the "Ideal Debtor" as follows: "[T]he 'Ideal Debtor' should be a married, employed homeowner who (1) is the beneficiary of a spendthrift trust or has a large employer-provided retirement account; (2) has high, but reasonable, living expenses; (3) provides financial support only to legal dependents; and (4) has little (or no) student loan, alimony, or child support debt.").

[140] Bankruptcy Act of 1898 § 17(a)(2), *amended by* Bankruptcy Act of 1903, Pub. L. No. 57-62, 32 Stat. 797 (1903). However, even before 1903, child support debt was nondischargeable. *See Dunbar v. Dunbar*, 190 U.S. 340, 353 (1903) (clarifying that child support obligations have always been nondischargeable).

[141] *Id.*

[142] Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[143] The 1978 Bankruptcy Code marks the beginning of modern Bankruptcy Code. The 1978 Code included excluded nine categories of debt from discharge, including domestic support debt. Debts in bankruptcy are given a priority status so that when a person or company liquidates their assets, the top priority creditor is paid first. Currently domestic support debt is the top priority and receives payment in full first, even before the trustee administering the case.

[144] *See supra* Part I.A.

[145] *See*, *e.g.*, Remarks of Rep. Patricia Schroeder, Bankruptcy Reform - Hearings before the Subcommittee on Economic and Commercial Law of the House Judiciary Committee (Aug. 17, 1994) ("Congress must take strong measures to prevent non-custodial parents from weaseling out of their child support obligations. By closing loopholes in the bankruptcy code that allow

The Congressional Committee for the 1994 Amendments was concerned that "bankruptcy was dealing too liberally with deadbeat' parents and ex-spouses,"[146] and Congress wanted to ensure that "the bankruptcy process cannot be utilized to avoid alimony and child support obligations."[147] Congress was also concerned that if parents were discharging their child support obligations in bankruptcy, then "the burden is further shifted on the Federal Government when these families face no other choice but welfare to provide the support the absent parent ought to be providing."[148] Congress went on to explain that the 1994 Amendments would "prioritiz[e] support payments and shield[] single parents against the shifting of spousal debts [which] can help break this tragic welfare cycle."[149] Therefore, the 1994 Amendments provided priority status for domestic support debts, upgrading them to seventh of nine priority debts.[150] The 1994 Amendments defined domestic support debts as

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debtors to avoid these obligations, we are sending a strong message that we will no longer tolerate deadbeat parents."); *see also* Remarks of Rep. Slaughter, 140 CONG. REC. H10752 (daily ed. Oct. 4, 1994)(Text and Consideration of H.R. 5116) ("The Bankruptcy Reform Act would obligate the non-custodial spouse, who agreed to pay the couple's marital debts, to continue responsibility for these debts. I think it is outrageous that wives and dependent children must answer to creditors for debts the husband first agreed to pay. . . . I have heard heartbreaking stories from single parents who want nothing but the best for their children, but find themselves forced to fight for their rightful level of child support. With no other recourse, these families often turn to welfare to provide the child support the absent parent ought to be responsible for.")

[146] See *supra* note 3; *see also* SULLIVAN et al., *supra* note 1, at 179 ("In 1994, in response to a crescendo of complaints about the effects of bankruptcy on divorced women and their children, Congress passed substantial reforms designed to improve the legal position of spouses and children in bankruptcy.").

[147] Marriott, *supra* note 3, at 1113; citing H.R. Rep. No. 103–835, at 34 (1994). *See also id.* at 54 (The Congressional Committee stating "[t]his subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts.").

[148] Remarks of Rep. Slaughter, 140 CONG. REC. E1389 (daily ed. June 30, 1994). See also, National Bankruptcy Review Commission - Minutes of the Meeting Held May 16 and 17, 1996 ("With regard to support arrears, Professor Whitford noted that they are permanently nondischargeable unlike educational loans which can be discharged after seven years. He likened support obligations to a life sentence. . . . Commissioner Shepard asked why should there be any distinction between the person who has to pay a spouse and a person who has to pay the government who paid the spouse. . . . Professor Whitford noted that whereas the original objective of the consumer bankruptcy discharge is to supply an incentive to the debtor to re-enter the work force and reestablish his or her financial standing, nondischargeable support arrears impacted on that objective."); *see also* Sullivan et al., *supra* note 1, at 176-77 ("if these (support) obligations were discharged, some legislators fear that more families would become charges of the state, increasing the welfare rolls and harming the innocent children.").

[149] *Id. supra* note 150, Remarks of Rep. Slaughter, 140 CONG. REC. E1389 (daily ed. June 30, 1994). Representative Slaughter goes on to say, "the President has said that ending prolonged dependence on welfare is a priority." *Id.*

[150] Bankruptcy Reform Act of 1994, Pub. L. No., 103 -394, 108 Stat. 4106 (1994).

"alimony, maintenance or support."[151] This provision did not make any reference to welfare debt.[152]

Despite the Congressional rhetoric and the 1984 Child Support Enforcement Amendments, courts were split on whether domestic support debts owed to the government were dischargeable. Some courts found that under the 1994 Amendments, domestic support debts owed to the government were fully dischargeable and did not get any special treatment under the Code.[153] These courts found that debt to reimburse the government when a child is placed in foster care,[154] debts owed to wardship units,[155] and debt arising from court appointed attorneys or mental health experts in family law cases[156] were all debts that were dischargeable because they were owed to the government and not the support claimant themselves. Whereas other courts found that these debts were domestic support obligations and nondischargeable, even though they were owed to government units.[157]

Congress was also concerned about potential loopholes that allowed fathers to use the bankruptcy system to renegotiate divorce settlements. For example, in general, property settlement debts are dischargeable. However, as part of the 1994 Amendments Congress added an exception that made property settlement debts that are connected to divorce-related debts nondischargeable.[158] Congress reasoned that the payment of needed support must take precedence over property settlement debts, and that the debtor's fresh start via forgiveness of these property settlement debts is outweighed when it comes at a substantial detriment to the debtor's obligees.[159]

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151 *Id.* § 304.

152 *Id.*

153 *See infra*, notes 150-153.

154 *Cnty. of Oakland v. Fralick*, 215 B.R. 132, 134 (W.D. Mich. 1997) ("It is evident from the language of this statute that it intends to except child support obligations from discharge, but only to the extent they are owed directly to the child or to a spouse or former spouse that is supporting the child."

155 *In re Spencer*, 182 B.R. 263 (Bankr. E.D. Cal. 1995)

156 *In re Linn*, 38 B.R. 762 (9th Cir. BAP 1984)

157 Compare with *In re Burton*, 132 B.r. 575 (Bankr. N.D. Ind. 1988); *In re Canganelli*, 132 B.R. 369 (Bankr. N.D. Ind. 1991); *In re Chang*, 163 F.3d 1138, 1140 (9th Cir. 1998).

158 11 U.S.C. § 523(a)(15) (1994); H.R. REP. 103-835, 54, 1994 U.S.C.C.A.N. 3340, 3363; *see also Matter of Crosswhite*, 148 F.3d 879, 887 (7th Cir. 1998) ("Congress, by enacting § 523(a)(15), made it clear that, even if the state courts did not use the traditional devices of alimony and support, the long-term responsibilities of the debtor to those with whom he once had a familial relationship and to those who are dependent upon him because of that familial relationship are economic factors that must be weighed."). However, there were two exceptions where this debt could be discharged: with two exceptions: (1) if the debtor does not have the ability to pay the debt from disposable income or (2) if the benefit to the debtor in discharging the debt outweighs the detrimental consequences to the debtor's former spouse or child. This balancing test was eliminated as part of the 2005 Amendments. *See* 11 U.S.C. § 523(a)(15) (2005).

159 H.R. REP. 103-835, 54, 1994 U.S.C.C.A.N. 3340, 3363; *see also Matter of Crosswhite*, 148 F.3d 879, 887 (7th Cir. 1998) (Congress, by enacting § 523(a)(15), made it clear that, even if the state courts did not use the traditional devices of alimony and support, the long-term responsibilities

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the current iteration of the Bankruptcy Code, was the culmination of years of bankruptcy reform efforts and several versions of the bill.[160] BAPCPA also supported another powerful change in the treatment of domestic support debt.[161] BAPCPA not only elevated child support debt to first priority status,[162] but it also placed these debts under the umbrella of "domestic support obligations."[163] BAPCPA expanded the definition of domestic support obligations to include domestic support debts owed to or recoverable by a government unit.[164] These debts would cover welfare recoupment including recoupment for government support benefits like food stamps. Congress was very intentional in expanding the definition of child support to include these reimbursements to the government.[165] Congress explained that the "most

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of the debtor to those with whom he once had a familial relationship and to those who are dependent upon him because of that familial relationship are economic factors that must be weighed.").

160 Bankruptcy Abuse Prevention and Consumer Protection Act [hereinafter "BAPCPA"], Pub. L. No. 109-8, 119 Stat. 23 (2005).

161 11 U.S.C. § 507(a)(1)(A) (granting first priority to "[a]ll unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.").

162 In practice, DSOs are second priority to the extent that the trustee's fees need to be paid in order to pay the DSO claims. Although this higher priority status was lauded by policymakers as a great stride for women collecting child support debt, it was just rhetoric because the practical effect of the first priority status is very small considering the large majority of chapter 7 cases are no asset cases meaning that no creditors are getting paid. *See*, *e.g.*, Remarks of Sen. Biden,146 CONG. REC. S11462 (daily ed. Nov. 1, 2000) (noting that giving domestic support obligations first priority is a "historic improvement in the treatment for family support payments, child support, and alimony.") *but see* Warren, *supra* note 114, at 41 ("To give women a 'first priority' here is to offer them a ticket to stand first in line to collect nothing."); *Sullivan et al.*, at 180 (noting that the priority status "gives the ex-spouse and children first crack at an empty box.").

163 BAPCPA , *supra* note 163, at § 211.

164 *Id.*

165 Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, and the Need for Bankruptcy Reform, Hearings before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee (Mar. 4, 2003) ("Having created this definition of a 'domestic support obligation,' the Reform Act . . . generally treats support related debts similarly, no matter how the debt arose or to whom the debt is owed."); Remarks of National Women's Law Center, Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. H9839 (Daily Ed. Oct. 12, 2000) ("The major change in this section of the bill would be an increase in the rights of States to be paid in Chapter 13 for child support that was assigned to them as reimbursement for public assistance."); Remarks of Rep. Conyers, Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. H9826 (Daily Ed. Oct. 12, 2000) ("The major change in this section of the bill would be an increase in the rights of States to be paid in Chapter 13 for child support that was assigned to them as reimbursement for public assistance."); Prepared Statement of Joan Entmacher, Vice President and Director, Family Economy center, National Women's Law Center, Washington DC, Bankruptcy Reform Act of 1999 (Part III), Hearings

significant effect" of the expanded definition of domestic support obligations is that "all debts owed to a governmental entity which are derived from payments by the government to meet needs of the debtor's family for support and maintenance are excepted from discharge."[166]

BAPCPA also expanded domestic support debts to include any interest accrued on these debts.[167] This means that any interest that accrues on unpaid child support, even while a parent is incarcerated, is also not dischargeable in bankruptcy. Furthermore, BAPCPA included additional penalties for child support debtors and methods for the government, as a child support collector, to go after "deadbeat dads" after filing for bankruptcy including "withholding, suspension, or restriction of a driver's license, or a professional, occupational or recreational license" and "authoriz[ing] the reporting of overdue support owed by a parent to any consumer reporting agency."[168]

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before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee (Mar. 18, 1999) ("From the perspective of government child support agencies, the provisions are clearly a benefit; for families, the picture is mixed. Government agencies would benefit from the provisions because under current law, only child support owed to families is a priority debt; child support assigned to states to reimburse assistance to families is nondischargeable, but not priority."); Remarks of Sen. Grassley, Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. S11705 (Daily Ed. Dec. 7, 2000). Includes Section-by-Section Analysis, ("[Sections 523(a)(5) and (15))] make[] all domestic support obligations non-dischargeable. The most significant effect of this change is that all debts owed to a governmental entity which are derived from payments by the government to meet needs of the debtor's family for support and maintenance are excepted from discharge."); Remarks of Rep. Nadler, Bankruptcy Reform Act of 1999 (Part III), Hearings before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee (Mar. 18, 1999) ("I understand why [the government] . . . like[s] this bill. It will make their lives somewhat easier. But I don't think that it'll make the lives of custodial parents, mostly women, in collecting owed child support very easy. [There] is a distinction between the interests of the State child support collection agencies and the interests of the women who are rearing children who are owed support."); *but see* H. Rpt. 107-3, pt. 1, Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 (Feb. 26, 2001), ("[the bill] provides a definition of "domestic support obligation' that includes funds owed to government units. If the government is acting as the debt collector for a woman or child, this is appropriate; the benefits of this inure to women and children directly. However, if the government is collecting for its own benefit (say, for example, the woman recipient is on welfare and the government is collecting arrearages to reimburse State or Federal expenditures), then the result may be to put the government collection agency in direct competition with single mothers and children").

166 *See* Remarks of Sen. Grassley, Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. S11705 *supra* note 167.

167 BAPCPA, *supra* note 163, at § 211("'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief . . . including interest that accrues on that debt").

168 BAPCPA, *supra* note 163, at § 214; *see also* Remarks of Sen. Biden, Consideration and Passage of S. 256, 151 Cong. Rec. S2464 (Daily Ed. Mar. 10, 2005) ("This legislation . . . lifts the stay on a number of methods that family support officials use to go after deadbeat dads . . . it would permit restrictions on deadbeat dad's driving, professional, or recreational licenses. It would permit family support collection officials to intercept his tax refunds."); Remarks of Sen. Hatch, Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. S11683 (Daily Ed. Dec. 7, 2000) ("[S]uspending the driver's license of the deadbeat parent can be a very effective way of getting them to pay the child support they owe.").

These changes were purportedly in direct response to the worry that custodial parents, primarily mothers, and children were being harmed under the 1994 Amendments because "deadbeat" fathers were using bankruptcy to avoid paying child support they could afford to pay or to renegotiate divorce settlements.[169] However, much of this dialogue did not consider a non-inconsequential segment of child support debtors who owe the government child support and would not be able to renegotiate their child support payments even under the 1994 Amendments. Still, much of the Congressional rhetoric around domestic support reform during the passage of BAPCPA was about ensuring that "deadbeat" fathers did not skirt their financial responsibilities.[170]

There is scant literature that interrogates the nondischargeability of welfare debt on the individuals that carry this debt, due to the lack of integration of this aspect of family law with bankruptcy law. However, almost every fresh start theory for discharge supports the forgiveness of welfare debt.[171] Economic

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[169] Remarks of Sen. Hatch, Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. S11683 (Daily Ed. Dec. 7, 2000) ("Frankly, I was outraged to learn of the many ways deadbeat parents were manipulating and abusing the current bankruptcy system in order to get out of paying their domestic support obligations."); Remarks of Sen. Orrin G. Hatch, Consideration of S. 625, 145 Cong. Rec. S14073 (Daily Ed. Nov. 5, 1999) ("[B]ankruptcy will no longer be used by deadbeat parents to avoid paying child support and alimony obligations.")

[170] *See*, *e.g.*, Remarks of Rep. Gekas, 147 Cong. Rec. H133 (Daily Ed. Jan. 31, 2001) Part V: Congressional Record: 107th Congress – Document 88, Page H133 ("Ensures that bankruptcy cannot be used to interfere with the enforcement efforts of federal, state and local authorities with respect to overdue child support obligations."); Remarks of Sen. Biden, Consideration and Passage of S. 256, 151 Cong. Rec. S2464 (Daily Ed. Mar. 10, 2005) ("Right now, a deadbeat father can file for bankruptcy and come out without paying one penny of support. . . . the law will hold the deadbeat dad's feet to the fire: he will pay, he will pay in full. . . . Under the bill, . . . [a] father will never complete bankruptcy until he is paid up. He must pay."); Consideration of S. 1301, 144 Cong. Rec. S10650 (Daily Ed. Sept. 21, 1998) [Grassley] ("I want to point out that some bankruptcy lawyers actually advertise that they can help deadbeat dads get out of their child support and other marital obligations."); Remarks of Rep. Cannon, Consideration of H.R. 975, 149 Cong. Rec. H1981 (Daily Ed. Mar. 19, 2003) ("this bill . . . includes consumer protection reforms that prioritize the payment of spousal and child support, for instance, making sure that the deadbeat parents cannot use bankruptcy to avoid their support responsibilities."); Remarks of Sen. Kennedy, Consideration of S. 256, 151 Cong. Rec. S2406 (Daily Ed. Mar. 10, 2005) ("We have a chance to say to women across America, who are taking responsibility every single day for their children, but have a deadbeat dad who won't do his part, that we're on your side."); Remarks of Rep. Sensenbrenner, Consideration of S. 1920, 150 Cong. Rec. H143 (Daily Ed. Jan. 28, 2004) ("The current system allows deadbeat parents to use bankruptcy to avoid their child support obligations. . . . If this bill is voted down . . . people who are opposing this move are giving these deadbeat parents a get-out-of-obligation-free card so that they can stiff their custodial former spouses."); Remarks of Rep. Sensenbrenner, H. Rpt. 109-31, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Apr. 8, 2005) ("We need to ensure that deadbeat parents can no longer use bankruptcy to shed their child and spousal support obligations.").

[171] There are some fresh start theories that do not apply to debtors carrying welfare debt because they focus on creditor recovery and generally to not apply to most chapter 7 debtors who have no assets. For example, a discharge of welfare debt would not necessarily increase assets available to creditors or encourage these debtors to take financial risks or engage in new business ventures. There are also other fresh start theories, not discussed in the is Article that do not apply to debtors carrying welfare debt including fresh start theories that "protect individuals

rehabilitation is "[o]ne of the primary purposes of the consumer bankruptcy discharge" and has been used by scholars to argue for the expansion of dischargeable debt.[172] Debtors carrying welfare debt are likely not part of the economic marketplace considering the debt-criminal justice pipeline and that the large majority of these debtors make less than $10,000 a year and their child support arrears account for 70% of their income.[173]. Under the economic rehabilitation theory, if these debtors were to receive a fresh start free from their debt, they would be restored to economic productivity as opposed to continually being kept in a debt-to-prison cycle.[174] With a fresh economic start, these debtors may also be less likely to have to rely on social services and welfare, another fresh start theory, since the majority of their income would not have to go to repaying the government.[175]

Other fresh start theories also support the discharge of welfare debt. The biblical and moral notions of forgiveness and human dignity above economic benefits (or economic costs in this case since it costs the government more to try to collect these uncollectible debts) support allowing these debtors to receive debt forgiveness.[176] Similarly, the humanitarian fresh start theory underlying the earliest bankruptcy laws that were created to provide a solution to the financially downtrodden instead of imprisonment also support the forgiveness of welfare debt.[177] A fresh start would also promote the physical and mental health of debtors that are oftentimes facing imprisonment for debt that they can never afford to pay.[178]

Although, theoretically, the public policy justification for nondischargeability of these debts still cuts against discharge since these are debts that would be used to finance the government, the characteristically uncollectible nature of these debts makes financing the government with these debts a near impossibility. Congress' balance in favor of the creditor's interest in recovering full payment of these debts should not outweigh these child support debtors' interest in a fresh start because full repayment to government will not occur. However, since the current system does not allow the discharge of these debts, the debtors that carry these debts cannot use bankruptcy, the primary system of debt relief in this country, to discharge, or even reduce, these domestic support obligations.

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from their own uncontrolled overconsumption of credit," "promote[] efficient allocation of risk of loss between the debtor and creditor," and "incentivizes creditors to monitor themselves in granting or withholding credit." *See* Byington, *supra* note 118, at 122-23.

172 *See* Langston, *supra* note 133, at 1167.

173 Ludden, *supra* note 13 (Nov. 19, 2015); Dinner, *supra*, note 2, at 148.

174.Pardo & Lacey, *supra* note 105, at 414 ; *see also* Howard, *supra* note 105 at.

175 *See*, *e.g.*, Jackson, *supra* note 108, at 1402.

176 Flint, *supra* note 108 at 519-21.

177 Tabb, *supra* note 124, at 14-15; *see also* MANN, *supra* note 125, at 102; MANN, *supra* note 125, at 99; Byington, *supra* note 118, at 121.

178 *See* Jacoby, *supra*, note 122 at 560-61; Thorne, *supra* note 122 at 142-46.

D. Comparison to Partially Dischargeable Tax Debt

Although the treatment of domestic support obligations in bankruptcy got stricter over time, tax debt was treated differently and over time there were less restriction on discharging this debt.[179] A comparison of the historical treatment of welfare debt reveals that the government's primary concern as a creditor is not solely the inability to absorb the cost of nonpayment but may instead be based on policymakers' views of the type of debtor more likely to carry that debt and more deserving of a fresh start.[180]

Tax debts were one of the earliest debts owed to the government that were deemed nondischargeable.[181] However, unlike welfare debt, the consumer bankruptcy system's treatment of tax debts has actually become less restrictive with more opportunities for an individual to discharge tax debt.[182] The Bankruptcy Act of 1898 excluded the discharge of debts "due as a tax levied by the United States, the State, county, district, or municipality in which he resides."[183] Under this earliest exclusion of tax debt, there did not appear to be any types of tax debt, no matter how old these debts were, that could be discharged in an individual's bankruptcy.[184]

The 1973 Report of the Commission of Bankruptcy Laws of the United States recommended limiting tax priorities to certain taxes due within one year of the bankruptcy petition.[185] This one year limitation, however, was not passed.[186] The 1978 Act saw the first substantial change to the treatment of tax debt. The Act created a partial discharge of tax debt because the Code allowed the discharge of income tax debts that were over three years old, and all other taxes could still be discharged unless they were subject to lien.[187] The Bankruptcy Code's treatment of tax debt has not substantially changed since the 1978 Act.[188] The dischargeability of tax debt, however, has not come without criticism. During the Congressional debate of the 1994 Amendments, there was concern that the bankruptcy system served as a "tax haven" that allowed consumer debtors to "accrue eight to ten years of outstanding returns and then have to pay only for three years in a bankruptcy case."[189] Despite this worry, the

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179 *Id.*

180 *Id.*

181 Act of July 1, 1898, ch. 541, § 17, 30 Stat. 544, 550 (repealed 1978).

182 *Compare* Bankruptcy Act of 1989 and BAPCPA.

183 Act of July 1, 1898, ch. 541, § 17, 30 Stat. 544, 550 (repealed 1978)

184 *Id.*

185 REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC.NO. 93-137, pt. 1, at 216.

186 Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

187 § 523(a)(1), 92 Stat. at 2590-91 (codified as amended at 11 U.S.C. § 523(a) (2006). Tax debt was also given sixth priority under the 1978 Act. Secured debts are typically not discharged in chapter 7.

188 *Compare* Bankruptcy Act of 1978 and BAPCPA

189 National Bankruptcy Review Commission - Minutes of the Meeting Held Sept. 18 and 19, 1996; *see also* National Bankruptcy Review Commission - Minutes of the Meeting Held Oct. 18 and 19, 1996 ("Recalling his experience in preparing tax returns for individuals, Commissioner

treatment of tax debt in bankruptcy has largely gone unchanged and unchallenged since the 1978 Act. BAPCPA essentially kept the same time period limitations on discharging income tax debt, and concerns about the three year time period did not substantially change the Bankruptcy Code's treatment of this debt.

Congressional resistance to changing the dischargeability of income tax debt may be influenced by economic fresh start theories and the historical sympathy towards debtors carrying business debt, and not the low-wage workers they employ. As Shu-Yi Oei explains, because of the way wage workers are paid, they are not likely to carry tax debt, even though they pay a greater proportion of their income in payroll taxes than higher income taxpayers .[190] Individual business owners, not their workers, are the most likely to carry tax debt into the consumer bankruptcy system.[191] Since 67% of business owners are white, compared to only 6% of Black business owners, white debtors are more likely to get the benefit of the bankruptcy tax discharge.[192] Further, the earliest bankruptcy system in this country was created to protect wealthy, white debtors with business debt. As Bruce H. Mann explained, "[t]he imprisonment of 'wealthy debtors' . . .confounded the normal expectations of social and economic status."[193] The worry that wealthier debtors, or even the more modern middle class debtors, could end up in jail for their debts continues to drive many of the fresh start theories that emphasize the need for a bankruptcy system to serve an insurance function for business debtors and encourages debtors to take financial business risks.

The same holds true when the consumer bankruptcy discharge system is compared to the debt relief available to businesses. Melissa B. Jacoby explains that the debt relief available to businesses is not conditioned on the business being honest but unfortunate.[194] Indeed, bankruptcy's nondischargeability

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Shepard said that many taxpayers learned to claim excess numbers of exceptions and dependents so that the amount of withholding is reduced and then file for bankruptcy relief to discharge their tax liability.").

[190] Oei, *supra* note 26 at 419 ("As has been pointed out by the Center on Budget and Policy Priorities, low- and moderate income taxpayers pay a greater proportion of their income in payroll taxes than taxpayers of higher income.") citing CONG.BUDGET OFFICE,AVERAGE FEDERAL TAX RATES IN 2007, at 2 (2010) (showing that in 2007, taxpayers in the lowest household income quintile paid 8.8% of their household income in "social insurance taxes," whereas the percentages for taxpayers in the top 10%, 5%, and 1% of household income paid 4.5%, 3.3%, and 1.6% respectively); *see also* Tax Policy Center, URBAN INSTITUTE & BROOKINGS INSTITUTION, *How does the federal tax system affect low-income households?*, https://www.taxpolicycenter.org/briefing-book/how-does-federal-tax-system-affect-low-income-households (last visited Dec. 12, 2023) ("Most low-income households do not pay federal income taxes, typically because they owe no tax (as their income is lower than standard deduction . . . the average payroll tax rate for households in the lowest income quintile is 6.9 percent (the same as the 6.9 percent average rate for all households).").

[191] *Id.*

[192] Zippia, *Business Owner Demographics and Statistics [2023]: Number Of Business Owners In The US*, https://www.zippia.com/business-owner-jobs/demographics/ (last visited June 14, 2023).

[193] MANN, supra note 125, at 99.

[194] Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 Emory Dev. J. 497, 503 (2023).

provisions only apply to an "individual debtor," which does not include corporation.[195] As Jacoby further notes, the chapter 11 system, which is often used for large businesses in bankruptcy, "does permit the cancellation of debt, with virtually no exceptions."[196] Thus, the bankruptcy system, even within itself, does not consistently apply these same morality themes across the different type of debtors seeking relief.

E. Government's Ability to Absorb Nonpayment

The limitation on discharging debts owed to the government is partially based on the presumptive inability of the government to absorb the loss from nonpayment. There are debates, primarily in the tax context, about the government's ability to absorb the costs of discharge in bankruptcy. These debates can extend to other government-owed debt, like welfare debt, that if made dischargeable, the government would be forced to absorb additional losses. Scholars opposing the discharge of tax liabilities have argued that the taxes are for the "common good," and prioritize the tax revenue base over the private right of discharge.[197] Some of these scholars argue that it is fundamentally unfair to shift the burden to other taxpayers if a debtor is allowed to discharge their debt.[198] Still, other scholars are concerned that the government, as a tax collector, is an involuntary creditor and unable to secure its debt before extending credit.[199]

Shu-Yi Oei has explained that the government cannot as easily diversify its risk for several reasons including not every individual or entity owes taxes, there are certain constraints on the government's ability to raise tax rates, and there can be potentially negative behavior resulting from imposing higher taxes on compliant taxpayers.[200] Thus, lost revenue by the government through bankruptcy discharge must be weighed against the other functions performed by the government.[201] Oei explains that "[b]ecause the government already performs a robust social insurance role outside of bankruptcy, any increased bankruptcy risk to the government must be weighed against the likely impacts on its capacity to administer social insurance to other socioeconomic groups of

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195 *Id.*

196 *Id.*

197 Barbar K. Morgan, *Should the Sovereign Be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy*, 74 Am. Bankr. L.J. 461, 463 (2000) referencing PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY 23-24 (1995) ("The arguments put forward by tax authorities for the priority of their claim is traditionally that the public interest comes before the private interest"); Barbara K. Morgan, *Governmental Tax Priorities in Bankruptcy Proceedings: An International Comparison*, 15 J. Bankr. L. & Prac. 5 Art. 2 ("The priority protects the revenue base for the public good and avoids shifting the burden of the debtor's unpaid taxes to other taxpayers.").

198 SENATE COMM. ON THE JUDICIARY, TO ACCOMPANY S. 2266, S. REP. NO 95-989, at 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5800 ("To the extent that debtors in a bankruptcy are freed up from paying their tax liabilities, the burden of making up the revenues thus lost must be shifted to other taxpayers.").

199 Morgan, *supra* note 197, at 464.

200 Oei, *supra* note 26, at 416 – 18.

201 Oei, *supra* note 26, at 402.

recipients through other mechanisms."[202] As countless scholars have recognized, the consumer bankruptcy system is the social safety net for the middle class.[203] If the government allows middle class debtors to use the consumer bankruptcy system to discharge their government-owed taxes, the government would potentially have to shift funding away from other social insurance programs, like welfare for the poor, in order to account for the middle class losses.[204]

On the other side of the debate, some scholars have maintained that there are not as many constraints on the government's ability to absorb lost revenue since the government is a creditor to the entire nation.[205] In other words, these scholars argue that the government is in a better position to absorb the cost of nonpayment than private creditors because the amounts owed to the government are a small percentage of the government's total revenue.[206] For example, the government's total revenue in 2022 was $4.44 trillion.[207] Scholars have also argued that the government can "hedge" across different types of taxpayers, for example collecting money from the debtor's employers, which

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[202] Oei, supra note 26, at 407.

[203] *See* Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 116 (2003) (observing that more than ninety percent of families in bankruptcy are middle class); Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1071–73 (2004) (suggesting that that while other social safety net programs are designed for the lower classes, bankruptcy appears to provide a safety net for middle class individuals who may not qualify for other social safety net programs); Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 25, 36–38 (Katherine Porter ed., 2012) ("People in bankruptcy . . . reflect a class status that is much like their [middle-class] counterparts around the country.").

[204] Oei, *supra* note 26, at 378 ("Such functions include national defense, the provision of public goods, and the administration of the social safety net through nonbankruptcy avenues. In sum, any policy that increases the government's share of debtor default risk in bankruptcy must consider the impacts on these other government functions.").

[205] Oei, *supra* note 26, at 399 citing Frances R. Hill, *Toward a Theory of Bankruptcy Tax: A Statutory Coordination Approach*, 50 TAX LAW. 103, 148-50 (1996) ("[B]ased on the twin foundations of an attack on sovereign priorities and assertions of the Service's ability to absorb and spread costs, as well as an implicit argument that it is a more appropriate cost-spreader than are private creditors, bankruptcy law significantly alters the non-bankruptcy tax assessment and collection process . . . [thus,] bankruptcy theory has rested on the argument that the Service can absorb the cost of nonpayment of tax liabilities"); William T. Plumb, Jr, *Federal Liens and Priorities-Agenda for the Next Decade*, 77 Yale L.J. 228, 244 (1967) ("The Government, drawing its revenue from the entire population, is in a better position to self-insure its risks than are private parties, for some of whom the failure of even a single major debtor may be ruinous."); *but see* Oei, *supra* note 26, at 411 ("In the first place, the government is not, in fact, creditor to the entire nation. With respect to state taxes, the claim is obviously overbroad because state taxing authorities are not creditors to those who do not reside in the particular state. Even in the case of federal taxes, not every single individual or business entity has a positive tax liability.").

[206] *Id.*; *see also* Morgan, *supra* note 197, at 466 ("Critics of the priority reject the community interest argument, contending that the debt owed to the government is unlikely to be significant in terms of total government receipts, whereas the loss to private creditors may cause substantial hardship and precipitate additional insolvencies.").

[207] Government Revenue, U.S. TREASURY FISCAL DATA, https://fiscaldata.treasury.gov/americas-finance-guide/government-revenue/#:~:text=In%20fiscal%20year%202022%2C%20federal,States%20that%20year%20%244.44%20trillion (last visited 12/21/2023).

allows the government to still collect taxes from private creditors of the defaulting debtors to offset the loss of discharge in bankruptcy.[208] Scholars that believe the government can absorb cost of nonpayment have also argued that the government is in a better position to increase taxes to account for potential default or lost revenue from nonpayment.[209] They argue that the government is in a unique position compared to most other creditors, especially involuntary and nonconsensual creditors, because they have tremendous power to collect taxes.[210] As part of this power, the government can not only raise taxes to account for default but can protect itself prebankruptcy to account for any nonpayment.

The government has likely already had to implement these tax strategies to account for unpaid welfare debt. These debts are sometimes over a decade old, and the individuals who owe these debts are oftentimes unemployed or underemployed and may never be able to make enough money to repay these debts.[211] Instead, the government has likely already raised taxes or revenue to account for these losses. In the case of individual debtors that carry years of unpaid child support debt, there is very little prospect that the government will get paid back. The government has already had to absorb the cost of nonpayment of these debts through other means, likely increasing taxes or pulling spending funding from other areas.

Further, the $20 billion of child support arrears pales in comparison to the amount of tax arrears owed by some of the wealthiest Americans. The United States Department of Treasury estimates that each year the United States loses approximately $163 billion dollars in uncollected taxes that are owed by the top 1 percent of Americans by annual income.[212] The Treasury Department also estimates that the "tax gap," the amount owed to the government between paid and owed taxes, is between $600 and $688 billion each year and could be

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[208] Oei, *supra* note 26, at 400 ("[T][he government is able to hedge across different types of taxpayers") citing Report of the Commission on the Bankruptcy Laws of the United Sates, at 216 (noting that the loss of revenue from removing priority will be "offset . . . by a reduction in the amount of bad debt deductions taken by other creditors.").

[209] *See*, *e.g.*, Michelle Arnopol Cecil, *Crumbs for Oliver Twist: Resolving the Conflict Between Tax and Support Claims in Bankruptcy*, 20 Va. Tax Rev. 719, 730 (2001) ("[S]upport claimants are unable to spread their risk of loss like the government is able to do by raising tax rates or increasing tax revenue from other sources"). This is counter to the argument by some scholars that the government is actually a nonadjusting creditor, unlike private creditors, because they cannot adjust their premiums or change their lending decisions to in the face of potential default. *See* Oei, *supra* note 26, at 399.

[210] *See* Oei, *supra* note 26, at 400 citing Barbara K. Day, *Governmental Tax Priorities in Bankruptcy Proceedings: An International Comparison*, 15 J.BANKR. L. & PRAC. 565, 566–68 (2006); Hill, *supra* note 222, at 154; Morgan, *supra* note 197, at 467 n.17.

[211] *See supra* notes 92 – 1-6.

[212] Sylvan Lane, THE HILL, *Treasury: Top 1 percent responsible for $163 billion in unpaid taxes,* https://thehill.com/policy/finance/571316-treasury-top-1-percent-responsible-for-163-billion-in-unpaid-taxes/ (Sept. 8, 2021) at 1 ("The U.S. loses roughly $163 billion each year in taxes owed and unpaid by the richest Americans."); Daniel Estrin, et al., NPR, *The IRS misses billions in uncollected tax each year. Here's why* https://www.npr.org/2022/04/18/1093380881/on-tax-day-the-treasury-department-urges-for-more-funding-to-the-irs, (April 19, 2022) ("We have a tax gap that's about $600 billion.").

as high as $1 trillion annually.[213] The "net tax gap," after enforcement and late payments, is between $539 and $625 billion, with approximately three-quarters of the net tax gap, or $475 billion, from individual income tax.[214] Both welfare reimbursement in the form of welfare debt and federal income tax payments are both part of the public funds that the government uses to pay for different expenditures.[215] And even if the government was able to collect welfare debt, state officials who are charged with dispersing these funds for the support of children instead "divert resources away from the poor and politically powerless to state official's preferred activities."[216] There is no guarantee that any welfare reimbursement funds would be used for needy children and families, because both tax debt and welfare debt collected by the government are part of the public fund.

Although it may be politically unpopular to allow debtors with burdensome welfare debt to discharge this debt in bankruptcy and shift the burden to taxpayers, Congress has demonstrated that it is willing to do this for some tax debt debtors that are facing financial distress. The majority of welfare debt is over 20 years old and already going unpaid and the government has already had to account for the cost of nonpayment. Individuals carrying unmanageable welfare debt should similarly be afforded an avenue for debt relief.

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These examples detail how the government can, and has been, absorbing the nonpayment of welfare debt that is currently nondischargeable. The next Part will explain how without debt forgiveness in the bankruptcy system, some of the most financially vulnerable Americans accrue even more

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[213] Lane, *supra* note 258, at 1 ("The Treasury Department estimated that the gap between paid and owed taxes was about $600 billion in 2019, and IRS Commissioner Charles Rettig has suggested that it could be as high as $1 trillion annually.").

[214] Committee for a Responsible Federal Budget, *IRS Estimates a $625 Billion Tax Gap*, https://www.crfb.org/blogs/irs-estimates-625-billion-tax-gap (Oct. 24, 2023) ("Three-quarters of the net tax gap in 2021 ($475 billion) comes from the individual income tax, while one-sixth ($112 billion) comes from payroll taxes, 6 percent ($37 billion) from corporate income taxes, and a very small amount ($1 billion) from estate taxes."); Congressional Research Service, *Federal Tax Gap: Size, Contributing Factors, and the Debate over Reducing It*, https://crsreports.congress.gov/product/pdf/IF/IF11887 (Oct. 30, 2023) (finding "underreported income is by far the largest source of the federal tax gap, accounting for 80% of the gross tax gap in 2011-2013 and 2020-2021").

[215] U.S. Department of the Treasury, General Fund, https://fiscal.treasury.gov/general-fund/ (last visited Dec. 12, 2023) ("As 'America's Checkbook,' the General Fund of the Government consists of assets and liabilities used to finance the daily and long-term operations of the U.S. Government as a whole."); Congressional Research Service, *The Child Support Enforcement (CSE) Program*, https://crsreports.congress.gov/product/pdf/IF/IF10113 (July 19, 2023) ("states collect child support on behalf of families receiving TANF assistance to reimburse themselves (and the federal government) for the cost of TANF cash payments to the family"); *see also* Oei, *supra* note 26, at 410 ("business tax revenues, as well as individual tax revenues, go to the same place to fund government programs").

[216] *See supra* note 27.

nondischargeable debt and are forced into a cycle of debt and incarceration that is nearly impossible to escape.

III. COLLATERAL CONSEQUENCES OF NONDISCHARGEABILITY

The previous sections demonstrate how low-wage, or in some cases no-wage workers, are subject to welfare debt that they cannot pay and cannot discharge. This section shows the collateral consequences of nondischarge of welfare debt. One of those consequences is increased interaction with the criminal justice system and incarceration, which carries another set of debts that are similarly nondischargeable. This section also compares the collateral consequences of carrying dischargeable tax debt to show that the most punitive collateral consequences are assigned to welfare debt which is most likely to be carried by poor, Black men.

A. Collateral Consequences of Welfare Debt

The collateral consequences of welfare debt are vast and include financially and socially devasting consequences. Although there are some child support debts that are owed to the individual claimant, like the custodial parent, approximately twenty percent of the total arrears are owed to the government.[217] The collateral consequences of welfare debt follow recognizable patterns of race and class. As a 2021 study noted, 5% of all fathers, but 15% of all Black fathers, have been jailed for child support.[218] A 2020 study noted that "80% of the fathers in court for nonpayment of child support were men of color, predominately Black men."[219] In South Carolina, one-eighth of inmates were in custody due to child support arrears.[220] Men with incomes less than $10,000 owe 70% of arrears, with the median support order representing 83% of their income making it nearly impossible to not accrue welfare debt.[221]

Debtors that carry welfare debt are subject to typical penalties for carrying unpaid debt like poorer credit scores and less access to credit, liens, and asset seizures, although these are less effective for these creditors.[222] Child

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[217] OCSE Report, *supra* note 5; *see also* Tait, *supra* note 7, at 311.

[218] Hyson, *supra* note 104.

[219] 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).

[220] Tait, *supra* note 7, at 315; Frances Robles and Shaila Dewan, NY TIMES, *Skip Child Support. Go to Jail. Lose Job. Repeat. - The New York Times*, https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html (April 19, 2015) ("[I]n 2009, a survey in South Carolina found that one in eight inmates had been jailed for failure to pay child support. In Georgia, 3,500 parents were jailed in 2010. The Record of Hackensack, N.J., reported . . . that 1,800 parents had been jailed or given ankle monitors in two New Jersey counties in 2013.").

[221] Dinner, *supra* note 2, 148.

[222] Maldonado, *supra* note 80, at 1000 ("[C]hild support enforcement agencies have aggressively pursued nonresident parents who do not pay child support. They do so by garnishing their wages, intercepting their tax returns, suspending their drivers' licenses, initiating criminal proceedings, and even booting their vehicles to shame them into complying with child support orders."); *but see* Brito, *supra* note 7, at 965 ("Conventional enforcement tools, such as wage garnishment, liens, and asset seizure, work very efficiently with noncustodial parents who have

support debtors can also have their wages garnished.[223] Although the Consumer Credit Protection Act protects employees from being fired by their employers because their wages have been garnished, this only applies to one debt.[224] If an individual, for example, has a wage garnishment from the government for child support arrears and another creditor, the employer can fire that employee.

When an individual has child support debt, the government can take a number of actions against the debtor to try to recuperate the debt and to penalize the debtor that are not standard to all debtors.[225] For example, the government can suspend a child support debtor's driver's license or a professional license (like a trucking license) which prohibits them from getting to work and working.[226] Child support debtors, especially those where the government is the creditor, are also subject to more government supervision.[227] These debtors have to continually interact with the court system and can also be charged of civil or criminal contempt of court for failing to show up to a child support hearing, failure to pay the court-ordered child support on time, as well as criminal charges for nonsupport.[228]

There are also legal fines and fees associated with welfare debt. Coined the "debt-criminal justice complex," this system operates to trap a group of low-wage individuals that are in arrears on child support debt—most often Black men—with an added layer of government harassment and debt in the form of legal fines and fees.[229] These legal fines and fees, along with contempt charges, can lead to imprisonment, even though these debtors were never able to pay the child support when it was initiated.[230] Because Black men are already more likely to interact with the criminal justice system, the nonpayment of child support debt gives police another reason to incarcerate them.[231]

Further exacerbating this problem, the majority of states will not modify, or pause, a child support order when a parent is incarcerated for failure to pay child support.[232] This means that the debt continues to accrue while the parent is incarcerated and unable to work and earn an income.[233] The rationale is that

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regular earnings or assets. These methods, however, are practically useless for collecting child support from fathers without stable, consistent employment and financial assets.").

[223] *Id.*

[224] Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, 15 U.S.C. 1601 (1968).

[225] Stolzenberg, *supra* note 80, at 2012 ("[P]unitive child support collection efforts, including "wage garnishment, suspension of drivers or professional licenses, or jail," inhibit fathers' ability to earn income and drive them away from their children"); *see also* BAPCPA, *supra* note 163, at § 214.

[226] *Id.*

[227] Tait, *supra* note 7, at 307.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *See* Atkinson, *supra* note 29, at 950 ("[O]ver-policing and the effective criminalization of poverty that developed in the wake of the War on Drugs disproportionately affected people of color.").

[232] Tait, *supra* note 7, at 315-16; Dinner, *supra* note 2, at 150. Although there is scant national data on the amount of debt accrued while incarcerated, one national study found that incarcerated child support debtors accrue on average $5000 of child support debt while incarcerated. See

[233] Tait, *supra* note 7, at 316.

a child support modification should only be put into place when there is a change of circumstances outside of the parent's control. Incarceration is seen as something that was in the parent's control, and therefore not grounds to pause the child support while incarcerated.[234] Child support debtors can leave jail owing $15,000 to $30,000 in child support in addition to the other fines and fees associated with incarceration.[235] Incarceration for unpaid welfare debt is not infrequent but is cyclical, with noncustodial parents returning to jail time-and-time again for child support debt.[236] While in jail, these child support debtors can also accrue additional fines associated with that incarceration that compound the debt they owe the government.[237]

The resultant penal debt, which is commonly a collateral consequence of unpaid welfare debt, carries its own severe set of collateral consequences. The collateral consequences of penal debt include job loss, loss of voting rights, accumulation of additional child support debt and rent and utilities, and further incarceration.[238] As Atkinson explained, "unmanageable penal debt disproportionately sends the most economically vulnerable individuals into socially undesirable debt spirals." These debt spirals result in a cycle of additional nondischargeable penal debt and incarceration that is oftentimes impossible to escape. This is especially devastating for lower-class debtors who are trapped in a cycle of both penal debt and welfare debt.

It is worth noting that this problem is largely unique to lower class child support debtors who owe the government. Despite some notable high profile celebrities that have failed to pay child support,[239] this is not the norm and deflect attention away from the child support debtors that are low or no income individuals. There is a difference between people who can afford to pay child support but choose not to, and those who are too poor to pay child support and sit in jail while the interest on these debts continues to accrue. Indeed, "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 government assistance."[240] Even middle income noncustodial parents are not likely to carry child support debt because of

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[234] Tait, *supra* note 7, at 315-316. This is also the case when the parent is incarcerated for a crime unrelated to the failure to pay charge. There is no modification of child support in some states while an individual is incarcerated.

[235] *Id.*

[236] *See supra* note 113.

[237] Dinner, *supra* note 2, at 149-50 ("In some states, incarceration also does not justify prospective modification in child support obligations.").

[238] Atkison, *supra* note 26, at 962-63; *id.*, at 949 ("Even a relatively low fine, if unaffordable, can result in catastrophic outcomes particularly when further punishment is meted out for the failure to pay those fines.").

[239] *See*, *e.g.*, Robert Chiarito and Elizabeth A. Harris, *R. Kelly Sent Back to Jail Over Unpaid Child Support*, NY TIMES, March 6, 2019.

[240] Tait, *supra* note 7, at 320.

legislative reforms that have strengthened and automated child support enforcement.[241]

Those with child support debt that could really benefit from a bankruptcy discharge are the ones that truly cannot afford to pay. Although middle class or high wealth individuals may owe child support, that support is owed directly to the household. The burden of recovering child support arrears in this instance is on the custodial parent, and the government does not initiate legal action against these debtors.[242] The bankruptcy system's prioritization of child support creditors seems to track these types of private child support arraignments, prioritizing middle class mothers who are owed child support. As Dinner explains, "[b]ecause marriage tracks class lines . . . private family law largely regulates middle class families."[243]

However, welfare debt should be treated differently than middle class private child support debt because these are fundamentally different debts. welfare debt is welfare reimbursement and owed to the government, and not the custodial parents and children. Low-income noncustodial parents typically pay a higher percentage of their income for child support than middle- and upper-income wage earners.[244] The government's role as creditor in child support cases, therefore, must also be examined since it is these lower class debtors that cannot use the bankruptcy system to receive debt forgiveness.

It begs the question why the government would continue to initiate characteristically unpayable child support orders that disproportionately impact poor, Black men. Some scholars argue that it is purely for punitive purposes.[245] As Tait explains, "[o]n 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."[246] The most devastating of those penalties is a cycle of incarceration, which, outside of the social ramification, include financial penalties that are similarly nondischargeable in the consumer bankruptcy system.

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[241] Brito, *supra* note 7, at 960-61 ("As a result of legislative reforms that strengthened and automated child support enforcement, noncustodial parents who have the money to pay support, in fact, do so.").

[242] Tait, *supra* note 7, at 320.

[243] Dinner, *supra* note 2, at 83

[244] Brustin, *supra* note 63, at 2.

[245] Tait, *supra* note 7, at 307; Tait, *supra* note 7, at 315-15 ("This system . . . has created 'modern day debtors' prison for poor noncustodial parents who lack the ability to pay support."); Hyson, *supra* note 104 (describing the system of debtors' prison for poor, unemployed and African American or Hispanic fathers); Hasday, *supra*, note 80, at 357 (describing how "the New York legislature created new forms of positive law . . . to regulate poor families deemed pathological. These laws authorized the intense scrutiny of family life, the frequent arrest and incarceration of parents found wanting, and the systematic institutionalization of their children.").

[246] Tait, *supra* note 7, at 307.

B. Comparison to Partially Dischargeable Income Tax Debt

Tax debt is dischargeable unless it is a federal or state income tax that is due and owing within three years of the individual filing for bankruptcy.[247] The collateral consequences of government-owed tax debt, similar to most debt that an individual carries, can include a negative effect on credit score, inability to access credit or affordable housing. Unpaid income tax debt can lead to the accrual of interest on the debt, tax penalties, wage garnishment, collections, and liens on property.[248] Tax penalties can accrue at a rate of 5% per month that the taxes are late, up to 25% of the total amount of taxes owed. Interest also accrues at 5% annually. Federal tax liens are public information and alert creditors to your tax debt. However, the IRS very rarely files tax liens for debtors that owe less than $10,000. And although the IRS technically has a right to seize a tax debtors' assets, the IRS usually only seizes money, through wage garnishments or taking money from a debtor's bank account. Although the IRS has many avenues to collect past due income taxes and financially punish a debtor, the IRS will typically work out payment plans for debtors, and these payments stop these types of levies (i.e. stops the wage garnishment if the debtor agrees to a payment plan).

Although these are similar financial consequences to welfare debt, the IRS often exercises discretion to not impose some of the harshest penalties and liens if tax debtors agree to payment plans. Further, bankruptcy provides a system of debt forgiveness for these debtors to discharge income tax debt that is accrued more than three years prior to the debtor's bankruptcy filing. The same debt spirals that exist for child support debtors carrying ten or twenty years of past due debt can be avoided for income tax debtors who, after filing bankruptcy, only have to manage three years of past due taxes. Although this still may lead to financial consequences for a tax debtor, these consequences pale in comparison to the consequences of unpaid welfare debt because it is extremely rare to go to jail for unpaid taxes, even if the debtor can afford to pay the taxes.[249] If a debtor cannot afford to pay taxes, because the debtor is simply too poor to pay, incarceration is virtually nonexistent.[250]

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[247] 11 U.S.C. § 523(a)(1). Other tax debts are discharged unless the government has placed a lien on the property, such as tax liens on real estate.

[248] *See, e.g.*, IRS, Levy, https://www.irs.gov/businesses/small-businesses-self-employed/levy (last visited Aug. 6, 2023) ("An IRS levy permits the legal seizure of your property to satisfy a tax debt. It can garnish wages, take money in your bank or other financial account, seize and sell your vehicle(s), real estate, and other personal property").

[249] *Who Goes to Prison for Tax Evasion?* | H&R Block (hrblock.com) https://www.hrblock.com/tax-center/irs/tax-responsibilities/prision-for-tax-evasion/ (last visited June 14, 2023) ("Very few taxpayers go to jail for tax evasion. . . . The IRS doesn't pursue many tax evasion cases for people who can't pay their taxes."); Phil Sheridan, *How to Avoid Jail When You Owe Back Taxes – What to Do if You Can't Pay Your Taxes*, Debt.org, https://www.debt.org/tax/how-to-avoid-jail-when-owe-back-taxes/
("For the most part, people who are unable to pay a tax bill, . . . are not headed to jail.").

[250] *Id.*

IV. AN ARGUMENT FOR REFORM

Whereas the previous Part outlined the devasting consequences of carrying nondischargeable welfare debt, this Part identifies solutions. Part A makes a policy suggestion that further reinforces the consumer bankruptcy system's goal of preventing undesirable debt spirals for economically vulnerable individuals. To curb the collateral consequences of nondischargeable welfare debt, Congress should enact targeted reforms to the consumer bankruptcy system that brings these debts in alignment with forgivable government-owed tax debt. This Part also reinvigorates the push to eliminate the nondischargeability provisions. Part B will respond to potential concerns with the proposed reform.

A. Nondischargeability Reform

The nondischargeability of welfare debt harms already economically vulnerable debtors and should be made dischargeable in the consumer bankruptcy system. At the very least, welfare debt should be treated similarly to government-owed income tax debt that is dischargeable if the debt was accrued three years prior to the bankruptcy filing. This would allow debtors carrying welfare debt that the government has already absorbed nonpayment of to be discharged. $10.4 billion of welfare debt was due to the government over 20 years ago and would be dischargeable if this debt was treated the same as income tax debt in bankruptcy.[251] If the driving force behind the dischargeability of income tax debt that is older than three years is that the government has an interest in monies that are new to the IRS or state revenue authorities, then the same argument should be made for of welfare debt that was due to the government over 20 years ago.[252] The only result of treating welfare debt differently is to create a continuous cycle of poverty and incarceration for individuals owing this debt. The discharge of this debt in the consumer bankruptcy system can stop these undesirable debt spirals and can help prevent the incarceration of individuals carrying welfare debt.

Therefore, as an intermediate reform, welfare debt should be treated similar to income tax debt and be dischargeable if it was accrued over three years before an individual's bankruptcy filing. If the government does not have an interest in income tax debt older than three years, there is not an economic reason for the government to be interested in welfare debt that the bankruptcy system has determined the debtors are unable to pay. This is especially true when the individuals who carry these debts are already financially vulnerable, and the collateral consequences of not being able to discharge this debt oftentimes leads to the devastating consequences of even more debt and incarceration.

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[251] OCSE Report, *supra* note 5.

[252] *See* Oei, *supra* note 26, at 383-84 ("[A]n important policy behind these tax priorities is to give priority to those taxes that are new enough that the IRS or state revenue authorities may not yet have had an opportunity to collect them").

However, making welfare debt dischargeable if it was accrued three years prior to the debtor's bankruptcy filing may not go far enough. Regardless of how old the welfare debt is, it should be dischargeable in the consumer bankruptcy system if the debtor is unable to pay the burdensome debt. The bankruptcy system is designed to examine debtors' assets and debts, on an individual basis, to determine their ability to repay their debts. Normatively, the consumer bankruptcy system should provide debt relief for individuals that carry burdensome debt, regardless of the type of debt. The current system of discharge is underinclusive and small reforms that make individual nondischargeable debts dischargeable do not address the system-wide issue that prevents individuals carrying burdensome debt from discharging them. If one of the primary purposes of the consumer bankruptcy system is economic rehabilitation and debt relief for economically vulnerable individuals, then this goal is not achieved if there are individuals that cannot obtain debt relief because of the type of debt that they carry.

B. Potential Concerns and Responses

Even a moderate reform that would allow individuals carrying welfare debt a greater discharge opportunity is not without potential concerns. This Section addresses two such concerns and demonstrates why this targeted reform is nonetheless the best avenue to begin to eliminate the harm of the nondischargeability of welfare debt and provide an economic fresh start for these debtors.

1. Moral Hazard Concerns

One of the primary concerns with making additional debt dischargeable is that individuals will take advantage of the bankruptcy system and discharge debts that they can afford to pay. However, even if an opportunistic debtor did take advantage of the bankruptcy system in this way, the debtor would not be able to file chapter 7 again for another eight years. In reality, consumer debtors are generally resistant to filing bankruptcy, due largely to shame, and struggle with their debt for years before they file.[253]

Further, there are good faith filing requirements already in the bankruptcy system that would prevent individuals who can afford to pay their debts from discharging them.[254] Also, bankruptcy is not cost free. There are fees associated with filing bankruptcy, including attorney's fees, that have increased

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[253] Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 220-221 (finding "two-thirds of people who file bankruptcy report that they seriously struggled with their debts for more than two years prior to bankruptcy. Almost one-third report that they seriously struggled for more than five years. . . . . [s]even out of ten long strugglers say they felt shame upon filing bankruptcy.").

[254] For example, the 2005 Bankruptcy Abuse and Prevention Act requires debtors that file chapter 7 to pass a "means test" to determine the debtor's ability to pay. *See* Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

substantially since 2005.[255] Individuals who discharge their debts in chapter 7 must also give up any nonexempt assets in exchange for the discharge.[256] Once a person exits bankruptcy there are future costs like higher interest rates, loss of opportunities for future extensions of credit, and lost job opportunities since employers can pull an individual's credit score.[257] These bankruptcy costs may outweigh using the bankruptcy court as a an avenue to escape paying the government.

2. Systematic Barriers to Access

Because filing for bankruptcy is not without cost, and the monetary cost of filing bankruptcy may be prohibitive for child support debtors who make less than $10,000 a year. The chapter 7 filing fee is $335 and on average attorneys charge $1224 to assist chapter 7 debtors.[258] These fees have to be paid, in full, prior to the chapter 7 bankruptcy filing.[259] Even the least expensive chapter 7 filing would account for more than 10% of these debtors' annual income, making it a highly cost-prohibitive process. An alternative under the current system would be to file chapter 13, which allows debtors to not have to pay attorney's fees up front but can roll them in as part of a repayment plan.[260] Pamela Foohey, Robert M. Lawless, Katherine Porter, and Deborah Thorne's nationwide empirical study, however, found that when debtors cannot afford the upfront costs of a chapter 7 plan, they pay $2,000 more in attorney's fees as a part of a "no money down" chapter 13 plan and have their cases dismissed at a rate eighteen times higher than if they had filed chapter 7.[261] However, even if chapter 7 attorney's fees could be paid in small amount through the typical 6 month chapter 7 case, at a rate of approximately $200 a month, these child support debtors are still likely "too poor to go bankrupt."[262] Although a few pro se debtors successfully discharge their debts in chapter 7, the current system is too complex to navigate without the assistance of an attorney.[263] Even if welfare

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[255] The chapter 7 filing fee is $335 and on average attorneys charge $1224 to assist chapter 7 debtors. *See* Pamela Foohey, *Fines, Fees, and Filing Bankruptcy*, 98 N.C. L. REV. 419, 423 (2020).

[256] *See* Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2297, 2306 (2019) ("People who file chapter 7 receive a relatively speedy discharge of most of their debts in exchange for surrendering their assets to a bankruptcy trustee, who sells those assets and distributes the proceeds to the debtor's creditors.").

[257] Jackson, *supra* note 108, at 1427 ("[B]y using bankruptcy in order to obtain a discharge, the individual puts others on notice that he might resort to it again. By exercising his right of discharge, then, the individual may decrease his access to credit in the future."); Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67,100-09, 125-28 (2006) ("Some debtors will be denied employment because a bankruptcy is on their credit report. Others will be fired from existing jobs, despite the fact that doing so is unlawful.").

[258] *See* Foohey, *supra* note 264 at 423.

[259] *Id.* at 424.

[260] *Id.*; *see also* Foohey, et. al, *supra* note 110, at 1064.

[261] Foohey, et. al, *supra* note 110, at 1094.

[262] Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting on and Beyond United States v. Kras*, 2. AM. BANKR. INST. L. REV. 57, 57 (1994).

[263] Foohey, et. al, *supra* note 110, at 1105.

debt could be discharged, the current system is cost prohibitive for these debtors. Therefore, this reform has to also be coupled with a reform to the bankruptcy system, like the Consumer Bankruptcy Reform Act, which aims to simplify the consumer bankruptcy process and make it more accessible to debtors of modest financial means.[264] If bankruptcy is a viable option for these debtors, and the bankruptcy process can be streamlined to eliminate the costs and barriers that make filing pro se challenging, then debtors that carry welfare debt could access the primary debt relief system in this country and avoid the welfare debt-to-prison cycle.

CONCLUSION

Debtors carrying nondischargeable welfare debt are disadvantaged in the consumer bankruptcy system. The rhetoric about the types of debtors carrying child support debt into bankruptcy does not comport with the reality facing debtors with welfare debt. These individuals are often poor, Black men who are forced into a cycle of debt, poverty, and incarceration, and do not have the same access to debt relief as tax debtors and businesses. The proposed reforms would begin to eliminate the cycle of debt for these individuals, giving them a more equal economic fresh start. Elimination of the nondischargeability provisions would be a major change in law. However, this Article advances a dialogue about who is harmed by the nondischargeability provisions. This Article challenges bankruptcy law to include economically marginalized populations in discussions about the proper role of the bankruptcy system.

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[264] Consumer Bankruptcy Reform Act of 2022, S. 4980(2022); Senate, U.S. Senator Elizabeth Warren of Massachusetts, *Warren and Nadler Introduce the Consumer Bankruptcy Reform Act of 2020*, https://www.warren.senate.gov/newsroom/press-releases/warren-and-nadler-introduce-the-consumer-bankruptcy-reform-act-of-2020#:~:text=The%20Consumer%20Bankruptcy%20Reform%20Act%20will%3A,process%2C%20and%20reducing%20filing%20fees. (Dec. 9, 2020) ("The Consumer Bankruptcy Reform Act will make it easier and less expensive for financially-strapped families and individuals to obtain financial relief by replacing the two separate consumer bankruptcy chapters with a single system available to all consumers, streamlining the filing process, and reducing filing fees").