PILING ON DEBT:
The Intersections Between Child Support Arrears and Legal Financial Obligations

Vicki Turetsky and Maureen R. Waller

Abstract

Child support is one of many debts that accumulate for poor nonresident parents during and after incarceration. As with legal financial obligations, child support debt functions as a form of cost recovery to the state, includes other fees, costs, and interest added onto the original child support order, and triggers aggressive enforcement measures. This Article focuses on child support policies that contribute to the debt burden held by the most disadvantaged parents, who are more likely to have contact with the criminal justice system and a history of incarceration. The Article first addresses cost recovery by the child support program and then discusses child support debt as a collateral consequence of incarceration. The Article also points to key factors driving this debt, including support orders that are not based on ability to pay, and identifies enforcement strategies that can further reduce nonresident parents' ability to pay these debts, such as incarceration and driver's license suspension. We identify recent policy efforts that address the causes and consequences of accruing unmanageable debt, including during periods of incarceration. The Article concludes with policy recommendations which would prioritize children's wellbeing over cost recovery and help disadvantaged parents make consistent child support payments, participate in the job market, and maintain family relationships.

About the Authors

Vicki Turetsky, J.D., was the federal child support commissioner during the Obama administration. Maureen R. Waller is Associate Professor of Policy Analysis and Management at Cornell University. This Article draws in part on research conducted for the Abell Foundation.[1] We thank the foundation for permission to use this work.

1. *See* Vicki Turetsky, The Abell Report: Reforming Child Support to Improve Outcomes for Children and Families, Abell Foundation (2019).

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Introduction

It is unconstitutional to incarcerate people for debts they are unable to pay. In *Turner v. Rogers*, the U.S. Supreme Court affirmed that indigent nonresident parents owing child support arrears may not be sent to jail without determining whether they had the ability to pay their child support arrears.[2] However, there is no legal protection against incurring unmanageable debts during incarceration. More than half of people incarcerated in state prison are parents of minor children and half of these parents have open child support cases.[3] In prison, child support debt can continue to build month by month, often growing exponentially during this time.[4] Research suggests parents typically enter prison with $10,000 in child support arrears and leave owing $20,000 or more.[5]

2. The resident (or custodial) parent is the parent who lives with the child the majority of the time. The nonresident (or noncustodial) parent is the parent who does not live with the child the majority of the time. An obligor is a nonresident parent with a child support order. *See* Turner v. Rogers, 564 U.S. 431, 435 (2011).
3. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 17 (2010); CTR. FOR POL'Y RES., INCARCERATION, REENTRY AND CHILD SUPPORT ISSUES: NATIONAL AND STATE RESEARCH OVERVIEW 2–4 (2006).
4. Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES J. 5, 7 (2004).
5. Several early state studies found that incarcerated parents leave prison with an average of $15,000 to $30,000 or more in unpaid child support, with no means to pay upon release. *See* VICKI TURETSKY, STAYING IN JOBS AND OUT OF THE UNDERGROUND: CHILD SUPPORT POLICIES THAT ENCOURAGE LEGITIMATE WORK 2 (2007); Esther Griswold & Jessica Pearson, *Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies*, 65 CORRECTIONS TODAY 87, 87–88 (2003).

Child support is just one of many debts that accumulate for nonresident parents during and after incarceration. As with legal financial obligations, child support debt can function as a form of cost recovery to the state, include other fees, costs, and interest added onto the original child support order, and trigger aggressive enforcement measures. Parents who have contact with the criminal justice system can also incur a long list of additional legal financial obligations, including fines, restitution, fees, and assessments.[6] We have limited information about the total magnitude of these financial obligations across the two systems or the cumulative consequences for low-income parents and their families as they accrue over time.

There are several parallels between monetary sanctions imposed by the criminal justice and those imposed by the child support system as well as notable differences. Legally, child support is not a fine that represents a punishment, sanction, or a penalty or a form of restitution to compensate victims for damages.[7] Instead, it reflects the basic legal obligation of parents to support their children. Similar to fees, costs, and surcharges, however, child support can function as a form of cost recovery to the state. Under welfare cost recovery policies, states confiscate child support payments from the poorest families to reimburse public assistance and fund government operations.[8] When child support is retained as state revenue, it is similar to legal financial obligations, and enforcement efforts to recoup welfare costs "more closely resemble debt-collection proceedings," according to the *Turner* Court.[9]

As with legal financial obligations, child support arrears often include other fees, costs, and interest added onto the original child support order. Indeed, interest has been identified as the most important factor driving the significant growth arrears in several states.[10] Child support arrears can also include retroactive support for periods before the orders were established, including Medicaid costs for the birth.[11] Like finan-

6. *See, e.g.*, Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. Crim. 471, 475 (2018); Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 Persp. Pol. 638, 639 (2015); Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 Clearinghouse Rev. J. Poverty L. & Pol'y 187, 188–89 (2007).
7. Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 18 (2016).
8. *See* Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 Persp. Pol. 638, 645 (2015); Vicki Turetsky, What If All the Money Came Home? 1 (2000).
9. Turner v. Rogers, *supra* note 2, at 449.
10. Elaine Sorensen, Liliana Sousa, & Simone G. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 55 (2007).
11. *See* Carolyn J. Heinrich, Brett C. Burkhardt, & Hilary M. Shager, *Reducing Child Support Debt and Its Consequences: Can Forgiveness Benefit All?*, 30 J. Pol'y Analysis & Mgmt. 755, 756 (2011).

cial obligations accrued in the criminal justice system, this type of debt similarly accumulates over time and can trigger aggressive enforcement measures such as incarceration and driver's license suspension.[12]

Nonresident parents with the lowest incomes and most barriers to employment are often expected to pay an impossibly large share of their income toward child support.[13] When support orders fail to take into account the real financial capacity of parents, debt builds rapidly over time. Unpaid child support contributes to an overwhelming debt burden held by incarcerated and formerly incarcerated people in particular, who are generally poor and disproportionately people of color.[14]

For the most part, this debt will never be collected.[15] Outstanding child support arrears have grown to $115 billion over the last forty years,[16] and most of this debt is owed by parents with incomes under $10,000.[17] When parents fall behind, poorly targeted and overly aggressive enforcement can make it even harder for them to stay employed, maintain family ties, and keep up with their support payments.[18] Unrealistic child support orders, cost recovery policies, and harsh enforcement efforts may also undermine parents' trust in the legitimacy of the child support system.[19]

Faced with overwhelming financial pressures, some parents try to ignore their unmanageable child support obligations, pay only a portion of their debt, or work in the informal economy where it is difficult to track earnings and collect payments. Others may generate income through illegal activities to support their children and themselves and to pay down

12. In fact, several of the enforcement tools currently used to collect legal financial obligations were derived from the child support program. *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 Fam. L. Q. 519 (1996).
13. Carl Formoso, Determining the Composition and Collectibility of Child Support Arrearages Volume I: The Longitudinal Analysis 1–2 (2003).
14. Jennifer Bronson & E. Ann Carson, Prisoners in 2017 15 (2019); Caroline W. Harlow, Educ. & Correctional Populations 6–10 (2003).
15. *See* Robert Plotnick et al., *Increasing Child Support Collections from the Hard-to-Collect: Experimental Evidence from Washington State*, 89 Soc. Serv. Rev. 427, 428 (2015); Sorensen, Sousa & Schaner, *supra* note 10, at 55; Formoso, *supra* note 13, at 27.
16. This amount refers to total federally-certified arrears owed by parents participating in the public child support program funded under title IV-D of the Social Security Act and does not include arrears owed in private cases. Elaine Sorensen, *TANF Arrears Continue to Decline,* Office of Child Support Enforcement, Administration for Children and Families, U.S. Department of Health and Human Services, 2019.
17. Sorensen, Sousa & Schaner, *supra* note 10, at 22.
18. Kimberly J. Turner & Maureen R. Waller, *Indebted Relationships: Child Support Arrears and Nonresident Fathers' Involvement with Children*, 79 J. of Marriage & Fam. 24, 25 (2017); Daniel P. Miller & Ronald B. Mincy, *Falling Further Behind? Child Support Arrears and Fathers' Labor Force Participation*, 86 Soc. Serv. Rev. 604, 604–05 (2012).
19. *See, e.g.*, Turetsky, *supra* note 5, at 3; Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. of Pol'y Analysis & Mgmt. 89, 107 (2001).

their debts.[20] Unmanageable child support debt negatively impacts family and community stability and contributes to accumulating risks, disadvantages, and inequities for children, parents, and communities.[21]

This article focuses on child support policies that contribute to the debt burden held by the most disadvantaged parents, who are more likely to have contact with the criminal justice system and a history of incarceration. The article first addresses cost recovery by the child support program and then discusses child support debt as a collateral consequence of incarceration. The article also points to key factors driving this debt, including support orders that are not based on ability to pay, and identifies enforcement measures that can further reduce nonresident parents' ability to pay these debts, such as incarceration and driver's license suspension. We identify recent policy efforts that address the causes and consequences of accruing unmanageable child support arrears, including during periods of incarceration. The Article concludes with policy recommendations which would prioritize children's wellbeing over cost recovery and help disadvantaged parents make consistent child support payments, participate in the job market, and maintain family relationships.

I. Cost Recovery in the Child Support Program

The child support program serves one in five children in the United States and half of poor children, making child support one of the largest income support programs for children. The program collected $28.6 billion in 2018, making child support one of the largest income support programs for children.[22] Resident parents who apply for Temporary Assistance for Needy Families (TANF) are required to participate in the state child support program and assign their rights to support to the state.[23] Parents may also be subject to state cost recovery efforts if their children receive Medicaid or foster care payments. Other families voluntarily apply for child support services.[24]

20. Turetsky, *supra* note 5; Lauren J. Kotloff, Leaving the Street: Young Fathers Move from Hustling to Legitimate Work, Public/Private Ventures 5–8 (2005); Lauren M. Rich, *Regular and Irregular Earnings: Implications for Child Support Practices*, 23 Child. & Youth Serv. Rev. 353, 354–55 (2001).
21. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. of Soc. 1753, 1760–61 (2010); Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. of Pol'y Analysis & Mgmt. 44, 44–45 (1998).
22. In 2018, 9 percent of the child support program caseload involved families receiving TANF, while 42 percent involved former TANF families who did not opt out of services when they stopped receiving TANF. Half of families never received TANF. Off. of Child Support Enf't, *supra* note 16, at 7–8.
23. Social Security Act, 42 U.S.C. § 608(a)(2)–(3) (2012).
24. In most states, parents of children receiving Medicaid are required to cooperate with the child support program and assign their rights to the state to medical support payments specifically designated for medical expenses and ordered separately from monthly child support obligations. *See* Social Security Act, 42

Not all families with child support cases participate in the child support program; some pursue child support through private litigation. Parents who participate in the public program tend to be more economically disadvantaged than parents with private cases, and are more likely to be people of color.[25] Over half of resident parents participating in the public child support program are Black or Hispanic, two-thirds have incomes below 200 percent of poverty, and over three-quarters receive some form of public assistance.[26]

Child support enforcement tools have been particularly effective for parents who have stable connections to employment and the financial ability to meet their child support obligations.[27] Most nonresident parents pay child support, and consistent, on-time child support payments can help low-income families increase their income and improve their economic stability.[28] Child support represents a 41 percent share of family income for poor families that receive it, and lifts 1 million people out of poverty every year.[29]

However, estimates indicate that about one-quarter of nonresident parents are poor and unable to meet their formal child support obligations.[30] This is usually because child support orders for these parents do not adequately account for actual income and are set at unrealistically high levels. Despite barriers to meeting their formal child support obligations, the majority of low-income fathers provide in-kind or informal support to their young children, and informal support is associated with spending more time with children and closeness in the father-child

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U.S.C. § 1396k (2020). In addition, states are required to refer "appropriate" foster care cases to the child support program and require assignment when children receive federally funded maintenance payments. 42 U.S.C. § 671(a)(17) (2020); *see also* Information Memorandum IM-12-02 from Vicki Turetsky, Commissioner, Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv. to State Agencies Administering Child Support Enf't Plans under Title IV-B, IV-D, and IV-E of the Social Security Act (Aug. 1, 2012).

25. Off. of Child Support Enf't, *supra* note 16, at 7.
26. Natalie Demyan & Letitia Logan Passarella, Lifting Families Out of Poverty: Child Support is an Effective Tool for Maryland Families 1 (2019); Elaine Sorensen, Arthur Pashi & Melody Morales, Characteristics of Families Served by the Child Support (IV-D) Program: 2016 U.S. Census Survey Results 4–9 (2018).
27. Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Family Centered Innovations to Improve Child Support Outcomes 2 (2011).
28. Demyan & Passarella, *supra* note 26, at 5; Elaine Sorensen, The Child Support Program is a Good Investment 10 (2016); Yoonsook Ha, Maria Cancian & Daniel R. Meyer, *The Regularity of Child Support and Its Contribution to the Regularity of Income*, 85 Soc. Serv. Rev. 401, 402–03 (2011).
29. Elaine Sorensen, The Child Support Program is a Good Investment 2 (2016).
30. Elaine Sorensen & Helen Oliver, Policy Reforms are Needed to Increase Child Support from Poor Fathers 3–4 (2002); *see also* Yoonsook Ha, Maria Cancian & Daniel R. Meyer, *Child Support and Income Inequality*, 10 Poverty & Pub. Pol'y 147, 153 (2018) (suggesting that the incomes of unmarried fathers are equal to or less than unmarried mothers after paying child support).

relationship.[31] Poor mothers and fathers often report a preference for informal support when the father's child support payment is retained to recover welfare costs.[32]

Most child support payments collected by the child support program are used to support children. However, the child support program, which is funded by federal and state governments, also has a significant cost recovery function. This means that many of the poorest children never receive the child support paid by their parents. Welfare cost recovery policies embedded in the child support program alter the stakes and equities of child support enforcement. When child support payments are used as government revenues, they lose their character as support for children and more closely resemble legal financial obligations used to finance government functions.[33]

Families who apply for TANF must assign, or sign over, to the state their rights to child support in order to receive cash assistance. States hold back $1.1 billion, or 4 percent of total program collections, to reimburse cash assistance from TANF and foster care programs.[34] Those collections are split with the federal government and treated as government revenues. Typically, the state share is used to fund TANF, child support, or other social services, or is added to the state general fund,

31. MARIA CANCIAN ET AL., CHARACTERISTICS OF PARTICIPANTS IN THE CHILD SUPPORT NONCUSTODIAL PARENT EMPLOYMENT DEMONSTRATION (CSPED) EVALUATION 35 (2018); TIMOTHY GRALL, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015 12 (2020); Maureen R. Waller, Allison D. Emory & Elise Paul, *Money, Time, or Something Else? Measuring Noncustodial Fathers' Informal and In-Kind Contributions*, 39 J. OF FAM. ISSUES 3612, 3613 (2018); Jennifer B. Kane, Timothy J. Nelson & Kathryn Edin, *How Much In-Kind Support Do Low-Income Nonresident Fathers Provide? A Mixed-Method Analysis*, 77 J. OF MARRIAGE & FAM 591, 593–94 (2015); VIRGINIA KNOX & CINDY REDCROSS, PARENTING AND PROVIDING: THE IMPACT OF PARENTS' FAIR SHARE ON PATERNAL INVOLVEMENT, MANPOWER DEMONSTRATION RES. CORP. 48, 53 (2000); Lenna Nepomnyaschy, *Child Support and Father-Child Contact: Testing Reciprocal Pathways*, 44 DEMOGRAPHY 93, 106–08 (2007).

32. MAUREEN R. WALLER., MY BABY'S FATHER: UNMARRIED PARENTS AND PATERNAL RESPONSIBILITY (2002); David J. Pate, Jr., *An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2*, *in* FATHERS OF CHILDREN IN W-2 FAMILIES, W-2 CHILD SUPPORT DEMONSTRATION EVALUATION OF NONEXPERIMENTAL ANALYSES, VOL. II 79 (Daniel R. Meyer & Maria Cancian eds., 2002).

33. *Turner v. Rogers*, *supra* note 2, at 449 ("We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody . . . Those proceedings more closely resemble debt-collection proceedings.").

34. OFF. OF CHILD SUPPORT ENF'T, *supra* note 16, at 7. Colorado reports similar preliminary results following implementation of its new law to pass through 100 percent of ongoing monthly payments to families receiving TANF. Michael Martinez-Schiferl, *Poster Paper: Effects of Child Support Full Pass Through on Colorado Families in Need*, Presentation at the Association for Public Policy Analysis and Management 41st Annual Fall Research Conference (Nov. 7, 2019), https://appam.confex.com/appam/2019/webprogram/Paper30963.html [https://perma.cc/XM57-CZ2M].

while the federal share is sent to the federal treasury. Evidence from policy experiments in Wisconsin and Washington DC which passed through the child support payments to families receiving TANF found that nonresident parents were more likely to pay formal child support and resident parents received more support.[35]

Although state cost recovery policies vary, states overall keep two-thirds of the support collected for children receiving cash assistance. Even after families leave TANF, states continue to withhold a share of their child support payments to pay back cash assistance costs. These payments made for families who no longer receive TANF represent 60 percent of the total cost recovery dollars. It is important to note that more than half of child support program cases involve families who never received cash assistance and are not subject to assignment rules. From these families, however, states collect service fees and costs. Some states also pursue reimbursement of Medicaid costs, although the amount is not separately reported. A few seek Medicaid reimbursement of childbirth costs, hugely adding to the debt burden of low-income nonresident parents.[36]

Over the past four decades, the mission of the child support program has steadily evolved, and the program has become an important family support and antipoverty program.[37] Welfare cost recovery now plays a more limited role and contributes far less revenue to the state budget than in the past.[38] Currently, one-fifth of child support arrears are owed to the government, down from one-half in 2002.[39] Two federal policy changes have reduced the cost-recovery role of the child support program. First, TANF caseloads have declined steeply following

35. Maria Cancian, Daniel R. Meyer & Emma Caspar, *Welfare and Child Support: Complements, Not Substitutes*, 27 J. of Pol'y Analysis & Mgmt. 354, 354 (2008); Kye Lippold, Austin Nichols & Elaine Sorensen, Evaluation of the $150 Child Support Pass-Through and Disregard Policy in the District of Columbia 46 (2010).

36. All child support orders must provide for child health care coverage, whether through private or public insurance or public coverage through Medicaid and CHIP. Some states also order medical child support to reimburse specific medical bills not covered by insurance. A small number of states seek orders to reimburse Medicaid for birthing costs. Courts order medical support payments separately from regular child support payments, and medical support is accounted for separately. Administrative data aggregate $543 million in medical support payments to reimburse custodial parents and those redirected to the Medicaid agency. *See* Off. of Child Support Enf't, *supra* note 16, at 7.

37. Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., National Child Support Strategic Plan for 2015–2019 1 (2016); Vicki Turetsky, In Everybody's Best Interests: Why Reforming Child Support Distribution Makes Sense for Government and Families 7 (2005).

38. Twenty-five years ago, states kept almost three times as much child support as they do today. In 1996, states held back 24 percent of total collections, or $2.9 billion. *See* Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., FY 1996 Annual Report to Congress: Office of Child Support Enforcement (1996).

39. Dennis Putze, Who Owes the Child Support Debt? 2 (2017); Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Major Changes in Who is Owed Child Support Arrears 1 (2014).

implementation of the 1996 federal welfare reform law. Second, federal laws enacted over the past two decades have prioritized support payments to families over welfare cost recovery.[40] Since 2006, states have had the flexibility to pay 100 percent of all collected support payments to families. All states have substantially reduced cost recovery, but all continue to keep some collected support to reimburse cash assistance.[41]

Even as welfare cost recovery has begun to recede, however, legal financial obligations generated by the criminal justice system have grown to claim the limited resources of poor fathers and their families, competing with support payments for children and exhausting family resources.[42] Legal financial obligations both compound and crowd out child support payments. Although federal policy has prioritized payment of child support over other kinds of public debt such as student loans, states have not necessarily done so.[43] Consequently, poor fathers are forced to prioritize whichever payments will keep them out of jail.

II. Child Support Debt as a Collateral Consequence of Incarceration

Child support caseloads include a significant number of parents who are incarcerated or have a history of incarceration.[44] Parents who have been incarcerated accrue almost three times

as much in arrears as those who were never in prison by the time their children are age 15.[45] In 2005, the Council of State Governments specifically identified child support debt as a collateral civil consequence of incarceration.[46]

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40. The 2006 federal law curtailed the scope of support assignment and gave states several options to pay more or all of collected support to current and former TANF families. *See* Paul Legler & Vicki Turetsky, More Child Support Dollars to Kids: Using New State Flexibility in Child Support Pass-Through and Distribution Rules to Benefit Government and Families 1 (2006).
41. National Conference of State Legislatures (NCSL) tracks state implementation of TANF pass-through options, but not other family payment options adopted by states. Nat'l Conf. of State Legislatures, *Child Support Pass-Through and Disregard Policies for Public Assistance Recipients* (July 18, 2017), https://www.ncsl.org/research/human-services/state-policy-pass-through-disregard-child-support.aspx [https://perma.cc/82L5-U6UA].
42. Jennifer L. Noyes et al., Final Implementation Findings from the Child Support Noncustodial Parent Employment Demonstration (CSPED) Evaluation 91 (2018).
43. 26 U.S.C. § 6402(c) (2019); 42 U.S.C. 664(a) (2014).
44. Off. of Child Support Enf't, *supra* note 3, at 2.
45. Allison D. Emory, Lenna Nepomnyaschy, Maureen R. Waller, Daniel P. Miller & Alexandra Haralampoudis, *Providing After Prison: Nonresident Fathers' Formal and Informal Contributions to Children*, Russell Sage Found. J. of Soc. Sci. (2020).
46. *See* Council of State Governments, Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community (2005) (citing child support debt as a collateral civil consequence of incarceration in policy statements 8, 13, 18, 23, 34).

Research from the Child Support Noncustodial Parent Employment Demonstration (CSPED), found that two-thirds of demonstration participants reported a history of incarceration in jail or prison. CSPED, a largescale demonstration funded by the federal Office of Child Support Enforcement (OCSE) and conducted in eight states, involved more than 10,000 nonresident parents participating in the child support program. Only 56 percent of participants had worked in the thirty days prior to enrollment. Among those who had worked in the past thirty days, their median monthly earnings were $500, while their median child support order was $325 per month. For 58 percent of employed participants, child support order amounts represented more than half of their earnings.[47]

When parents go to prison, many do not realize that their child support continues to accrue even though they lack any ability to pay it. Most incarcerated parents have little or no income and do not have any realistic ability to pay child support while in prison. Even on work release, earnings are usually small and barely cover basic needs in prison.[48]

Under federal law, parents facing a substantial drop in income may seek a review and adjustment (also called modification) of their child support orders.[49] Timely modification is important to prevent the accumulation of overwhelming debt during incarceration, especially because federal law prohibits courts from retroactively modifying child support orders once they are established.[50] However, in most states, support orders are not automatically suspended when parents go to prison. Instead, incarcerated parents must initiate a review and adjustment of their orders.

Many incarcerated parents do not understand the child support process or their rights to request review and adjustment of their child support orders and cannot easily contact the child support office. Because incarcerated parents are involuntarily confined, their access to the Internet or cell phones is often restricted due to security concerns. They may not have access to legal counsel or other community-based resources that could provide timely information. Consequently, their opportunity to seek information and request a review in time to prevent the accumulation of debts often is limited or nonexistent.[51]

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47. Cancian et al., *supra* note 31, at xi.
48. Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 Clearinghouse Rev. J. Poverty L. & Pol'y 187, 189 (2007); Pamela Ovwigho, Correne Saunders & Catherine E. Born, The Intersection of Incarceration & Child Support: A Snapshot of Maryland's Caseload 9–11 (2005).
49. 42 U.S.C. § 666(a)(10) (2018).
50. The Bradley Amendment, Pub. L. No. 95-509, 100 Stat. 1904 (codified as amended at 42 U.S.C § 666(a)(9)(c) (2018)). *See* Vicki Turetsky, Realistic Child Support Policies For Low Income Fathers 8 (2000).
51. *See* Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Changing a Child Support Order 2 (2014); Jennifer L. Noyes, Maria Cancian & Laura Cuesta, Holding Child Support Orders of Incarcerated Payers in Abeyance: Final Evaluation Report 2 (2012).

Two decades ago, half of states treated incarceration as "voluntary unemployment," a legal doctrine barring incarcerated parents from seeking a modification of their child support orders. Since then, nearly all of these states have eliminated laws treating incarceration as voluntary unemployment.[52] As discussed below, recent federal rules prohibit states from treating incarceration as "voluntary unemployment" that legally bars incarcerated parents from requesting a modification of their orders, but several states are still in the process of implementing these rules.[53] Moreover, unless states take action to automatically suspend child support orders during incarceration, most debt will accrue unabated.

Employment and family support are critical for successful reintegration into the community following prison.[54] However, child support debt can take a large personal toll, with implications for employment, health, family life, and civic participation. In federal surveys, homeless veterans reported that child support debt was one of their top legal problems.[55] In qualitative studies, disadvantaged men report significant challenges complying with child support orders when they lack stable employment and convey a sense of hopelessness about their ability to pay off their arrears. They are particularly discouraged about accruing high debts while they are unemployed, incarcerated, or supporting their children informally, and about experiencing enforcement practices such as incarceration that can further undermine their employment and ability to provide for their children.[56]

There is mounting quantitative evidence that high arrears substantially reduce child support payments, labor force participation, earnings, credit scores, and stable housing by nonresident parents.[57] Upon release,

52. Author's review of recent state child support guidelines amendments. *See* Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., "Voluntary Unemployment," Imputed Income, and Modification: Laws and Policies for Incarcerated Noncustodial Parents (2012); Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 Judges J. 5, 5–6 (2004).
53. Flexibility, Efficiency and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,521 (Dec. 20, 2016) (to be codified at 45 C.F.R. pt. 301–309).
54. Christy A. Visher & Shannon M.E. Courtney, Cleveland Prisoners' Experience Returning Home 2 (2006).
55. Off. of Pub. Aff., U.S. Dep't of Veterans Aff., Community Homelessness Assessment, Local Education and Networking Groups (CHALENG) 2 (2019).
56. Waller, *supra* note 32; Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. of Pol'y Analysis & Mgmt. 89, 93 (2001); David J. Pate, Jr., *An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2*, *in* Fathers of Children in W-2 Families, W-2 Child Support Demonstration Evaluation of Nonexperimental Analyses, Vol. II 79 (Daniel R. Meyer & Maria Cancian eds., 2002); Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124 Am. J. Soc. 1, 39–41 (2018).
57. Turner & Waller, *supra* note 18, at 24–25; Daniel P. Miller & Ronald B. Mincy, *Falling Further Behind? Child Support Arrears and Father's Labor Force*

incarceration typically results in a decline in employability and earnings potential, and parents returning to the community often struggle to find employment and pay their child support orders. Parents with a history of incarceration earn lower wages, have higher child support debts, and pay a smaller share of their child support orders than those who were not incarcerated.[58]

Parents who owe large child support debts are more likely to become discouraged and leave formal employment, further compromising their ability to support their children. This is partly because up to 65 percent of disposable income can be withheld from the paychecks of nonresident parents owing arrears under the Consumer Credit Protection Act.[59] This high withholding rate can have the unintended effect of pushing low-wage parents out of a job, because the remaining paycheck is often too little to survive on.[60] Child support debt can lead to increased job-hopping, participation in the underground economy, and generation of illegal income as parents try to support themselves and their children and avoid the child support program.[61]

Indebtedness can exacerbate family hardship and tensions, driving a wedge between the parents and pushing nonresident parents away from their children.[62] Child support debt that exceeds a nonresident parent's ability to pay can increase friction between the parents and unrealistically inflate resident parent expectations of payment.[63] Child support debt can also create a barrier to parent involvement. There is evidence that indebted fathers have significantly less contact with their children,

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Participation, 86 Soc. Serv. Rev. 604, 604–05 (2012); Maria Cancian, Carolyn Heinrich & Yiyoon Chung, *Does Debt Discourage Employment and Payment of Child Support? Evidence from a Natural Experiment* 3–5 (Inst. for Res. on Poverty, Working Paper No. 2009-012, 2009); Harry J. Holzer, Paul Offner & Elaine Sorensen, *Declining Employment Among Young Black Less-Educated Men: The Role of Incarceration and Child Support*, 24 J. Pol'y Analysis & Mgmt. 329, 346–47 (2004).

58. Carl Formoso & Qinghua Liu, Arrears Stratification in Washington State: Developing Operational Protocols in a Data Mining Environment 35 (2010); Pew Charitable Tr., Collateral Costs: Incarceration's Effect on Economic Mobility 9–17 (2010).

59. Under federal law, states have the discretion to withhold a lower amount. 15 U.S.C. § 1673(b)(3) (2018); *see* Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Income Withholding for Child Support: Techniques for Effective Management of Program Operations (2007).

60. Levingston & Turetsky, *supra* note 48, at 191.

61. Turetsky, *supra* note 5, at 3–4.

62. Karin Martinson & Demetra Nightingale, Ten Key Findings from Responsible Fatherhood Initiatives 1 (2008); Judi Bartfeld, Forgiveness of State-Owed Child Support Arrears 12 (2003).

63. Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. of Pol'y Analysis & Mgmt. 89, 99 (2001).

are less engaged in their daily activities, and provide less frequent informal support.[64]

Nonresident parents with child support arrears also report more depression and problematic alcohol use.[65] Research from the federal CSPED demonstration suggests that as many as one-quarter of low-income parents who owe child support and participate in employment programs suffer from major depression.[66] In addition, other research shows that "unsecured debt," such as credit card debt and medical debt, is associated with lower socioemotional wellbeing for children.[67] Data from the National Longitudinal Study of Adolescent Health indicates that high debt relative to resources is also a significant independent predictor of negative health outcomes such as depression and anxiety, suicidal ideation, obesity, substance use, and cardiovascular diseases.[68] Behavioral science research further finds that financial stress reduces capacity for good decisionmaking and problemsolving.[69] Unlike some other forms of debt, child support arrears can create lifelong indebtedness, even after the obligor's children are grown and have children of their own.

III. Why is Child Support Debt so High?

Child support debt is both "a cause and a consequence" of noncompliance with child support orders.[70] A 2017 OCSE analysis of child support program cases found that most unpaid child support arrears are owed by nonresident parents with reported incomes below $10,000 per year.[71] This finding is consistent with a landmark study of child support arrears in nine large states conducted in 2007 by the Urban Institute, which found that nonresident parents with reported income of $10,000 or less owed 70 percent of the debt.

The best predictor of compliance with a child support order is a nonresident parent's monthly gross earnings.[72] Parents who meet their current support obligations are more likely to be employed and have significantly higher earnings. By contrast, nearly all parents who fall behind

64. Turner & Waller, *supra* note 18, at 26.
65. Hyunjoon Um, *The Role of Child Support Debt on the Development of Mental Health Problems among Noncustodial Fathers* 13–14 (Colum. Univ. Sch. Soc. Sci., Working Paper No.19-05-FF, 2019); Turner & Waller, *supra* note 18, at 27.
66. Cancian et al., *supra* note 31, at 17.
67. Lawrence M. Berger & Jason N. Houle, *Parental Debt and Children's Socioemotional Well-being*, 137 Pediatrics 1, 1–2 (2016).
68. Elizabeth Sweet et al., *The High Price of Debt: Household Financial Debt and Its Impact on Mental and Physical Health*, 91 Soc. Sci. Med. 94, 95 (2013).
69. Sendhil Mullainathan & Eldar Shafir, Scarcity: The New Science of Having Less and How it Defines our Lives (2013).
70. Maria Cancian, Carolyn J. Heinrich & Yiyoon Chung, *Discouraging Disadvantaged Fathers' Employment: An Unintended Consequence of Policies Designed to Support Families*, 32 J. Pol'y Analysis & Mgmt. 758, 760 (2013).
71. Putze, *supra* note 39, at 3 (2017).
72. Mark Takayesu, How Do Child Support Order Amounts Affect Payments and Compliance? 14 (2011).

on child support payments have unstable employment and low earnings, and a significant number have a history of incarceration.[73] For example, 90 percent of Wisconsin nonresident parents who made no payment and 60 percent making partial payment were incarcerated or did not have year-round employment.[74]

The amount of the order compared to actual income also strongly predicts payment, especially for parents with the lowest incomes.[75] A growing body of research has found that compliance declines at all income levels when monthly support order amounts are set higher than about 20 percent of the nonresident parent's actual gross earnings.[76] Lower-earning parents are expected to pay a much higher share of their incomes toward child support. For example, parents who earn a $50,000 median income in Maryland are ordered to pay 14 percent of their earnings as child support, while parents earning a $6000 median income are ordered to pay 61 percent.[77] Charging interest, fees and costs for paternity testing, case processing, and court costs, calculating child support retroactively to the child's birth, and seeking Medicaid reimbursement for childbirth costs all contribute to unrealistically high child support orders and result in a debt balance as soon as the order is established.[78]

In many states, low-income parents are routinely issued standard minimum wage orders. These orders are based on imputed, or assumed, income rather than a factual determination of a specific parent's income and ability to pay. Courts often impute income when nonresident parents are unemployed, employed part-time, or fail to come to court, or when income documentation is missing. Imputed income exaggerates actual earnings. In one Maryland study, parents with orders based on imputed income actually earned 72 percent less than the amount listed on the child support worksheets.[79]

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73. Yoonsook Ha et al., Factors Associated with Nonpayment of Child Support 10–14 (2008); Letitia Logan Passarella, Maryland's Child Support Caseload: Examining Obligors Who owed Support in July 2017 3 (2018).
74. Ha et al., *supra* note 73, at 15.
75. Judi Bartfeld, Forgiveness of State-Owed Child Support Arrears 8 (2003); Takayesu, *supra* note 72, at 40.
76. Natalie Demyan & Letitia Logan Passarella, Actual Earnings and Payment Outcomes Among Obligors with Imputed Income 10 (2018); Formoso & Liu, *supra* note 58, at 8; Off. of Inspector Gen., U.S. Dep't of Health & Hum. Serv., Child Support for Children on TANF 10 (2002); Takayesu, *supra* note 72, at 27.
77. Letitia Logan Passarella, *Maryland Snapshot of Noncustodial Parents: Examining Who Owed Support in July* 2017, Univ. Maryland Sch. Soc. Work (2018).
78. 42 U.S.C. § 654(6) (2019); *see also* Vicki Turetsky, Realistic Child Support Policies For Low Income Fathers 7 (2000).
79. Demyan & Passarella, *supra* note 76, at 1; *See also* Robert D. Plotnick & Alec I. Kennedy, *How Accurate are Imputed Child Support Orders?* 88 Child. & Youth Serv. Rev. 490, 490 (2018) (finding that imputation did not match actual earnings, resulting in orders that are too high or too low for the majority of nonresident fathers in Washington study).

Cases with imputed income at the minimum wage pay at a lower compliance rate, accumulate higher debts, and collect fewer dollars than when an order is set based on a lower amount.[80] As the Office of Inspector General for the U.S. Department of Health and Human Services concluded two decades ago, "Income imputation appears ineffective in generating payments."[81]

In many jurisdictions, the routine use of income imputation when parents are low-income has created a two-tiered legal system. In higher earning cases, income is imputed sparingly and only when there is a sufficient evidentiary foundation to establish that nonresident parents have deliberately reduced their earnings or where the facts show a discrepancy between reported income and lifestyle. The burden of proof is typically placed on the party seeking imputation. By contrast, income is assumed as "potential income" without further evidence when nonresident parents have limited education, few marketable job skills, and low or no earnings. The burden of proof is on low-earning nonresident parents to establish that they are unable to secure fulltime employment. This outcome does not reflect the realities of the labor market for poor, less educated parents, particularly young African American men—few fulltime jobs, unstable part-time work often located far from the neighborhood, racial discrimination, and high incarceration rates.[82]

IV. Child Support Enforcement and Inability to Pay

Seventy percent of child support payments are collected through payroll deductions, like taxes. However, for those nonresident parents who are not employed fulltime with a paycheck that is sufficient to satisfy their child support obligations, failure to pay child support can lead to a host of legal consequences, including criminal and administrative penalties, such as driver's license suspension, revocation of professional, occupational and recreational licenses, passport revocation, seizure of financial accounts, property liens, interception of tax refunds and government payments such as Social Security and unemployment insurance benefits, and negative credit reporting.[83]

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80. The University of Maryland found that the collection rate for imputed minimum wage orders is 10 percentage points lower than orders based on actual income in low-income cases, while the California study found that the most likely outcome of minimum wage orders was zero payments during the year following order establishment. Demyan & Passarella, *supra* note 76, at 10; *see also* Mark Takayesu, Understanding Payment Barriers to Improve Child Support Compliance 4 (2013).

81. Off. of Inspector Gen., U.S. Dep't of Health & Hum. Serv., The Establishment of Child Support Orders for Low Income Non-custodial Parents 3 (2000).

82. *See* Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Market: A Field Experiment*, 74 Am. Soc. Rev. 777, 777–80 (2009).

83. Carmen Solomon-Fears, Alison M. Smith & Carla Berry, Child Support Enforcement: Incarceration As the Last Resort Penalty for Nonpayment of Support 2 (2012).

The interaction between the criminal justice system and the child support system is relevant both for nonresident parents with open child support orders during incarceration, and for those parents who are incarcerated for noncompliance with their child support orders.[84] Most incarcerated parents who accumulate child support debt are in prison or jail for reasons that are unrelated to child support enforcement. In these cases, the policy focus is on preventing and reducing the accumulation of uncollectible arrears during prison.

However, parents can also be incarcerated for failure to pay child support. Parents typically face civil contempt charges and serve time in a jail rather than prison. Less commonly, parents can be prosecuted for criminal nonsupport or jailed for criminal contempt.[85] In addition, staying current on child support payments is sometimes made a condition of parole, and failure to pay is treated as a parole violation that can send a parent back to jail. Limited information is available about the prevalence or cost of using incarceration as a child support enforcement tool, although it is widely believed to not be cost-effective.[86]

A civil contempt proceeding is intended to be coercive and conditional, while the purpose of a criminal contempt proceeding is punitive. However, the key distinction is that nonresident parents are constitutionally entitled to counsel and other enhanced due process safeguards in a criminal contempt proceeding, but not for civil contempt. A finding of civil contempt for failure to pay support typically requires that a defendant has been ordered to pay child support, has the ability to comply with the order, and failed to do so. A defendant is said to "carr[y] the keys of his prison in his own pockets" by paying the "purge amount" set by the court,[87] which is a payment toward arrears required by the court to avoid being jailed on contempt charges.

Child support civil contempt practices vary considerably from state to state. For example, some state child support agencies rarely, if ever, bring civil contempt actions. Other state agencies routinely use show cause or contempt proceedings to elicit information from the nonresident parent or to order a parent to seek work or go into employment or substance abuse programs, but jail is not a typical outcome. Some states also provide for legal counsel in a civil contempt action when it can lead to incarceration.[88]

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84. Nat'l Conf. of St. Legislatures, *Child Support and Incarceration* (Mar. 4, 2019), https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx [https://perma.cc/B3HV-CRC8].
85. The Deadbeat Parent Act, 18 U.S.C. § 228 (1998) (making it a federal crime to intentionally evade payment by traveling across state lines if support has remained unpaid for more than one year or is greater than $5,000); *see* Solomon-Fears, Smith & Berry, *supra* note 83, at 12.
86. Solomon-Fears, Smith & Berry, *supra* note 83, at 12.
87. Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Turner v. Rogers Guidance 7–8 (2012).
88. *Id.* at 3.

When parents fall behind on their child support payments, poorly targeted and overly aggressive enforcement can make it even harder for them to stay employed, keep up with their current support payments, and stay out of jail. There is no evidence that incarceration results in more reliable child support payments when the issue is inability to pay. Rather, incarceration can result in the accumulation of additional child support debt, and has the potential to reduce future earnings, erode a child's relationship with his or her parent, and negatively impact family and community stability.

A. *Civil Contempt and the Turner v. Rogers Decision*

In June 2011, the U. S. Supreme Court decided the case of *Turner v. Rogers*.[89] The question in *Turner* was whether the due process clause of the Fourteenth Amendment of the U.S. Constitution requires states to provide legal counsel to an indigent person at a child support civil contempt hearing that could lead to incarceration in circumstances where the resident parent or opposing party was not represented by legal counsel.

In 2003, Mr. Turner, the nonresident parent, was $5,700 behind in child support payments. He was held in civil contempt for nonpayment on five occasions and was incarcerated several times, including a twelve-month jail term in 2008. In South Carolina, unlike other states, the family court clerk automatically initiates a civil contempt hearing without involvement of the child support program or private attorneys for the parties. At the hearing, Mr. Turner was not represented by counsel, nor was a state child support attorney or counsel for the resident parent involved.

The trial court ordered that Mr. Turner be jailed without making any findings on the record regarding Mr. Turner's ability to pay the purge amount. The court set the entire child support arrears balance as the purge amount. Mr. Turner subsequently appealed, alleging that his rights were violated because the due process clause of the Fourteenth Amendment required the state to provide him with appointed counsel in a civil contempt hearing that could lead to incarceration.

The Court held that the state violated Mr. Turner's due process rights. The *Turner* Court also suggested that an express finding may be constitutionally required that the nonresident parent has the actual and present ability to comply with the court's purge order. In other words, the defendant must carry "the keys of his prison in his own pockets," whether it is satisfying a purge payment, participating in an employment or substance abuse treatment program, or other required actions.

However, the *Turner* Court held that a state does not need to automatically provide counsel to an unrepresented defendant in a child support civil contempt proceeding, under the specific facts of the case, if the state has "in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether

89. *See* Turner v. Rogers, 564 U.S. 431, 435 (2011).

the supporting parent is able to comply with the court order." The Court specifically left unresolved the question of what due process protections may be required where: (1) the other parent or the state is represented by an attorney; (2) the unpaid arrears are owed to the state under an assignment of child support rights; or, (3) the case is unusually complex.

Pro se litigants in child support program cases—that is, parents without legal representation—are often low-income, have little understanding of child support laws, and have difficulty navigating the court process.[90] Most of the time, neither parent in a child support case has a lawyer to represent them in court. Agency lawyers do not represent either parent. Instead, they represent the state's interest in obtaining financial support for children so that they are adequately cared for and have less need for public assistance. For parents, the legal consequences of going to court without a lawyer to represent their interests can be serious. Procedural justice research finds that nonresident parents are more likely to comply with child support obligations when they perceive that the proceedings have been fair, they have been able to explain their circumstances and to be heard, and they have been treated respectfully.[91]

In 2012, the federal Office of Child Support Enforcement issued guidance to state child support agencies implementing the *Turner* decision, requiring them to screen cases for ability to pay before pursuing civil contempt.[92] These program requirements were incorporated into federal rules published in 2016, discussed below. Although many advocates saw the *Turner* decision as a loss for nonresident parents facing jail time, post-*Turner* ability to pay screening policies have had a significant impact on reducing state use of civil contempt procedures to enforce child support.[93] The *Turner* decision case caused states to reevaluate whether civil contempt and the threat of jail is the most effective approach to collecting child support. The decision also prompted consideration of how to best implement access to justice and procedural justice principles in child support proceedings.[94]

90. Bartfeld, *supra* note 75, at 10.

91. Tom R. Tyler, *Court Review—Procedural Justice and the Courts*, 44 J. Am. Judges Ass'n 26, 26 (2007); I-Fen Lin, *Perceived Fairness and Compliance with Child Support Obligations*, 62 J. Marriage & Fam. 388, 396-97 (2000); *see also* Modification to Funding Opp. Announcement HHS-2016-ACF-OCSE-FD-1172, Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Procedural Justice Informed Alternatives to Contempt (PJAC) 5 (July 8, 2016).

92. Information Memorandum IM-12-01 from Vicki Turetsky, Commissioner, Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv. to State Agencies Administering Child Support Enf't Plans under Title IV-D of the Social Security Act and Other Interested Parties (June 18, 2012), https://www.acf.hhs.gov/css/resource/alternatives-to-incarceration [https://perma.cc/D3HP-6JMJ]; Off. of Child Support Enf't, *supra* note 87.

93. *See, e.g.*, Elizabeth G. Patterson, Turner *in the Trenches: A Study of How* Turner v. Rogers *Affected Child Support Contempt Proceedings*, 25 Geo. J. on Poverty L. & Pol'y 75, 88 (2017).

94. Off. of Child Support Enf't, *supra* note 37, at 12.

B. *Driver's License Suspensions to Enforce Child Support*

Federal law requires states to use driver's license suspension as a tool to enforce child support arrears "in appropriate cases," but gives states the discretion within constitutional limits on how to implement this.[95] When parents cannot afford to pay all of their child support, driver's license suspension carries serious ramifications for parents, employers, and families, raising potential due process concerns.[96]

Data show that driver's license suspensions affect the poor to a much greater extent than other income groups. Having a suspended driver's license reduces the ability of already economically destabilized parents to work, pay child support, and maintain parent-child relationships, all key goals of the child support program. Driver's license suspension can set up a vicious cycle, making it harder to pay child support than before the suspension.[97]

The U.S. Census found that three-fourths of American workers regularly drive to work, underscoring the importance of driving in everyday life.[98] Driver's license suspensions threaten the ability of nonresident parents to earn a livelihood and can lead to job loss or the inability to look for a job.[99] Even a short suspension could cause a parent to lose a job or job opportunity. Research indicates that available jobs may be far away from home and out of reach of public transportation. Greater "job sprawl" is particularly associated with higher spatial mismatch for African American workers, who can be more geographically isolated from jobs. Further, a driver's license is a requirement for some jobs, such as a delivery person or truck driver. Some employers also use a valid driver's license as a condition of employment.[100]

Driver's license suspensions also can make matters worse by interfering with family responsibilities.[101] Nonresident parents may not be able to drive to see their children, pick them up from school or childcare, attend school conferences, or take them to the doctor. Not being able to drive

95. 42 U.S.C. § 666(a)(16) (2014); *see* Carmen Solomon-Fears, Child Support Enforcement and Driver's License Suspension Policies 4–5 (2011).

96. *See, e.g.*, Kavadas v. Martinez, No. MER-L-1004-15 (N.J. Super. Ct. Law Div. Dec. 7, 2018); State Dep't of Revenue v. Beans, 965 P.2d 725, 729 (Alaska 1998).

97. Alan M. Voorhees, Motor Vehicles Affordability and Fairness Task Force Final Report 42 (2006).

98. U.S. Census Bureau, Commuting Characteristics by Sex: 2013 American Community Survey 1-Year Estimates 1 (2013).

99. A New Jersey report states that 42 percent of individuals who had their licenses suspended lost jobs as a result of the suspension, 45 percent of those who lost jobs could not find another job, and 88 percent of those that were able to find another job reported a decrease in income. Vorhees, *supra* note 97, at 38.

100. Michael A. Stoll, Job Sprawl and the Spatial Mismatch between Blacks and Jobs 2 (2005).

101. Lavanya Madhusudan, Job Opportunities Task Force, The Criminalization of Poverty: How to Break the Cycle through Policy Reform in Maryland 26 (2018); Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. of Pol'y Analysis & Mgmt. 44 (1998).

also can mean that parents cannot help other dependent family members, taking them to doctor appointments, the grocery store, or church.

V. Policy Efforts to Mitigate the Causes and Consequences of Child Support Debt

At the same time that the role of cost recovery in child support program has become less central, there has also been more recognition at the state and federal level that child support arrears may be uncollectable from nonresident fathers with very low incomes and may have unintended consequences for their families. Over the last fifteen years, state child support agencies have begun to develop alternative family-centered and service-oriented strategies that prioritize the wellbeing of families and children over cost recovery and help poor, nonresident parents provide more consistent financial support for their children. This evidence-based approach to obtaining child support payments offers a promising alternative to standard enforcement strategies.[102]

More than three-fourths of child support programs have debt compromise programs to reduce or eliminate state-owed child support debt, although some of these are pilot programs or operate on a case-by-case basis.[103] Although evaluations are ongoing, some evidence suggests these programs improve low-income parents' ability to pay ongoing child support.[104] The Bradley Amendment, a 1986 federal amendment to title IV-D of the Social Security Act, establishes the basis for interstate enforcement by treating payments due under child support orders as state judgments entitled to full faith and credit and by prohibiting courts from retroactively modifying them. However, under the longstanding federal interpretation of the Bradley amendment, states have the authority to cancel child support debts owed to government as recovered welfare costs.[105] The right to cancel child support arrears owed to families

102. Dan Bloom & Cindy Redcross, *Demonstrated Results: Successful Collaborations That Improve Outcomes in Prisoner Reentry and Child Support*, 2018 Pol'y & Practice 20, 23; Jennifer L. Noyes, Lisa K. Vogel & Lanikque Howard, *Culture Change: Implementing a New Approach to Child Support*, 35 Focus 5, 15–17 (2019); Vicki Turetsky, *Llama, Llama, Child Support Under Obama*, *in* Evidence Works: Cases Where Evidence Meaningfully Informed Policy 59–65 (Nick Hart & Meron Yohannes eds., 2019).

103. Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., *State Child Support Agencies With Debt Compromise Policies* (Oct. 1, 2018), https://www.acf.hhs.gov/css/state-child-support-agencies-with-debt-compromise-policies-map [https://perma.cc/U9P8-VNK3]; Daniel R. Levinson, State Use of Debt Compromise to Reduce Child Support Arrearages i (2007).

104. Carolyn J. Heinrich, Brett C. Burkhardt & Hilary M. Shager, *Reducing Child Support Debt and its Consequences: Can Forgiveness Benefit All?*, 30 J. Pol'y Analysis & Mgmt. 755, 755–56 (2011).

105. 42 U.S.C. § 666(a)(9) (2014); Memorandum PIQ-00-03 from David G. Ross, Commissioner, Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., to State IV-D Directors, State IV-D Program Flexibility with Respect to Low Income Obligors (Sept. 14, 2000).

belongs to resident parents, and states do not have authority to reduce those debts without the resident parents' consent.

Many states have also designed strategies to help prevent low-income parents from accruing unmanageable arrears, such as "right-sizing" support orders by curtailing the use of imputed income and eliminating interest, Medicaid birthing costs, and retroactive orders, and partnering with TANF or workforce agencies, courts, and community-based organizations to provide employment and parenting services.[106] It is increasingly common for state child support programs to match data with prisons and jails in order to identify incarcerated parents with child support orders. Child support agencies often provide educational sessions and individual case consultations in prisons that result in modifying child support orders and reducing state-owed arrears. A limited number of states automatically reduce support orders during incarceration, although most states require incarcerated parents to request a modification.

To spur adoption of these strategies and accelerate culture change within the child support program, OCSE has funded a number of large-scale demonstration and pilot projects in such areas as arrears reduction, alternatives to contempt, and employment services.[107] Recent findings from the CSPED demonstration, which tested this new way of doing business, included substantially improved satisfaction with the child support program for nonresident parents and positive effects on earnings and parenting.[108]

In 2016, OCSE also adopted a set of research-informed administrative rules intended to reinforce this shift toward a family-centered approach to child support enforcement.[109] The federal rules aim to

106. Admin. for Child. & Fam., U.S. Dep't of Health & Hum. Serv., *State Child Support Agencies with Programs to Ensure that Child Support Orders Reflect Current Earnings* (Oct. 31, 2017), https://www.acf.hhs.gov/archive/css/state-child-support-agencies-programs-csorders-current-earnings [http://perma.cc/7SHX-A3RF]; Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., *Work-Oriented Programs with Active Child Support Agency Involvement that Serve Noncustodial Parents* (July 1, 2018), https://www.acf.hhs.gov/css/work-oriented-programs-for-noncustodial-parents-with-active-child-support [https://perma.cc/AME5-LCBJ].

107. *See* Bloom & Redcross, *supra* note 102; Caroline Mage, Peter Baird & Cynthia Miller, A New Response to Child Support Noncompliance: Introducing the Procedural Justice-Informed Alternatives to Contempt Project 1–2 (2019); Off. Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Addressing Child Support Needs of Homeless Veterans: HHS/VA/ABA Collaboration (2017); Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Building Assets for Fathers and Families (BAFF) Demonstration Grant (2016); Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Highlights from the CSPED Characteristics and Final Implementation Reports (2019); Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Lessons Learned from the BICS Demonstration Grants (2018).

108. Maria Cancian, Daniel R. Meyer & Robert G. Wood, *Can a Redesigned Child Support System Do Better?*, 35 Focus 18 (2019).

109. Flexibility, Efficiency and Modernization in Child Support Enforcement

increase child support payments to children while reducing the accumulation of uncollectible debt owed to the state in cases where the parents have low incomes. Under the federal rules, states are required to implement a number of changes to existing state laws and procedures:

> States must amend their child support guidelines to provide that child support orders are based on the parent's "earnings, income, and other evidence of ability to pay."[110] Child support agencies have the responsibility to develop a sufficient factual basis for the support obligation.[111]

States must account for the parents' subsistence needs in setting orders.[112]

States may not impute standardized amounts attributed to parents based on general assumptions about employability and income potential. Under the federal rules, states that authorize income imputation must take into consideration factual evidence of a nonresident parent's specific circumstances.[113]

Programs, *supra* note 53; *see* Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Final Rule Summary: Flexibility, Efficiency and Modernization in Child Support Enforcement Programs (2017).

110. 45 C.F.R. § 302.56(c)(1) (2017) (providing that "The child support guidelines established under paragraph (a) of this section must at a minimum: (1) Provide that the child support order is based on the noncustodial parent's earnings, income, and other evidence of ability to pay."); *See* Off. of Child Support Enf't, U.S. Dep't of Health & Hum. Serv., Guidelines: Flexibility, Efficiency and Modernization in Child Support Enforcement Programs (2017).

111. 45 C.F.R. § 303.4(b) (requiring that state child support agencies, at a minimum, are: "(1) Taking reasonable steps to develop a sufficient factual basis for the support obligation, through such means as investigations, case conferencing, interviews with both parties, appear and disclose procedures, parent questionnaires, testimony, and electronic data sources; (2) Gathering information regarding the earnings and income of the noncustodial parent and, when earnings and income information is unavailable or insufficient in a case gathering available information about the specific circumstances of the noncustodial parent, including such factors as those listed under § 302.56(c)(1)(iii) of this chapter; (3) Basing the support obligation or recommended support obligation amount on the earnings and income of the noncustodial parent whenever available. If evidence of earnings and income is unavailable or insufficient to use as the measure of the noncustodial parent's ability to pay, then the support obligation or recommended support obligation amount should be based on available information about the specific circumstances of the noncustodial parent, including such factors as those listed in § 302.56(c)(1)(iii) of this chapter. (4) Documenting the factual basis for the support obligation or the recommended support obligation in the case record.").

112. 45 C.F.R. § 302.5(c)1)(ii) (providing that the state guidelines must provide that the support order "[t]akes into consideration the basic subsistence needs of the noncustodial parent (and at the State's discretion, the custodial parent and children) who has a limited ability to pay by incorporating a low-income adjustment, such as a self-support reserve or some other method determined by the State.").

113. 45 C.F.R § 302.56 (c)(iii) (providing that if imputation of income is authorized, the state guidelines provide that an order "takes into consideration the specific circumstances of the noncustodial parent (and at the State's discretion, the custodial parent) to the extent known, including such factors as the noncustodial

State guidelines are prohibited from treating incarceration as voluntary unemployment[114] or excluding incarceration as a basis for modifying child support orders.[115]

States must provide notice to incarcerated parents who will be incarcerated for more than 180 days of their right to request a review of their orders.[116] Alternatively, the federal rules permit states to modify the orders of incarcerated parents by operation of law and to automate the process for greater efficiency.[117]

States must establish guidelines for the use of civil contempt. State child support agencies must screen cases for ability to pay, provide clear notice to parents that ability to pay is at issue, and provide the courts with factual information about the ability of nonresident parents to pay.[118]

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parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.").

114. 45 C.F.R § 302.56(c)(3) (stating that state child support guidelines must at a minimum: "Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders.").

115. 45 C.F.R. § 303.8(c) (2019) (providing that "[s]uch reasonable quantitative standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.").

116. 45 C.F.R. § 303.8(b)(2) (providing that "[t]he State may elect in its State plan to initiate review of an order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request and, upon notice to both parents, review and, if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section."; 45 C.F.R. § 303.8(b)(7)(ii) (2019) provides that: "The State must provide notice . . . . If the State has not elected paragraph (b)(2) of this section, within 15 business days of when the IV-D agency learns that a noncustodial parent will be incarcerated for more than 180 calendar days, to both parents informing them of the right to request the State to review and, if appropriate, adjust the order, consistent with this section. The notice must specify, at a minimum, the place and manner in which the request should be made. Neither the notice nor a review is required under this paragraph if the State has a comparable law or rule that modifies a child support obligation upon incarceration by operation of law.").

117. 45 C.F.R. § 303.8(b)(2) (providing that "[t]he State may elect in its State plan to initiate review of an order, after learning that a noncustodial parent will be incarcerated for more than 180 calendar days, without the need for a specific request and, upon notice to both parents, review and, if appropriate, adjust the order, in accordance with paragraph (b)(1)(i) of this section."); *See* Off. of Child Support Enf't, U.S. Dep't of Health and Human Servs., Final Rule Fact Sheets: Modification for Incarcerated Parents (2017).

118. 45 C.F.R. § 303.6(c)(4) (providing for "[e]stablishing guidelines for the use of civil contempt citations in IV-D cases. The guidelines must include requirements that the IV-D agency: (i) Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order; (ii) Provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making

States also have more federal funding available for *pro se* services and alternative dispute resolution, and transportation to child support appointments and hearings.[119]

States are in the process of implementing these rule provisions as part of their quadrennial child support guidelines review cycles, with implementation to be completed by 2021. Below, we highlight twelve policy recommendations to further help disadvantaged parents make consistent child support payments, participate in the job market, and maintain family relationships. These recommendations are particularly relevant for those parents who are at heightened risk for accruing unmanageable debts in both the child support and criminal justice systems.

VI. Twelve Recommendations

1. States should get their child support programs completely out of the welfare cost recovery business by adopting the entire set of federal options to pay all collections to families.

2. To comply with federal rules, state child support guidelines must specify that child support orders are based on the obligor's "earnings, income and other evidence of ability to pay" and reserve enough money for low-income parents to provide for their basic subsistence needs.

3. States should use available evidence of actual income as the basis of support orders even when parents have low incomes and must avoid the routine use of imputed income and standard minimum wage orders.

4. States should be able to credit informal or in-kind child support payments agreed to between both parties when the nonresident parents' earnings are limited, as is done in some tribal child support programs.

5. States should stop charging interest on unpaid child support obligations.

6. States should automatically reduce support orders of incarcerated parents by operation of law, automate the process, and monitor support orders and payments upon release. At minimum, they must provide notice of the right of incarcerated parents to seek a review and adjustment of their orders to comply with federal rules.

7. States should automate criteria to identify and review cases with high default orders, standard minimum wage orders, and no payments,

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a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and (iii) Provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action"); *See* Off. of Child Support Enf't, US Dep't of Health and Human Servs., Final Rule Fact Sheets: Civil Contempt-Ensuring Noncustodial Parents Have the Ability to Pay (2017).

119. 45 C.F.R. § 304.20(b)(3) (providing that "[s]ervices and activities for which Federal financial participation will be available . . . (v) Bus fare or other minor transportation expenses to enable custodial or noncustodial parties to participate in child support proceedings and related activities; (vi) Services to increase *pro se* access to adjudicative and alternative dispute resolution processes in IV-D cases related to providing child support services").

and streamline and speed up the modification process, so that existing orders are adjusted to reflect current ability to pay and to prevent the buildup of arrears.

8. States should set up automated criteria to identify the cases where uncollectible debt owed to the state can be reviewed and written off, and should adopt debt compromise programs to help disadvantaged parents manage their arrears.

9. States should avoid the routine use of civil contempt procedures to enforce support orders. To comply with federal rules, state child support agencies must screen cases for ability to pay before seeking civil contempt, provide the court with a factual basis of ability to pay, and provide appropriate notice to parents.

10. States should stop suspending the driver's licenses of low-income parents for child support nonpayment.

11. States should develop specialized outreach and case management strategies for incarcerated and unemployed parents.

12. States should implement nonresident parent employment and fathering programs, child support problemsolving courts, improved judicial access for *pro se* litigants, and other effective family-centered services.

Conclusion

Outstanding child support debt has grown to $115 billion over the last forty years, and is largely uncollectible. When that debt is owed to the government to repay cash assistance, it resembles other legal financial obligations and loses its character as support for children. As TANF caseloads shrink, welfare cost recovery is becoming a less significant aspect of the child support program than in the past, and most child support debt is owed to families. The accumulation of child support debt has major adverse effects on the ability of low-income nonresident parents to maintain employment and maintain relationships with their children. Much of the debt accumulates during periods of incarceration or unemployment and is partly the result of state policies to impute fictional income to parents when they do not have earnings. Overly aggressive and poorly targeted enforcement efforts—particularly civil contempt and driver's license suspension—are often ineffective and have the effect of driving low-income nonresident parents out of jobs and into the underground economy. States are moving toward family-centered policies that address inability to pay through realistic support orders, state debt reduction, and employment and other services, instead of jail.