



Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry

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In the old days, when people were too poor to pay a debt we sent them to “debtors’ prison.” Of course, the practice of jailing people for having empty pockets was always unconscionable and, eventually, found to be unconstitutional.¹ Today we have revived the nexus between prison and debt—albeit with a twist. Today “debtor’s prison” describes the buildup of debt during a person’s prison stay. Most people are poor when incarcerated. Once behind bars, they accumulate significant additional debt due to criminal financial and child support obligations. Courts, corrections departments, and parole and probation agencies levy a range of cost-recovery and punitive sanctions, while parents in prison face mounting child support obligations that they lack the ability to pay. While sending a person to prison because of the person’s poverty is unconstitutional, there is no proscription against piling on debt during a prison stay.

Unrealistic levels of debt and cost-recovery policies enforced by criminal justice and child support agencies do just that. While legal, such policies are ill-advised, undermining the criminal justice system’s rehabilitation goals, the child support system’s goals to support children, and society’s interest in fully reintegrating people after-release from prison. We describe the types of criminal financial sanctions levied against people as they make their way through the criminal justice system and the child support policies that lead to unrealistic and counterproductive payment obligations. Enforcement mechanisms used to collect debt interfere with successful reintegration. Policymakers should reassess how they handle financial obligations in view of the goals to help individuals maintain regular employment, limit participation in the underground economy, reduce recidivism, and provide steady support to families over time.

I. Prison as Poorhouse

Our nation’s prison population is overwhelmingly poor—a critical factual backdrop to any discussion of debt accumulation during a prison stay. According to a 1997 survey of state prisoners conducted by the U.S. Department of Justice, three-fourths of state inmates did not complete high school, almost half reported incomes of less than \$1,000 in the month before arrest, and two-fifths were either unemployed or work-

¹*Bearden v. Georgia*, 461 U.S. 660 (1983).

ing only part-time before their arrest.² Based on Department of Justice data collected in 2000, in a 2006 report, the New York State Bar Association found it “fair to conclude that about 80% of all defendants charged with a felony in the United States are indigent”.³

Prison inmates are also, overwhelmingly, people of color. The racial disparities in the system are stark. Of state and federal prisoners, 60 percent were black or Hispanic at the end of 2005. Of 25- to 29-year-old black men, 8 percent were in prison.⁴ Among young black men, up to 30 percent has a history of incarceration.⁵ As advocates well know, both poverty and incarceration disproportionately affect communities of color.

II. Debt Accumulation During a Prison Stay

Incarcerated people accumulate debt layer by layer. Support for children, restitution for the victim, punishment for crime, recovered costs for the taxpayer—taken alone, each charge may have a legitimate public policy rationale. However, the current practice of piling on multiple debts can create an untenable situation for parents released from prison and has the unintended consequences of pushing people into the underground economy and back to a life of crime. In particular, shifting the burden of the costs of operating the criminal justice and welfare systems from the public to the individu-

als caught up in the system creates unnecessary barriers to rehabilitation and reintegration for those least likely to be able to bear the financial burden, while turning criminal justice and child support agencies into bill collectors.

A. Multiple Criminal Financial Penalties

The three basic categories of criminal justice-related debts are (1) fines and assessments levied with a punitive purpose; (2) penalties levied with a restitution purpose; and (3) assessments levied with a public cost-recovery purpose. The first category of criminal debt is fines. Fines are the formal penalties imposed on convicted offenders by the court as a part of the judgment and sentence. Fines are the traditional monetary penalty, usually imposed according to severity of crime, to punish an individual. According to researchers, “[n]ationally, fines are imposed in 25 % of all felony convictions: 20% of violent offenses, 24% of property offenses, 27% of drug offenses, 19% of weapons offenses, and 27% of other offenses.”⁶ Special assessments are automatically levied by law on every offender who comes before that court or on all persons guilty of a particular offense.⁷

The second category of financial obligation, restitution, is a court-ordered payment by the offender to the victim for financial losses. Restoration is rooted in a restorative justice approach that emphasizes repairing the harm of criminal

²CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, EDUCATION AND CORRECTIONS POPULATIONS (2003), available at www.ojp.usdoj.gov/bjs/abstract/ecp.htm; CHRISTOPHER MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN (2000), available at www.ojp.usdoj.gov/bjs/abstract/iptc.htm.

³NEW YORK STATE BAR ASSOCIATION, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS pt. I.B.2. (2006), www.nysba.org/MSTemplate.cfm?Section=Table_of_Contents1&Site=Special_Committee_on_Collateral_Consequences_of_Criminal_Proceedings&Template=/Content-Management/HTMLDisplay.cfm&ContentID=80374.

⁴Paige M. Harrison & Allen J. Beck, *Prisoners in 2005*, BUREAU OF JUSTICE STATISTICS BULLETIN, Nov. 2006, at 3, www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

⁵HARRY HOLZER ET AL., DECLINING EMPLOYMENT AMONG YOUNG BLACK LESS-EDUCATED MEN: THE ROLE OF INCARCERATION AND CHILD SUPPORT (2004), available at www.urban.org/publications/411035.html.

⁶Mark Bergstrom & R. Barry Ruback, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIMINAL JUSTICE AND BEHAVIOR, 242, 260 (2006).

⁷Portions of these assessments often go to general victim advocate and victim compensation funds. According to the U.S. Department of Justice, “[n]early every state has some form of general offender assessment, penalty, or surcharge that all convicted defendants must pay” and that goes to funds set aside for victim services or compensation. Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, *State Legislative Approaches to Funding for Victims' Services*, Legal Series Bulletin No. 9, www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin9/mcj199477.pdf.

behavior. It “embodies both the just deserts notion of offense-based penalties and concern for the victim.”⁸ Restitution payments may be collected at probation or parole stages.

The third category of criminal justice-related debts has a public cost-recovery purpose and is imposed separately from sentencing by agencies that constitute the criminal justice system. Police departments, jails, prisons or other criminal justice agencies often seek to recover the public costs of arrest, conviction, and incarceration—costs typically borne by taxpayers. Recovered costs often are returned to the state treasury and are not retained by the criminal justice system agencies that assess them. Among such costs are service fees that may arise before or after conviction to cover the cost of certain “services” used by a suspect, defendant, or convicted person:

- Preconviction assessments, such as jail book-in fees levied at the time of arrest, a jail per diem to cover the cost of pretrial detention, a public defender application fee charged when someone applies for court-appointed counsel, or bail investigation fees levied when the court is asked to set bail.
- Postconviction service levies, such as presentence report fees to defray the cost of gathering information about the defendant that informs his sentence; public defender recoupment fees charged to offset the cost of appointed counsel; residential fees levied on convicted persons in a residential or work release center (usually a percentage of gross income, or a flat fee for room and board); costs of prison housing.
- Postrelease service fees, such as monthly parole or probation supervision fees.

Increasingly courts also are imposing costs against convicted persons to cover basic court expenses, such as maintenance of court facilities, service of warrants, and law enforcement officers' retirement funds.⁹

According to the New York State Bar Association, “the financial penalties imposed [upon people in the criminal justice system], directly or indirectly, as a result of a criminal conviction, are among the least recognized of the collateral consequences.”¹⁰ As this description indicates, criminal financial penalties are not assessed or coordinated by a single authority. Rather, multiple debts are levied at various stages of the criminal justice process, often without any knowledge or consideration of financial obligations already assessed, to be assessed, or the financial resources of the person targeted for assessment.

These dollars and dimes add up. A Center for Community Alternatives analysis of the financial consequences of two common felony convictions illustrates the problem. The center found that someone convicted in New York of driving while intoxicated (a felony) and operating a motor vehicle with no insurance (a misdemeanor) could end up facing a bill of almost \$8,000 by the time he left the system.¹¹

B. Accumulating Child Support

Most people in prison are parents—55 percent of men and 65 percent of women in state prison have children under 18.¹²

⁸Bergstrom & Ruback, *supra* note 6, at 249–50.

⁹Many jurisdictions publish fee schedules listing costs associated with a criminal proceeding. See Judge Larry Allen, Willoughby Municipal Court, Local Rules of Court and Case Management (effective Jan. 1, 2007), www.willoughbycourt.com/site/court-rules/files/LOCAL%20RULES%20OF%20COURT.pdf, as an example, listing these costs among others: arrest-related: warrant fee (\$30); bond-posting fee (\$5); jail commitment fee (\$15); court/trial-related: basic court cost (\$40); public defender application fee (\$25); preliminary hearing scheduling fee (\$5); jury trial or bench trial (\$5); sheriff fee for taking a prisoner before a judge (\$5); jury demand fee (\$20); failure to waive jury no later than final pretrial (\$100); witness fee (\$12 per day); probation-related: probation fee (\$50–\$100); presentence report (\$30); electronic monitoring (\$50); community service cost (\$25).

¹⁰NEW YORK STATE BAR ASSOCIATION, *supra* note 3, at 163.

¹¹Alan Rosenthal & Marsha Wiessman, Center for Community Alternatives, Sentencing for Dollars: The Financial Consequences of a Criminal Conviction 17 (2007), www.communityalternatives.org/articles/financial%20consequences.html.

¹²MUMOLA, *supra* note 2, at 2.

About half of incarcerated parents have open child support cases.¹³ Child support caseloads also include a significant number of parents with a history of incarceration. For example, a recent study by the University of Maryland found that nearly 16 percent of child support cases involve a noncustodial parent who has been incarcerated. In the child support cases, of those families who receive Temporary Assistance for Needy Families (TANF), 30 percent involve an incarcerated noncustodial parent.¹⁴

Parents entering prison with a support order usually remain responsible for child support payments while in prison even though they cannot meet their obligations. Typical support orders range from \$225 to \$300 per month.¹⁵ Because most parents have no real income while in prison, their child support debt continues to build every month.¹⁶ Parents owing child support typically enter prison with a \$10,000 child support debt and leave owing \$20,000 or more.¹⁷

Compliance with support orders is strongly linked to ability to pay. In a study of child support orders set for low-income parents, the U.S. Department of Health and Human Services (HHS) Office of Inspector General found that

compliance was significantly lower when a monthly order was more than 20 percent of a parent's income than when orders were 15 percent or less of income.¹⁸ Similarly a Washington State study found that when monthly child support orders exceeded 20 percent of reported gross wages, arrearages grew.¹⁹

Contributing to unrealistically high child support orders is a number of state policies and practices, among them the use of a legal presumption that noncustodial parents have earnings from a full-time, full-year job even when child support databases do not give evidence of employment or income. Most states impute income based on minimum or, in a few states, median state wages in setting orders. While some states do not initiate a support order during incarceration, other states routinely set a default order in the parent's absence. Charging interest and fees, calculating child support retroactively to the child's birth, and seeking state reimbursement for childbirth hospital bills paid by Medicaid contribute to inflated orders.²⁰

All states are required to have a process for adjusting child support orders when the circumstances of either parent changes.²¹ However, few states initiate the

¹³VICKI TURETSKY, *STAYING IN JOBS AND OUT OF THE UNDERGROUND: CHILD SUPPORT POLICIES THAT ENCOURAGE LEGITIMATE WORK* (2007), available at www.clasp.org/publications/cs_brief_2.pdf.

¹⁴Pamela Caudill Ovwigho et al., *The Intersection of Incarceration and Child Support: A Snapshot of Maryland's Caseload* (2005), www.familywelfare.umaryland.edu/reports/incarceration.pdf.

¹⁵TURETSKY, *supra* note 13, at 2; OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *INCARCERATION, REENTRY, AND CHILD SUPPORT ISSUES: NATIONAL AND CHILD SUPPORT RESEARCH OVERVIEW* (2006), available at www.acf.hhs.gov/programs/cse/pubs/2006/reports/incarceration_report.pdf; Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 *JUDGES' JOURNAL* 5, 7 (2004).

¹⁶Pearson, *supra* note 15, at 7.

¹⁷TURETSKY, *supra* note 13, at 1; Pearson, *supra* note 15, at 7.

¹⁸OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OEI-05-99-00390, *THE ESTABLISHMENT OF CHILD SUPPORT ORDERS FOR LOW INCOME NON-CUSTODIAL PARENTS* (2000), available at <http://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf>.

¹⁹CARL FORMOSO, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *DETERMINING THE COMPOSITION AND COLLECTIBILITY OF CHILD SUPPORT ARREARAGES: VOLUME I—THE LONGITUDINAL ANALYSIS* (2003), www1.dshs.wa.gov/pdf/esa/dcs/reports/cvol1prn.pdf; JO PETERS, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *DETERMINING THE COMPOSITION AND COLLECTIBILITY OF CHILD SUPPORT ARREARAGES: VOLUME II—THE CASE ASSESSMENT* (2003), www1.dshs.wa.gov/pdf/esa/dcs/reports/caseassessmentfinal.pdf.

²⁰ELAINE SORENSEN ET AL., CALIFORNIA DEPARTMENT OF CHILD SUPPORT SERVICES, *EXAMINING CHILD SUPPORT ARREARS IN CALIFORNIA: THE COLLECTIBILITY STUDY* (2003), www.childsup.cahwnet.gov/pub/reports/2003/2003-05collectibility.pdf; Karen N. Gardiner et al., *Office of Child Support Enforcement, U.S. Department of Health and Human Services, Administrative and Judicial Processes for Establishing Child Support Orders* (2002), www.acf.hhs.gov/programs/cse/pol/DCL/2003/dcl-03-15a.doc; Vicki Turetsky, *Center for Law and Social Policy, Realistic Child Support Policies for Low Income Fathers* (2000), available at www.clasp.org/publications/realistic_child_support_policies.pdf.

²¹42 U.S.C.A. § 666(a)(10) (West 2003).

process for adjusting orders when a parent is incarcerated, and few incarcerated parents know how to access it. A recent survey conducted by the Center for Law and Social Policy found that, in a quarter of states, incarceration is considered to be "voluntary unemployment," disqualifying parents in prison from obtaining reduced support orders.²² However, the state trend is toward reducing orders during incarceration. For example, a recent Indiana Supreme Court decision reversed the state's voluntary-unemployment standard. The court concluded: "[T]he child support system is not meant to serve a punitive purpose. Rather, the system is an economic one designed to measure the relative contribution each parent should make—and is capable of making—to share fairly the economic burdens of child rearing[.]"²³

Even if paid, most of this money would not benefit the children under child support cost-recovery rules. When children receive TANF, they are required to sign over their rights to child support to the state. The state withholds half or more of collected child support to repay assistance costs, and families do not receive it.²⁴ There is evidence that withholding child support to repay welfare benefits

further decreases compliance and increases participation in the underground economy.²⁵

III. The Disconnect Between Ability to Pay and High Debt Levels

People leave prison facing high levels of child support debt and criminal financial obligations. They need jobs to support themselves and their families, and to pay off debts owed to the state. Yet most people with criminal records have a hard time finding employment, and the jobs they are able to secure are usually low-wage and part-time or seasonal.²⁶ Usually people with criminal records have limited education and job skills. Only a quarter of state inmates finished high school before going to prison. Black and Hispanic inmates are less likely than whites to have a high school diploma or GED (general educational development) certificate.²⁷ Employers are much less likely to hire people with a criminal record than other groups of comparably skilled workers and are less willing to hire black men with criminal records than similar white men.²⁸ Significantly research shows that employers may even be more likely to hire white men with a criminal record than black men without one.²⁹ For those

²²Jan Justice, *Modifying Child Support Orders of Incarcerated Parents to Prevent the Build-up of Debt*, www.clasp.org (forthcoming July 2007). However, some state child support agencies are collaborating with state corrections agencies to reduce support orders during incarceration. In the last two years, some states have eliminated their voluntary unemployment standard. For an earlier list of states, see Pearson, *supra* note 15, at 11.

²³*Lambert v. Lambert*, No. 32S01-0604-CV-136, slip op. at 8 (Ind. Feb. 22, 2007) (state's voluntary unemployment standard failed to serve children's best interests, because "[t]o the extent that an order fails to take into account the real financial capacity of a jailed parent, the system fails the child by making it statistically more likely that the child will be deprived of adequate support over the long term"); *id.* at 9.

²⁴SORENSEN ET AL., *supra* note 20, at 68; Owwigho et al., *supra* note 14, at 10. The recently enacted Deficit Reduction Act of 2005 provides states with new options to distribute more child support to families instead of retaining it to repay welfare benefits. 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* (2006), available at www.clasp.org/publications/more_cs_dollars_policy_brief_v10.pdf.

²⁵DANIEL MEYER & MARIA CANCIAN, *W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, PHASE 2: FINAL REPORT* (2003), www.irp.wisc.edu/research/childsup/csde/publications/phase2.html; EARL JOHNSON ET AL., *FATHERS' FAIR SHARE: HELPING POOR MEN MANAGE CHILD SUPPORT AND FATHERHOOD* (1999).

²⁶HOLZER ET AL., *supra* note 5, at 7–8.

²⁷HARLOW, *supra* note 2, at 1. A GED is a general educational development certificate offered in lieu of a high school diploma. Of those with a GED, at least seven in ten inmates obtained it while in prison.

²⁸HOLZER ET AL., *supra* note 5, at 8.

²⁹See Devah Pager, *The Mark of a Criminal Record*, 108 AMERICAN JOURNAL OF SOCIOLOGY 937, 960 (2003) ("[T]he persistent effect of race on employment opportunities is painfully clear in these results. Blacks are less than half as likely to receive consideration by employers relative to their white counterpart, and black nonoffenders fall behind even whites with prior felony convictions."); DEVAH PAGER & BRUCE WESTERN, *RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET* 6–7 (2005), available at www.princeton.edu/~pager/race_at_work.pdf ("Calibrating the magnitude of the race effects to the effects of a felony conviction presents a disturbing picture. Blacks remain at the very end of the hiring queue, even in relation to (white) applicants who have just been released from prison.").

facing high debt, already meager wages will be reduced further by payroll deductions made by the state to cover outstanding debts.

This combination of low wages and high debt may discourage people from taking and keeping jobs in the formal economy. For some, the financial pressure may even increase the temptation to generate income through illegal activities.³⁰ Despite these realities, many states and localities pursue robust and counterproductive debt collection and enforcement efforts.

A. Enforcing Criminal Financial Sanctions

Each state has its own methods of recovering criminal economic sanctions and punishing default on criminal debts. During incarceration, state prison officials, for example, regularly collect criminal financial obligations from inmates by deducting monies directly from inmate accounts—accounts often funded by an inmate's spouse or other family members.³¹ As one judge observed, the source of prison funds is "mostly women ...[who] undoubtedly deprive themselves of funds that could be devoted to the purchase of necessities for them and their children."³²

A survey of case law and statutes suggests two standard legal consequences for people who fall behind in criminal debt payments after release from prison:

civil judgments and reincarceration. In some states, financial obligations constitute a judgment against someone who is convicted, and collection may be accomplished through payroll deduction, wage assignment, and seizure of assets or through the imposition of a civil restitution lien or other traditional civil liens.³³ Under Florida's civil restitution framework, for example, crime victims, the state, and its local subdivision may seek a court-ordered civil restitution lien against convicted persons found liable for damages and losses. The range of damages assessed is statutorily prescribed. A lien remains on the debtor's property until the debt is fully paid.³⁴

Most states make wage garnishment available for collecting criminal justice-related debt, including victim restitution owed under a court order.³⁵ The U.S. Supreme Court recognizes wage garnishment as a means of compelling payment for money owed to the court.³⁶ To compel payment of public defender application fees, states may use wage garnishment, among other mechanisms. In Delaware, for instance, a defendant who is unable to pay the prescribed \$50 fee must report to the commissioner of corrections for directions on how to discharge the amount through work.³⁷ In Minnesota the fee is subject to the state revenue recapture act, allowing the state to garnish wages, seize property, file adverse credit bureau reports, and impound vehicles.³⁸ In the federal court system "probation officers

³⁰HOLZER ET AL., *supra* note 5, at 10; LAUREN KOTLOFF, LEAVING THE STREET: YOUNG FATHERS MOVE FROM HUSTLING TO LEGITIMATE WORK, PUBLIC/PRIVATE VENTURES (2005), available at www.ppv.org/ppv/publications/assets/181_publication.pdf; Lauren Rich, *Regular and Irregular Earnings: Implications for Child Support Practices?* 23 CHILDREN AND YOUTH SERVICES REVIEW 353-76 (2001).

³¹Christy Visher & Shannon Courtney, *Cleveland Prisoners' Experience Returning Home* (2006), www.urban.org/publications/311359.html; Creasie Finney Hairston, *The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children*, 78 CHILD WELFARE JOURNAL OF POLICY, PRACTICE AND PROGRAM 617, 628 (1998).

³²*Dean v. Lehman*, 18 P.3d 523, 539-40 (Wash. 2001).

³³See WASH. REV. CODE ANN. §§ 9.94A.760(3), 10.01.160 (West 2007).

³⁴FLA. STAT. ANN. §§ 960.295, 939.04, 55.03 (West 2007).

³⁵See, e.g., CAL. PENAL CODE § 1214(b) (Westlaw 2007) ("A victim shall have access to all resources available under the law to enforce the restitution order, including, but not limited to, access to the defendant's financial records, use of wage garnishment and lien procedures, information regarding the defendant's assets, and the ability to apply for restitution from any fund established for the purpose of compensating victims in civil cases.")

³⁶See *Williams v. Illinois*, 399 U.S. 235, 245 (1970).

³⁷DEL. CODE ANN. tit. 29, § 4607(d) (2003).

³⁸MINN. STAT. ANN. § 270A.03-04 (West 1998 & Supp. 2006); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WILLIAM AND MARY LAW REVIEW 2045, 2054 (2006).

must act as bill collectors, though they lack the power to garnish wages or establish a lien on a convicted defendant's property."³⁹

Those behind in payments may be forced to pay interest and other costs associated with civil collection methods or face incarceration. For example, in Washington, interest accrues upon unpaid financial obligations at a rate of 12 percent from the date of judgment until final payment unless a court determines otherwise. If a Florida locality refers an unpaid financial obligation to a private collection agent or private attorney for collection, a collection fee and attorney fees may be added to the balance owed.⁴⁰

A person likely faces civil proceedings for failure to satisfy monetary penalties such as these, which are normally enforceable against a person's assets in the same manner as other civil judgments.⁴¹ New York, Washington, and Florida authorize incarceration for willful nonpayment or as punishment for contempt of court.⁴² Since a financial obligation is a condition of sentence or probation, a person who fails to pay may also be subject to additional penalties such as electronic home monitoring, community service, or a curfew.⁴³ Officials may also revoke probation or impose community-based sanctions, such as community service, curfew, sus-

pension or revocation of driver's license, and electronic monitoring, for persons in default of their payments.⁴⁴

The U.S. Supreme Court found it unconstitutional to incarcerate someone automatically without first determining whether one willfully avoided paying one's criminal debt. However, the Court did leave room for states to incarcerate people for willful nonpayment.⁴⁵ Whether criminal justice decision makers are making the right call about whether nonpayment is willful or not depends, of course, upon whether they are using the appropriate standards to determine if someone is in a position to pay.⁴⁶

B. Enforcing Child Support Obligations

Most child support is collected automatically through payroll deductions.⁴⁷ When noncustodial parents start a job, the Consumer Credit Protection Act permits the child support agency to withhold up to 65 percent of their paycheck to repay the debt.⁴⁸ Enforcement tools such as passport denial, driver's license revocation, and financial asset seizure have made paying child support the norm for noncustodial parents who have the ability to pay—a societal turnaround that has significantly increased family income and reduced child poverty over the past decade.⁴⁹

³⁹William M. Acker Jr., *Making Sense of Victim Restitution: A Critical Perspective*, 6 FEDERAL SENTENCING REPORT 234 (2002).

⁴⁰WASH. REV. CODE ANN. § 19.52.020 (West 2007); FLA. STAT. ANN. §§ 939.04, 55.03, 938.35 (West 2007).

⁴¹WASH. REV. CODE ANN. § 10.82.010 (West 2007); FLA. STAT. ANN. § 938.30(5) (West 2007); N.Y. CRIM. PROC. § 420.10 (6) (McKinney 2007).

⁴²N.Y. CRIM. PROC. § 420.10(3) (McKinney 2007); WASH. REV. CODE ANN. § 10.82.030, 10.01.180 (West 2007); FLA. STAT. ANN. § 938.30 (West 2007).

⁴³See WASH. REV. CODE ANN. § 9.94A.634, 9.94A.760(10), 9.94A.737, 9.94A.740 (West 2007).

⁴⁴FLA. STAT. ANN. § 948.01, 948.10, 775.089 (West 2007). Driver's license suspension, common among formerly incarcerated people, also may result from failure to maintain insurance, appear in court on or pay a ticket, or pay child support. Margy Waller et al., *Driver's License Suspension Policies* (2005), www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid=%7B0D3DDA6F-BFDE-4179-A28D-7BC017B89D1%7D.

⁴⁵*Bearden*, 461 U.S. at 668–69; *Tate v. Short*, 401 U.S. 395 (1971).

⁴⁶Rhode Island Family Life Center, *Court Debt and Related Incarceration in Rhode Island* (2007), www.ri-familylifecenter.org/pagetool/reports/CourtDebt.pdf.

⁴⁷42 U.S.C.A. § 666(a)(16) (West 2003).

⁴⁸15 U.S.C. § 1673(b).

⁴⁹ELAINE SORENSEN, *CHILD SUPPORT GAINS SOME GROUND* (2003), available at www.urban.org/publications/30860.htm; Vicki Turetsky, *The Child Support Program: An Investment that Works* (2005), www.clasp.org/publications/cs_funding_072605.pdf.

Most people agree that parents should support their children to the best of their ability. However, children receive the most benefit from reliable long-term support from their parents, even if those payments are modest. The key to regular child support payments is steady employment.⁵⁰ The reality is that most parents coming home from prison have trouble supporting themselves, let alone their children. Those who cannot maintain steady employment and keep up with their child support obligations fall deeply into debt, and their children lose out.

A number of studies found that most child support debt was that of low-income parents with orders set too high relative to their ability to pay.⁵¹ For example, an Urban Institute study of California child support arrears found that 80 percent of unpaid child support debt was owed by parents with less than \$15,000 of net income. Over half of the arrears were owed by debtors with less than \$10,000 income but who owed more than \$20,000 in debt, while only 1 percent of child support debtors had net incomes over \$50,000. Unpaid interest accounted for 27 percent of the debt. The likelihood of collecting this debt declined significantly after the first year and continued to decline over time.⁵²

Researchers found that, even with more aggressive enforcement strategies, unrealistic orders resulted in uncollectible

debt.⁵³ As a result, states carry high debt balances on their books that will never be paid off. Incarceration contributes to the build-up of uncollectible child support debt. For example, about 18 percent of arrears in Colorado child support cases were owed by parents with a history of incarceration, while a Washington State study determined that over 30 percent of cases with arrears of \$500 or more and no recent payment history involved parents with prison records.⁵⁴ In California the median arrears for parents incarcerated were 50 percent higher than other debtors.⁵⁵

States can write off some but not all of this debt. Under the "Bradley Amendment," federal law requires that any payment or installment of support due under a child support order be "a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced."⁵⁶ The Bradley Amendment allows states to enforce support orders administratively when they become due and across state lines without having to return to court and reduce overdue support to judgment. While the Bradley Amendment prohibits courts from modifying child support orders or reducing arrears retroactively, nothing in the law prohibits a state from reducing, forgiving, or waiving that portion of debt permanently assigned to a state to repay cash assistance under child support cost-recovery rules.⁵⁷ In recent

⁵⁰TURETSKY, *supra* note 13, at 5.

⁵¹See, e.g., Judi Bartfeld, *Forgiveness of State-Owed Child Support Arrears* (2003), www.irp.wisc.edu/publications/sr/pdfs/sr84.pdf; Jessica Pearson & Esther Griswold, *New Approaches to Child Support Arrears: A Survey of State Policies and Practices*, in CENTER FOR POLICY RESEARCH, *CHILD SUPPORT ARREARS: A COMPILATION OF THREE REPORTS* (2001), <https://childsupport.state.co.us/siteuser/do/general/GetPDF?PDFNumber=84>; FORMOSO, *supra* note 19; PETERS, *supra* note 19; see Turetsky, *supra* note 20.

⁵²SORENSEN ET AL., *supra* note 20, at 69.

⁵³*Id.*; Pearson & Griswold, *supra* note 51, at 28; Jo Peters, WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *OVERCOMING THE BARRIERS TO COLLECTION* (1999), available at www1.dshs.wa.gov/pdf/esa/dcs/reports/scpfinalreport.pdf. E.g., some states publish "most wanted deadbeats" posters, conduct "deadbeat parent" arrest roundups, require "purge payments" (a lump-sum payment to avoid jail), or bring contempt proceedings that result in incarceration.

⁵⁴Pearson, *supra* note 15, at 7; FORMOSO, *supra* note 19, at 55–56; PETERS, *supra* note 19, at 81–82.

⁵⁵SORENSEN ET AL., *supra* note 20, at 129.

⁵⁶42 U.S.C.A. § 666(a)(9) (West 2003).

⁵⁷Federal policy statements issued by the Office of Child Support Enforcement, U.S. Department of Health and Human Services, that delve into this topic include Policy Interpretation Question OCSE-PIQ-00-03 (Sept. 14, 2000), www.acf.hhs.gov/programs/cse/pol/PIQ/2000/piq-00-03.htm; Policy Interpretation Question OCSE-AT-PIQ-99-03 (March 22, 1999), www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9903.htm; and Action Transmittal OCSE-AT-89-06 (April 19, 1989), www.acf.hhs.gov/programs/cse/pol/AT/1989/at-8906.htm.

years, a number of states have begun to implement policies to reduce state-owed-arrears.⁵⁸

When researchers from the Urban Institute asked recently released men what kept them from returning to prison, the largest percentage singled out support from their families and seeing their children as the most important factors: ties with family and children mattered even more than housing or employment.⁵⁹ Strong family relationships are positively correlated with maintaining employment, staying away from drugs, and rebuilding a social network after incarceration—practices that also make society safer and save taxpayers money. Yet, when parents walk away from jobs, they often pull away from their children. Parents who see no end in sight to their child support debts are less likely to remain in low-wage jobs, to comply with child support obligations in the future, or to reunite with their children and reintegrate into society.⁶⁰

IV. The Fix: Realistic Assessments and Flexible Enforcement

Current approaches to assessing and collecting criminal financial obligations and child support during incarceration are not effective—for formerly incarcerated people, for their families, or for taxpayers. Notwithstanding strong enforcement efforts, researchers found that “[s]taggering amounts of [criminal] economic sanctions are unpaid, more than \$4.5 billion in fines at the federal level and more than \$166 million in New Jersey alone.”⁶¹ This finding suggests that when the state imposes unrealistically high financial obligations, neither the state nor the individual benefits. The

state is harmed when it budgets as if it will receive certain revenues, but those dollars never materialize. It may compound the problem by engaging in futile, but costly, efforts to recover the funds. Individuals who do not pay off the debt find themselves in a financial hole that negatively affects their ability to maintain employment, find a place to live, support their children, and secure credit.

Realistic financial and child support obligations can reinforce responsibility, increase parental engagement with children, and result in needed financial help to children, families and communities. Unmanageable debt does the opposite by increasing pressure on recently released people to quit low-wage jobs and return to the underground economy—a choice that can harm families and communities in ways that go far beyond a lack of financial support. Cost-recovery policies can fuel resentment and an unhealthy disrespect for the law.⁶²

Although agencies overseeing child support programs and criminal monetary sanctions share a law enforcement mission, they serve different public interests. The criminal justice system’s goals are to hold people accountable for their actions, redress harm to victims, and enhance public safety. The goals of the child support system are to reinforce parental responsibility and to serve the best interests of children by ensuring that children receive a fair share of their parents’ incomes. However, the overriding public goal must be to prevent recidivism by helping people released from prison to turn away from crime, stabilize their lives, maintain regular employment, and make a lasting commitment to their children.⁶³

⁵⁸Justice, *supra* note 22. In recent years a number of states have implemented policies or conducted federal demonstration projects to reduce state-owed arrears. The policies and demonstration projects are often conditioned on the noncustodial parent agreeing to participate in an employment program and keeping up with ongoing monthly support.

⁵⁹Visher & Courtney, *supra* note 31, at 7.

⁶⁰TURETSKY, *supra* note 13, at 5; CYNTHIA MILLER & VIRGINIA KNOX, MANPOWER DEMONSTRATION RESEARCH CORPORATION, THE CHALLENGE OF HELPING LOW-INCOME FATHERS SUPPORT THEIR CHILDREN: FINAL LESSONS FROM PARENTS’ FAIR SHARE (2001), available at www.mdrc.org/Reports2001/PFS/PFSHelpingFathers.pdf.

⁶¹Bergstrom & Ruback, *supra* note 6, at 264.

⁶²Visher & Courtney, *supra* note 31, at 10; Pearson, *supra* note 15, at 5.

⁶³TURETSKY, *supra* note 13, at 5.

Increasingly policymakers see a link between these systemic goals and the successful reintegration of people into their families and communities following a prison stay.⁶⁴ At this writing, for example, the Second Chance Act, which would provide federal demonstration grant funds to test policies that increase successful prisoner reentry, is making its way through Congress with strong bipartisan support.⁶⁵ A number of states have received federal grants from HHS to test alternative ways to manage child support debt.⁶⁶

No one is well served by backing people into a corner that results in life on the streets or return to prison. The best interests of families, communities, and taxpayers are served by realistic repayment policies that help those reentering the community maintain employment, support themselves and their families, and avoid criminal activity. To support this reintegration, build families, and create an environment in which debts can be paid off realistically, states can adopt a number of strategies.

For criminal financial obligations, states can

- build policymaker knowledge of current criminal sanctions: to understand fully the scope and purpose of each assessment, policymakers should conduct an inventory of the criminal sanctions as enacted in statutes and policies, and as applied in practice, in state and local jurisdictions;
- conduct an impact analysis when a new criminal sanction is proposed: before enacting a new criminal financial obligation, policymakers should review the scope of financial assessments and evaluate the impact of any proposed assessments to determine how new levies will financially affect those subjected to them and their prospects for successful reentry;

- avoid creating new financial obligations or increasing existing obligations: institute a moratorium on new criminal financial obligations or increases in existing obligations until their scope and effect are fully understood; and
- conduct individualized assessments: rather than automatically levying criminal financial penalties (particularly those aimed at reimbursing the system for costs), use realistic standards to evaluate the ability to pay.

For child support, states can

- set realistic child support orders: set realistic initial child support orders based on actual income and a realistic assessment of ability to pay;
- prevent mounting child support obligations: reduce or suspend support obligations at the beginning of a prison term and eliminate state policies that treat incarceration as "voluntary employment";
- pay families, not the state: eliminate welfare cost-recovery policies and distribute all child support directly to families;
- let parents participate in the child support process: facilitate participation by incarcerated noncustodial parents and custodial parents in child support proceedings (such as paternity and support order establishment hearings) through remote video access and telephone hearings; and
- forgive state-owed debt: reduce or waive child support arrears assigned to the state to repay welfare benefits, for example, by adopting a "debt leveraging" program that requires participation in employment and payment of ongoing child support.

⁶⁴See COUNCIL OF STATE GOVERNMENTS, REPORT OF THE REENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY (2004), available at www.reentrypolicy.org/reentry/THE_REPORT.aspx.

⁶⁵Second Chance Act, S. 1060, 110th Cong. (2007), and H.R. 1593, 110th Cong. (2007), available at <http://thomas.loc.gov>.

⁶⁶OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, WORKING WITH INCARCERATED AND RELEASED PARENTS: LESSONS FOR OCSE GRANTS AND STATE PROGRAMS (2006), available at www.acf.hhs.gov/programs/cse/pubs/2006/guides/working_with_incarcerated_resource_guide.pdf.

To ensure realistic and reasonable debt collection, states can

- identify outstanding debt: identify parental and child support status, as well as criminal justice financial obligations, as part of prison intake and release;
- provide postprison debt management and repayment assistance: aid people leaving prison by developing debt repayment strategies and creating a standardized procedure to review and reduce debts owed to the state when people leaving prison cannot pay;
- give priority to payment of child support obligations: payment of realistic child support obligations to families should be given priority over cost-recovery efforts by the criminal justice system;
- promote employment: provide prison and postrelease services to increase employment; and
- reinforce family ties: maintain parent-child contact and other family connections during incarceration and support safe family reunification upon release.

■ ■ ■

When people are connected to work and family, they are less likely to return to prison. Criminal financial sanctions and child support policies should not serve as barriers to employment and family reunification but instead should be set and enforced consistently with the goals of promoting successful reintegration into society and reducing recidivism.