ARTICLE

Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents

Ann Cammett*

INTRODUCTION

Public defenders and civil legal aid organizations, despite their particular mandates, serve the same low-income communities. Notwithstanding their mutual commitment to providing direct services to the indigent, advocates from the criminal defense bar and civil poverty law practitioners do not, as a matter of course, engage in cross-collaboration on contemporary problems that negatively affect low income-communities.1 Two recent trends have highlighted this problem: mass incarceration, aggravated by crippling civil sanctions from criminal convictions; and aggressive enforcement of child support orders against those incarcerated parents.

In recent years, much has been written about the civil sanctions that flow from

---

* J.D., City University of New York Law School. Ann Cammett is currently a teaching fellow and staff attorney in the Domestic Violence Clinic at Georgetown University Law Center. She previously served as a Skadden Fellow at the Legal Aid Society in New York, providing comprehensive civil legal services to formerly incarcerated women, and as a prisoner reentry policy analyst at the New Jersey Institute for Social Justice.

1. In most jurisdictions, legal services to the poor are overwhelmingly rendered under a traditional criminal defense or civil law rubric, which precludes practitioners from recognizing interdisciplinary problems in the course of their daily practice. Cross-collaboration is not a standard mode of operation regularized in any jurisdiction’s service delivery system, although the complex nature of contemporary problems indicates that it should be. There are notable exceptions, including service delivery organizations such as the Bronx Defenders (http://www.bronxdefenders.org/who/001.html) and Neighborhood Defender Service of Harlem (http://www.ndsny.org/programs.htm), who deliver comprehensive criminal and civil legal services to the same indigent clients. Most recently, in 1999, the Public Defender Service for the District of Columbia started a Civil Legal Services Unit to address the wide range of cases involving the collateral consequences of a criminal arrest, conviction or an extended period of incarceration, such as civil forfeiture, eviction, denial of public benefits, termination of parental rights, deportation and academic expulsion. See Public Defender Service for the District of Columbia, The Civil Division, http://www.pdsdc.org/Civil/index.asp. For more information on cross-collaboration, see generally Cynthia Works, Reentry: The Tie that Binds Civil Legal Aid Attorneys and Public Defenders, CLEARINGHOUSE REV., Sept.–Oct. 2003, at 328; McGregor Smyth, Bridging the Gap: A Practical Guide to Civil-Defender Collaboration, CLEARINGHOUSE REV., May–June 2003, at 56.
criminal convictions—more commonly referred to as “collateral consequences.” These are additional penalties, not imposed at trial, against people with criminal records that derive from a patchwork of federal, state and regulatory frameworks and limit participation in critical areas of life such as employment, housing, education, public benefits, parental rights, immigration, and the ability to vote. For people attempting to reenter society after a period of incarceration, these laws create very real barriers to basic survival, disrupt family reunification, and hinder civic involvement, making the promise of reintegration an empty one. Barriers to reentry don’t simply punish the person seeking to start anew; they generate serious repercussions for their families and for communities that are disproportionately affected by incarceration. While formerly incarcerated people are expected to rejoin society and lead crime-free lives, they confront numerous obstacles to successful reentry at every turn.

To this daunting situation add the issue of child support. Most prisoners are parents, and many are responsible for the financial support of children. Advocates for low-income communities, whether criminal defenders or civil practitioners, are generally unaware that, in most jurisdictions, child support debt continues to mount during incarceration, despite the fact that parents earn little or no money while in prison. Those who are concerned with the successful reentry of prisoners have recommended that child support obligations be automatically suspended during incarceration. But policy choices that affect children are difficult to discuss in a rational way—with legislators, judges, and even other advocates who recognize the scarcity of resources available to prisoners. Any recommendation that appears to pit the interests of children against the adults responsible for them—especially adults that have engaged in criminal behav-


3. To describe these barriers, I am inclined to use the term “collateral sanctions” rather than “collateral consequences.” Consequences are foreseeable results of actions, criminal or otherwise. The fact that people would continue to experience civil liabilities and perpetual punishment once a debt is resolved through incarceration seems patently unfair, particularly since they are often unaware of the existence of these sanctions when they plead to or are convicted of a crime. The Merriam-Webster’s Collegiate Dictionary definition of a sanction is (3): “the detriment, loss of reward, or coercive intervention annexed to a violation of law as a means of enforcing the law” (Eleventh Edition 2003).

4. CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN (2000), available at http://www.ojp.usdoj.gov/bjs/abstract/p05.htm. The Bureau of Justice Statistics found that 63% of federal prisoners and 56% of state prisoners in 1999 reported having children under the age of 18. Since these statistics are self-reported, the actual numbers of prisoners with children is probably much higher. No comprehensive statistics exist for the actual number of incarcerated parents with court-ordered child support obligations.
ior—is a nonstarter. Therefore, in many states many prisoners emerge from incarceration facing a multitude of civil barriers to reentry and insurmountable debt.

This article examines the recent convergence of incarceration, collateral sanctions, and child support enforcement. I argue that the current system of aggressive support enforcement against incarcerated parents serves as a de facto civil sanction in many jurisdictions, creating yet another collateral consequence of incarceration. In conjunction with other barriers, a lifetime of crushing debt may preclude successful reentry altogether. All child support obligors are not the same, but the enforcement system generally provides little discretion for courts to distinguish between deadbeats—parents who are able but unwilling to pay support—and “deadbrokes”—those who are unable to pay due to extreme poverty or incarceration. Further, current child support enforcement mechanisms fail to generate adequate financial support for children and their custodial parents from incarcerated parents, even after their release. In fact, the system creates a perverse disincentive to participation in the formal economy, as well as a host of other unintended consequences that harm children and families. Ultimately, children are the big losers when misguided public policy hampers an incarcerated parent’s ability to provide emotional and financial support for their families in the long term.

Part I of this Article briefly discusses the broader problems of incarceration, collateral sanctions, and reentry that confront low-income communities. Part II examines the history of child support and its enforcement mechanisms, focusing on the development of public policy in the wake of welfare reform. Part III discusses child support policy, practice, and the law as they specifically affect incarcerated parents and their children. Finally, Part IV looks at opportunities for advocacy by legislators, policymakers, and anti-poverty advocates who care about the collective health and vitality of low-income communities.

I. INCARCERATION AND REENTRY: A VICIOUS CIRCLE FOR POOR COMMUNITIES

Without a doubt, incarceration on the scale that it exists in the United States in the twenty-first century drains resources from neighborhoods that are already surviving on the margin. Spurred by mandatory sentencing and punitive drug laws, the imprisonment of huge numbers of human beings stigmatizes them,

5. See, e.g., Knight v. Knight, 71 N.Y.2d 865 (N.Y. Ct. App. 1988) (holding that a father's financial hardship as a result of a felony conviction and incarceration did not warrant reduction or suspension of accrual of support payments during incarceration because financial hardship resulted from father's "wrongful conduct").

diverts financial resources, and imposes significant legal barriers that are often unsurmountable for those returning home from prison; it also exacts hidden costs on the families trying to lend them support.

The successful reentry of prisoners has taken on new urgency in recent years because of the unprecedented numbers of people coming home from incarceration. Currently, the prison population in the United States is 2.2 million and growing. As such, the U.S. has the dubious distinction of being the world’s number one jailer, both in real numbers and in the proportion of its population living under the auspices of the criminal justice system. The prison population continues to grow, and reentry is virtually universal; annually, about 650,000 people are released from custody to disproportionately poor and minority communities. The vast majority of prisoners will come home, but recidivism rates are high: of those leaving prison about 66% will return within three years. That number is not surprising given what they face. Attorneys and other advocates have recently focused on dismantling collateral sanctions to assist in reentry. However, a criminal conviction can also subject an individual to myriad other punishments that are not strictly collateral consequences. These other hidden sanctions can appear in the form of fees owed to the state arising from imprisonment, including payment for the cost of probation, parole and restitution, debt garnishment, and other counterproductive sanctions such as automatic suspension of driver’s licenses for any drug conviction.


10. It is important to note that incarceration itself is not a prerequisite for sanctions. Conviction for or plea to a crime can trigger many legal sanctions even without an actual sentence of incarceration. For example, the imposition of probation (without incarceration) for DWI or a drug charge in New York will included mandatory payment of “surcharges” for the costs of probation, contributions to crime victims funds, and other fees. See THE CTR. FOR CMTY. ALTERNATIVES, SENTENCING FOR DOLLARS (2004), available at http://www.communityalternatives.org/articles/sentencing_dollars.html.

11. The rationale for imposing such onerous restrictions on people with criminal records derives from various sources, depending upon the nature of the sanction. Historically, as in the case of voting rights, the argument has been made that lawbreakers forfeit citizenship privileges based on their failure to comply with society’s rules and the social contract, although the history of race-based disenfranchisement in the United States may render that argument a specious one. as many laws were specifically designed to exclude blacks from the voting process. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 27 (2003). With respect to restrictions on employment, current policy dictates that a person’s criminal history reflects an inherent potential danger to people or property in the workplace. Rarely are employment prohibitions narrowly tailored to restrict the activities of those engaged in specific crimes with a rational relationship the job sought: they usually come in the form of blanket limitations that are overinclusive and have an impact on the job prospects of many who may be properly suited for
Nevertheless, it would be a mistake to focus on the purely legal impediments to reentry. For people in low-income communities of color in particular, the scope of the barriers to successful reintegration amount to more than the merely legal: the stigma of incarceration, racial discrimination in employment, low levels of education, minimal job skills, and poor mental and physical health are all challenges facing those reentering society. The NuPolicy Leadership Group, a policy group comprised entirely of formerly-incarcerated people, have referred to the phenomenon of reentry as “NuEntry,” owing to the recognition that most prisoners enter prison with marginal skills, options, and resources to begin with; they were economically and socially disadvantaged before they entered prison, and return home with their prospects even more diminished.

Legal sanctions create difficulties in meeting basic needs after release from a prison sentence, and are in and of themselves often more destabilizing to a family than the period of incarceration itself. In the aggregate they amount to insurmountable obstacles for some.

The contemporary focus on recognizing and dismantling collateral sanctions identifies the fundamental unfairness inherent in expecting former prisoners to engage in crime-free lives and commit themselves to productive behaviors—then setting them up to fail by denying them adequate resources to succeed. However, it is important to think about collateral sanctions more broadly. The families of prisoners bear these costs as well—sometimes significantly. Families awaiting the return of a loved one from prison contribute their limited resources to the “upkeep” of their incarcerated family members by any number of means: supplementing prison commissary accounts; bearing the costs of travel to often distant correctional facilities (not to mention the humiliation associated with visiting policies); and in the loss of vital resources that occur through the time and vast energy required to maintain meaningful connections to loved ones who are

employment. Sanctions restricting access to federal funds for education and for welfare benefits specifically arise from drug crimes and not other kinds of offenses, even violent offenses and may inappropriately penalize classes of offenders.


13. See Panel Discussion, The Crisis of Black Male Employment in New York City, presented at Increasing Public Safety: New York City, NuEntry and Employment (The Harvard Club, New York, NY, May 16, 2005). The group is housed at Medgar Evers College, The City University of New York, in Brooklyn, NY. The NuPolicy Leadership Group also challenges the notion that, for many, there was ever participation in civic life prior to incarceration, much less an opportunity to engage competitively in the formal economy. Id.

14. This is especially true when it comes to immigration consequences resulting from criminal convictions. Non-citizens, and even long-time green card holders who reside in the United States, can be deported based on relatively minor convictions such as drug possession. See MANUEL D. VARGAS, N.Y. STATE DEFENDERS ASS'N, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE 1-11 (2003) (presenting examples of deportation triggered by relatively minor offenses).
locked up. For example, more than forty states allow outrageous surcharges to accrue to telephone phone calls from correctional facilities—which must be made collect—and create a further “tax” upon prison families. These calls can cost up to 630% of the cost of regular phone calls, and can compel families to make a choice between having contact with a family member in prison and purchasing life’s bare necessities. In these ways family members who have not been accused of any crime also pay the costs of incarceration.

Likewise, mass incarceration and its attendant civil barriers have an enormous impact on entire communities, particularly communities of color. The focus on the loss of voting rights—or disenfranchiseism—is in an important sense a political issue. Not only are individuals with criminal records shut off from the primary means of civic participation, but communities with high incarceration rates also experience severely diluted voting strength as a result. In a vicious cycle, this loss of voting power translates into a reduced capacity to change the very conditions that contribute to high rates of incarceration in urban communities. Nationally, blacks are disenfranchised at a rate nearly five times higher than non-blacks. Moreover, the U.S. Census Bureau counts people in prison as residents of the communities in which they are incarcerated, rather than as residents of their home communities. With more than two million people in prison or jail today, many of them in prisons far from their homes and incarcerated in rural areas far from where they resided before prison, this counting method produces drastic distortions in Census Bureau data. And, because Census data determines how states draw political districts as well as how officials distribute billions of public dollars each year, political power and resources flow to more affluent areas rather than being appropriately spent in communities where socio-economic conditions contribute mightily to rising incarceration in the first place.

15. See generally Johnna Christian, Riding the Bus: Barriers to Prison Visitation and Family Management Strategies, 21 J. CONTEMPORARY CRIM. JUSTICE 31 (2005), available at http://ccj.sagepub.com/cgi/reprint/21/1/31; J. Christian, J. Mellow, & S. Thomas, Social and Economic Implications of Family Connections to Prisoners, 34 J. CRIM. JUSTICE 443 (2006) (describing the “loss of social capital” which arises from lost opportunities for improvement in social status experienced by families as a result of devoting so many of their subsistence resources to supporting an incarcerated family member, along with the constant negotiation of competing interests).


One aspect of these civil disabilities should be of particular interest to anti-poverty advocates. Collateral sanctions, particularly against people with drug convictions, affect poor people almost exclusively. Prisoners are overwhelmingly poor; but the sanctions themselves deprive formerly incarcerated people of opportunities to lift themselves out of poverty, whereas they have a negligible impact on people that already have resources. Consider a few of the sanctions that concern the areas of life most necessary to stabilize after a prison or jail sentence:

- Former prisoners seeking employment are likely to find it in the low-wage economy, given the level of work-related skills and education that the majority of them possess. Without the social connections available to people with more resources, returnees have a diminished ability to create opportunities less dependent on the wage economy. Therefore they are far more negatively affected by the vast array of restrictions on jobs and even licenses for people with criminal records.

- Next to meaningful employment, secure housing is the most necessary requirement of staying out of prison. Most housing prohibitions are directed against those seeking subsidized housing, who are among the poorest of Americans. Further, these same subsidized housing restrictions keep people from living with family members in public housing who will be at risk of eviction if they are allowed to live with them, even temporarily.

- Bans on public benefits, which in some states are total if you are convicted of a drug crime, preclude those who are poor and substance-addicted from obtaining meaningful drug treatment and recovery, since they are not able to pay for private rehabilitation centers that require health insurance.19

- Strict limits on federal educational loans keep people convicted of drug crimes from escaping from poverty and improving their condition in life. These limitations do not apply to those who can afford to pay for college.

And so on: there is an inescapable nexus between entrenched poverty, the criminal justice system, and sanctions that ultimately punish people simply because they are poor.20

subpages/RV4_AccuracyCounts.pdf. See also Editorial, Counting Noses in Prison, N.Y. TIMES, April 18, 2006, at A26 (urging the Census Bureau to alter the way it counts prisoners by allowing the use of home addresses to designate residence).


20. Under American jurisprudence, people living in poverty are not designated a suspect class. Such a designation would require the state to show a compelling state interest to uphold legislation that affects the poor as a group. At most, the Supreme Court has employed strict scrutiny to find unconstitutional laws that established wealth-based classifications within them, but poverty itself has never attained the status of suspect class. William C. Rava, State Constitutional Protections for the Poor, 71 Temp. L. Rev. 543, 549 (1998).
II. AN OVERVIEW OF CHILD SUPPORT ENFORCEMENT

Along with the specter of incarceration, the child support system looms large in poor communities. When families are low-income, the distribution of available resources takes on elevated importance and decisions about how to divide them are especially difficult.21 For these custodial parents, support from a parent outside of the household is a critical resource. To address the needs of poor children with non-resident parents, child support enforcement mechanisms against these parents have become more automated, and in general have accelerated the collection of more support for children. This is an important and valuable goal. At the same time, the system has become more coercive and punitive against the poorest parents—including incarcerated parents—culminating in the enactment of federal laws under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), collectively known as “welfare reform.”

While welfare reform vastly altered the landscape of erstwhile entitlements for poor families, less well-known is its attendant restructuring and bolstering of child support enforcement, designed to transfer responsibility for support of poor children from the government to non-resident parents. With the advent of welfare reform, child support income became critical for custodial mothers being “transitioned” from public assistance, since they would ultimately be losing their benefits.22 The support of poor families was intended to shift to low-income parents, usually fathers, who themselves have extremely limited resources and tend to have child support orders that exceed their financial abilities.23 About 70% of child support debt is owed by men who make $10,000 a year or less, or have no recorded wage earnings at all; less than 4% is owed by men earning more than $40,000.24

This troubling disparity is an unintended consequence of legitimate efforts by women’s and children’s advocates to strengthen laws to wrest support from


23. In 1999, more than a quarter of low-income fathers who paid child support spent 50% or more of their personal income on child support, while only 2% of non-poor fathers spent that much. Elaine Sorensen & Helen Oliver, Urban Inst., Policy Reforms Are Needed to Increase Child Support from Poor Fathers 5 (2002), available at http://www.urban.org/UploadedPDF/410477.pdf.

obligors unwilling to pay their fair share. The federal government, for its part, weighed in by instituting reforms to recoup money for children on public assistance that was being provided by the state, pursuant to welfare reform and earlier reform efforts. Well-intentioned efforts to fix a broken child support system have contributed to the present lack of flexibility in generating fair and reasonable initial support orders and managing them thereafter.

A. The Origins of Child Support Enforcement

Child support and other family-related matters are resolved through the application of state domestic relations laws. Each jurisdiction has its own requirements for providing support and for addressing a parent’s request to “modify” an award, or request that an order be increased or decreased due to a change in financial circumstances.

Historically, a support order was often completely within the discretion of the judge. Before specific guidelines were adopted, an award was loosely based on the judge’s personal assessment of the needs of both parents and children. Since the process was so arbitrary, it produced orders that were unpredictable and resulted in different awards for similar litigants—and many of these awards were inadequate for the support of children. One study found that most noncustodial parents paid more in monthly car payments than they did in child support payments. In the event that noncustodial parents failed to pay, the burden to enforce the support order through the courts fell almost exclusively on the custodial parent, usually the mother. Owing to a dearth of enforcement tools, these families were recovering an abysmal percentage of support owed to them by noncustodial fathers. Even as late as 1985, it was estimated that less than half of the women who were owed child support received the full amount due, and a full 26% received no support at all. Clearly there was a need for standardization of these processes, as well as for better enforcement tools.

B. Child Support and Families on Public Assistance

Enter the federal government, for whom the problem of inadequate and uncollected support was of a serious but different concern. In 1935 it had established the safety net for low-income families with its Aid to Families with


Dependent Children (AFDC) program.\textsuperscript{27} By the early 1970s, Congress recognized that the composition of the AFDC caseload had changed drastically. 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.

Concurrent with Congresses' re-examination of need-based assistance to poor children was an emerging racial stigmatization of welfare recipients. The focus on reforming welfare, directed by the nascent neo-conservative movement, gained political currency as notions of "entitlements" arising from Great Society programs began to change.\textsuperscript{28} Reluctance to embrace any perceived expansion of the social welfare state, particularly to benefit minority women, originally found its expression in a government document commonly referred to as the "Moynihan Report."\textsuperscript{29} This controversial report pointed to the deterioration of the "Negro" family unit as the fundamental source of weakness in the urban black community. It asserted that the breakdown of the family structure—presumably one that ought to be "headed" by a male—was exemplified by the surge in unmarried mothers and female-headed households, which led to a significant increase in welfare dependency.\textsuperscript{30}

Conservatives later furthered their attack on the social welfare state by encapsulating the country's unease with entitlement programs. The demonization of erstwhile entitlements for poor people, especially those of color, reached its political nadir in 1976 when presidential candidate Ronald Reagan recited the story of a woman whom he disparagingly referred to as a "welfare queen."\textsuperscript{31} She was identified as a welfare cheat—an unmarried black woman from the South Side of Chicago (with many children) who had allegedly used "80 aliases" to fraudulently drain the coffers of government, while "hardworking citizens pay their bills and put up with high taxes." Couched in the language of personal responsibility, the race and gender undercurrent of the welfare debate firmly took

\begin{footnotesize}
\begin{enumerate}
\item Pub. L. No. 74-271, 49 Stat. 620 (1935). Title IV of the Social Security Act of 1935 was originally called Aid to Dependent Children (ADC), it was later renamed Aid to Families with Dependent Children (AFDC). Receipt of AFDC required a dependent child and absent parent.
\item See generally LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE: 1890-1935 (1994) (opining that the modern pejorative meaning of "welfare" has evolved to describe certain specific government entitlement programs, such as AFDC, to the exclusion of other government contribution programs such as Social Security old-age pensions and tax abatements to property owners).
\item The essence of this thinking can now be found in the resurgent "healthy marriage" initiatives promoted as solutions to entrenched poverty, but without a similar emphasis on state-sponsored programs for job creation to make self-sufficiency a reality. See, e.g., U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Healthy Marriage Initiative, http://www.acf.hhs.gov/healthymarriage/about/mission.html.
\end{enumerate}
\end{footnotesize}
hold in the public imagination, ultimately culminating in the 1996 "welfare reform" amendments.

Similarly, the image of a prototypical child support obligor was reflected in the public imagination as the "deadbeat dad"—a non-compliant, uninvolved father whose intransigence toward supporting his children required decisive action to compel him to pay. These potent images, whatever their relation to the reality of AFDC recipients and child support obligors, drove politicians and the public to create legislation that would transfer the responsibility of support for the children of poor citizens from the federal government to non-resident biological parents.

The Child Support Enforcement and Paternity Establishment Program, enacted in 1975, was "a response by Congress to reduce public expenditures on welfare by obtaining support from noncustodial parents on an ongoing basis to help non-AFDC families get support so they could stay off public assistance, and to establish paternity for children born outside marriage so that child support could be obtained for them." It appears, then, that despite declarations of support for poor children emerging from the federal government in its parens patrie capacity, the new child support system was originally designed not specifically to help children, but rather to recover the cost of public assistance paid by the government to poor families.

Custodial parents whose families received federally-funded cash assistance (renamed Temporary Assistance to Needy Families, or "TANF," in 1996) were required to assign their economic rights to the state. That is, the states would collect money paid by noncustodial parents to reimburse itself and the federal government for the cost of a family's welfare grant; the custodial parent would receive none of the support paid by the absent parent. Absent good cause—


36. See Vicki Turetsky, CTR. FOR LAW & SOC. POLICY, IN EVERYBODY'S BEST INTERESTS: WHY REFORMING CHILD SUPPORT DISTRIBUTION MAKES SENSE FOR GOVERNMENT AND FAMILIES 5 (2005), available at http://www.clasp.org/publications/cs_brief_1_final.pdf (describing the dual purposes of the child support program as reimbursing government for public assistance costs and avoiding public costs by helping families to remain self-sufficient). See also generally Daniel L. Hatcher & Hannah Lieberman, Breaking The Cycle of Defeat for "Dead broke" Noncustodial Parents Through Advocacy on Child Support Issues, 37 J. POVERTY L. & POL'y 5, 9 (May-June 2003). While recoupment of support continues to be a goal, the federal government has expanded its services to ensure that all children with a non-resident parent receive support, whether or not they receive cash benefits from welfare.


38. 42 U.S.C.A. § 657(a)(1) (2006). Some states currently allow parents to keep all or a portion of the support payment as a "pass-through." See generally Paula Roberts & Michelle Vinson, CTR. FOR LAW
usually interpreted as families at risk of domestic violence—parents are required to cooperate in establishing paternity and locating noncustodial parents, with failure to comply resulting in sanctions or a denial of benefits.\footnote{39} Federal law also permits states to charge noncustodial parents for retroactive support of the child (usually tied to the date that the family first received welfare) and also for the hospital costs of the birth, although not all states elect to do so.\footnote{40} Because the majority of the prison population in the United States is very low-income—as of 2000, 82\% of prisoners are poor enough to qualify for assigned counsel, and convictions are obtained in three-quarters of those cases\footnote{41}—it can be inferred that the majority of child support arrears owed by prisoners are actually owed to the states rather than to the custodial parents of their children.

In the new federal framework, Congress provided funding to states in order to help operate child support programs, which would be overseen by the federal Office of Child Support Enforcement (OCSE). The states were to create enforcement agencies, known as IV-D programs after the title of the Social Security Act that authorizes them; in exchange, the federal government would reimburse the states for a majority of costs to administer the programs.\footnote{42} In this capacity it could also establish baseline practices for states to adopt which would make them eligible for federal funding. Since the creation of the OCSE, an increasing number of federal statutes and amendments have been created to set

---

\footnote{39} 42 U.S.C.A. § 654(29)(A)(i) (2006). Good cause is often construed as evidence of domestic violence that may put parents or their children at risk. The state TANF agency makes the determination of what constitutes good cause. See 42 U.S.C. § 602(a)(7)(A)(iii) (2006). The “Family Violence Option” (FVO) of the federal welfare legislation allows states to waive certain requirements for individuals receiving public assistance who are victims of family violence. States who adopt the FVO may waive, “pursuant to a determination of good cause, program requirements such as time limits for individuals receiving assistance, residency requirements, child support cooperation requirements, and family cap provisions.” \textit{Id.}


\footnote{41} See Smyth, supra note 1, at 57.


HeinOnline -- 13 Geo. J. on Poverty L. & Pol’y 324 2006
guidelines for support\textsuperscript{43} and to solidify enforcement.\textsuperscript{44}

C. The Bradley Amendment and Welfare Reform

Of the child support measures adopted over time, two provisions in particular have contributed to the rise of child support arrears owed to the states: the Bradley Amendment and new enforcement provisions pursuant to welfare reform. Congress adopted the Bradley Amendment to Title IV-D in 1986 to prohibit all retroactive modifications to child support orders in most instances, regardless of the reason for the request.\textsuperscript{45} This prohibits requests to reduce or eliminate the amount of a support order already in arrears. Prior to the amendment, it was a common practice for obligors to amass large child support debt, only to have the amount owed reduced or eliminated by providing "good cause" and invoking judicial discretion to obtain the reduction. Congress intended this amendment to eliminate the practice. The Bradley Amendment allows downward modification of child support orders, but only from the filing date of an application to modify.\textsuperscript{46} To date the statute remains in effect. All arrears previously accrued by the parent become non-dischargeable debt. Therefore, if parents fail to seek—and obtain—a modification before arrears mount, they are stuck with them.

In addition to the broad restructuring of welfare policies, the welfare reform bill dramatically bolstered various child support enforcement processes. It increased the use of wage withholding to collect child support,\textsuperscript{47} allowed for liens on property and on lump sum payments,\textsuperscript{48} and mandated that employers report all newly hired employees to the child support program.\textsuperscript{49} It also permitted states to revoke the driver’s and professional licenses of parents who fell behind in child support payments.

\textsuperscript{43} See, e.g., The Family Support Act of 1988, Pub. L. No. 100-485 § 103(a)(3) (1988), codified at 42 U.S.C.A. § 667(b)(2), which mandated that the states establish presumptive child support guidelines by 1994. It created a "rebuttable presumption" that the amount of support under the guidelines would be the correct amount to be awarded. This presumption required a written finding on the record that the applications of the guidelines would be "unjust or inappropriate" in a particular case, which would be sufficient to challenge the presumption. It also required that the states establish criteria under which the application of the guidelines might be unjust or inappropriate, and that the guidelines be used to determine subsequent modifications as well.

\textsuperscript{44} See, e.g., The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378 (1984), which required the states to strengthen their enforcement powers even as to non-AFDC families. The Amendments provided for income withholding, liens against defaulting obligors, and a parent locator service for all custodial parents. It also required OCSE to establish a national advisory panel on support guidelines, and required the states to establish numeric guidelines to determine appropriate child support.

\textsuperscript{45} Pub. L. No. 99-509, codified at 42 U.S.C.A. § 666(a)(9)(c) (2006). A court could, under the terms of the federal statute, end a support obligation by operation of law if a parent brings a motion to terminate support due to the emancipation of a child, a situation which would render the support obligation moot.


Finally, PRWORA required states to statutorily prescribe a variety of other procedures to improve the effectiveness of child support enforcement overall.

Some of the enforcement mechanisms provided for in PRWORA have served to make the process of getting support from working parents speedier and more efficient. Even coercive measures can be appropriate: if there is income available, they might compel a reluctant obligor to pay up. But if a parent is poor, they can serve as an impediment to finding and keeping a job. Provisions such as license suspension for non-payment of support can make getting to work to earn money for support more difficult or even impossible, a result that appears to run counter to the goals of the child support program. Driver’s license suspension is just one of the mechanisms that can backfire. States can also report support arrears to collection agencies, which has an adverse impact on a person’s credit rating. Moreover, while this article focuses on child support arrears that accrue during incarceration, a large number of individuals are actually incarcerated for non-payment of support and can later be subject to re-arrest solely for ongoing non-compliance with a support order that they cannot pay. In the final analysis, some of the more coercive elements of enhanced enforcement are simply counterproductive and do not produce real support for children.

III. INCARCERATION, CHILD SUPPORT, AND THE LAW

A. First Things First: Economic Survival in a Post-Incarceration World

Some collateral sanctions are not technically a legal consequence of a criminal conviction but instead flow from the practical realities of spending time in prison. The accumulation of child support arrears by incarcerated parents is a prime example of a consequence that springs from the nexus of imprisonment, aggressive enforcement and entrenched poverty. While there are no specific criminal statutes that make the actual accrual of arrears a direct legal result of a prison sentence, the inability to satisfy a support order due to little or no earning capacity in prison—combined with policies that require parental support of nonresident children and laws that ignore earning capacity and focus only on unrelated criminal conduct—leave prisoners with little recourse to satisfy mounting support obligations and place them in a more or less permanent state of debt.

When parents owe child support arrears, the automated processes of state child support agencies kick in to collect the monies owed. But for those parents leaving prison, the first requirement is to obtain stability in order to survive in the “free

world" and this necessity is often abruptly thwarted by these child support enforcement mechanisms.

First, federal law provides for garnishment of a parent’s salary at the rate of up to 65% to recoup on child support arrears. The implications here are obvious. If a recently released parent overcomes employment barriers and obtains a job (which is often low-wage) the majority of that person’s income will be deducted immediately to satisfy this debt, regardless of whether enough remains for self-support. For example, an individual earning minimum wage for full-time work at the current federal rate of $5.15 per hour would make a gross salary of $206.00 per week. Surviving in the low-wage economy on this income, while being garnished for arrears as well as ongoing support, is next to impossible. This encourages noncustodial parents to find work “off-the-books,” where they can avoid the government’s tracking system but are subject to exploitation by unscrupulous employers—or to resume criminal activity. Under this rubric, it is likely that children will get less—or no—ongoing support and the dynamic is likely to exacerbate tensions with custodial parents. Further, maintaining employment in the underground economy creates limitations on future income growth and financial stability.\(^5\)

\[\textbf{B. Voluntary Unemployment?: Incarceration, and Child Support Law}\]

In addition to substantial barriers to reentry, incarcerated parents face legal obstacles in addressing their child support obligations. Many prisoners enter a term of incarceration already owing support. While some may have previously ignored their obligations, others did not. Some, like many incarcerated mothers, are custodial parents before incarceration and start to accrue arrears while in prison when a child is in foster care or receiving public assistance. Despite their status as parents before prison, the majority of state laws are unforgiving to those who cannot pay support due to diminished earning capacity arising from incarceration.

Public policy considerations that focus on blame for criminal conduct as opposed to financial viability contribute to this problem of enormous arrears. In most jurisdictions, incarceration is considered “voluntary unemployment” to determine whether parents have experienced a “substantial change of circumstances” for the purposes of modifying child support orders.\(^54\) A substantial change of circumstances normally arises when parents have had a precipitous


\(^{54}\) See 42 U.S.C.A. § 666(a)(10)(b). Federal guidelines allow a tri-annual review of the economic circumstances of the parties to make regular adjustments to the amount of a support order. Outside of that review provision, a moving party must submit proof of a substantial change in financial circumstances that warrants a modification.
drop in income—as in severe illness or unemployment due to no fault of their own. Despite the fact that incarceration invariably triggers a significant drop in income—as prisoners earn nothing or very little for their labor—many courts have held that prison results from voluntary criminal behavior that should not create a “windfall” for a parent at the expense of the child entitled to support by suspending child support accrual during incarceration.\footnote{This assumes the obligor is incarcerated for a crime other than non-payment of child support.}

Other jurisdictions have found to the contrary. Focusing on prisoners’ lack of assets rather than “voluntary” criminal behavior, those courts have deemed incarceration an appropriate “justification” for a downward modification since incarceration confers a significant drop in income.\footnote{See, e.g., Lewis v. Lewis, 637 A.2d 70 (D.C. Ct. App. 1994) (incarcerated parent could not be ordered to pay support until release from prison, as rule preventing parent from evading support responsibility by voluntarily reducing income did not apply).} Some courts subscribe to a partial justification theory, or consider incarceration to be one factor in deciding whether to modify an order.\footnote{Jessica Pearson, Building Debt While Doing Time, 43 JUDGES’ J. 5, 6 (2004) (discussing various approaches used by the states to address arrears accumulation for incarcerated individuals).} Whether a state subscribes to the justification theory, the no justification theory, or the partial justification theory will be an important factor in whether prisoners accumulate arrears during incarceration.\footnote{Id.}

In a justification or partial justification jurisdiction, a prisoner might have an opportunity under the law to take affirmative steps to modify an outstanding order during the period of incarceration. This might not even be an option in some states, because of the “no justification” policy.

Unfortunately, whether a jurisdiction will allow for suspension of arrears during incarceration is only the beginning of the analysis.\footnote{States that allow modification of child support orders pursuant to a substantial change in circumstances usually require the incarcerated parent to submit a motion to a court for relief. See, e.g., D.C Code Ann. § 16-916.01(o), § 16-916.01(s), D.C. Super. Ct. Dom. Rel. R. 7(b).} The more practical problem of child support arrearage, even in justification states, is whether the parent understands that he or she has a right to seek a modification or the legal assistance to do so. Many parents in this situation assume that child support is automatically suspended upon entry to prison because it is obvious that they will not be earning enough to pay. But this is not the case. Even if prisoners understand the importance of taking this action, they have other constraints. Owing to the dearth of available legal representation, inmates usually prepare motion forms themselves, often incorrectly or illegibly, and sometimes forwarded to the wrong court. Very few states have addressed this issue proactively by legislation. In most states where court intervention is even an option, it is incumbent upon the obligor to seek a modification at the earliest time. By the time most incarcerated parents become aware that they should have taken steps to request modification, they have accumulated arrears that most will likely never
pay off since federal law precludes cancellation of any arrears.  
Child support arrears can amount to significant debt. A study of 650 
incarcerated parents with child support orders in Massachusetts found that the 
parents entered prison owing an average of $10,543 in unpaid child support; if the 
orders remained at pre-incarceration levels, they would accumulate another 
$20,461 in debt over time, plus 12% interest and 6% in penalty charges.  
Similar trends have been reported in other states, and bleak prospects for employment 
after incarceration don’t provide much hope of satisfying this debt over the long 
term.  

C. The Economic Landscape for Incarcerated Men

Noncustodial parents are expected to contribute to the support of their 
children, and most want to. Nevertheless, any examination of child support must 
be viewed through the lens of the prevailing economic conditions of the parents 
in question. Out of the seven million noncustodial fathers who do not pay child 
support, 2.5 million are poor and have very marginal education and skills.  
Employment figures from the Current Population Survey (CPS) demonstrate that, 
even during the boom economic period of the 1990s, employment rates for 
less-educated men remained stagnant.  

After one of the longest economic 
expansions in history, 22% of young men with a high school diploma or less 
education were not working, and when they did, earned lower real wages for 
comparable work than before. A few of the factors that contribute to this 
negative employment trend are: a decline in job availability for less-educated 
workers overall, due to an increase in demand for literacy and technical skills; the 
movement of manufacturing, construction and transportation jobs away from the 
inner cities; and employer discrimination, particularly against African Amer-
icans.  

Commensurate with the decline of younger men in the workforce is the 
rise of the prison population, presumably with the same young adults who cannot

60. See supra notes 40-41 and accompanying text.
61. Pearson, supra note 57 at note 20 and accompanying text (citing N. Thoennes, Cen. For Pol'y 
Res., Child Support Profile: Massachusetts' Incarcerated and Paroled Parents 16 (2002)).
62. See Pearson, supra note 57, notes 19-24 and accompanying text.
63. See generally Elaine Sorenson and Chava Zibman, Urban Inst., Poor Dads Who Don't Pay 
64. Elise Richer, Abby Frank, Mark Greenberg, Steve Savner, & Vicki Turesky, Ctr. For Law 
& Soc. Policy, Boom Times A Bust: Declining Employment Among Less-Educated Young Men 3 
(2003), available at http://www.clasp.org/publications/Boom_Times.pdf. See also Cammett, supra note 
53, at 6.
65. See Boom Times, supra note 64, at 6 (average hourly wages for men aged 18-24 with no more than 
a high school diploma dropped from $10.47 (1999 dollars) in 1979 to $8.68 in 1999). Young 
African-American men have fared most poorly, as evidenced by a 13% drop in employment over the last 
two decades. Id. at 7. The group analyzed did not include young men who were institutionalized, so their 
lack of employment did not even factor into the study. Id. at 2. Including this data would have made the 
numbers even more daunting.
66. See id. at 5-10.
find steady work in the formal economy.

Moreover, a recent study focused on “less-educated” black men suggests that over the past two decades incarceration and strict child support enforcement have curtailed labor force activity, especially in those aged 25-34. The results of this study also indicate that past incarceration and child support can account for most of the declines over time in labor force activity for this group. Among other things, the report recommends a review of the barriers to employment by distinguishing those that are sensible from those that are punitive and counterproductive, like driver’s license revocation and other bans on occupational licensing for those with criminal records.

D. The Special Needs of Incarcerated Mothers

Because obligors are overwhelmingly fathers, the specter of the “deadbeat dad” drives most policy reforms related to child support. Policy organizations analyzing the subject tend to refer exclusively to fathers since their actual numbers are much higher, and in these pages I often follow this practice. Despite the prevalence of fathers as obligors, however, the growing number of incarcerated mothers should compel us to reconsider gendered notions of child support. Primarily as a result of drug policies, women have experienced the greatest increase of incarceration, outpacing all other groups. Incarcerated women achieve a dubious parity with men: as noncustodial parents they are subject to the same support enforcement requirements and become liable for support, particularly if their children receive public benefits or reside in foster care. Further, these mothers find themselves in a double bind because they are more likely to have been custodial parents prior to incarceration and are at increased risk of termination of parental rights.

Mothers as child support obligors are invisible as a group, although the gender-neutral application of the law dictates otherwise. For them, the challenges of reentry are even greater. Often housed in correctional facilities far away from minor children, many receive few regular visits, which they are usually unable to compel by law. This is a situation that is not only personally costly to mothers

68. Id. at 329.
69. Id. at 346-47.
and their children, but can contribute to the loss of parenting rights over children for whom they were primary caregivers before prison.\textsuperscript{72} Indeed incarcerated mothers, more than fathers, tend to focus on the problem of resuming custody, visitation, and other related issues, as the negative outcomes are more visible and immediate.\textsuperscript{73} Upon release, they may be consumed with the prospect of reunification with children being cared for by others or in the foster care system but will need to secure and pay for housing before they can do so.

Child support debt payment is a complicating factor in a complex reentry dynamic. Shifting to a genuinely gender-neutral understanding of incarcerated parents in their role as child support obligors can be transformative. Rather than being driven by images of the "deadbeat dad," which focuses the discourse on blameworthiness, the resulting policy discussion can shift to a parent’s real ability or potential to provide financial support, an analysis of which is genuinely needed to address the rights and responsibilities of low-income parents. The interrogation of a parent’s capacity to contribute financially and otherwise should be the sole legal basis for determining support obligations, regardless of the parent’s criminal history or gender.

Unfortunately, there has been little work done on the specific economic impact of child support arrears on incarcerated mothers. If incarcerated obligors can be considered a special needs group, then mothers can be considered a very special needs group. Most incarcerated women are mothers but also have other gender-specific issues that require attention.\textsuperscript{74} The prevalence of substance abuse and histories of sexual and domestic violence among women in prison is staggering,\textsuperscript{75} and these traumas require ongoing attention upon reentry. Child support debt creates yet another barrier to finding appropriate housing which is required by courts and child welfare agencies as a prerequisite for resuming custody of their children. Much more research is required to parse the true impacts of child support debt for mothers.

IV. OPPORTUNITIES FOR ADVOCACY

A. A Look at the Policy Landscape

Child support policy is fraught with danger. Competing and legitimate policy

\footnotesize{\textsuperscript{72} Id. at 11.}
\footnotesize{\textsuperscript{74} See Mumola, Incarcerated Parents and Their Children, supra note 4, at 2. According to the Bureau of Justice Statistics 2000 report, 65% of female state prisoners and 59% of female federal prisoners reported having a child under the age of 18.}
\footnotesize{\textsuperscript{75} See When “Free” Means Losing Your Mother, supra note 71, at 6. The report indicates that past trauma and abuse are strongly tied to women’s involvement in illegal activity, and that women drug abusers are four times as likely to have a history of being sexually assaulted than women who do not use drugs.}
considerations always create the potential for conflict between groups that traditionally support custodial parents in civil proceedings and those who advocate for prisoners generally. But it need not be so. There is an increasing recognition that prisoners, insomuch as they represent a class of obligors with "special needs," must be dealt with differently to stem the tide of child support arrears owed to the state.

The government is concerned not only with collecting arrears for its own sake, but also with the effect of large uncollected payments on the state that will never be collected. The federal government evaluates state performance in collecting arrears using the number of cases that are in arrears with collections. Since the passage of the welfare reform law, collections have increased nearly 50% overall. Despite this success, program administrators worry that arrears—more than $96 billion nationally—will make them appear inefficient. And, while collections improve, arrears owed to the state continue to mount.

The Department of Health and Human Services, however, has begun to recognize that collecting support from a parent who wants to pay but has few resources to do so presents special challenges, as reflected in the National Child Support Enforcement Strategic Plan for fiscal years 2005-2009. In recent years the child support enforcement community has slowly evolved from an exclusive posture of aggressive support collection to one that includes creating a "culture of compliance" in its stakeholders, including noncustodial parents. Included in the Strategic Plan's delineated strategies to carry out its mission of collecting support for children is a call to "customize [its] approach to customer service." Among its recommendations are to "customize enforcement approach[es], distinguishing between those who refuse to pay (e.g. denial/revocation of licenses) and those who cannot pay (e.g. workforce development referral)." These changes cannot come quickly enough for parents struggling with crushing child support debt.

Low-income parents with large amounts of arrears may never be able to satisfy them, and enforcing orders against them will likely result in less

76. See Michelle Ganow Jones, Options to Help Low-Income Noncustodial Parents Manage Their Child Support Debt, 6(7) WELFARE INFORMATION NETWORK ISSUE NOTES 2 (2002).
77. See id.
79. Id.
81. Id. at 2.
82. Id. at 12.
83. Id.
support paid overall.\textsuperscript{84} States have experimented with programs such as: arrears forgiveness programs; fatherhood programs; and, most important, job training and workforce development programs to assist poor parents with paying support.\textsuperscript{85} These programs are designed to give very low-income parents a shot at becoming long-term financial contributors to their children’s well-being, the true goal of the child support program. In addition to creating programs to enhance job readiness for marginally-employed parents, we can also examine the ways in which low-income parents accumulate arrears, and recommend solutions to adjust practices for more equitable outcomes from the start.

Unfortunately, enhanced federal and state collection efforts have outpaced the creation of job and education programs to support parents who cannot earn enough income to become regular financial contributors for their children. Broader policy changes are needed to counteract the growing arrears accumulated by incarcerated parents. While there are many possible approaches to this goal, a few changes would go a long way toward this end.\textsuperscript{86}

- **Toll (or suspend) child support obligations for incarcerated parents.** Allowing arrears to accrue against a low-income prisoner with no assets when she or he cannot earn money in prison is a counterproductive practice. Currently two states suspend child support for institutionalized parents legislatively. North Carolina automatically allows a child support order to be suspended with no arrears accruing “during any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make payment.”\textsuperscript{87} This state law recognizes the legitimacy of suspending orders for poor prisoners who are not earning money during confinement, while allowing those with resources to fulfill their obligations. In 2000, Virginia amended its laws to exempt “parents unable to pay child support because they lack sufficient assets . . . and who in addition . . . are imprisoned with no chance of parole” from the presumptive minimum support order of $65.00.\textsuperscript{88} Of course, prisoners with resources are expected to satisfy support obligations.

- **Make modifications part of intake procedures at correctional facilities.** In the absence of legislation that suspends child support arrears for incarcerated parents automatically, state Departments of Corrections can develop an expedited administrative process to assist prisoners with no assets in modifying support orders upon entry to prison. A remedy that


\textsuperscript{85} See \textsc{Roberts, Ounce, supra} note 40, at 42.

\textsuperscript{86} See \textsc{Cammett, supra} note 53, at 10-13.


\textsuperscript{88} \textsc{Va. Code Ann. § 20-108.2(B)} (2006).
assists prisoners with applications would also greatly aid court personnel that must process motions from the same person repeatedly before obtaining a corrected motion to file. Massachusetts, for example, employs a full-time Child Support Enforcement employee at the state Department of Correction reception facility who makes presentations and meets individually with parents to prepare, among other things, modifications of child support orders.\textsuperscript{89} Oregon has implemented a model project to notify those recently incarcerated that their obligations continue to mount and what steps need to be taken to modify the order.\textsuperscript{90} In addition, the state has established a rebuttable presumption that a noncustodial parent who is incarcerated for a period exceeding 180 days and has an income of less than $200 per month is unable to pay support.\textsuperscript{91} If the parent requests modification, the order is reduced to $0 for the period of incarceration; sixty-one days after an individual is released, his or her order reverts to the original amount.\textsuperscript{92}

- **Provide partial or graduated waivers of support debt owed to the state.** In exchange for completing an education, job-training program, or parenting program and consistent payment of ongoing child support, the state has the option of discharging a percentage of arrears owed to the state or the accumulated interest on such arrears. Programs such as this exist in a number of states, including Vermont, Washington, and Minnesota.\textsuperscript{93} Custodial parents not involved in the cash public assistance system can agree to waive arrears at any time.\textsuperscript{94} Notwithstanding the prohibition on retroactive modification of arrears, federal law permits the waiver of arrears owed to the states in certain circumstances.\textsuperscript{95} States may also offer periodic amnesty, where obligors can appear at specified periods and make new payment arrangements in exchange for waiving contempt charges and recalling warrants.

- **Limit the practice of “imputing” income to unemployed parents.** Child support should ideally be based on the *actual* income of an obligor or a reasonable assessment of their ability to pay. When a court “imputes” income, it is charging support to a parent based on income that does not actually exist; it is based on what the court believes the obligor should be making, given the economic history or perceived earning ability of the person. While this is a useful enforcement tool to reach parents who are seeking to shirk their responsibilities (e.g. regularly employed non-W-2 wage earners who report no income), imputing income for many low-income parents without careful consideration of individual circumstances is a

\textsuperscript{89} See Pearson, *supra* note 57, at 5.
\textsuperscript{90} See also Roberts, *Pursuing Justice, supra* note 84, at 24.
\textsuperscript{92} OR. ADMIN. R. 137-055-3300(7) (2006).
\textsuperscript{93} See Roberts, Ounce, *supra* note 40, at 13-16 (analyzing various state programs).
\textsuperscript{94} It is unlikely that the state would take any part in advising custodial parents to waive any child support arrears due to them, although it is an option they can elect to exercise.
\textsuperscript{95} See Hatcher & Lieberman, *supra* note 36, at 10.
dangerous practice: one that leads to the accrual of inappropriate arrears. The earnings of very low-income parents tend to fluctuate wildly due to the lack of job skills and the unavailability of full-time work. When making an initial support order, the court should make greater efforts to determine real wages or earning power of obligors through current payroll records or state and federal income taxes. In the absence of actual income information, support should be set at the guidelines minimum barring evidence that an obligor is “voluntarily unemployed.”

B. A Look at Anti-Poverty Law and Practice

Because of the nature of poverty law practice, most advocates see the problems of their clients through their limited practice areas. For defenders this means criminal law; for civil aid lawyers, family law, housing law, public benefits, and so on. However, the nature of contemporary problems that implicate both criminal and civil law makes this an inefficient way to address client needs. As attorneys, our first and foremost obligation is to zealously represent individual clients, and we must seek the result that will benefit them in their individual cases. But this requires at least a passing knowledge of how these systems interact. As Cynthia Works, Director of Training for the National Legal Aid and Defender Association, has observed, “Without assistance from civil legal aid attorneys and public defenders equipped to handle the legal hurdles of reentry, many ex-offenders fall prey to recidivism, ending up on the docket of the same public defender who helped them on the very offense for which they were originally incarcerated.”

In no instance is this more true than when addressing the issue of child support arrears. Like all collateral sanctions, child support modification requires that advocates (including criminal defenders) have knowledge of how their particular jurisdiction treats prisoners with child support obligations. While federal law drives much of child support policy, each jurisdiction makes the law that governs how support orders are made and modified, and what special opportunities, if any, are available to help people with arrears. Advocates should know if a state treats incarceration as a justification for a downward modification of support, if it doesn’t, or if it will consider it as a factor. Early intervention is key. For incarcerated parents whose support obligations stem from a period of incarceration when they were unable to satisfy payment, obtaining information about how they can maintain control over their child support debt before incarceration is critical.

Child support is not a one-size-fits-all proposition. In representing clients seeking support or support enforcement, civil lawyers should consider that fair,

96. The practice of imputation is not mandated, but at work here is the prevailing belief that most people are able to work full-time at minimum wage allow courts to set support orders at that rate.
97. Works, supra note 1, at 330.
realistic, and appropriate support orders make ongoing support more likely to be paid to their client's children, and may engender more positive long-term outcomes for everyone involved.

In thinking about the real nature of collateral sanctions, including child support, it helps to take a look at a potential reentry experience of one client:

_Terry J. is a father who was employed and paying regular child support for his two children until he was arrested and imprisoned on a felony drug charge. He and the mother of his children are not on good terms. She is fed up with his addiction and has pretty much cut off contact completely. While in prison, he attempts to get some help with his drug problem but there is a long waiting list for drug treatment. He'll be released in eighteen to twenty-four months and expects to deal with it then. Upon intake, no one asks him if he has children; no one asks if he pays child support. He was working as a truck driver before his arrest. His job won't be there when he gets out—his company doesn't hire people with criminal records. While inside he trains to be a barber, since he has no real skills and didn't finish high school._

Terry is in for a rude awakening. What he doesn't know is that if the state that he lives in requires licensing to be a barber, his conviction will probably disqualify him because he won't meet the "good moral character" requirement. He also might not be aware that drug treatment won't be so easy to come by. The federal government allows states to decide to deny public assistance—which he'll need—to anyone with a drug conviction.

Frustrated in his efforts to find work as a barber, he attempts to get another driving job—until he gets a notice in the mail that his driver's license has been suspended for non-payment of child support. When he shows up at the family court to see what he must do to get his license back, he discovers that he is $10,400 in arrears. To get his license reinstated, the state may require 25% of the balance of his arrears and a promise to pay the rest within a year while resuming his weekly child support obligation. The judge might say that she will reduce his support obligation to $25 per month until he finds a job. But she can't do anything about the arrears. He'll have to pay them back. No one mentioned that this might be an issue while he was in prison, or that he could write the court to ask for a modification of his support.

Terry will probably have some serious housing issues as well. He has nowhere to live and wants to stay with his mother temporarily. He can't. She lives in public housing. People with drug convictions are barred from public housing unless they can show "evidence of rehabilitation." He doesn't know what that is, and no one else seems to know, either. If he stays with his mother without notifying the

98. "Terry" is a composite of many clients I have helped sort out collateral sanctions arising from their criminal convictions. Although he is a fictional character, his situation is not at all atypical for someone with his history.
housing authority, she might get evicted. Terry is broke, homeless, and not in recovery. Drugs are a likely escape route right now.

If Terry’s case looks like a parade of horribles, it is. But the sad fact is that his is an all-too-typical scenario. And, if Terry were not a man, but a woman and a mother, chances are that, further, she wouldn’t get her kids back until she found a place to live. Where and when could Terry have best been assisted?

- **Civil-Criminal Collaboration.** Recently, much has been written about the great potential inherent in civil legal services and public defender collaboration, and practical suggestions to bridge this gap are set forth in those writings. In organizations that provide both criminal and civil advocacy many of the clients will cycle through the organization as juvenile, criminal and finally civil clients with problems that are recurrent and interrelated. Despite differing roles for criminal and civil advocates in the provision of services to their clients, the huge specter of incarceration requires that both criminal defenders and civil advocates address the intersection of criminal and civil sanctions in their clients’ lives so that some of the effects can be mitigated. At the very least, information and resource sharing between these sectors can provide valuable information that can be of enormous help to clients that need to gain an awareness of potential problems at the earliest possible juncture. Finally, persistent problems faced by clients from either sector can be passed on to groups specializing in affirmative litigation to seek redress. Recently, advocates have suggested that the most effective way to address collateral sanctions is to attack them through state-by-state litigation.

- **Public Education.** Public defenders and civil legal aid organizations cannot be expected to carry the full weight of such an enormous social problem. Apart from the question of what their respective roles are vis-à-vis their clients, these advocates are often under-resourced and overwhelmed in carrying out their traditional roles for their clientele, much less adding new responsibilities that can overwhelm them. The good news is that more information is becoming available generally about the legal sanctions that affect people with criminal convictions. Note that in Terry’s case the sanctions that he faces will vary depending on where he lives. The Legal Action Center in New York has created a fifty-state survey on legal barriers to reentry and other related materials; these resources provide a great start in sorting through the maze of sanctions that operate differently in each jurisdiction. The Center’s subsidiary group—the National H.I.R.E. Network—provides information and sup-

---

99. See generally, e.g., Smyth, supra note 1, and Works, supra note 1.
port to people with criminal convictions seeking support around employ-
ment issues. Other state policy organizations and reentry institutes can begin to compile information and self-help materials in the states that they monitor to assist with the dissemination of information to advocacy 
groups and community based and social service organizations, where these issues often present themselves.

- Lay advocacy. Not all advocacy requires the services of an attorney. Many groups assist prisoners inside correctional facilities by giving them information to help prepare for reentry—information that can have a significant impact on whether they can beat back sanctions by preparing “defenses” that exploit exceptions to prohibitions, such as that on admission to public housing. Advocates can help after release as well. In Terry’s case, for example, preparing evidence of rehabilitation requires the labor-intensive collection of various materials to help demonstrate that the applicant is not a “danger to the health, safety and peaceful enjoyment of the other tenants.” This is a process that can be assisted by a lay advocate, if they have training and materials to “build a case.” Materials explaining collateral sanctions can also be left at in unemployment offices, drug treatment programs and other points of service where people in need of information tend to cycle through.

CONCLUSION

Incarceration exacts a heavy toll on individuals, families, and communities. Having reasonable access to resources is necessary to help the formerly incarcerated find and keep employment, take their place in society, and care for their families. Civil sanctions, including the imposition of inappropriate child support arrears, impede the chance of successful reentry, and inhibit the ability of those reentering to provide long-term emotional and financial support for their children.

Criminal defenders have a unique opportunity to intervene or provide information to assist clients with understanding and taking action to address potentially crippling sanctions—such as child support arrears—before they become a lifetime debt after a period of incarceration. Likewise, civil legal aid attorneys can resolve to understand the myriad ways that incarceration

105. See 42 U.S.C. § 13661(b)(c) (2006). While the federal statute provides the authority for housing projects to deny admission to anyone engaged in drug-related or violent criminal activity, it allows housing authorities to consider evidence of rehabilitation for those who have abused drugs or alcohol.
affects the lives of their clients and identify specific barriers in providing effective civil representation. But before each of these groups can do these things, they will have to begin talking to each other. Resolving to undertake such a task will go a long way toward helping people in low-income communities navigate the fault lines of our present legal system.