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Ann Cammett

University of Nevada, Las Vegas – William S. Boyd School of Law

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ARTICLES

Deadbeats, Deadbroke, and Prisoners

Ann Cammett*

ABSTRACT

Historically, child support policy has targeted absent parents with aggressive enforcement measures. Such an approach is based on an economic resource model that is increasingly irrelevant, even counterproductive, for many low-income families. Specifically, modern day mass incarceration has radically skewed the paradigm on which the child support system is based, removing millions of parents from the formal economy entirely, diminishing their income opportunities after release, and rendering them ineffective economic actors. Such a flawed policy approach creates unintended consequences for the children of these parents by compromising a core non-monetary goal of child support system—parent-child engagement—as enforcement measures serve to alienate parents from the formal economy after reentry and drive them underground and away from their families.

In this Article, I propose that lawmakers harmonize child wellbeing rhetoric with policy by mitigating the counterproductive effects of federal and state law on incarcerated parents, an issue that is undoubtedly of national concern. I also invite readers to reimagine the normative contours of child supportive practices by recognizing that child support alone will never be an effective substitute for broader antipoverty measures.

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* Associate Professor of Law, Co-Director, Family Justice Clinic, William S. Boyd School of Law, University of Nevada Las Vegas; L.L.M., Georgetown University Law Center; J.D., City University of New York Law School. I wish to thank Marcia M. Gallo, Ann C. McGinley, Nancy Rapoport, and Cliff Rosky for helpful comments.

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I. INTRODUCTION

The child support enforcement system punishes some low-income families, especially those with an incarcerated parent. Such a proposition, at first blush, seems counterintuitive. Consistent with a mandate to generate economic support for children, federal intervention into the support arena has resulted in much improved collection rates from nonresident parents with financial resources.¹ However, enforcement has not come close to eradicating child poverty for the

1. See generally ELAINE SORENSEN, URBAN INST., CHILD SUPPORT GAINS SOME GROUND (2003), available at http://www.urban.org/uploadedpdf/310860_snapshots3_no11.pdf; see also VICKI TURETSKY, CTR. FOR LAW & SOC. POL’Y, THE CHILD SUPPORT PROGRAM: AN INVESTMENT THAT WORKS (2005), available at <http://www.clasp.org/admin/site/publications/files/0234.pdf>.

children most in need, a significant goal of the system.² In the case of incarcerated parents, who are disproportionately poor³ and from communities of color,⁴ federal enforcement of child support orders plays a more limited role in securing more financial stability for their children. Indeed the opposite result is common: aggressive enforcement and uncollectible debt can manifest in unintended consequences that hamper the larger goal of ongoing parental support.

Prisoners are also parents, and in many states they amass huge child support arrears during a period of incarceration.⁵ Such a debt does not relate to real income since prisoners earn little or no money,⁶ the debt will likely never be collected, and the support arrearage will not ultimately redound to the benefit of their children.⁷ This dynamic has been further complicated by an important element of the support model that we have embraced in the United States:

2. J. THOMAS OLDHAM, PREFACE TO CHILD SUPPORT: THE NEXT FRONTIER ix, ix-xiii (J. Thomas Oldham & Marygold S. Melli eds., 2000) (reviewing recent research on the impact of child support reforms and finding that “there is considerable evidence that reforms have failed to accomplish one of the most important objectives of child support, that of reducing child poverty”). In 2009, both the poverty rate and the number in poverty increased for children under the age of 18 (from 19.0% and 14.1 million in 2008 to 20.7% and 15.5 million in 2009). CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, CURRENT POPULATION REPORTS (2010).

3. See BRUCE WESTERN, RUSSELL SAGE FOUND., PUNISHMENT AND INEQUALITY IN AMERICA 100 (2006) (noting that about a third of inmates were not working before being admitted to prison or jail based on correctional surveys between 1979 and 1997 and noting that, “underscoring their low levels of ability and poor employment records, prison and jail inmates earn significantly less at the time of their incarceration than other young men aged twenty-two to thirty with the same level of education”). *Id.* at 101; see also CREASIE FINNEY HAIRSTON, CHILD WELFARE LEAGUE OF AMERICA, THE FORGOTTEN PARENT: UNDERSTANDING THE FORCES THAT INFLUENCE INCARCERATED FATHERS’ RELATIONSHIPS WITH THEIR CHILDREN 619 (1998) (“Most prisoners are male, are young, have low levels of education, and are poor at the time of their arrest.”).

4. *E.g.*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Jan. 23, 2011) (“More than 60% of the people in prison are now racial and ethnic minorities. For Black males in their twenties, 1 in every 8 is in prison or jail on any given day. These trends have been intensified by the disproportionate impact of the “war on drugs,” in which three-fourths of all persons in prison for drug offenses are people of color.”).

5. Analyses of child support profiles in Massachusetts indicated that released prisoners owe an average of over \$16,000 in child support debt, including nonpayments from before and during prison. Increases in debt during incarceration averaged over \$5,000. Esther Griswold & Jessica Pearson, *Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies*, CORRECTIONS TODAY, June 1, 2003, at 65. See also Kirsten D. Levingston & Vicki Turetsky, *Debtors’ Prison: Prisoners’ Accumulation of Debt as a Barrier to Reentry*, 41 CLEARINGHOUSE REV.: J. OF POVERTY L. & POL’Y 186, 187 (2007) (“Courts, corrections departments, and parole and probation agencies levy a range of cost-recovery and punitive sanctions, while parents in prison face mounting child support obligations that they lack the ability to pay.”); Elizabeth J. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J.L. & PUB. POL’Y 95, 140 (2008) (“[T]he idea of child support orders and their vigorous enforcement as a means to a better life for the children of absent parents has sometimes gotten ahead of the reality. Increasing the amount of a child support award provides no benefit to the child if there is no prospect of payment.”).

6. For instance, inmates in Massachusetts may earn as little as \$1 per day, and inmates in Colorado earn between 25¢ and \$2.50 per day. See Griswold & Pearson, *supra* note 5, at 88.

7. See *infra* Part III.A.

absolute enforcement against all nonresident parents who have fallen behind in child support, regardless of their circumstances. A wide range of very serious sanctions, such as onerous salary garnishment, driver's license suspension, re-incarceration, and many others can be triggered against parents when they are released. Moreover, pursuant to federal law—specifically the Bradley Amendment—debt from child support arrears cannot be modified or discharged by a court once it is accrued.⁸ These automatic penalties are counterproductive, as they make it more difficult for formerly incarcerated parents to pay ongoing support as they attempt to successfully reintegrate into society and resume contact with their children. Rather, automatic child support enforcement creates perverse incentives that alienate parents from the formal economy and drive them underground—and away from their families.⁹ Such a paradigm cannot be in the best interests of their children and runs counter to the goals of the child support program.¹⁰

The universal perception that all parents who fail to pay support are “deadbeat dads”¹¹ remains a powerful cultural narrative and tough enforcement against parents that fail to pay is resonant with the body politic. This narrative driving child support enforcement has become progressively more punitive without allowing for meaningful political and policy discourse that distinguishes deadbeats from “deadbrokes”—those who simply don't have the ability to pay. Further, in the case of prisoners, state courts often conflate blame for criminal conduct with one's actual ability to earn money while incarcerated, using debt accumulation and obligation as a proxy for further punishment.¹² Yet, debt accrued during incarceration does not typically represent a resource from which children will eventually benefit. A financial obligation on the books, unmoored to

8. See *infra* Part III.B.

9. See Ronald J. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. OF POL'Y ANALYSIS & MGMT. 44, 48 (“More aggressive and punitive enforcement efforts may not always result in increased collections and may be harmful for low-income noncustodial fathers, discouraging them from formally supporting their children.”).

10. See MINDY HERMAN-STAHLE ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., INCARCERATION AND THE FAMILY: A REVIEW OF RESEARCH AND PROMISING APPROACHES FOR SERVING FATHERS AND FAMILIES 6-5 (2008) (“Difficulties paying child support can also impede father-child relationships by causing tension between fathers and their children's caregivers, to whom they owe the money or by presenting legal barriers to fathers' contact with their children.”).

11. In this Article, parents with child support debt are frequently referred to as fathers owing to the overwhelming prevalence of men as obligors in the child support system. However, the child support system itself is gendered and thus has a powerful impact on women, particularly low-income mothers. Exploration of this dynamic however, is beyond the scope of this Article. An example of how mainstream the concept of “deadbeat dads” has become lies in its inclusion in the heralded Oxford English Dictionary: “deadbeat dad n. colloq. (orig. and chiefly U.S.) a father who lives apart from his children and does not support them financially; (more generally) any neglectful father.” OXFORD ENGLISH ONLINE DICTIONARY, <http://www.oed.com/view/Entry/47620?redirectedFrom=deadbeat%20dad#eid7510269> (last visited Feb. 2, 2011).

12. See *infra* Part III.C. Courts sometimes focus on the inmate's criminal acts rather than earning capacity when deciding whether it is appropriate to suspend or modify a child support order during incarceration.

real earning capacity, may remain unpaid forever because it does not represent real income or future earnings.¹³ It is quite simply an uncollectible debt that does not benefit children, the state,¹⁴ or society.¹⁵

This Article posits parental incarceration as a stark illustration of the predicament that many low-income obligors and their families routinely confront. I do not seek to answer the question of who is ultimately responsible for the support of low-income children. That question is beyond this Article's scope. Rather, I examine the functioning of modern child support legislation *on its own terms* and conclude that the trajectory of enforcement policy—historically powered by animus against deadbeat dads—eclipses a critical assessment of whether the child support system meets its stated goal of child well-being for a significant number of children: those with an incarcerated parent. This issue must be assessed anew, in light of mass incarceration and its deleterious effect on parents as economic actors in the child support system—but also because the rush to enforcement fails to acknowledge and prioritize the specific social needs of this rapidly growing constituency of children with incarcerated parents.

Part II of this Article provides an overview of escalating enforcement within the federal child support system, describing policymakers armed with a mandate to confront escalating welfare costs, who in turn enact legislation to transfer those costs to absent parents. It describes child support as an area of family law increasingly identified with welfare law and driven by political narratives of deadbeat parents rather than reasoned policy to effectuate child-centered goals. In examining the effects of this approach, I determine that automatic enforcement provisions have the effect of punishing those least able to comply with them voluntarily.

Part III proceeds by identifying the genesis of debt accumulation that renders

13. See Mincy & Sorensen, *supra* note 9, at 44-51 (“Punitive child support policies, however, will likely be ineffective and even harmful if they continue to ignore the segment of the population that may have insufficient income to pay child support.”).

14. Overall child support collections for 2009 totaled more than \$26 billion. However, the total amount of child support unpaid arrears owed was more than \$107 billion. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT FY 2009 PRELIMINARY DATA REPORT tbl.P-1 (2010), available at http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/preliminary_report_fy2009/table_1.html. It was previously reported that about half these arrears were owed to the government for welfare cost recovery and not to families. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT FY 2003 PRELIMINARY DATA REPORT, PREFACE: THE STORY BEHIND THE NUMBERS (2004), available at http://www.acf.hhs.gov/programs/cse/pubs/2004/reports/preliminary_data/#preface.

15. See Marsha Garrison, *The Goals and Limits of Child Support Policies*, in CHILD SUPPORT: THE NEXT FRONTIER 24-25 (J. Thomas Oldham & Marygold S. Meli eds., 2000) (“Because most poor children do not have ‘deadbeat dads’ who can contribute significantly to their support, child support policy will offer the most help to the least needy: it cannot be expected to achieve a major reduction in children’s poverty.”). See also Joel F. Handler & Yeheshel Hasenfeld, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 223 (1991) (explaining that early critics of welfare policy concluded child support enforcement efforts would have little impact on poor families because of low earnings of poor fathers).

incarcerated parents vulnerable as economic actors, and does so within the context of numerous legal and civil barriers to participation in the free world. It also analyzes how legal impediments, such as the Bradley Amendment and state laws that contribute to prisoner debt, compromise one of the core values of the child support system—parent-child re-engagement.

Part IV explores the child support system within the context of mass incarceration, an emerging trend that foreshadows a substantial shift in the established breadwinner paradigm. This Part invites readers to reevaluate the pressing needs of children with incarcerated parents by harmonizing child-centered rhetoric with child support policy. This Part also offers proposals for change in both legal and normative terms: a legal response to remedy the effects of counterproductive legislation and a normative claim that challenges readers to embrace a broader vision of child supportive practices for the children of incarcerated parents.

II. CHILD SUPPORT ENFORCEMENT IN HISTORICAL CONTEXT

The prominence of child support in modern family law is a “critical element in a larger shift from the husband-wife relationship to parent-child ties as the defining element of family obligation.”¹⁶ The older precedents in which child support has historically been rooted grew out of a conception of family centered on marriage.¹⁷ Owing to the rise in divorce rates and non-marital births, modern child support treats parent-child ties as more lasting than spousal relationships and independent of the relationship between parents.¹⁸ Thus, child support policy has emerged pursuant to this trend to chart a path that provides for children’s financial needs outside of the context of the “traditional” nuclear family.

Nevertheless, modern child support policy is predicated on a common tenet of financial obligation. As Martha Minow notes, “[t]he dramatic increase in rigorous enforcement of laws requiring nonresident parents to support their children financially reflects what seems to be a remarkable degree of consensus about a fundamental norm. People who produce children should provide for their

16. June Carbone, *Child Support Comes of Age: An Introduction to the Law of Child Support*, in *CHILD SUPPORT: THE NEXT FRONTIER* 3 (J. Thomas Oldham & Marygold S. Meli eds., 2000) (noting that in an era in which half of marriages end in divorce, and many American births are non-marital, most children spend part of their childhood in single-parent families); see also Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523 (1996) (noting that in 1996 “less than 10% of families with children under age 18 conform to the pattern of a single male breadwinner and female stay-at-home spouse. Nevertheless, we retain the traditional model, although cloaked in a new egalitarian, gender-neutral ideology”).

17. Carbone, *supra* note 16, at 4.

18. Robin Fretwell Wilson, *A Review of From Partners to Parents: The Second Revolution in Family Law* by June Carbone, 35 FAM. L.Q. 833, 834-5 (2002) (“With the fading importance of marriage, Carbone finds in parenthood ‘the key to a renewed sense of obligation that connects family roles to community needs.’ Custody and child support rather than marriage should occupy ‘the moral center of family law’ because unlike the helter-skelter array of intimate relationships among adults, ‘parenting involves a more predictable set of obligations.’”).

support.”¹⁹ Enforcement may indeed be appropriate to the task of coercing an unwilling but able parent to pay child support in our system, which places the primary burden of support on nonresident parents rather than on society itself.²⁰ But if one embraces such a norm, an important implication of that norm is that a parent has the ability to maintain consistent employment in order to provide support.²¹ The evolution of child support policy and law has not historically contemplated nonresident incarcerated parents, but rather presupposes a normative model of family obligation where enforcement measures apply to all parents equally under an absent breadwinner framework.²² This bedrock principle has evolved over into facially neutral legislation that attempts to address the support of children by parents not living in the household—in particular fathers—but fails to uniformly make critical distinctions between the circumstances of absent parents, such as incarceration, that might lead to more appropriate policy outcomes.

A. Federal Policymaking and Cooperative Federalism

Since New Deal legislation was enacted in the 1930s, the federal government has exercised its spending powers²³ to dramatically alter the landscape of the child support system in the United States. The Supreme Court has consistently held that Congress may use its spending power to achieve ends it could not reach under its other enumerated powers, so long as the legislation is in pursuit of the general welfare.²⁴ With respect to child support policy, the national government

19. Martha L. Minow, *How We Should Think About Child Support Obligations*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 302, 302 (Irwin Garfinkel et al. eds., 1998) (exploring the various rationales for child support obligations). *See also* David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2588 (1995) (“The duty that parents have to support their children rests, in our culture, on the widely shared belief in each person’s responsibility for his voluntary actions and in deeply rooted notions of what it means to be a parent. Conservatives feel additional anger when they, as taxpayers, are required to pay for children born of nonmarital relationships that they consider immoral. Liberals feel anger of another sort. They deplore the gendered nature of the problem. They know that it is men who walk away from their children, and women left in poverty who bear the burden. This may be a moral crusade, but it is one well-grounded in a range of American values.”).

20. *See infra* notes 178-82 and accompanying text.

21. Ironically, Minow also notes that, “if the parents had stayed together in one household regardless of their resources, they would have no legal obligation to support their children beyond subsistence because of the state’s respect for parental prerogatives under the rubric of family privacy.” Minow, *supra* note 19, at 307.

22. *See infra* notes 145-48 and accompanying text.

23. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 280 (2008) (“There is little question that Congress’s extensive involvement in family policy is constitutional under the Spending Clause.”); *see also* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918-19 (1995) (explaining the expansive power Congress holds under the Commerce Clause).

24. Under Article I, Section 8 of the Constitution, Congress has authority “to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.” U.S. CONST. art. I, § 8.

has justified this authority by citing child support as an area of national concern.²⁵ As such, “[t]here is little question that Congress’s extensive involvement in family policy is constitutional under the Spending Cause,”²⁶ and courts have routinely upheld congressional child support mandates.²⁷

Thus, in 1935, the U.S. Congress enacted the Social Security Act,²⁸ a federal economic security program intended to alleviate the suffering of the Great Depression. Local government entities were staggering under the costs of relief, and the massive unemployment of previously employed white, male voters made it politically impossible to dismiss the poor as responsible for their own circumstances.²⁹ Under Title IV of the Act, Aid to Dependent Children (ADC)³⁰ was established as a federal program that added funds to state “mothers’ aid programs,”³¹ providing monthly payments to families who met certain federal requirements.³² The threshold requirement was a lack of support by an absent

25. See Estin, *supra* note 23, at 270 (“Particularly in areas that concern children, both Congress and the Supreme Court are deeply involved in constructing and maintaining background norms of family regulation in the United States.”); see also Harry D. Krause, *Child Support Enforcement: Legislative Tasks for the Early 1980s*, 15 FAM. L.Q. 349, 350 (1982) (“‘Family policy’ in terms of public versus private responsibility came to be a national concern.”).

26. Estin, *supra* note 23, at 280. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court enumerated restrictions on Congress’s spending power, noting that “the exercise of the spending power must be in pursuit of ‘the general welfare,’” and on this question, “courts should defer substantially to the judgment of Congress.” 483 U.S. at 207. Subsequently, in *U.S. v. Kansas*, 24 F. Supp. 2d 1192 (D. Kan. 1998), challenging amendments to the Child Support Enforcement Program enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act, the district court noted that “[c]hild support regulations are within the ‘pursuit of the general welfare,’” (citing Children’s & Parents’ Rights Ass’n v. Sullivan, 787 F. Supp. 2d 724, 735 (N.D. Ohio 1991)). 24 F. Supp. 2d at 1197.

27. See Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 578 (1998) (noting that despite restrictions on spending power articulated in *Dole*, “the Court has not invalidated an exercise of the federal spending power since 1936 and never has invalidated federal conditional spending for state or local governments. When states have asserted federalism or autonomy objections to conditional spending programs, the Court’s consistent response has been that states remain free to refuse the funds if the conditions are objectionable”).

28. Social Security Act, 42 U.S.C. § 301 (1935).

29. See Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 722 (1992) (“The Great Depression provided the impetus for a national framework to provide assistance to the poor.”).

30. 42 U.S.C. § 601-617 (1935). The name of the program was changed to Aid to Families with Dependent Children (AFDC) in 1962. Public Welfare Amendments of 1962, 42 U.S.C. § 1314-15. See Estin, *supra* note 23, at 275 (“Congress claimed a more significant role with the Aid to Dependent Children program, enacted as Title IV of the Social Security Act of 1935.”); Laura W. Morgan, *Child Support Fifty Years Later*, 42 FAM. L.Q. 365, 366 (2008) (“Modern child support law has its primary origins in Title IV-A of the Social Security Act of 1935, Aid to Families with Dependent Children . . .”).

31. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935, at 37 (1994) (stating also that state mothers’ aid programs were so prevalent that forty-six of the forty-eight states had passed laws authorizing them).

32. Laura A. Morgan, *The Federalization of Child Support A Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law”*, 16 J. AM. ACAD. MATRIMONIAL LAW. 195, 202 (1999).

parent³³—and an “absent” parent often meant a father who had died.³⁴ This framework did not contemplate parents in prison who would otherwise be expected to pay support. The question of prisoners’ obligations vis-à-vis children had not yet been interrogated because imprisonment was not a defining source of mitigation during the New Deal period due to the relatively low rate of parental incarceration. In 1933, approximately 125,000 Americans were incarcerated.³⁵ By comparison, we currently incarcerate 2.3 million people in our prisons and jails.³⁶

The original purpose of federal support for children through state mothers’ aid was to defray the cost of raising children in their own homes and to deter child labor and the institutionalization of fatherless children, as was common during the era.³⁷ As such, the goals of the federal government were primarily child-centered. After Congress enacted ADC (later renamed Aid to Families with Dependent Children, or AFDC) in 1935, the role of the federal government in providing a basic safety net for low-income children continued apace, although mothers did not themselves receive benefits until 1950.³⁸

By the early 1970s, Congress recognized that the composition of the AFDC caseload had changed dramatically.³⁹ In earlier years, the majority of children needed financial assistance because their fathers had died; by the 1970s, the majority needed aid because their parents were separated, divorced, or never

33. See Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIMONIAL LAW. 103, 109 (1990) (“The AFDC program was designed to provide support for ‘dependant’ children who were not being properly supported by their parents.”).

34. In earlier years the majority of children needed financial assistance because their fathers had died; by the 1970s, the majority needed aid because their parents were separated, divorced, or never married. See THE 2000 GREEN BOOK, *Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means* (October 2000, ed. 17), Committee on Ways and Means of the U.S. House of Representatives, available at <http://aspe.hhs.gov/2000gb/sec8.txt>.

35. U.S. DEP’T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1884, tbl.3-6, available at <http://www.ncjrs.gov/pdffiles1/pr/102529.pdf>.

36. See *infra* note 129 and accompanying text.

37. See GORDON, *supra* note 31, at 37 (“In labor-scarce America the services or wages of a child over ten was one of the most valuable assets a man could have.”); see also MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6 (1994).

38. Social Security Act Amendments of 1950, 42 U.S.C. § 411-18, 1351-55, 1308 (2010). The program did not expire, but rather expanded and opened up to those that had previously been excluded. The civil rights and welfare rights movements of the 1960s, and aggressive lawyering on behalf of poor people, removed many of the systematic administrative barriers used to keep African-American women from receiving benefits. See Williams, *supra* note 29, at 724; ANNALISE ORLECK, STORMING CAESAR’S PALACE (2009) (recounting the strategies of Ruby Duncan and the women of the Welfare Rights Movement). Moreover, the pivotal scholarship of Professor Charles Reich in the 1960s set the stage for the concept of welfare as an entitlement to meet the enduring problem of poverty during the “Great Society” period. Williams, *supra* note 29, at 724.

39. S. REP. NO. 93-1356, at 42-43 (1974) (“What kinds of families are these in which the father is absent from the home? Basically, they represent situations in which the marriage has broken up or in which the father never married the mother in the first place. . . . It is disturbing to note that from 1971 to 1973, there has been a 21.7 percent increase in the number of AFDC families receiving AFDC in which the father was not married to the mother.”).

married.⁴⁰ Moreover, Congress identified a link between the poverty of custodial parents, usually mothers, and absent fathers who routinely neglected to pay support for children who were not in their care.⁴¹ Congress began to pay closer attention to absent fathers, specifically as a result of growing concerns about the number of families on welfare. As noted by the Senate Committee on Finance of the 94th Congress:

The Committee believes that all children have the right to receive support from their fathers. The Committee bill is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.⁴²

The child support enforcement system was poised to turn its attention to fathers—and to step up enforcement mechanisms against them.

B. Enforcement: Legislating a Cure for Poverty

Far-reaching child support reforms in the mid-1970s were “propelled by widespread denigration of absent fathers.”⁴³ In the political regulation of the family and its attendant narratives, the “welfare queen” had her corollary in the deadbeat dad.⁴⁴ The basic premise underlying the creation of the national child support program and enforcement provisions was that non-supporting fathers were the principal agents of increased welfare costs and that child poverty was due the their failure to pay support.⁴⁵ The reasons why fathers failed to pay were myriad—running the gamut from outright abdication of responsibility to shared poverty—but consideration of their individual circumstances was secondary to

40. See generally Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L. Q. 519, 520 (1996) (providing a detailed analysis of child support enforcement acts culminating with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

41. Elrod, *supra* note 33, at 113 (“During the 1970’s increasing numbers of female households fell below the poverty level, until one half of families in poverty were headed by women.” (citing BUREAU OF JUSTICE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS: MONEY, INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES, 1983, at 21-22 tbl.15 (1985))).

42. STAFF OF S. COMM. ON FINANCE, 94TH CONG., CHILD SUPPORT DATA & MATERIALS 3 (Comm. Print 1975).

43. See Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 263 (2000) (“These far-reaching child support reforms are propelled by wide-spread denigration of absent fathers. . . . This change coincided with the convergence of welfare law and child support law in Title IV-D.”).

44. *Id.*

45. See *infra* note 50 and accompanying text.

the push for overall accountability.⁴⁶ It was in this context in 1974 that Congress sought to undertake the first broad restructuring of child support enforcement by enacting federal legislation under Title IV-D of the Social Security Act, with the primary objective of recouping welfare expenditures made to households with poor children.

1. Family Support Act: Title IV-D of the Social Security Act

With the passage of the Family Support Act (FSA),⁴⁷ for the first time, the national government required states receiving AFDC funds to establish and enforce child support obligations.⁴⁸ The intent of the FSA was to reduce the federal costs of AFDC by sharpening enforcement of support obligations by nonresident parents. As the reasoning goes, the more child support collected, the lower the cost of the program to the federal government.⁴⁹ In essence, the government was noting its legislative intent to transfer the responsibility for the support of children from the government's safety net to the nonresident parent. As Congress declared in 1975, "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents."⁵⁰

Despite the fact that the primary goal of the 1974 changes was to reduce federal welfare expenditures, the child support enforcement resources were also made available to parents who were not welfare recipients.⁵¹ Congress enacted a

46. See Legler, *supra* note 40, at 562, 563 (commenting on the impact of welfare reform in 1998, Legler notes that "these changes must be seen in the context of the total picture. By itself collecting child support is not a solution to the problem of poverty in single parent families. Much of the money will flow to families above the poverty line. Alone, it will have only a modest impact on poverty rates and welfare costs. If policymakers expect the changes in child support policy to substitute for cuts in welfare expenditures, they will have sorely missed the boat"); ELAINE SORESENSEN & CHAVA ZIBMAN, URBAN INST., POOR DADS WHO DON'T PAY CHILD SUPPORT: DEADBEATS OR DISADVANTAGED? tbl.1 (2001), available at <http://www.urban.org/publications/310334.html> (noting that "in 1997, 29% of fathers were institutionalized").

47. Social Security Amendments of 1974, 42 U.S.C. §§ 651-60 (requiring states to meet standards promulgated by the newly established federal Office of Child Support Enforcement (OCSE), a division of the Department of Health and Human Services).

48. *Id.* (requiring that every state that received AFDC funds had to establish a child support agency (known as a IV-D agency from Tile IV section D of the Social Security Act)); see Brito, *supra* note 43, at 263 ("Duality in family law is exemplified by the two distinct bodies of family law that exist in the United States: one for families receiving public assistance and another for families in the rest of society.").

49. See *supra* note 42 and accompanying text.

50. STAFF OF S. COMM. ON FINANCE, *supra* note 42. Generally, Title IV-D left the states in charge of collection and paternity establishment but gave the government an enhanced role as the "active stimulator, overseer and financier of state collection systems." See HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 309 (1981) (discussing the 1974 Amendments).

51. Under the new regime, all AFDC applicants were required to assign their rights to their child support monies collected to the state and to agree to cooperate in locating the absent parent, establishing paternity, obtaining a support judgment, and securing payments. The states agencies were also required to establish a "parent locator service" with access to federal data including Internal Revenue and Social Security information. Estin, *supra* note 27, at 546-47 (1998).

series of legislative initiatives thereafter to require states to sharpen their laws and strengthen enforcement powers even as to non-welfare families.⁵² Within a few years, half of all support collections were for non-welfare families, rather than the families that were originally targeted for recoupment.⁵³ This early failure to actually collect from low-income parents indicated a problem with uniform enforcement against all parents and suggested that some fathers might also be very poor and would, without other supports, be unable to substantially lift their children out of poverty.⁵⁴ However, the failure to collect from these absent parents was primarily addressed by continuing to tighten enforcement provisions via federal legislation⁵⁵ against all obligors, rather than exploring why it was so difficult to collect from AFDC fathers.

2. Personal Responsibility and Work Opportunity Reconciliation Act

The most comprehensive overhaul of the increasingly federalized child support system was yet to come. In 1996, pursuant to President Clinton's pledge

52. The Child Support Enforcement Amendments of 1984 broadened the scope of the FSA by requiring the states to: withhold child support from delinquent parents (in a limited manner); provide for the imposition of liens against property of defaulting obligors; and deduct unpaid support obligations from federal and state income tax refunds. Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 8 (1990).

53. *Id.* at 6-7 ("In middle class family support, [enforcement] has made a significant difference: more than one-half of total collections are going to children who are not on the welfare rolls."); see also Estin, *supra* note 27, at 597 ("It is not clear how much more child support enforcement can help the nation's poorest families. Thus, although the support enforcement program is justified by Congress under its spending power as growing from the obligation to protect the funds expended for public assistance, the link between child support enforcement and welfare budgets has grown increasingly attenuated.").

54. Krause, *supra* note 52, at 13 ("Looking carefully at statistics and reality, one may reasonably conclude that many fathers are unable to provide the support their children need to get a decent start in life, even if many try. To the extent we view child support enforcement as the sole solution to child poverty, we are as wrong as those in the 1960s who saw the AFDC program as the sole appropriate source of support for female-headed families."); see also Irwin Garkinkel, Sara S. McLanahan & Thomas Hanson, *A Patchwork Portrait of Nonresident Fathers*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 31, 48 (Irwin Garfinkel, Sara S. McLanahan, Daniel R. Meyer & Judith A. Seltzer eds., 1998) (noting that one-half of the children of fathers receiving public assistance had incomes below \$6,000 per year); Chambers, *supra* note 19, at 2577 ("My puzzlement arises from a suspicion that although improved enforcement programs would likely produce substantial positive results for many women and children, they would also, for a substantial and unmeasurable number of men, women and children, inflict unintended and undesirable harms that we would regret. As is often true in our society, these negative consequences would be borne disproportionately by the poorest persons and by persons of color.").

55. The 1988 Family Support Act amendments provided that, beginning in 1994, for all new or modified support orders, child support payments are to be withheld from absent parents' wages automatically and without regard to whether they are in arrears. Support guidelines must be used to determine child support obligations, and child support orders are to be reviewed every three years. Family Support Act of 1988, 42 U.S.C. § 668-69, 681-87 (2010). The 1988 enactments also created the U.S. Commission on Interstate Child Support, which was charged with making recommendations on improvements to the interstate establishment and enforcement of child support awards. The Commission's Final Report, issued in August 1992, included 120 separate recommendations to Congress. *Official Recommendations of the United States Commission on Interstate Child Support*, 27 FAM. L.Q. 31 (1993).

to “end welfare as we know it”⁵⁶ Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),⁵⁷ also known as “welfare reform.” PRWORA ended the federal entitlement program ADFC and replaced it with Temporary Aid to Needy Families (TANF)—a program that provided block grants to the states to run their own public assistance programs.⁵⁸ While it is well understood that welfare reform altered the national landscape of entitlements, it is less commonly known is that it also effected a significant restructuring of the entire national child support system.⁵⁹

The major effect of PRWORA was that the federal government would no longer provide a guaranteed safety net of cash benefits. Rather, the major responsibility for helping poor families shifted to state and local governments.⁶⁰ Moreover, legislative policy zeroed in on the link between poverty, single mothers, and absent fathers.⁶¹ Characterizing welfare policy as “the crisis in our Nation,” Congress declared that “prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important government interests.”⁶² This policy concern was reflected in the terms of the revised welfare program, in its requirements for enhanced case processing, stringent new rules for state paternity laws, and in the child support enforcement provisions.⁶³ In order to qualify for block grants, states were required to operate a Title IV-D child support enforcement program and undertake a multitude of new measures that would lead

56. President William Jefferson Clinton, Presidential Campaign Speech (Oct. 11, 1992). The first news story reporting President Clinton’s use of the phrase “end welfare as we know it” appeared on Oct. 12, 1992, during Clinton’s campaign. After his election in November 1992, he used the phrase in a speech to the National Conference of State Governors. Jason DeParle, *Caution of Welfare: Even Though They Please Moynihan, Clinton’s Actions are Far From Bold*, N. Y. TIMES, Feb. 2, 1993, at A1. See, e.g., Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523 (1995).

57. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter PRWORA] (codified as amended in scattered sections of 42 U.S.C.). See also H.R. REP. NO. 104-651 (1996), reprinted in 1996 U.S.C.C.A.N. 2183, 2184 (“There is little doubt that the current welfare system is a failure. It traps recipients in a cycle of dependency. It undermines the values of work and family that form the foundation of America’s communities. Most devastating of all, it fails the Nation’s children. These are the pathologies that the welfare reform incorporated in this reconciliation measure is intended to cure. The reform proposal saves families by promoting work, discouraging illegitimacy, and strengthening child support enforcement.”).

58. See Legler, *supra* note 40, at 519.

59. This legislation was buttressed a series of findings about the importance of marriage and responsible fatherhood and motherhood, the national increase of out-of-wedlock pregnancies and births, and the negative consequences of raising children in single parent homes. PRWORA, *supra* note 57, § 101(1)-(9).

60. Legler, *supra* note 40, at 519. (“The bottom line is that the federal government will no longer guarantee a cash assistance safety net for children. This will shift the major responsibility for helping poor families to state and local governments.”).

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

62. PRWORA, *supra* note 57, § 101(10).

63. *Id.* § 331-33.

to increased child support collection.⁶⁴ Title III of the PRWORA details a mandatory child support collection structure that must be established and operated if a state is to remain eligible for the full Temporary Assistance to Needy Families (TANF) grant.⁶⁵

By the time PRWORA became law in 1996, it was known that there were a significant number of parents owing child support who themselves were living at or below the poverty line. For example, a report indicated that California's arrears were highly concentrated among noncustodial parents with low incomes and high arrears.⁶⁶ Further, a report by the Bureau of Justice Statistics noted that in 1997 most fathers in state prisons reported incomes below the poverty line prior to incarceration, with 53% earning less than \$1,000 in the month before their arrest.⁶⁷ Nevertheless, obligors continued to be treated as one homogeneous group, and their failure to pay seen as automatically willful. President Clinton assured an audience (a week prior to signing the welfare reform bill) that nonpayment of child support was a serious crime, comparing it to robbing a bank

64. See Morgan, *supra* note 32, at 210-11 ("PRWORA requires states to enact legislation or regulations to: (1) expand the scope of existing in-hospital paternity establishment programs and to make them uniform; (2) streamline the process for the establishment of paternity; (3) provide authority to the child support enforcement agency to order genetic testing without the necessity of obtaining an order from any judicial or administrative tribunal; (4) create a state registry of all cases in which services for collection are provided by the state IV-D agency, which must include the amount of the obligation, a record of payments collected, the amount of arrears, if any, the distribution of collections, and identifying information on the parties and child[ren]; (5) coordinate the state registry with the Federal Case Registry, Federal Parent Locator Service, Medicaid agencies, and Interstate Information; (6) create a Directory of New Hires that will report to the Federal Parent Locator Service for matching; (7) match new hires against Federal Case Registry of Child Support Orders; (8) require employers to send withholdings to the state disbursement unit within seven days after payday; (9) require the Social Security number of any applicant for a commercial driver's license, occupational license, professional license, or marriage license, and in any paternity or child support action; (10) adopt the Uniform Interstate Family Support Act (UIFSA) by January 1, 1998; (11) use standard forms for interstate enforcement of child support by October 1, 1996; (12) create expedited procedures without court order for obtaining financial records by subpoena, imposing penalties for failure to respond to subpoena requests, requiring responses to other state requests for information, providing access to public records, ordering income withholding, and securing assets by intercept from workers' compensation benefits, judgments, settlements, and lotteries; (13) adopt the Uniform Fraudulent Conveyance Act of 1981, or other similar act that creates a prima facie case of fraud for transfers of property to avoid support payment where a support obligation is owed; (14) establish liens against real estate and personal property as a matter of law for overdue support owed by a parent who resides or owns property in the state, and give full faith and credit to liens arising in sister states where such liens are properly recorded or served in accordance with state law; (14) [sic] withhold, suspend, or restrict drivers' licenses, professional and occupational licenses, and recreational licenses of individuals who owe child support.").

65. See generally Legler, *supra* note 40.

66. Seventy percent of California's arrears were reported by parents earning \$10,000 or less. Elaine Sorensen, *Understanding How Child Support Arrears Reached \$18 billion in California*, 94 AM. ECON. REV. 312, 314 (2004).

67. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN 10 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf>.

or a 7-Eleven store.⁶⁸ To press his point, the President warned: “if you owe child support, you better pay it. If you deliberately refuse to pay it, you can find your face posted in the Post Office. We’ll track you down with computers We’ll track you down with law enforcement. We’ll find you through the Internet.”⁶⁹ As was typical of the discourse surrounding debtor parents, the President made no distinction, as a matter of fact or policy, between deadbeats and deadbroke. He certainly made no mention of people in prisons and the structural barriers to compliance, or how such enforcement of delinquent child support might impact prisoners or their families.⁷⁰ The goal was to make child support obligations inescapable, “like death or taxes.”⁷¹

III. PRISONERS AND ENFORCEMENT: THE GENESIS OF DEBT CREATION

Whatever the philosophical aims of punishment, it seems to us problematical to add to the terms of imprisonment a cumulating debt of child support which the prisoner cannot presently pay and which will await him upon release. From the standpoint of rehabilitation, at least, ordering deferred child support for the length of imprisonment may have its own unintended consequences.

—D.C. Court of Appeals, 1994⁷²

Apart from living disproportionately in poverty, incarcerated parents are particularly vulnerable to accruing unreasonable child support debt. One indication that child support payments alone are not a viable solution for poverty is that, for all the support collected from parents—made possible by powerful enforcement tools at the disposal of the government—state child support systems are still owed well over \$107 billion dollars in arrears.⁷³ Many parents simply

68. See Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 *YALE L.J.* 1123, 1124 (1999) (citing William J. Clinton, Remarks Made to the Citizens of Denver (July 18, 1996)).

69. *Id.*

70. PRWORA was not the final piece of support enforcement legislation passed by Congress during the Clinton Administration. Armed with continued bipartisan support for increased punishment for delinquent obligors generally, President Clinton subsequently signed into law the “Deadbeat Parents Punishment Act.” 18 U.S.C. § 228 (2010). The Act made it a federal felony to cross state lines for a willful evasion of child support obligation for any person who “(a)(1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000; (2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000; or (3) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than \$10,000.” *Id.* The Act passed both chambers by overwhelming margins.

71. See Legler, *supra* note 40, at 538.

72. *Lewis v. Lewis*, 637 A.2d 70, 73 (D.C. Cir. 1994).

73. See *supra* note 14; see also ELAINE SORENSEN ET AL., URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 1 (2007), available at <http://aspe.hhs.gov/hsp/07/assessing-CS-debt/> (“Nearly three quarters of the high debtors had no reported income or reported incomes of \$10,000 a year or less.”).

cannot pay their child obligations as designated by the courts.⁷⁴ This fact raises the question: why are they ordered to pay support that they cannot afford in the first place?

A. *Growing Arrears to the State, Disproportionate Impact in Enforcement*

Notwithstanding federal control over child support policymaking, states retain the power to establish and modify orders in their jurisdictions within their state courts or, increasingly, administrative agencies.⁷⁵ Federal law requires that each state establish child support guidelines to determine the amount of child support awards,⁷⁶ but states have considerable discretion in doing so. Moreover, though enacted as facially neutral, the triggering of enforcement mechanisms against parents who fall behind in child support payments have a disproportionately negative effect on those without the resources to pay, especially incarcerated parents.

1. State Practices that Lead to Arrears Growth

State law is determinant in four areas that contribute to child support arrears growth: the amount of child support awards, the process of establishing awards, the standard by which awards are modified, and whether interest is assessed on child support arrears.⁷⁷ Thus, state practices can lead to inappropriate child support orders from the outset. Many states allow for setting awards by default—that is, when the obligor is not present to testify to actual income.⁷⁸ An order in this instance is calculated with little regard for a parent's actual ability to pay. In 2000, seventy percent of the noncustodial parents with arrears in

74. SORENSEN ET AL., *supra* note 73, at 23 (“Prior research suggests that many obligors who do not have reported quarterly wages have relatively limited resources. Research shows that this group is significantly more likely to be disabled, in prison, and without a bank account, than obligors with income.”).

75. Many states are moving toward more administrative, less court-dependent systems. At least 18 states have some type of administrative process for establishing and enforcing orders. See Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, in CHILD SUPPORT: THE NEXT FRONTIER 46, 54 (J. Thomas Oldham & Marygold S. Melli eds., 2000) (noting that “[t]he accumulated experience of these states demonstrates that administrative process can potentially speed adjudication, reduce costs, preserve or even enhance due process, improve access to the adjudicatory process, reduce fragmentation of case processing, and free up court time by relieving the court system of routine child support matters”).

76. “Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.” See 45 C.F.R. § 302.56(a). “[T]he State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.” 45 C.F.R. § 302.56(f).

77. Sorensen, *supra* note 66, at 312.

78. *Id.*

California had their awards established by default.⁷⁹ Some commentators have noted that courts are too quick to establish awards by default, in the service of bureaucratic needs to establish paternity and obtain orders quickly.⁸⁰ Moreover, many incarcerated obligors are not even aware that an order by default has been entered against them, because there is a disconnect between some corrections departments and child support agencies.⁸¹ Courts or agencies can also calculate child support retroactively to the child's birth, and seek state reimbursement for childbirth hospital bills paid by Medicaid, causing arrears to be inflated from the beginning.⁸²

Further, some courts actually "impute" income to a parent by supplying the court's judgment of what their earning capacity should be, rather than actual earnings.⁸³ Most states impute income based on full-time work at the minimum wage; some on median state wages.⁸⁴ Similarly, some states even count needs-based Supplemental Security Income (SSI) as parental income, rendering a limited governmental grant of assistance for parents' physical or mental disabilities income for the purposes of child support.⁸⁵

According to senior policy analyst Elaine Sorensen, the single largest contributing factor contributing to growth arrears in her California study is the assessment of interest at ten percent per year.⁸⁶ Federal law is silent about assessing arrears on child support debt, but nearly half of the states do such assessments.⁸⁷ Compounded interest can cause a relatively modest award to balloon very quickly, as many prisoners must wait years until release to even begin to satisfy their obligations. Given this scenario, it's no wonder that arrears

79. *Id.*

80. See Maura D. Corrigan, *A Formula for Fool's Gold: The Illustrative Child Support Formula in Chapter 3 of the ALI's Principles*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 409, 418 (Robin Fretwell Wilson ed., 2006) (noting that, in her experience as a judge overseeing child support cases, default orders do not immediately produce any actual money, and can contribute to payment avoidance). Maura Corrigan is currently the incumbent Director of the Michigan Department of Human Services and was previously a justice of the Michigan Supreme Court, where she oversaw a statewide conversion to the federally-mandated Michigan Child Support Enforcement System. See Press Release, Michigan Supreme Court Office of Public Information, Justice Maura Corrigan Ends Supreme Court Tenure Today; Praised By Chief Justice Young For 'Lasting Achievements' (Jan. 14, 2011).

81. See Griswold & Pearson, *supra* note 5, at 87 (urging departments of correction and support agencies to collaborate: "[t]here is largely an unknown intersection between incarcerated parents and [child support enforcement programs] and some states are addressing the problems that arise from having parents in prison who do not meet their child support obligations").

82. See Levingston & Turetsky, *supra* note 5, at 190.

83. *Id.*

84. *Id.*

85. See generally Angela F. Epps, *To Pay or Not to Pay, That is The Question: Should SSI Recipients Be Exempt From Child Support Obligations?*, 34 RUTGERS L.J. 63 (2002) (arguing that SSI recipients should be exempt from payment of child support and that the federal government, through the Child Support Enforcement Program, should make this exemption mandatory).

86. See Sorensen, *supra* note 66, at 313.

87. *Id.*

can grow to astronomical proportions. Much of the debt is considered uncollectible,⁸⁸ yet many states nevertheless retain the practice of applying interest on overdue child support. Practices such as setting default orders, imputing nonexistent income to an obligor, and compounding interest make it likely that most child support orders that are established this way will quickly become unmanageable.

2. The Impact of Enforcement on Incarcerated Parents

The trajectory of enforcement measures has expanded over time to ensure that parents obligated to pay support could not escape those obligations. To a certain extent, this policy makes sense. Increased automation and automatic wage withholding, once established by a state, should result in mass processing and ultimately lessen the burden on the administrative agencies over time. “New hire” reporting requirements⁸⁹ can identify newly employed wage earners immediately and expedite income withholding. Further, some enforcement techniques such as liens on property,⁹⁰ passport denials,⁹¹ income tax intercepts,⁹² and other asset seizures can operate to transfer resources to satisfy child support debt when those resources are available. Many of these enforcement tools—and indeed the panoply of enforcement mechanisms developed over time—are designed to expedite payments from parents operating as economic actors engaged in regularized employment. However, for many who are not consistently employed, such as those who are incarcerated, some automatic provisions are at best counterproductive.

Prominent enforcement tools flowing from the enhancements of the 1996 welfare reform and earlier bills also include: garnishment of salary at up to 65%; withholding, suspension, or restriction of drivers’, professional, and occupational licenses for individuals who owe child support; and even a requirement to report overdue child support to national credit bureaus.⁹³ Pursued against recalcitrant

88. *Id.* at 315. In 2002, large states like California held nearly 18 billion dollars in arrears, up from 2.5 billion ten years earlier. A state’s ability to collect on arrears—one of the key performance measures that merits federal funding of state programs—has a significant impact on retaining federal incentive money. Collecting on arrears owed by very low-income parents has proven nearly impossible. *Id.* at 312 (“In California, child-support arrears are largely uncollectible; only 25 percent of California’s arrears are likely to be collected in ten years, and arrears could easily double in that time if California does not address their growth.”).

89. PRWORA, *supra* note 57, § 453A.

90. *Id.* § 368.

91. *Id.* § 370.

92. *Id.* § 325.

93. The 1996 Welfare Reform Act requires states to have procedures for periodically reporting, subject to certain due process safeguards, the name of any non-custodial parent owing past-due support and the amount of the delinquency. 42 U.S.C. § 666(7); *see also* Fair Credit Reporting Act, 15 U.S.C. § 1681s-1 (“Notwithstanding any other provision of this title, a consumer reporting agency shall include in any consumer report furnished by the agency in accordance with section 604 [§ 1681b] of this title, any information on the failure of the consumer to pay overdue support which (1) is provided (A) to the

obligors these methods are designed to, and can reasonably, act as incentives to payment. However, for prisoners who are released from a period of incarceration, they do not operate as incentives at all, but rather barriers to economic adjustment.

For example, as a society we encourage formerly incarcerated parents to find legitimate work, become financially stable, and resume child support once they are released. In fact, this is often a condition of parole. Because most child support is automatically collected through payroll deductions⁹⁴—and garnishment of wages at a rate of up to 65% of salary for child support debt⁹⁵ is permissible—it may be impossible for many people reentering society to support themselves with low-wage work, much less pay support on an ongoing basis.⁹⁶ Policy organizations and government agencies acknowledge that there is evidence that such child support pressures may help drive some less-educated, low-skilled parents into the “underground economy” in order to increase their income or to avoid formal enforcement.⁹⁷ Participation in the underground economy, which often includes illegal activity, will likely hasten re-incarceration. Once a parent returns to prison the cycle begins anew, and no support is likely to be paid at all. A parent’s earning capacity will continue to plummet, and children will be the ultimate losers in this dynamic.

Likewise, driver’s license suspension arising from overdue child support can be an incentive for those having economic resources to pay overdue support, or otherwise face significant inconvenience. But for those reentering society after a period of incarceration, the suspension of a driver’s license can serve as a barrier to employment necessary to begin the process of repayment, particularly in many areas of the country without access to mass transportation. Moreover, suspension of licenses can have ancillary negative effects, such as inhibiting access to necessary drug treatment and even visitation with children. In this way, facially neutral legislation can have a disparate effect on families that simply cannot pay.

One of Congress’ stated goals in enacting welfare reform was to increase the

consumer reporting agency by a State or local child support enforcement agency; or (B) to the consumer reporting agency and verified by any local, State, or Federal government agency; and (2) antedates the report by 7 years or less.”)

94. 42 U.S.C. § 666(a)(16); *see also* Levingston & Turetsky, *supra* note 5, at 193.

95. Consumer Credit Protection Act, 15 U.S.C. § 1673(b); *see also* Levingston & Turetsky, *supra* note 5, at 192.

96. This author recalls countless stories of low-income and formerly incarcerated clients unable to make ends meet due to automatic garnishment of child support arrears. Nell Bernstein recounts a story of one formerly incarcerated mother: since the mother’s release she had “worked her way up from minimum wage to eight dollars an hour, and retrieved her children from foster care. Then the state caught up with her and started garnishing her wages by 50 percent. At four dollars an hour, she could no longer cover rent, food, and child care.” NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 55 (2005).

97. *See* REENTRY POLICY COUNCIL, COUNCIL OF STATE GOV’TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY, POLICY STATEMENT 23, RECOMMENDATION E (2005), available at <http://reentrypolicy.org/Report/PartII/ChapterII-D/PolicyStatement23/Recommendation23-E>; *see also* Levingston & Turetsky, *supra* note 5, at 188.

state's flexibility in administering family assistance programs, including assistance in getting support from "hard-to-collect-from" parents.⁹⁸ Ironically, Congress concurrently enacted punitive measures against parents who fell behind on payments.⁹⁹ Once state-issued support orders become a debt, these federally mandated enforcement sanctions would automatically be triggered, rendering parents with large debts less able to provide support in the long term.

3. Context of Reentry: "Collateral" or Unintended Consequences

Debt is not the only problem facing people upon release from prison. Indeed, financial liabilities must be seen in the context of myriad co-recurring reentry barriers.¹⁰⁰ As a general matter, a great many incarcerated parents have marginal levels of education and inconsistent work histories before prison.¹⁰¹ One aspect of these poor success indicators that is largely ignored is the effect that criminal convictions have on the potential earning power of low-income parents—and by extension the difficulty of providing ongoing financial support to their children. A history of incarceration reduces wages, increases the risk for unemployment, and decreases job stability.¹⁰² Analysts indicate that incarceration is associated with a 66% decline in employment,¹⁰³ and many people released from prison struggle to

98. PRWORA, *supra* note 57, § 904 ("It is the sense of the Senate that—(a) States should diligently continue their efforts to enforce child support payments by the non-custodial parent to the custodial parent, regardless of the employment status or location of the non-custodial parent; and (b) States are encouraged to pursue pilot programs in which the parents of a non-adult, non-custodial parent who refuses to or is unable to pay child support must—(1) pay or contribute to the child support owed by the non-custodial parent; or (2) otherwise fulfill all financial obligations and meet all conditions imposed on the non-custodial parent, such as participation in a work program or other related activity."); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, NATIONAL CHILD SUPPORT ENFORCEMENT: STRATEGIC PLAN 2005-2009 12 (2005), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf [hereinafter STRATEGIC PLAN] (stating the National Child Support Enforcement Association's goal as to, "develop targeted, specific initiatives to deal with special populations, including incarcerated or formerly incarcerated parents").

99. *See generally* Legler, *supra* note 59. Enforcement efforts have also manifested in the Bankruptcy Code, as child support obligations are typically not dischargeable as debts. The Bankruptcy Reform Act of 1994 provided increased protection for debts owed to the children and former spouses of debtors. Pub. L. No. 103-394, 108 Stat. 4106 (1994) (codified as amended at 11 U.S.C. § 101 *et seq.*). The U.S. Code contains a specific exception to the discharge of debts owed "for a domestic support obligation." 11 U.S.C. § 523(a)(5). Moreover, debts for child support, alimony, and maintenance have a high priority for repayment over other debts. 11 U.S.C. § 507(a).

100. This includes other debts from incarceration, such as restitution and payment of fines incident to incarceration. *See generally* Levingston & Turetsky, *supra* note 5.

101. *See* Western, *supra* note 3, at 101. *See also* HAIRSTON, *supra* note 3, at 619; DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, INCARCERATION REENTRY AND CHILD SUPPORT ISSUES: NATIONAL AND STATE RESEARCH OVERVIEW 2 (2006) (noting that "[f]orty percent of parents in state prisons and 28 percent in federal prisons had neither a high school diploma nor a GED, while less than a third of parents (31% and 27%, respectively) had earned a GED").

102. *See generally* BRUCE WESTERN, INCARCERATION, MARRIAGE, AND FAMILY LIFE (2004).

103. B. M. HUEBNER, THE EFFECT OF INCARCERATION ON MARRIAGE AND WORK OVER THE LIFE COURSE, 22 JUST. Q. 281, 293 (2005); *see also* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 939 (2003) ("While little research to date has focused on the consequences of criminal sanctions, a small

find stable employment because of their low education and job skills, as well as discrimination by employers.¹⁰⁴

Every year, more than 760,000 people leave prisons and jails, and return home to marginalized communities that can provide them little support for employment and other pressing needs, such as housing and drug treatment. One looming issue for people with criminal records—apart from the stigma of incarceration—is the civil disabilities that they face upon release. These “collateral consequences” are additional penalties, not imposed at trial, that derive from a patchwork of federal, state, and regulatory frameworks and limit participation¹⁰⁵ in critical areas of life such as employment, housing, education, public benefits, parental rights, immigration, and the ability to vote.¹⁰⁶ For people attempting reentry after a period of incarceration, these laws and regulations create very real barriers to basic survival, disrupt family reunification, and hinder civic involvement.¹⁰⁷ Such a panoply of barriers, restricting access to life’s necessities, can make simply staying out of prison difficult.¹⁰⁸ The convergence of collateral sanctions, child support debt, and its subsequent enforcement limit participation in the “free world” and discourage family reunification.¹⁰⁹

and growing body of evidence suggests that contact with the criminal justice system can lead to a substantial reduction in economic opportunities. . . . [T]he barriers these men face in reaching economic self-sufficiency are compounded by the stigma of minority status and criminal record. The consequences of such trends for widening racial disparities are potentially profound.”); BRUCE WESTERN & BECKY PETIT, PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 11 (2010), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=60919 (“Incarceration reduces former inmates’ yearly earnings by 40 percent and limits their future economic mobility.”).

104. Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. OF SOC. 89 (2003).

105. *Id.*; see generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); see also Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL’Y 313 (2006) (arguing that child support debt is another “collateral consequence” of incarceration that serves as a barrier to successful reentry and rehabilitation).

106. See generally LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

107. See Cammett, *supra* note 105, at 313-15.

108. JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001), available at http://www.urban.org/uploadedpdf/from_prison_to_home.pdf (noting that “nearly two thirds of released prisoners are expected to be rearrested for a felony or serious misdemeanor within three years of their release”).

109. For example, structural issues such as housing may place limits on a parent’s ability to reestablish their relationships with their children. Access to affordable housing is an acute problem for formerly incarcerated parents, many of whom are rejected by private landlords. Moreover, many will be barred by public housing prohibitions directed against people with criminal convictions, which affect both admissions and eviction decisions. Federal regulations permit public housing agencies to deny housing based on prior criminal activity. Moreover, parents with criminal convictions face restrictions on cohabitating with family members that already live in public housing, and doing so without clearance can put the entire family at risk of eviction. See generally Miriam J. Aukerman, *Legal Strategies to Reduce Recidivism and Promote the Success of Ex-Offenders*, 1 MICH. CRIM. L. ANN. J. 4 (2003).

B. The Long Reach of the Bradley Amendment

There is one amendment to child support enforcement legislation that especially warrants examination for its tremendous impact on the management of child support arrears borne by prisoners. The Bradley Amendment is a 1986 amendment to Title IV of the Social Security Act¹¹⁰ that required states, in order to be in compliance with the federal child support program, to adopt:

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2) is (on and after the date it is due)—

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced,

(B) entitled as a judgment to full faith and credit in such State and in any other State, and

(C) not subject to retroactive modification by such State or by any other State;

except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the other obligor.¹¹¹

As indicated, this Amendment sets forth three distinct provisions: that once entered as final, any payment or installment of support due under a child support order is an enforceable money judgment by operation of law; that such a judgment is entitled to full faith and credit within and across state boundaries; and in its most cited provision, that the judgment cannot be retroactively modified by any state, except for pending petitions, but only prospectively.

In arguing for his proposed amendment, former New Jersey Senator Bill Bradley stated, “[t]his bill recognizes that circumstances change. The noncustodial parent may lose his or her job and not be able to afford the original child support award. This bill is not intended to prevent changes in future child support orders if circumstances change for the parents”¹¹²

The practical effect of this Amendment is that it prohibits courts or agencies from reducing or eliminating a support order once it is issued, for any reason. The

110. 42 U.S.C. § 666 (a)(9).

111. *Id.*

112. 132 CONG. REC. S5303-04 (daily ed. May 5, 1986) (statement of Sen. Bradley) (“[I]n 1984 Congress enacted major changes to significantly improve the collection of child support. I was pleased to sponsor those changes to break the shocking spiral of poverty for women and children who were not receiving support to which they were legally entitled. Since passage of the Child Support Enforcement Amendments of 1984, we have monitored those changes and found that despite considerable progress there are still loopholes that need to be closed.”).

Bradley Amendment does allow for retroactive modification in some circumstances: when the money is owed to a non-TANF custodial parent and that parent agrees to waive arrears, and in some limited circumstances, when the arrears are owed to the state to repay welfare costs and the state engages in a program designed to reduce arrears.¹¹³

The Bradley Amendment mirrors other legislation that seeks to capture the mass of parents owing child support with a wide net, due to the poor collection efforts common to states during the period in which it was enacted. Prior to the Amendment, it was a common practice for noncustodial parents owing support to amass arrears, only to have the amount owed reduced or eliminated by invoking unlimited judicial discretion in another state to obtain the reduction. Congress intended this amendment to eliminate this practice.¹¹⁴ The Bradley Amendment allows downward modification of child support orders prospectively, but only from the filing date of an application to modify.

Nevertheless, the Bradley Amendment didn't contemplate relief for incarcerated parents with child support orders, or any other child support defendant who was unaware of an existing child support order. Nor does it offer retrospective relief to a parent, who has for any reason, failed to affirmatively petition for a modification before arrears accrue.¹¹⁵ The Bradley Amendment has met with opposition from many quarters due to its inflexible application.¹¹⁶ Most notably,

113. Exceptions to the arrears modification process exist, e.g., “[s]uch support judgments may, however, be compromised or satisfied by specific agreement of the parties on the same grounds as exist for any other judgment in the State. Judgments involving child support arrearages assigned to the State under titles IV-A, IV-E and XIX of the Act, may not be compromised by an agreement between the obligee and obligor unless the State, as assignee, also approves such an agreement. State law may further require that the court or administrative authority must endorse any agreement affecting child support orders to ensure that the best interests of the child are protected.” OFFICE OF CHILD SUPPORT ENFORCEMENT, PIQ-99-03, COMPROMISE OF CHILD SUPPORT ARREARAGES (Mar. 22, 1999), available at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9903.htm> (noting also that “[w]e encourage caution not to confuse compromising arrearages with the statutory prohibition against retroactive modification of arrearages. Retroactive modification of arrearages occurs when a court or administrative body takes actions to erase or reduce arrearages that have accrued under a court or administrative order for support. In effect, retroactive modification of arrearages alters the obligor’s obligation without the concurrence of the obligee (or the State assignee) . . .”).

114. The Senate Report language states that “[w]hat the Committee is seeking to prevent is the purposeful noncompliance by the noncustodial parent, because of his hope that his child support obligation will be retroactively forgiven.” S. REP. NO. 99-348, at 155 (1986).

115. The Senate Report language further states that “[i]f the noncustodial parent’s financial circumstances change because of unemployment, illness, or another such reason, the amendment puts the burden on the noncustodial parent to notify the custodial parent and the court or entity which issued the child support order of [the noncustodial parent’s] changed circumstances and [the noncustodial parent’s] intention to have his[her] child support order modified. No modification would be allowed before the date of this notification.” S. REP. NO. 99-348, at 155 (1986).

116. See, e.g., Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering The Field of Family Law*, 25 GA. ST. U. L. REV. 397 (2008) (noting that federal legislation in the area of family law can be problematic as it inhibits the ability of local government to fashion solutions to local concerns); see also Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L. Q. 235, 246 (1999) (“Originally intended as a

proponents of repeal or revision cite egregious scenarios involving child support debt incurred by noncustodial parents.¹¹⁷ One such situation concerned a noncustodial father who was held hostage in Kuwait for almost five months, unable to comply with the Amendment's notification procedures.¹¹⁸ A second case involved a man who was falsely incarcerated for murder, exonerated and released, only to be arrested for non-payment of child support.¹¹⁹

One need not consider such extreme instances of unintended consequences to understand the generally negative effect of the Bradley Amendment on a great number of incarcerated parents. Many prisoners discover long after imprisonment that a federal law has foreclosed any possibility of a reduction after accruing significant debt. Further, prisoners are subject to state law, which often forbids them from petitioning a court for even a prospective suspension of arrears simply because they are incarcerated.

C. "Voluntary Unemployment": The Peculiar Problem of Incarcerated Parents

The potential for debt accumulation resulting from the Bradley Amendment's prohibition on retroactive arrears has a profound effect on people housed in correctional facilities. About half of all inmates have open child support cases.¹²⁰ However, there is no uniform approach to addressing the problem of prisoners' child support obligations. Under most child support guidelines, the modification process can be engaged when a parent experiences a substantial change of financial circumstances.¹²¹ However, the devolution of financial circumstances cannot occur through the fault of the parent requesting the modification. Quitting a job, or being willfully or "voluntarily unemployed" or underemployed are examples of situations where a court will find it inappropriate to reduce the

response to anecdotes that judges were forgiving arrearages too freely, the Bradley Amendment became a classic example of the unintended consequences of federal overkill."'). Grassroots organizations have also taken up opposition to the Amendment. See ALLIANCE FOR NONCUSTODIAL RIGHTS LEGISLATIVE ACTION CENTER, <http://ancpr.com/bradleywrticle.htm> (last visited Feb. 4, 2011). There have been few recorded challenges to the Bradley Amendment. One unsuccessful challenge to the Amendment was *Bowes et al. v. Reno et al.*, No. 00-12557-NG (D. Mass. dismissed Oct. 22, 2001). Even before the passage of the Bradley Amendment, some were concerned about the potential for large arrearages in some cases, in courts that would not consider modification. See Krause, *supra* note 25, at 355 ("The question as to whether, in an appropriate case, modification should be allowed retrospectively, thus wiping out or reducing accumulated arrearages, has been answered variously. The better view, it seems, would permit the elimination of 'impossible' arrearages . . .").

117. See DOUGLAS REID WEIMER, CONG. RESEARCH SERV., RS 20642, THE BRADLEY AMENDMENT: PROHIBITION AGAINST RETROACTIVE MODIFICATION OF CHILD SUPPORT ARREARAGES 3-4 (2000), available at http://assets.opencrs.com/rpts/RS20642_20000727.pdf.

118. *Id.* at 3.

119. *Id.* at 4.

120. See Vicki Turetsky, *Staying in Jobs and Out of the Underground: Child Support Policies That Encourage Legitimate Work*, 2 CLASP POLICY BRIEF: CHILD SUPPORT SERIES (Ctr. for Law & Soc. Policy, Washington, D.C.), Mar. 2007, at 1, available at http://www.clasp.org/publications/cs_brief_2.pdf.

121. See Sorensen, *supra* note 66, at 314.

amount of a child support obligation.¹²² The court or agency's interpretation of what constitutes voluntary unemployment will vary according to individual state law, which varies widely.

Articulated through their case law or child support statutes, some states dictate that incarceration is "voluntary unemployment" when declining to grant a suspension of arrears during a term of confinement. This policy prerogative reflects the perspective that a prisoner's criminal acts should not warrant consideration when evaluating an obligation to provide for a child.¹²³ Stated differently, prisoners should not get a break from paying support due to their own voluntary criminal acts. This approach¹²⁴ to a difficult policy question is commonly referred to as the "no justification" rule: that incarceration from a prisoner's criminal acts is foreseeable and do not justify a suspension of arrears during incarceration.

Other states articulate a different approach: incarceration as a "complete justification" for suspending arrears, thus suggesting that child support orders should be tied to earning capacity, of which there is very little during incarceration.¹²⁵ Jurisdictions that follow this approach often note that, as a policy matter, forcing a prisoner to accumulate huge (often insurmountable) arrears during a period of incarceration acts as a disincentive to engaging the child support system and providing support and engagement with families after release.¹²⁶ Finally, a third evaluative method treats incarceration as "one factor"

122. See Marian F. Dobbs, *Practice Under Child Support Guidelines—Calculation of Gross/Net Income*, in DETERMINING CHILD & SPOUSAL SUPPORT § 4:16 (2009).

123. See *Knights v. Knights*, 522 N.E.2d 1045, 1046 (N.Y. 1988) ("A [prisoner's] current financial hardship is solely the result of his wrongful conduct culminating in a felony conviction and imprisonment. . . . [T]hese 'changed financial circumstances' warranted neither a reduction of petitioner's child support obligation nor a suspension in the accrual of the support payments during the period of petitioner's incarceration"); *Davis v. Vance*, 574 N.E.2d 330, 330 (Ind. Ct. App. 1991) (finding that public policy requires obligors to take responsibility for criminal acts and all repercussions that flow from them); *State v. Nelson*, 587 So. 2d 176, 178 (La. Ct. App. 1991) (finding that a voluntary act cannot be used to justify the extinction of a protected right such as child support); *Koch v. Williams*, 456 N.W.2d 299, 301 (N.D. 1990) (finding that a voluntary change of circumstances does not justify modification, especially in light of the public policy interest of protecting the best interest of the child).

124. This "justification" framework is set forth in the case of *Halliwell v. Halliwell*, 741 A.2d 638 (N.J. Super. Ct. App. Div. 1999), where the court grapples with a variety of approaches from different jurisdictions. For a thorough analysis of this framework, see Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES' J. 5, 6 (2004).

125. See, e.g., *Willis v. Willis*, 840 P.2d 697, 699 (Or. 1992) (holding that modification will be considered if the obligor's criminal act was not committed primarily to avoid the support obligation). Note that this case was superseded by Administrative Rule 461-200-3300, where arrears are automatically suspended during incarceration: section 7 states that "[A]n order entered pursuant to ORS 416.425 and this rule, that modifies a support order because of the incarceration of the obligor, is effective only during the period of the obligor's incarceration and for 60 days after the obligor's release from incarceration. The previous support order is reinstated by operation of law on the 61st day after the obligor's release from incarceration." OR. ADMIN. R. 461-200-3300 (2007).

126. See *Lewis v. Lewis*, 637 A.2d 70 (D.C. 1994).

to be considered in determining whether a modification is warranted.¹²⁷

The diverging case law on this issue—and on the question of state practices contributing to arrears—has a peculiar result. Whether a prisoner amasses debt is often tied to what state in which he or she happens to be imprisoned, even though federal enforcement and penalties are triggered universally. Moreover, if a particular state law allows for modification of arrears owed to the state, most prisoners are completely unaware that they must petition a court for a modification of a support order prospectively. In any event, prisoners often have significant child support debt upon release, either because their state does not allow for modifications at all or because they are unaware that they must affirmatively petition for them under the notification requirement of the Bradley Amendment.¹²⁸

Federal legislation and state practices create insurmountable arrears that have an impact on prisoners. They transcend even the onerous burdens experienced by all other low-income parents struggling to pay child support. While other low-income obligors experience similar economic barriers, people with criminal convictions must also contend with stigma, legal barriers arising from criminal convictions, and federal and state legislation that have a complicating effect on their ability to navigate the child support system. This complex dynamic is underscored by the ubiquitous nature of criminalization in our culture.

127. *See Sanders v. State*, 67 P.3d 323, 328 (Nev. 2003) (“We agree with those courts that take incarceration into account when determining whether an individual is excused from paying child support. Accordingly, we hold that a jury can consider whether incarceration is a valid affirmative defense In making this determination, the jury should weigh factors such as whether the obligor has other assets or income, the obligor’s past and future ability to earn income, the length of the obligor’s incarceration, and the best interest of the child.”).

128. The Department of Health and Human Services, when promulgating enabling rules and regulations for the Bradley Amendment, did consider prisoners and other institutionalized persons seeking suspension of arrears, but the resulting rules demonstrate how unworkable a framework it is. The rules note that “[i]t is the obligor’s responsibility to take action promptly to seek modification of a support obligation based on a change in his or her circumstances. The obligor or his or her representative should immediately, upon the development of any circumstances that inhibit his or her ability to pay support, file a petition with the court or administrative authority to modify the support order. These circumstances might include: (1) The obligor is unable to pay support due to confinement or incarceration in a mental or penal institution; (2) the child goes to live with the obligor; (3) the child is emancipated or dies; (4) the obligor becomes permanently, or temporarily disabled, or seriously ill, with no benefits, earning capacity or assets; or (5) the obligor becomes unemployed. If the obligor cannot afford legal counsel, the obligor should seek assistance from any available public legal services.” Child Support Enforcement Program, Implementation of Section 9103 of Public Law 99-509: Prohibition of Retroactive Modification of Child Support, 54 Fed. Reg. 15762 (Apr. 19, 1989). There are at least three problems with this framework: (1) Most prisoners are completely unaware of the dictates of the regulation and assume that the states don’t expect them to pay since they are not earning income; (2) It does not contemplate that many states consider incarceration to be “voluntary unemployment” and do not allow for suspension of arrears; and (3) legal aid offices are routinely overextended and cannot provide legal services in child support matters, nor are offices supported by the Legal Services Corporation allowed to represent inmates. Nonetheless, some states that do allow modifications upon incarceration have experimented with collaboration between child support agencies and correctional facilities to encourage timely petitions for modification.

IV. ENFORCEMENT IN AN AGE OF MASS INCARCERATION:
PROPOSALS FOR A WAY FORWARD

The emergence of strict enforcement measures against low-income parents arose in conjunction with another disturbing national trend: mass incarceration and its attendant correctional supervision.¹²⁹ The reality of modern-day mass incarceration has immeasurably skewed the breadwinner paradigm on which the child support system is based: millions of parents are now removed from the formal economy entirely or have seen their earning capacity significantly diminished after release from prison. Yet policy prerogatives have proceeded as if enforcement alone would render this population of parents able to comply with child support obligations. The designation of incarcerated parents as “hard-to-collect-from” does not reflect the depth of the problem we face because it renders invisible the vast number of families caught up in child support enforcement and attendant economic barriers.

The number of incarcerated people currently stands at more than 2.3 million.¹³⁰ According to a report by the Pew Charitable Trust, that amounts to one in one hundred of all residents of the United States.¹³¹ In the aggregate, including all probationers, parolees, prisoners, and jail inmates, America now holds more than 7.3 million adults under some form of correctional control.¹³² “That whopping figure is more than the populations of Chicago, Philadelphia, San Diego and Dallas put together, and larger than the populations of 38 states and the District of Columbia.”¹³³ All told, one in thirty-one—or 3.2% of all adults—is under some form of correctional control.¹³⁴ The burgeoning prison population troubles criminal justice activists, scholars and legislators¹³⁵ owing to a variety of

129. Since 1975, when Congress first started to address the issue of support from nonresident parents, the number of incarcerated parents has grown exponentially. Inmates in state and federal prisons have increased seven-fold from less than 200,000 in 1970 to 1,613,556 by 2009. An additional 767,620 are held in local jails, for a total of 2.3 million. THE SENTENCING PROJECT, FACTS ABOUT PRISONS & PRISONERS (2010), available at http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Jul2010.pdf.

130. United States incarceration outstrips China, which is far more populous, and locks up five to eight times as many people as other western democracies. PEW CHARITABLE TRUST, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008).

131. *Id.* For some groups the numbers are especially startling. While one in thirty men between the ages of 20 and 34 is behind bars, for African-American males the number is one in nine. Women are the fastest growing segment of the prison population, growing at twice the rate of men. *Id.* at 3.

132. PEW CHARITABLE TRUST, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009).

133. *Id.*

134. *Id.*

135. The relative costs and inequities of incarceration have caused some legislators to rethink the use of public resources for prison building and maintenance. U.S. Sen. Jim Webb (D-Va.) has noted that, “America’s criminal justice system has deteriorated to the point that it is a national disgrace. . . . We need to fix the system. Doing so will require a major nationwide recalculation of who goes to prison and for how long and of how we address the long-term consequences of incarceration.” William Fisher, *U.S. Overflowing Prisons Spur Call for Reform Commission*, INTER PRESS SERVICE, May 17, 2010, available at <http://www.commondreams.org/headline/2010/05/17-6>.

concerns: the disparate effect on communities of color;¹³⁶ outsized municipal spending on corrections; and the declining impact on crime reduction and public safety.¹³⁷ What is much less often discussed is the impact of insurmountable child support and other financial obligations on those preparing for reentry. A serious policy debate about the value—or indeed the very meaning—of child support in the lives of their children is overdue.

A. *Reevaluating Need: Children with Incarcerated Parents*

The impact of incarceration on children is of great concern.¹³⁸ Between 1991 and 2007, when the latest statistics were available, the number of children of incarcerated parents increased eighty percent to more than 1.7 million minor children.¹³⁹ It is likely that nearly 7.5 million children have a parent on probation or parole¹⁴⁰ who are saddled with a criminal conviction. Children of incarcerated parents often grow up in difficult environments; having a parent in prison is yet one more challenge to overcome. Losing a parent to prison affects multiple aspects of children's lives and affects them to varying degrees. Such a loss likely can have a significant impact on the emotional, psychological, developmental, and financial wellbeing of the child.¹⁴¹

Children with incarcerated parents, like all children, need financial resources. However, the potential monetary payoff from child support enforcement alone is

136. See generally, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that the U.S. criminal justice system functions as a contemporary system of racial control through the war on drugs and its justifications for discrimination and social exclusion). "In 2005, African Americans represented 14% of current drug users, yet constituted 33.9% of persons arrested for a drug offense, and 53% of persons sentenced to prison for a drug offense." *Racial Disparities in the Criminal Justice System: Hearing Before the H. Judiciary Subcomm. on Crime, Terrorism, & Homeland Security*, 111th Cong. 3-4 (2009) (testimony of Marc Mauer, Executive Director, The Sentencing Project); see also Ted Chiricos, Kelly Welch, & Marc Gertz, Racial Typification of Crime and Support for Punitive Measures, 42 *CRIMINOLOGY* 359, 374 (2004) (finding that among whites, support for harsh sentencing policies was correlated with the degree to which a particular crime was perceived to be a "black" crime).

137. PEW CHARITABLE TRUST, *supra* note 132, at 18-20. For example, between 1997 and 2007, New York experienced both the greatest decrease in violent crime and, simultaneously, the greatest decrease in prison population and incarceration rate of any state: the prison population declined by almost 6,500 inmates, a 9.4% dip that amounted to a 15% drop in the incarceration rate. Concurrently New York's violent crime rate fell a remarkable 40%. *Id.* at 21.

138. See MARGARET DIZEREGA, *CTR. FOR EFFECTIVE PUB. POLICY, ENGAGING OFFENDERS' FAMILIES IN REENTRY* 8 (2010), available at <http://www.cepp.com/documents/Engaging%20Offenders%20Families%20in%20Reentry.pdf>.

139. *Id.*; see also LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PARENTS IN PRISON AND THEIR MINOR CHILDREN* (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pptmc.pdf>; WESTERN & PETIT, *supra* note 103, at 18 ("1 in every 28 children in the United States—more than 3.6 percent—now has a parent in jail or prison. Just 25 years ago, the figure was only 1 in 125.").

140. See HERMAN-STAHL ET AL., *supra* note 10, at Summary Points. See generally BERNSTEIN, *supra* note 96 (children suffer from anxiety disorders and post-traumatic stress).

141. See HERMAN-STAHL ET AL., *supra* note 10, at Summary Points.

very low given the economic condition of their parents. What may be more critical to their wellbeing is emotional and social reengagement with their parents during incarceration and also upon release.¹⁴² Mothers and fathers who are confined are greatly impaired and limited in their ability to effectively fill their roles as caregivers, providers, teachers, supporters, and role models—and children suffer for it.¹⁴³ Although not all incarcerated parents will resume a relationship with their children, many will, and an enlightened public policy should consider this greater goal.¹⁴⁴

1. Harmonizing Child Support Rhetoric with Effective Policy

The inherent value of incentivizing parental involvement is not simply one that makes sense for the children of incarcerated parents: it is incorporated into the stated goals of national child support policy. Although federal intervention was originally based primarily on welfare recoupment, Congress quickly extended its services to families not receiving welfare and also integrated general child wellbeing policy imperatives into the system.¹⁴⁵ Over time, the priorities and rhetoric of child support policy and programmatic activities have evolved to reflect this shift.¹⁴⁶ For example, the current Federal Office of Child Support Enforcement's (OCSE) stated goal is "to help families by promoting family self-sufficiency and child well-being."¹⁴⁷ In expounding on this major goal OSCE states that:

[w]e want to send the strongest possible message that parents cannot walk away from their children. Our goals are to ensure that children have the financial support of both their parents, to foster responsible behavior towards children, to

142. *See infra* Part IV.

143. *See* DIZEREGA, *supra* note 138, at 8 (noting that there has been little research exploring these consequences of parental incarceration: "[r]esearch on child development and the few studies that examine the effects of parental incarceration on children demonstrate that these children may suffer from trauma, anxiety, guilt, shame, sadness, and fear among other conditions").

144. *See* HAIRSTON, *supra* note 3, at 636 ("Most incarcerated fathers care about their children and many try hard to be good parents against tremendous odds. The obstacles to the maintenance of parent-child relationships when parents are incarcerated are numerous, resulting from public policies, administrative regulations, and erroneous assumptions about fathers' connections with their children and children's needs for their parents.").

145. *See* STRATEGIC PLAN, *supra* note 98, at 1 ("The FY 2005–2009 Plan weaves a modern mosaic from a set of updated objectives and related strategies. These objectives and strategies demonstrate how the Child Support Enforcement Program has evolved and matured. Child support is no longer primarily a welfare reimbursement, revenue-producing device for the Federal and State governments; it is a family-first program, intended to ensure families' self-sufficiency by making child support a more reliable source of income.").

146. *Id.*

147. U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT 1 (2009), available at http://www.acf.hhs.gov/opa/fact_sheets/cse_factsheet.pdf.

emphasize that children need to have both parents involved in their lives, and to reduce welfare costs.¹⁴⁸

Ironically, the current trajectory of enforcement provisions, ongoing debt accumulation, and welfare cost recovery¹⁴⁹ do not incorporate the realities of incarcerated parents in a way that can effectively realize all of these goals. On the surface, child support obligations create competing policy imperatives: providing support for formerly incarcerated parents seeking debt relief to stabilize within the economy, and at the same time addressing the needs of children who require financial support from nonresident parents. However, this is a false choice, as meaningful long-term financial and emotional care for children is inextricably linked to the successful reentry of their parents. From a reentry perspective, the most important factors in staying out of prison are family ties and consistent employment.¹⁵⁰ Ignoring barriers to reintegration faced by formerly incarcerated parents furthers the cycle of incarceration and is costly—for them, for their children, and for the larger society.

The growing number of children with an incarcerated parent represents one of the most significant consequences of the record prison population in the United States. For children these to receive some modicum of future support, parental

148. U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, HANDBOOK ON CHILD SUPPORT ENFORCEMENT i (2008), available at http://www.acf.hhs.gov/programs/cse/pubs/2005/handbook_on_cse.pdf.

149. Some have criticized welfare cost recovery mechanism as being detrimental to families and inconsistent with the government's emerging child-centered focus. See generally 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, 1032 (2007) (noting that "[r]eimbursement welfare costs directly conflicts with serving the best interests of the children, long recognized by the courts as the paramount purpose of child support. The two goals simply cannot coexist. Every dollar taken from a child in the name of welfare cost recovery is a dollar that does not serve the best interests of the child. Yet, despite the conflict, child support agencies attempt to serve both purposes simultaneously"). It is important to note that if the family does not receive welfare, the choice to pursue child support from a noncustodial parent is a matter of personal preference. If however, the family does receive TANF benefits, they are automatically relegated to the court process as they have assigned their rights to benefits when applying for them. In this case the government acts as the enforcer of support awards, and the state withholds half or more to repay assistance costs, and families do not receive it. Overall child support collections for 2009 totaled more than \$26 billion. However, the total amount of child support unpaid arrears owed was more than \$107 billion. See *supra* note 16 and accompanying text. The government had previously reported that about half these arrears were owed to the government for welfare cost recovery, and not to families. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT FY 2003, PRELIMINARY DATA REPORT, PREFACE: THE STORY BEHIND THE NUMBERS: WHO OWES THE CHILD SUPPORT DEBT? (2004), available at http://www.acf.hhs.gov/programs/cse/pubs/2004/reports/preliminary_data/#preface. The recently enacted Deficit Reduction Act of 2005 provides states with new options to distribute more child support to families instead of retaining it to repay welfare benefits. Pub. L. 109-171, 120 Stat. 4, (2005). It is unclear to what extent the states are doing this, since the Act also reduced federal funds for child support programs nationally. See PAUL LEGLER & VICKI TURETSKY, CTR. FOR LAW & SOCIAL POLICY, MORE CHILD SUPPORT DOLLARS TO KIDS: USING NEW STATE FLEXIBILITY IN CHILD SUPPORT PASS-THROUGH AND DISTRIBUTION RULES TO BENEFIT GOVERNMENT AND FAMILIES (2006) available at http://www.clasp.org/publications/more_cs_dollars_policy_brief_v10.pdf.

150. See Levingston & Turetsky, *Debtor's Prison*, *supra* note 5, at 197.

obligations must actually match earning capacity. However, an equally important goal is prioritizing parental engagement in all ways possible.

2. The Current Landscape

Neither Congress nor the states have entirely ignored the problem of incarceration and the attendant economic and social issues faced by parents and their children.¹⁵¹ In 2007, Congress passed the Second Chance Act, legislation that for the first time recognized the scope of incarceration on the national landscape,¹⁵² and which has also allocated some limited resources for various other reentry initiatives.¹⁵³ The lion's share of attention has been focused on marriage initiatives,¹⁵⁴ such as the federal Healthy Marriage and Responsible Fatherhood grants administered by the Department of Health and Human

151. See also U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, WORKING WITH INCARCERATED AND RELEASED PARENTS: LESSONS FOR OCSE GRANTS AND STATE PROGRAMS (2006), available at http://www.acf.hhs.gov/programs/cse/pubs/2006/guides/working_with_incarcerated_resource_guide.pdf.

152. Pub. L. 110-199, 122 Stat. 657 (2007). The Second Chance Act of 2007 provides a "comprehensive response to the increasing number of people who are released from prison, jail, and juvenile residential facilities and returning to communities. . . . [The Act] will help ensure the transition individuals make from prison, jail, or juvenile residential facilities to the community is safe and successful." OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, SECOND CHANCE ACT ADULT AND JUVENILE OFFENDER REENTRY DEMONSTRATION PROJECTS FY 2010 COMPETITIVE GRANT ANNOUNCEMENT 1 (2010), available at <http://www.ojjdp.ncjrs.gov/grants/solicitations/FY2010/SecondChanceMentoring.pdf>. However, a performance measure is gauged by the percentage of participants who fulfilled their child support obligations. *Id.* at 7-8.

153. See HERMAN-STAHLE ET AL., *supra* note 10, at 1-2. One example of such a policy is the Department of Justice's Serious and Violent Offender Re-entry Initiative, which in 2003 funded states and local communities to develop educational programs, training, and reentry strategies to reduce recidivism and promote healthy outcomes, including strong marriages, for ex-offenders. The Department of Labor's Prison Reentry Initiative (PRI) of 2004 also expanded reentry supports for newly released prisoners by funding local faith- and community-based organizations to offer housing, employment and mentoring programs to releasees. See OFFICE OF JUSTICE PROGRAMS: LEARN ABOUT REENTRY, <http://www.ojp.usdoj.gov/reentry/learn.html#serious> (last visited Feb. 4, 2011).

154. In this author's opinion the focus on marriage itself, rather than strengthening inmates ties to their children directly, is misplaced. In an era where half of marriages end in divorce and most children will spend some portion of their childhood in a home without both parents, marriages between persons without the promise of economic security and separation through incarceration are even more vulnerable to dissolution. See Vivian Hamilton, *Will Marriage Promotion Work?* 11 J. GENDER RACE & JUST. 1, 6-12 (2007) (describing barriers to marriage for low-income parents); JENIFER HAMER, WHAT IT MEANS TO BE A DADDY 203 (2001) ("It may be that having never-married parents and a 'very involved father' is better for the emotional stability and well-being of children than having lived with married parents who subsequently divorce."). But see Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847 (2005) (suggesting that the "transformative power" of marriage may lie first in the greater permanence of marital relationships and, secondarily, in the motivation of the parties to invest in these relationships; this article concludes that perceptions of enduringness may shape not only relationships between the adults, but may also frame the adults' relationships to their children).

Services.¹⁵⁵ Additionally, a number of states have incorporated “fatherhood” programs in conjunction with child support agencies; programs that sometimes include a limited measure of child support arrears forgiveness.¹⁵⁶ The quality and goals of such programs vary widely, although the recent proliferation of such programs should be studied and supported when they are effective as proactive efforts to address the child support dilemma.

A problem with initiatives that encourage support between prisoners and children in the reentry context is the piecemeal approach with which they are used. Many federal programs are administered through grant applications to the states that reach constituent groups haphazardly and do not provide nearly enough resources to tackle the national problem in a systemic way. Moreover, reductions in federal support for state child support programs, in conjunction with state budget contraction due to the ongoing economic recession are likely to foreshadow a reduction in funding for innovative state programs to support incarcerated parents and children. However, the biggest problem in the current landscape lies in the disconnect between existing programs that attempt to reintegrate parents who have significant debt and the contemporaneous failure to amend legislation and reconsider state practices that remain the source of that debt.

Meeting the overall goals of the child support enforcement system, as set out by the Office of Child Support Enforcement, requires a two-pronged approach: ameliorating the effects of legislation linked to debt creation and further re-envisioning child support law and praxis in a way that countenances the overall wellbeing of the children of incarcerated parents. The next sections explore legal and normative responses in turn.

B. A Legal Response

Programs that support formerly incarcerated parents attempting to reengage with children face an uphill battle so long as parents are released with monumental debt. When examining the role of the federal government one can first look to the direct impact of federal law on the creation of that debt. State

155. U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMINISTRATION FOR CHILDREN AND FAMILIES HEALTHY MARRIAGE INITIATIVES 2002–2009, AN INTRODUCTORY GUIDE (2010), available at <http://www.healthymarriageinfo.org/docs/ACFGuideto09.pdf>.

156. See, e.g., CAL. DEP’T. OF CHILD SUPPORT SERVS., COMPROMISE OF ARREARS PROGRAM REPORT TO THE LEGISLATURE 5 (2008), available at <http://www.childsup.ca.gov/Portals/0/resources/docs/reports/2008/coap2008-01.pdf> (“The focus of the DCSS compromise of arrears program is to collect on cases deemed uncollectible by offering the NCP a compromise in exchange for partial repayment of government-owed arrears, repayment of custodial party (CP) arrears, and in some cases remaining current on child support payments.”); D.C. FATHERING COURT, OFFICE OF THE ATTORNEY GEN., DISTRICT OF COLUMBIA, <http://csed.dc.gov/csed/cwp/view,a,3,q,639712,csedNav,%7C31158%7C.asp> (last visited Feb. 4, 2011) (describing the “Fresh Start” Program which provides that if a parent is enrolled and in good status, makes six child support payments, and graduates from the one-year program, 25% of his or her TANF arrearages are forgiven).

practices should come under similar scrutiny.

1. Rethinking Bradley

As has been previously discussed, the Bradley Amendment (“Bradley”) is relevant to the creation of arrears by prohibiting the retroactive modification of arrears, a factor that significantly contributes to debt accumulated by obligors in prison.

Some view Bradley as representing the danger of unintended consequences of federal policymaking in family law in that it disrupts the ability of courts to creatively address local problems.¹⁵⁷ The actual problem with the Bradley Amendment is its overreaching effect. Federal legislation in the child support arena has brought about many changes in state law requiring numerous reallocations of state governmental authority, from the judicial to the executive branch.¹⁵⁸ Unintended consequences are inevitable with such a large-scale governmental realignment.¹⁵⁹ As scholar Elizabeth Patterson has noted, “[t]he Bradley Amendment not only ignored the likely potential for unintended consequences of the changes occurring in the system; it magnified those consequences by foreclosing the possibility of post hoc amelioration.”¹⁶⁰

However, the totality of Bradley’s effect is more nuanced. The Amendment contains other provisions¹⁶¹ that provide authority for the states to enforce judgments across state lines under the “full faith and credit clause,” a necessary requirement for enforcing orders when noncustodial parents cross state boundaries. At the time it was enacted, few resources existed to address the problem of support enforcement when obligors changed jurisdictions, and interstate orders were difficult to enforce. Subsequent legislation was linked to the interstate provisions of the Bradley Amendment in order to strengthen enforcement across jurisdictions.¹⁶² Moreover, proponents of the law justified its existence by citing

157. See Patterson, *supra* note 116, at 428. (“The federal agency that administers the child support enforcement program is itself encouraging states not only to modify systemic mechanisms that lead to non-willful accrual of arrearages, but also to forgive the state share of accrued arrearages in certain circumstances.”); see also Levingston & Turetsky, *supra* note 5.

158. Patterson, *supra* note 116, at 428.

159. *Id.* (“Where those inefficiencies and unintended adverse effects have resulted in excessive child support awards against individual obligors—as in the case of many indigent parents—courts asked to enforce the awards need flexibility to avoid inequities, due process violations, and counterproductive outcomes.”).

160. *Id.* at 426-27.

161. See *supra* note 111 and accompanying text.

162. The Uniform Interstate Family Support Act (UIFSA) is one of the uniform acts drafted by the National Conference of Commissioners on Uniform State Laws. First developed in 1992, the NCCUSL revised the act in 1996 and again in 2001. The Act addresses non-payment of child support obligations and limits the jurisdiction that could properly establish and modify child support orders. NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAW, UNIFORM INTERSTATE FAMILY SUPPORT ACT (2001), available at http://www.ncsea.org/files/UIFSA_2001.pdf. It has been adopted by every U.S. state pursuant to the Personal Responsibility and Work Opportunity Act, which required that states adopt

concerns that a full-scale repeal would encourage parents who could rightfully pay their obligations to circumvent them.¹⁶³ Opponents of the Amendment have called for its repeal, but have primarily focused on the impact of the provision that prohibits all individuals from seeking relief from debt without regard to the circumstances of the accumulation of those arrears.¹⁶⁴ This is the main critique: the inflexibility of remedies.

The solution to this particular problem of the Bradley Amendment is not outright repeal, but a targeted goal of modifying the Amendment to provide a legal “escape clause” to remedy the counterproductive effects of the legislation in limited circumstances. The federal government has exercised plenary authority under its spending powers to mandate child support policy, having previously required state child support guidelines¹⁶⁵ and myriad enforcement provisions.¹⁶⁶ It is incongruous to affirm, on the one hand, that Congress has broad authority to regulate in the area of child support, but on the other hand lacks the authority to amend its own legislation to remedy a problem of national significance. It appears then that the real roadblock to modifying the Amendment is a political one, not one that arises from a lack of constitutional authority.¹⁶⁷ Despite its unintended consequences, the Bradley Amendment, as it was originally constituted, remains good law.

But Bradley can—and should—be amended in cases where arrears have mounted during a period of incarceration or other confinement, and where an individual has no practical or legal opportunity to provide child support or

UIFSA by January 1, 1998, or face loss of federal funding for child support enforcement. PRWORA, *supra* note 57.

163. See Marilyn Ray Smith, *Child Support Enforcement Services*, MASS.GOV, http://www.mass.gov/?pageID=dorterminal&L=5&L0=Home&L1=Individuals+and+Families&L2=Child+Support+Services&L3=Attorneys&L4=Articles&sid=Ador&b=terminalcontent&f=cse_reference_cseenforcementserv&csid=Ador (last visited Feb. 4, 2011) (“In general, allowing retroactive modification subverts enforcement efforts and encourages noncompliance. No other civil debt has been treated this way, not MasterCard, not mortgages, not even parking tickets.”).

164. See *supra* note 116 and accompanying text.

165. See *supra* Part II.A and accompanying text.

166. See *supra* Part II.A and B and accompanying text.

167. It is difficult to locate instances where child support enforcement legislation was reconsidered in order to assist prisoners. The political consequences of such a move would bring no rewards, due to the general antipathy against deadbeat parents and limited discourse about the efficacy of enforcement legislation. For example, in California, AB 862 (authored by Karen Bass, D., Los Angeles) would have required that every prisoner who is a parent of a minor child receive information on child support modification as developed by the CA Department of Child Support Services. The bill was passed in the Assembly on a vote of 41-34, but was vetoed by Governor Schwarzenegger. Objecting to the costs associated with the bill he noted that, “At the state level we should be looking for ways to improve child support collection so more funds get to the children, not investing in ways to alleviate the future financial burdens due to incarceration.” OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, LEGISLATIVE COUNSEL, STATE OF CALIFORNIA, Oct. 6, 2005, available at http://leginfo.ca.gov/pub/05-06/bill/asm/ab_0851-0900/ab_862_vt_20051006.html. Weighing in, Assemblyman Todd Spitzer, R-Orange opined that, “[t]he state should never aid and abet a criminal in avoiding child support. We should not allow prisoners to escape their financial responsibility to their own children.” CALIFORNIA REPUBLIC.ORG: SEPT. 2, 2005, <http://www.californiarepublic.org/CROHld/CROBlog/CROBlog200509.html> (last visited Feb. 4, 2011).

petition for a modification. This can be accomplished by vesting in courts or child support agencies a limited discretion to modify arrears under these circumstances, with written findings that such a modification furthers the best interests of the particular child in question. Such a framework would go a long way toward alleviating the debt, and counterproductive enforcement measures, which stand in the way of setting realistic orders that will encourage support of children in the long term.

2. State Practices: The Best Interests of Children with Incarcerated Parents

As indicated earlier, state practices also contribute to arrears growth. Federal regulations require that states have guidelines¹⁶⁸ with a rebuttable presumption that they apply and take into consideration the earnings and incomes of the noncustodial parent.¹⁶⁹ State adherence to these guidelines creates a rebuttable presumption that the amount of support awarded is appropriate.¹⁷⁰ Departures from the state guidelines must be justified by written findings and should include a consideration of the best interest of the child.¹⁷¹ The best interest standard is often referenced in child support law, frequently in conjunction with a consideration of parental circumstances.¹⁷² Even with these failsafe measures, guidelines applied to original support orders have not worked effectively to create realistic

168. *See* Guidelines for Setting Child Support Awards, 45 C.F.R. § 302.56 (2010) (“(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State; (b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.”).

169. *Id.* (“(c) The guidelines established under paragraph (a) of this section must at a minimum: (1) Take into consideration all earnings and income of the noncustodial parent; (2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation.”).

170. *Id.* (“(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.”).

171. *Id.* (“(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.”).

172. *See, e.g.*, WASH. REV. CODE § 26.19.065 (2010) (“The decision whether there is a sufficient basis to deviate below the presumptive minimum payment must take into consideration the best interests of the child and the circumstances of each parent. Such circumstances can include leaving insufficient funds in the custodial parent’s household to meet the basic needs of the child, comparative hardship to the affected households, assets or liabilities, and earning capacity.”); S.C. CODE ANN. § 43-5-590 (2009) (“The department shall establish criteria in accordance with federal regulations to determine whether action to establish paternity and secure support is not in the best interest of a child.”); N.H. REV. STAT. ANN. § 458-C:5 (2010) (“Special circumstances, including, but not limited to, the following, if raised by any party to the action or by the court, shall be considered in light of the best interests of the child and may result in adjustments in the application of support guidelines provided under this chapter.”).

orders for many incarcerated parents. This is especially the case where orders are set by default and imputation of nonexistent income, and where orders are later swelled by accrued interest.¹⁷³ The process of establishing such orders matters because ongoing support awards are later rendered permanent debt by operation of the Bradley Amendment. Changes in state practices regarding initial orders are difficult, but necessary. Notwithstanding the need to reassess state processes in establishing orders, no one-size-fits-all solution exists. Each state has its own particular iteration of guidelines and practices, and each must take into account the particular combination of factors that contributes to arrears accumulation.¹⁷⁴ Policy analysts have long encouraged states to do so in order to address a problem of arrears that is national in scope, but affects child state support systems directly.¹⁷⁵

Similarly, state jurisdictions that interpret incarceration as “voluntary unemployment” must continue to transform their policies into a more workable standard—an evolution that has been slowly taking place nationwide given the proliferation of incarcerated parents’ mounting debt.¹⁷⁶ This path has been forged by state child support agencies that have undertaken to implement arrears compromise programs, because so much of arrearage owed to the states has been deemed uncollectible. For this reason, the federal Department of Health and Human Services itself encourages states to compromise non-willful accrual of arrearages.¹⁷⁷ This is a welcome trend, but would be less critically needed if state guidelines were to incorporate presumptions in favor of debt modification for those

173. See *supra* Part III.A and accompanying text.

174. See SORENSEN ET AL., *supra* note 73, at 90 (“An effective arrears management plan will focus on interventions that address the factors that contribute to arrears growth the most. Thus, it behooves states to understand what drives arrears growth in their state. Although we found common factors contributing to arrears growth in the nine study states, the relative importance of these factors varied in the study states. Thus, we expect each state’s arrears management plan to vary depending upon the relative importance of factors contributing to arrears in that state.”).

175. *Id.* at 1 (“Despite record child support collections by state child support programs, considerable sums of child support go unpaid every year. These past due payments of child support, referred to as child support arrears, accumulate each year and have reached unprecedented levels in recent years.”). In an effort to reduce or eliminate possibly uncollectible debt, some States use debt compromise, a process whereby a state settles a portion or all of the child support debt owed to the state by a noncustodial parent. See U.S. DEP’T OF HEALTH & HUMAN SERVS., STATE USE OF DEBT COMPROMISE TO REDUCE CHILD SUPPORT ARREARAGES (2007).

176. See U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, WORKING WITH INCARCERATED AND RELEASED PARENTS: RESOURCE GUIDE ix (2006), available at http://www.acf.hhs.gov/programs/cse/pubs/2006/guides/working_with_incarcerated_resource_guide.pdf (giving analysis of ten projects involving incarcerated parents from different states; according to the guide a successful child support program: “simplifies modification request forms and designs a passive format to move the process forward, unless objected to by either parent; considers incarceration to be a sufficient change in circumstances to warrant modification of the child support obligation; develops a policy to settle or reduce arrears that accrued during incarceration; promotes practices to assist inmates with successful reentry, such as exempting a portion of an inmate’s savings account from garnishment for child support, or allowing a released obligor 60 to 90 days to find employment”) (emphasis added).

177. States have an incentive to discharge arrears (owed to the states through welfare recoupment) because debt from uncollected support has a negative impact on performance indicators used to calculate federal funding of state programs. See Hatcher, *supra* note 149, at 1070-75.

who are institutionalized. Such a presumption would arrest the growth of arrears in the population most likely to contribute to them, and reduce the need for compromise of arrears at the back end, lowering administrative costs simultaneously.

Legal responses to the growing problem of arrears would substantially alleviate the growing debt burden faced by many state systems. However, it should be just a start. The problem of arrears is, at its root, a problem of poverty—and one that should make policymakers ponder the current path of child support enforcement generally.

C. A Normative Response

A child fares best in a culture that supports its children. While the “best interest of the child” is central to the rhetoric of child wellbeing, the U.S. has demonstrated little political will compared to other western democracies in embracing a national commitment of prioritizing the economic wellbeing of children.¹⁷⁸ Other industrialized nations have much lower rates of child poverty.¹⁷⁹ In contrast, our national government initially signaled its intention to enter the realm of child support enforcement because it linked the growing number of welfare families directly to the failure of nonresident parents to pay.¹⁸⁰ As this reasoning goes, child support payments by these parents would raise the standard of living for children receiving welfare. This claim is widely disputed because the parents of these children are often also poor, and would not be able to provide sufficient support to accomplish this goal without other resources.¹⁸¹ As

178. See Nancy E. Dowd, *The Family and Medical Leave Act of 1993: Ten Years of Experience: Race Gender and Family/Work Policy*, 15 WASH. U. J.L. & POL'Y 219 (2004) (“Public rhetoric in the United States has always strongly supported families. Our policies, however, have not. In the area of work/family policy, the United States continues to lag behind every other advanced industrialized country, as well as many developing countries, in the degree to which we provide affirmative support for families.”); see also Krause, *supra* note 52, at 25 (“Taxation nationalized that part of children’s future earnings that might have gone to fund the retirement of their own parents. In exchange, the taxpayer should ‘preciprocate’ by bearing an appropriate share of the cost of supporting those who will later bear the burden of old-age support for all. . . . Society owes a more active role in supporting the rearing of children. Society should recognize this as a debt, not as reluctant charity.”).

179. Other countries do consistently more to provide support for caretakers. France and the Scandinavian counties are among those that have implemented family support policies that directly support caretaking. These policies include subsidized daycare, paid parental leave, universal health care, and income supplements to low-earning caretakers. See Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 357, 307 (2003).

180. See *supra* Part II.B.

181. See *supra* note 2 and accompanying text. Alternatively many scholars, such as Irwin Garfinkel, have long promoted a move toward a completely national system in the form of so-called “child support assurance.” IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY 18 (1992); see also Estin, *supra* note 27, at 599 (“In view of the many problems, it might be preferable to move toward a completely national system, such as the child support assurance programs proposed by Irwin Garfinkel and others. This type of system has the benefit of addressing the needs of children at all income levels, just as the social security system applies to all elderly people. And, like social security, it could be defended on spending power grounds. . . . [S]uch a program would very likely be more expensive than the current system and for that reason and others is unlikely to gain wide support. From a federalism

family law scholar Marsha Garrison aptly notes “[p]olicymakers simply must accept the fact that child support policy cannot substitute for an antipoverty program.”¹⁸² Recognizing and encouraging prisoners’ familial relationships and sanctioning contributions outside of the traditional framework are important ways to encourage and garner support for children.

1. Strengthening Parental Ties During Incarceration

Incarcerated parents face not only disproportionate poverty, but also a challenge in confronting stigma related to their status as parents. Many prisoners want to have an ongoing relationship with their children, and cite those relationships as incentives to stay out of prison in the future. Noted sociologist Creasie Finney Hairston writes that, “[i]n promoting responsible fatherhood among prisoners, it is not necessary to compromise family preferences, to romanticize ideal parent-child relationships that never existed, or to ignore parental behaviors that indicate that parent-child relationships or contacts are likely to be detrimental to children.”¹⁸³ For many families, child supportive practices should not commence at reentry after prison, but rather support for strengthening parent-child relationships should occur during incarceration.¹⁸⁴

Most prisoners had relationships with their children before incarceration; and many of the fathers surveyed in a prominent study who did not live with their children saw their children regularly.¹⁸⁵ Children dealing with parental incarceration and separation may share some of the same symptoms as children dealing with other traumatic events, but maintaining ties with their parents can lessen the impact of incarceration on children.¹⁸⁶ The majority of children want to see their

standpoint, however, a fully nationalized child support assurance program would be much less objectionable than the current system in which state governments are pressed into service to implement a national policy agenda.”).

182. See Garrison, *supra* note 15, at 31.

183. See HAIRSTON, *supra* note 3, at 636 (“It is critical to understand . . . that neither imprisonment or engagement in illegal activities is synonymous with being a bad parent in the eyes of prisoners’ children, their families, or their communities.”).

184. See HERMAN-STAHLE ET AL., *supra* 10, at 7-18 (“Successful reunification, when possible, often starts while a parent is incarcerated. During this time, fathers are, in effect, incapacitated from participating in their relationships as a partner, spouse, or parent. Visits are scarce, and both psychologically and physically demanding. Fewer than one-third of fathers in prison see at least one of their children on a regular basis. Phone and mail contact also presents challenges, as the collect-call policies in many prisons place heavy surcharges on the prisoners’ families, and mail communication from a correctional institution also carries a stigma and social cost. Any discussion of reentry must include efforts to challenge barriers around contact for prisoners during incarceration.”).

185. See CREASIE FINNEY HAIRSTON, FOCUS ON CHILDREN WITH INCARCERATED PARENTS, AN OVERVIEW OF THE RESEARCH LITERATURE 4 (2007).

186. *Id.* at 24; see also COUNCIL ON CHILDREN AND FAMILIES, CHILDREN AND INCARCERATED PARENTS, A JOURNEY OF CHILDREN, CAREGIVERS, AND PARENTS IN NEW YORK STATE 13 (2010) (“Despite the difficulty this experience brings, it is well-documented that ongoing parent-child communication, through phone calls, letters and visits can be especially beneficial since the contact can alleviate, to a certain extent, the fears children have of the unknown or fears they have as a result of prison images portrayed in movies

parents,¹⁸⁷ but this is easier said than done. Half of parents receive no visitation during incarceration, most likely because of the large distance between prisons and communities where families live.¹⁸⁸ Further, visiting conditions for family members can be appalling and further traumatize them.¹⁸⁹ In fact, there is some evidence that harsh prison policies, procedures and environments significantly affect children's perceptions of the visits and their parents, and as such "prison visiting policies do not reflect the needs or best interests of children. They inhibit the quality and frequency of contact and undermine meaningful communication between incarcerated parents and their children."¹⁹⁰ Moreover, visitation is a predictor of parent-child attachment and continuing involvement when parents are released.¹⁹¹ Visiting conditions for children must be remedied in light of the mandate to encourage stronger bonds between parents and children.

There is also a strong correlation between parental involvement and child support.¹⁹² Financial support is a valuable contribution to the lives of children. Yet we know that significant monetary support is difficult at best for many parents leaving prison, especially immediately following release. But parenting, even during incarceration, is of tremendous value to the wellbeing of the prisoner's children. Economic support should not be valued above all other kinds of support, especially for children who may have experienced separation from a parent through a traumatic event such as incarceration. It is important to explore the value of other support not generally recognized in the current framework of obligation centered on an absent "breadwinner."

2. Combating Tunnel Vision: What Is Child Support?

Child support policies should encompass a thoughtful analysis of whether they are actually child supportive from the perspective of any particular child, not a universal child that fits into a normative economic family structure. When parents

and television. Being able to communicate with their parent allows children to put to rest some of those fears. Additionally, ongoing communication allows children to share their daily lives with their parents, adding a degree of normalcy, and it is this ongoing communication that is particularly helpful in minimizing the pre-post prison gap when parents and children are able to be reunited.").

187. HAIRSTON, *supra* note 185, at 11.

188. *Id.* at 7. ("Prison location affected prisoners' visits with their children. The farther prisoners were from their homes, the greater the likelihood that they would have had no visitors in the past month. Of the prisoners whose homes were within 50 miles of the prison where they were placed, 54 percent had one or more visitors in the past month compared with 44 percent who lived from 50 to 100 miles, 30 percent who lived 101 to 500 miles and 16 percent who lived over 500 miles away.").

189. *Id.* at 8-9. The study also describes the wide variation in prisoner visiting policies, and also notes that more often than not, visitors are also treated like prisoners.

190. *Id.* at 8.

191. *Id.* at 24.

192. See STANLEY N. BERNARD & JANE KNITZER, NAT'L CTR. FOR CHILDREN IN POVERTY, MAP AND TRACK: STATE INITIATIVES TO ENCOURAGE RESPONSIBLE FATHERHOOD 49 (1999) ("Increasing evidence suggests that nonresident fathers who are engaged with their children—whether they see them informally or through planned access and visitation—are more likely to pay child support.").

do not live in the same household, child support treats the interests of children and parents as mutually exclusive by setting obligations solely through financial markers.¹⁹³ This paradigm is ineffective, especially for parents who are already poor.¹⁹⁴ In fact, this perception of support is both underinclusive and overinclusive.¹⁹⁵ Parents who pay child support may be uninvolved in their children's lives and have little contact with them, yet not incur the wrath of state intervention. Those who do not pay child support may be significantly involved in their children's upbringing and support them in nonfinancial ways.¹⁹⁶ In our current framework support is only relevant when a nonresident parent is paying money to satisfy parental obligations. Emotional and social support, crucial to a child's wellbeing, is not equally valued.¹⁹⁷

Given the realities of poverty and incarceration faced by many families, significant economic support is not always an option, but current child support law only recognizes financial contributions (and health insurance) as child support. Can current policy be transformed so that it recognizes and rewards practices that are actually child supportive in ways other than financial? Some commentators, such as Solangel Maldonado, have urged the inclusion of other in-kind support for child support purposes,¹⁹⁸ such as nonresident parents providing necessary goods and other types of material contributions.¹⁹⁹ There is evidence that for low-income parents, in-kind contributions also facilitate parental involvement.²⁰⁰ This is exactly the kind of engagement that the goals of

193. Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 386 (2005) ("Welfare policies that aggressively encourage paternity establishment and focus enforcement efforts on low-income fathers have contributed to a new definition of fatherhood based exclusively on biology and economic support. This definition hurts the state, low-income families, and, most especially, children.").

194. See Garrison, *supra* note 15, at 18.

195. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1012 (2006) (noting that some poor, nonresident African-American fathers' level of parental presence and involvement with children is far greater than the physical and emotional involvement of many fathers who provide financially for their children).

196. *Id.*

197. See Murphy, *supra* note 193, at 344 (2005) ("Three decades of welfare 'reform' have resulted in policies that threaten to limit the meaning of fatherhood to biology and financial support. While the primary goal of modern child support law was to reduce welfare costs, many hoped that improved child support collection would reduce poverty in low-income custodial households. These efforts, however, have had a number of unintended consequences that have adversely impacted low-income families, particularly the relationship between fathers and children in those families.").

198. See Maldonado, *supra* note 195, at 1016.

199. *Id.* at 1005; see also ELAINE SORENSEN & MARK TURNER, BARRIERS IN CHILD SUPPORT POLICY 12 (1996), available at <http://www.ncoff.gse.upenn.edu/litrev/sb-litrev.pdf> (noting that the law's failure to credit in-kind contributions and time spent providing child care as child support is at odds with "practice in most poor communities of accepting in-kind contributions of food, clothing, toys, child care or other assistance in lieu of financial contributions").

200. Maldonado, *supra* note 195, at 1005 ("Many fathers believe that they are not as important to their children as mothers and that their influence over their children is minimal if they do not live with them. However, when fathers bring their children toys and books, for example, they are, in a sense, present during play time or bedtime, making them feel they are contributing to their children's development. In

the Office of Child Support Enforcement contemplates, yet this type of support is not considered in the child support paradigm that is currently embraced.²⁰¹

Policymakers could also explore continuous nonresident parent caretaking as child support,²⁰² when possible.²⁰³ Such an approach could contribute to parents' sense of self-worth if they are unable to contribute financially.²⁰⁴ Many noncustodial parents already provide this type of support, but it is not acknowledged as child support contributions pursuant to state laws. Moreover, the larger social value of such a provision of services cannot be overstated: it codifies care giving in a way that some feminist scholars have advocated for decades.²⁰⁵ It forces consideration of a realignment of roles that are typically gendered, and skewed toward an overvaluing of financial contributions and an undervaluing of childcare. This adjustment in normative terms requires not so much resources, but vision, and a formal recognition of the importance of care giving.²⁰⁶ As Jane C. Murphy observes, "current child support policies that privilege the economic function of fatherhood above all others do not permit functional fathers to assume emotional and caretaking responsibilities without assuming full financial responsibilities under a child support regime that hurts low-income fathers."²⁰⁷ And mothers as well.

The child support system should not operate as a zero-sum game between parents and children, but rather toward a greater commitment to reexamining the particular realities of low-income families and more systemic approaches to the creation of child wellbeing. Child support enforcement measures are not

contrast, because fathers who pay child support do not determine how the money will be spent or know whether it will be used for the child, they sometimes believe that their cash contributions are not benefiting the child. Furthermore, fathers typically deliver in-kind contributions in person, thereby providing them with an opportunity to spend time with their children. Formal child support, in contrast, does not facilitate direct father to child contact because payments are generally made remotely. At most, formal child support payments bring fathers to the courthouse or to the enforcement agency.”)

201. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, HANDBOOK ON CHILD SUPPORT ENFORCEMENT, MAJOR GOALS (2009), *available at* http://www.acf.hhs.gov/opa/factsheets/cse_factsheet.html.

202. *See* Maldonado, *supra* note 195, at 1005.

203. Agencies would have to screen for family violence issues, and custodial parents would have to support this approach on an individualized level. Moreover, such care giving responsibilities are not possible for those who are still incarcerated. Nevertheless, the value of parental engagement with children during incarceration cannot be overstated, the effects of which may persist after release.

204. *See* Maldonado, *supra* note 195, at 1016.

205. *Id.* at 1019. *See also* Dowd, *supra* note 16, at 527 (“The perpetuation of a merely biological and economic definition of fatherhood is apparent in much modern law, which silently accepts lack of nurturing as unremarkable.”).

206. *See* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 164-66 (1995) (arguing that society has an interest in providing for its dependents and that mothering should be recognized as a socially beneficial caretaking function); *see also* Dowd, *supra* note 16, at 532 (“If our goal is to promote a nurturing model for fathering, that model is an androgynous one based on the experience of fathers who have parented as sole or primary parents. It is also apparent that the cultural role of motherhood is a well developed nurturing model that can be emulated by fathers.”).

207. Murphy, *supra* note 193, at 386.

necessarily punitive unless a parent is simply unable to comply, despite a desire to do so. If enforcement is unsuccessful because obligors cannot reasonably pay due to accumulated debt incident to their incarceration, the maintenance of such a policy is simply punishing families for being poor.

V. CONCLUSION

Political rhetoric is the enemy of good policy. Child support law and policy that is driven by animus against “deadbeat dads” without any sincere inquiry about whether these policies create wellbeing for children can, and does, have unintended consequences. Children of incarcerated parents need, above all, the consistent engagement of their parents. In this regard the child-centered goals of federal child support policy simply are not being met, taking a back seat to enforcement measures that have the counterproductive effect of creating uncollectible debt for parents, and driving them into the underground economy and away from their families. Such a dynamic cannot be in their best interest of their children. Rigid adherence to the normative economic family model has obscured the crisis of mass incarceration and its impact on families in the modern era. This national crisis cries out for a response, a legal one to be sure, focused on correcting the unintended consequences of federal and state legislation. Equally important is a normative response: reevaluation of the nature of child support and child supportive practices, in light of the system’s effect on families struggling with incarceration.