

# Enforcing the Unenforceable: Child Support Obligations of the Incarcerated

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## The Relationship Between the Increasing Number of Individuals Incarcerated and the Non-Payment of Child Support: An Introduction

In the United States, there are two growing, interrelated epidemics: the number of individuals incarcerated and the non-payment of child support.<sup>1</sup> While each represents a variety of difficult social and fiscal challenges, the continued rise of the number of individuals incarcerated is disproportionately affecting the non-payment of child support.<sup>2</sup> This article examines the interplay between the two epidemics and the traditional reticence of the courts in dealing with child support obligations of the incarcerated. This article recommends an enforcement mechanism that holds

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<sup>1</sup> See generally Drew A. Swank, *The Constitutionality of Limitations on a Felon's Right to Procreate and the Need to Support Children*, 2002 INT'L FAM. L. 16 (2002) (discussing the extent of the failure to pay child support in the United States); Drew A. Swank, *Das Boot! A National Survey of Booting Programs' Impact on Child Support Compliance*, 4 J. L. FAM. STUD. 265 (2002) (discussing in part the rise of the non-payment of child support).

<sup>2</sup> Stuart A. Miller, *The Myth of Deadbeat Dads*, WALL ST. J., Mar. 2, 1995, at A14; Office of Child Support Enforcement, *Child Support Enforcement (CSE) Background and Program Results*, available at <http://www.acf.dhhs.gov/programs/cse/pubs/2000/datareport/ch01.html> (Feb. 2000).

incarcerated delinquent non-custodial parents accountable for the non-payment of their child support while being realistic about their ability to pay the support while in prison.

*An Overview of the Incarceration Epidemic*

Even though reported crimes in the United States have declined slightly in recent years, the number of individuals imprisoned has never been higher.<sup>3</sup> As of December 31, 2001, there were 1,962,220 prisoners in federal or state prisons or local jails.<sup>4</sup> Since 1972, there has been a 500% increase in the number of incarcerated individuals.<sup>5</sup> In the last ten years alone, the population of American prisons grew by over 490,000 inmates—an increase of 62%.<sup>6</sup> There are now on average 470 inmates per 100,000 U.S. citizens, up from an average of 292 in 1990.<sup>7</sup> At the current rate, one in twenty individuals will be incarcerated during his or her lifetime.<sup>8</sup> There is a 9% chance for any male in the United States to go to prison during his lifetime; this chance jumps to 28% for African-American males.<sup>9</sup> Within three years of their release from prison, over two-thirds of all inmates will be rearrested for a new offense, with over half returning back to prison.<sup>10</sup>

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<sup>3</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Justice Data Online*, at <http://www.ojp.usdoj.gov/bjs/> (last modified June 14, 2002).

<sup>4</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Prison Statistics*, at <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last modified Sept. 4, 2002) [hereinafter U.S. Dep't of Justice, *Prison Statistics*].

<sup>5</sup> William Raspberry, *When Shame of Prison isn't a Deterrent*, DAILY PROGRESS, Oct. 15, 2002, at A5.

<sup>6</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Incarcerated Parents and Their Children*, at <http://www.ojp.usdoj.gov/bjs/> (Sept. 22, 2000) [hereinafter U.S. Department of Justice, *Incarcerated Parents*].

<sup>7</sup> U.S. Dep't of Justice, *Prison Statistics*, *supra* note 4.

<sup>8</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Offenders Statistics*, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last modified Aug. 6, 2002).

<sup>9</sup> *Id.*

<sup>10</sup> PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, [www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf) (June 2002).

In 1999, an estimated 721,500 state and federal prisoners were parents to 1,498,800 children under the age of eighteen,<sup>11</sup> with 2.1% of all children in the United States having an incarcerated parent.<sup>12</sup> Since 1991, the number of children with an incarcerated parent has risen by over 500,000.<sup>13</sup> Not surprisingly, a disproportionate amount of these children are not receiving the child support they need.<sup>14</sup>

### *The Child Non-Support Epidemic*

The non-payment of child support is also an issue of national importance.<sup>15</sup> Approximately one out of every four children in the United States is eligible to receive child support.<sup>16</sup> In 1998, there were approximately 14 million parents in the United States who had custody of 22.9 million children and were eligible to receive child support.<sup>17</sup> Approximately 5.5 million of these parents received assistance in collecting child support from state child support enforcement agencies.<sup>18</sup> Only 56% of all custodial parents, however, had some type of child support order or agreement.<sup>19</sup> Worse yet, of the custodial parents who had an order or agreement, 59% received either none or only part of the ordered or agreed amount of child support.<sup>20</sup> On average, \$4,200 was owed to each custodial parent in 1997, but only \$2,400 was paid.<sup>21</sup> All told, over \$84 billion dollars of child

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<sup>11</sup> U.S. Dep't of Justice, *Incarcerated Parents*, *supra* note 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Office of Child Support Enforcement, *supra* note 2; Miller, *supra* note 2.

<sup>15</sup> *Duranceau v. Wallace*, 743 F.2d 709, 711 (9th Cir. 1984) ("It is hard to imagine a more compelling state interest than the support of its children. The problem of delinquent child support is national in scope, and has prompted Congress recently to enact strong measures to help states collect these debts.").

<sup>16</sup> Va. Dep't of Soc. Servs., *2001 Fact Sheet*, at [http://www.dss.state.va.us/family/dcse\\_annualfacts.html](http://www.dss.state.va.us/family/dcse_annualfacts.html) (last visited July 8, 2002).

<sup>17</sup> TIMOTHY GRALL, U.S. CENSUS BUREAU, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS 1 (2000).

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.*

support arrears are owed in the United States<sup>22</sup>—an amount greater than the annual gross national product of Ireland.<sup>23</sup>

The child non-support epidemic, however, is more than merely an issue of billions of dollars owed to custodial parents. Non-payment of child support is a leading cause of child poverty and has been cited as the nation's greatest source of financial insecurity.<sup>24</sup> Children of single mothers are five times more likely to be poor than children of married parents.<sup>25</sup> Currently, 16% of all American children live in poverty.<sup>26</sup> For children of single parents, however, the rate grows to 29% living below the poverty level.<sup>27</sup> This rate grows even higher to 36% if the children receive no child support.<sup>28</sup>

The possibility of a child escaping poverty often depends on whether the child receives child support.<sup>29</sup> Child support payments are critical for moderate and low-income families, because the payments contribute to a substantial portion of the household income and help keep the families self-sufficient and out of poverty.<sup>30</sup> On average, child support

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<sup>22</sup> Office of Child Support Enforcement, *supra* note 2.

<sup>23</sup> Fact Monster, *Countries of the World*, at <http://www.factmonster.com/countries.html> (last visited Apr. 29, 2002). The annual gross national product of a country is the total market value of all the goods and services produced by a nation annually. AMERICAN HERITAGE DICTIONARY 578 (2d ed. 1982).

<sup>24</sup> Dawn L. Rudenko, *Child Support Recovery Act: Unification or Usurpation? The CSRA in the Aftermath of United States v. Lopez*, 31 NEW ENG. L. REV. 267, 269 (1996).

<sup>25</sup> Kristin Anderson Moore et. al, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, available at <http://www.childtrends.org/PDF/MarriageRB602.pdf> (June 2002); Nat'l Center for Children in Poverty, *Low-Income Children in the United States: A Brief Demographic Profile*, available at <http://cpmcnet.columbia.edu/dept/nccp/ycpf.html> (Mar. 2002).

<sup>26</sup> Nat'l Center for Children in Poverty, *supra* note 25.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> Vicki Turetsky, *Families Participating in the State Child Support Program*, available at <http://www.clasp.org/pubs/childrenforce/IVDparticipation.htm> (May 15, 2001).

<sup>30</sup> Paula Roberts, Center for Law and Soc. Policy, *The Importance of Child Support Enforcement: What Recent Social Science Research Tells Us*,

constitutes 16% of family income, equating to \$3,795 a year.<sup>31</sup> For families living below the poverty level, child support payments equate to 36% of family income.<sup>32</sup>

For divorced custodial parents, child support payments make up between 26% and 29% of the family income.<sup>33</sup> Custodial parents who received all of the child support they were owed had an average annual family income of \$27,500, with 15% living below the poverty level.<sup>34</sup> If only part of the child support owed is received, however, the average annual family income dropped to \$20,400, with 29% living below the poverty level.<sup>35</sup> If no child support is received, the average annual family income dropped to \$18,400, with 36% living below the poverty level.<sup>36</sup>

Beyond the financial aspect, child poverty disproportionately increases the risk of, among other things, inadequate nutrition, substance abuse, decreased educational achievement, increased juvenile criminal behavior, physical abuse, and teen and non-marital childbearing—which further perpetuates the cycle.<sup>37</sup> Children who receive their child support perform better academically, and are more likely to both finish high school and attend college.<sup>38</sup> Non-custodial parents who pay their child support are more likely to be involved in the lives of their children and provide emotional as well as financial support.<sup>39</sup>

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available at [http://www.clasp.org/pubs/childsupport/The\\_Importance\\_of\\_Child\\_Support\\_Enforcement.htm](http://www.clasp.org/pubs/childsupport/The_Importance_of_Child_Support_Enforcement.htm) (2002).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> GRALL, *supra* note 17, at 4, 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Moore, *supra* note 25; Nat'l Center for Children in Poverty, *Early Childhood Poverty: A Statistical Profile*, available at <http://cpmcnet.columbia.edu/dept/nccp/cpf.html> (Apr. 1997); Barbara J. Risman, *The Causes and Consequences of Children's Poverty*, 3 QUALITY OF LIFE IN N.C. 1, available at <http://www.ces.ncsu.edu/depts/sociology/pub/qol/vol3no1.html> (last visited July 16, 2002).

<sup>38</sup> Roberts, *supra* note 30.

<sup>39</sup> *Id.*

Payment of child support also benefits others beside the children and custodial parents involved. States with stronger child support enforcement programs have lower non-marital birth rates; lower divorce rates; and reduced welfare, Medicaid, and food stamp outlays.<sup>40</sup> Increased child support enforcement has reduced welfare payments by 12% to 16% from 1980 to 1996.<sup>41</sup> There is, however, room for improvement. If every custodial parent were collecting child support, public assistance recipients would decrease by 26%, food stamps by 19%, and Medicaid by 5%.<sup>42</sup> It has also been estimated that non-payment of child support costs taxpayers over \$22 billion a year in public assistance.<sup>43</sup> Because of its effect on the taxpayer and society as a whole, the duty of parents to support their children is a social obligation owed not only to their children but to the state as well.<sup>44</sup> As the statistics show, the non-payment of child support by the non-custodial parent, whether incarcerated or not, is important to every taxpayer in the United States.

*Holding Incarcerated Non-Custodial Parents Accountable for Paying Child Support*

A large number of children with an incarcerated parent are not receiving their child support. If fewer people were committing crimes and being incarcerated, statistically, more child support would be paid—to the benefit of children, custodial parents, and taxpayers. Unfortunately, the solution to the incarceration epidemic has eluded the government and scholars alike. The second epidemic, the non-payment of child support, could be improved, however, by creating a mechanism by which incarcerated non-custodial parents are held accountable for the payment of their child support. A

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<sup>40</sup> *Id.* See generally COMM. ON WAYS AND MEANS, 105TH CONG., 2000 GREEN BOOK app. M, available at [http://www.utdallas.edu/~jargo/green2000/Appendix\\_M.pdf](http://www.utdallas.edu/~jargo/green2000/Appendix_M.pdf) (Oct. 6, 2000) (examining the general effects of child support payments).

<sup>41</sup> Roberts, *supra* note 30.

<sup>42</sup> *Id.*

<sup>43</sup> Eric Pianin, *GAO Calls HHS's Child Support Enforcement Office Ineffective*, WASH. POST, July 21, 1994, at A29.

<sup>44</sup> *Fitzgerald v. Fitzgerald*, 618 P.2d 867, 868-69 (Mont. 1980).

number of courts nationwide have wrestled with the issue of whether incarceration of a non-custodial parent justifies decreasing or suspending a child support obligation.<sup>45</sup> But the issue of how to enforce a child support order of those already incarcerated has rarely been addressed. This article briefly examines the traditional approaches with regard to the child support obligations of the incarcerated, and then recommends the use of an enforcement mechanism that has been demonstrated to be effective in improving child support compliance and would be particularly well suited to these cases.

### **Three Different Approaches for Deciding Whether to Set or Modify Child Support Obligations When the Non-Custodial Parent is Incarcerated**

Courts around the United States are divided as to whether an individual's incarceration should be considered when establishing or modifying his or her child support obligation. Three basic trends have developed regarding this issue: (1) A number of courts refuse to consider incarceration as grounds for abating a child support obligation or for decreasing an existing obligation; (2) Other courts have held that incarceration abates the creation of a child support obligation or serves as a legitimate reason for decreasing an existing obligation; and (3) Still other courts employ the hybrid approach, holding that incarceration is but one factor to consider when establishing or modifying a child support obligation.<sup>46</sup>

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<sup>45</sup> Frank J. Wozniak, Annotation, *Loss of Income Due to Incarceration as Affecting Child Support Obligation*, 27 A.L.R. 5th 540-92 (1995). For other in-depth discussions of how various jurisdictions view this issue, see, for example, *State v. Miranda*, 916 P.2d 504 (Ariz. Ct. App. 1996); *Meyer v. Nein*, 568 N.E.2d 436 (Ill. App. Ct. 1991); *Marshall v. Marshall*, 15 S.W.3d 396 (Ky. Ct. App. 2000); *Halliwell v. Halliwell*, 326 N.J. Super. 442 (N.J. Super. Ct. App. Div. 1999).

<sup>46</sup> See, e.g., *Miranda*, 916 P.2d at 507; *Smith v. Smith*, 108 Cal. Rptr. 2d 537 (Cal. Ct. App. 2001); *Mascola v. Lusskin*, 727 So. 2d 328, 330-32 (Fla. Dist. Ct. App. 1999); *Meyer*, 568 N.E.2d at 436; *Marshall*, 15 S.W.3d

Courts that hold incarceration does not relieve parents of the duty to support their children or warrant a reduction in the amount of the child support obligation offer several rationales. These include the belief that criminal activity is voluntary and incarceration is the foreseeable result of committing a crime;<sup>47</sup> that incarceration is a self-induced change of circumstances equivalent to an able-bodied person voluntarily not working;<sup>48</sup> that abating or reducing the inmates' child support obligation rewards them for their criminal behavior while non-criminal, non-custodial parents remain liable for paying their support;<sup>49</sup> that as no other debts are suspended due to incarceration neither should child

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at 399-402; *Halliwell*, 326 N.J. Super. at 453-55; *Bergen County Bd. of Servs. v. Steinhauer*, 294 N.J. Super. 507, 511-18 (N.J. Super. Ct. App. Div. 1996); *Wozniak*, *supra* note 45.

<sup>47</sup> See, e.g., *Miranda*, 916 P.2d at 506-07 (citations omitted); *Charette v. Charette*, 1997 Conn. Super. LEXIS 1168 (Conn. Super. Ct. 1997); *Mascola*, 727 So.2d at 331-32 (citations omitted); *Davis v. Vance*, 574 N.E.2d 330 (Ind. Ct. App. 1991); *Meyer*, 568 N.E.2d at 437; *Marshall*, 15 S.W.3d at 401 (citations omitted); *Halliwell*, 326 N.J. Super. at 453; *Kreuzer v. Kreuzer*, 2001 Ohio App. LEXIS 2001, \*13 (Ohio Ct. App. 2001); *Richardson v. Ballard*, 681 N.E.2d 507 (Ohio Ct. App. 1996).

<sup>48</sup> *Miranda*, 916 P.2d at 507 (citations omitted); *Marshall*, 15 S.W.3d at 401 (citations omitted).

<sup>49</sup> *Halliwell*, 326 N.J. Super. at 453; *Kreuzer*, 2001 Ohio. App. LEXIS at \*13.



support be suspended or reduced;<sup>50</sup> and that the equitable doctrine of “unclean hands” is applicable.<sup>51</sup>

Additionally, courts considering the issue have universally held that suspension of a child support obligation is improper where the incarcerated parent has sufficient assets or income to meet the obligation.<sup>52</sup> Many prisoners work and have some income while incarcerated.<sup>53</sup> Some courts, therefore, are reluctant to relieve the incarcerated non-custodial parent of paying his or her support obligation, because the custodial parent and children would be left struggling while the incarcerated non-custodial parent is earning an income and living free of room and board

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<sup>50</sup> *Charette*, 1997 Conn. Super. LEXIS at \*19. In *Charette*, the court noted:

[T]he fact that incarceration does not absolve the defendant of any other financial obligation that he has incurred. Certainly the defendant’s mortgage obligation will not be discharged by the mere fact of his incarceration and indigency nor will interest abate during that time. The public policy of this state puts a higher priority on child support obligations than it does on payment to general creditors. To not order child support would contravene this policy and relegate the child to a lesser status than accorded that of a general creditor.

*Id.*

<sup>51</sup> See, e.g., *Miranda*, 916 P.2d at 507 (citations omitted); *Mascola*, 727 So.2d at 331; *Marshall*, 15 S.W.3d at 399 n.8; *Halliwell*, 326 N.J. Super. at 454 (citations omitted).

<sup>52</sup> *Miranda*, 916 P.2d at 507 (citations omitted).

<sup>53</sup> *Id.* While forty-five states, the District of Columbia, and the federal prison system pay inmates for work performed, the average daily rate of pay ranges only from \$0.99 to \$3.98. U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORR. INFO. CTR., INMATE WORK PROGRAMS: A REVIEW OF THE LITERATURE 2 (1992). Federal inmates are required to work, and their rate of pay is higher than the national average, \$0.12-\$1.15 per hour. 28 C.F.R. § 345 (2001); Fed. Bureau of Prisons, *Inmate Programs and Services—Work Programs*, at <http://www.bop.gov/ipapg/ipaover.html> (last visited Sept. 27, 2001).

expenses.<sup>54</sup> Indeed, the child's need for support continues throughout, and is not altered by, the parent's incarceration.<sup>55</sup>

Courts that hold the opposite viewpoint, that incarceration does justify the abatement or reduction of a child support obligation, likewise advance several rationales.<sup>56</sup> These include the belief that incarceration is always involuntary;<sup>57</sup> that being incarcerated is equivalent to losing one's job;<sup>58</sup> that courts should not enter unenforceable orders;<sup>59</sup> and that the unclean hands doctrine is inapplicable unless the incarceration is due solely to the failure to provide child support.<sup>60</sup>

Some courts cite federal funding for state child support agencies as a factor in deciding that incarceration of the non-custodial parent abates the child support obligation.<sup>61</sup> State child support agencies would receive more funding based in part on the success they have in collecting support.<sup>62</sup> The court in *Steinhauer* reasoned that since non-custodial parents will not pay their support anyway, the court should not impose the obligation to pay because doing so would mean reduced federal funding for the agencies.<sup>63</sup> Likewise, other courts have reasoned that the non-custodial parent's child support obligation should be suspended during incarceration because upon release the non-custodial parent will rarely pay the accumulated arrears. As a result, precious judicial resources

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<sup>54</sup> *Charette*, 1997 Conn. Super. LEXIS at \*14-20; *Koch v. Williams*, 456 N.W.2d 299, 302 (N.D. 1990).

<sup>55</sup> See, e.g., *Miranda*, 916 P.2d at 507 (citations omitted).

<sup>56</sup> See, e.g., *Halliwell*, 326 N.J. Super. at 454.

<sup>57</sup> See, e.g., *Miranda*, 916 P.2d at 507; *Marshall*, 15 S.W.3d at 396 (citations omitted); *Leasure v. Leasure*, 549 A.2d 225, 227 (Pa. Super. Ct. 1998).

<sup>58</sup> *Peters v. Peters*, 590 N.E.2d 777 (Ohio Ct. App. 1990).

<sup>59</sup> *Halliwell*, 326 N.J. Super. at 442.

<sup>60</sup> *Meyer v. Nein*, 568 N.E.2d 436 (Ill. Ct. App. 1991).

<sup>61</sup> *Bergen County Bd. of Servs. v. Steinhauer*, 294 N.J. Super. 507, 510-11 (N.J. Super. Ct. App. Div. 1996).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* The author questions whether there are any children who are better off because they were denied child support so that their state could receive more federal funding at their expense.

and taxpayer dollars will be spent trying to collect it.<sup>64</sup> In other words, since the non-custodial parent probably will not pay the support, there is no point in bothering to require the non-custodial parent to do so. Another reason given by courts for reducing or suspending an incarcerated parent's child support obligation is that not doing so would be tantamount to additional punishment and would hamper the parent's rehabilitation to becoming a productive member of society.<sup>65</sup>

Some courts, however, have taken exception to this last rationale, stating that being held responsible for providing child support is not additional punishment.<sup>66</sup> Rather, it is merely the same responsibility that millions of other non-custodial parents have to pay child support.<sup>67</sup> As the Florida Court of Appeals has stated, "child support is not a form of punishment at all but is instead a duty resulting from procreating children."<sup>68</sup> Whether the incarcerated parent, upon release, becomes a productive member of society is wholly within his or her discretion and is not predicated upon a child support obligation.<sup>69</sup>

The growing trend is for courts to treat the incarceration of the non-custodial parent as neither suspending a child support obligation nor prohibiting a reduction in the amount of child support.<sup>70</sup> Rather, courts following a third approach consider incarceration as but "one-factor" to be considered in determining child support and not a bright line

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<sup>64</sup> *Marshall v. Marshall*, 15 S.W.3d 396, 400 n.12 (Ky. Ct. App. 2000); *Halliwell*, 326 N.J. Super. at 457-58; *Steinhauer*, 294 N.J. Super. at 517-18.

<sup>65</sup> *Charette v. Charette*, 1997 Conn. Super. LEXIS 1168, \*12-13 (Conn. Super. Ct. 1997) (discussing this argument).

<sup>66</sup> *Id.*; *Mascola v. Lusskin*, 727 So.2d 328, 331 (Fla. Dist. Ct. App. 1999); *Parker v. Parker*, 447 N.W.2d 64, 66 (Wis. Ct. App. 1989).

<sup>67</sup> *Charette*, 1997 Conn. Super. LEXIS, \*12-13; *Mascola*, 727 So.2d at 331.

<sup>68</sup> *Mascola*, 727 So.2d at 332.

<sup>69</sup> *Charette*, 1997 Conn. Super. LEXIS at \*14; *Koch v. Williams*, 456 N.W.2d 299, 302 (N.D. 1990) (stating that holding incarcerated non-custodial parents responsible for paying their child support obligations upon release from prison will not hinder their rehabilitation).

<sup>70</sup> *State v. Miranda*, 916 P.2d 504, 507 (Ariz. Ct. App. 1996).

rule as to abatement or reduction.<sup>71</sup> This approach allows the trial court to utilize its discretion in determining whether incarceration should affect a child support obligation.<sup>72</sup> This approach gives the trial court greater flexibility than the bright line rules and potentially allows for a more just result.<sup>73</sup> Courts utilizing this approach consider, among other things, the length of incarceration, earning potential post-incarceration, and access to assets while incarcerated to determine whether support should be ordered or modified.<sup>74</sup> In jurisdictions that follow this approach, even public policies can be considered by the court in making its determination—policies such as the best interest of the child, the unclean hands doctrine, and the nature of the crime.<sup>75</sup>

The most extreme form of this approach actually ignores the fact that the non-custodial parent is incarcerated.<sup>76</sup> Instead, child support guidelines are calculated, as in every other case, with no reference to the status of the non-custodial parent.<sup>77</sup> If the non-custodial parent has no income, the court may impute income if it deems the non-custodial parent has earning capacity.<sup>78</sup> Earning capacity is comprised of the ability to work, the willingness to work, and an opportunity to work.<sup>79</sup> Absent the ability or opportunity to work, whether due to incarceration or any other reason, the court cannot impute income.<sup>80</sup> In this manner, the incarcerated are treated no differently than other parents, because the court does not concern itself with the underlying reason for the non-custodial

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<sup>71</sup> See *Miranda*, 916 P.2d at 504 (citations omitted); *Smith v. Smith*, 108 Cal. Rptr. 2d 537, 544 (Cal. Ct. App. 2001) (citations omitted); *Meyer v. Nein*, 568 N.E.2d 436, 437 (Ill. Ct. App. 1991); *Marshall v. Marshall*, 15 S.W.3d 396, 400 (Ky. Ct. App. 2000) (citations omitted); *Halliwell v. Halliwell*, 326 N.J. Super. 442, 454-55 (N.J. Super. Ct. App. Div. 1999) (citations omitted).

<sup>72</sup> *Marshall*, 15 S.W.3d at 396.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*; *Miranda*, 916 P.2d at 504; *Halliwell*, 326 N.J. Super. at 442.

<sup>75</sup> *Halliwell*, 326 N.J. Super. at 442.

<sup>76</sup> *Smith*, 108 Cal. Rptr. 2d at 537.

<sup>77</sup> *Id.* at 541.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 542.

<sup>80</sup> *Id.*

parent not having the ability or opportunity to work.<sup>81</sup> This approach is similar to the “one-factor” approach in that it neither expressly permits nor prohibits the establishment of a child support obligation of an inmate. It does not, however, provide the court with the same type of latitude it enjoys with the traditional “one-factor” approach.

### **Non-Enforcement of Inmates’ Child Support Obligations**

Regardless of which approach courts have followed, there has been almost universal reluctance to find the delinquent non-custodial parent in contempt or otherwise culpable for failing to provide child support while incarcerated. Courts reason that an individual who is unable to comply with a court order cannot be found in contempt by that court.<sup>82</sup> Another rationale given by courts is that since the state is responsible for incarcerating the non-custodial parent, the state is thereby responsible for preventing the parent from paying child support.<sup>83</sup>

These rationales, however, ignore the fact that the non-custodial parent was incarcerated due to his or her own voluntary acts. Incarceration is surely involuntary, as was the

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<sup>81</sup> *Id.* at 544.

<sup>82</sup> *Carter v. Coffee*, 130 Cal. Rptr. 887, 891 (Cal. Ct. App. 1976) (holding that a delinquent non-custodial parent who is unable to comply with a child support order cannot be adjudged in contempt for such non-compliance unless he has voluntarily created the disability for the purpose of avoiding payment); *Bailey v. Super. Ct.*, 11 P.2d 865, 867 (Cal. 1932); *Charette v. Charette*, 1997 Conn. Super. LEXIS 1168, \*13 (Conn. Super. Ct. 1997); *Mascola v. Lusskin*, 727 So.2d 328, 332 (Fla. Dist. Ct. App. 1999); *Davis v. Vance*, 574 N.E.2d 330, 330 (Ind. Ct. App. 1991); *Burchett v. Miller*, 704 N.E.2d 636, 638 (Ohio Ct. App. 1997); *Richardson v. Ballard*, 681 N.E.2d 507, 507 (Ohio Ct. App. 1996); *see also Wozniak*, *supra* note 45 (citing *In re Petition of R.H.N.*, 673 P.2d 805 (Colo. Ct. App. 1983)). *But see S.C. Dep’t of Soc. Servs. v. Johnson*, 391 S.E.2d 584, 585 (S.C. Ct. App. 1990) and *S.C. Dep’t of Soc. Servs. v. Parker*, 519 S.E.2d 351, 354-56 (S.C. Ct. App. 1999) (two termination of parental rights cases in which incarceration was found not to be a valid defense to an allegation of willful failure to provide child support).

<sup>83</sup> *Peters v. Peters*, 590 N.E.2d 777, 778 (Ohio Ct. App. 1990); *Charette*, 1997 Conn. Super. LEXIS at \*13 (discussing *Peters*).

delinquent non-custodial parent's arrest, arraignment, trial and conviction. But the underlying act that led to each of these proceedings, and ultimately resulted in incarceration, was by definition voluntary. If it were not voluntary, the delinquent non-custodial parent could not be convicted of a crime.<sup>84</sup> The court should not focus on whether the incarcerated delinquent non-custodial parent has the means to pay child support while in prison. Rather, courts should ask, "*but for*" the parent's voluntary criminal behavior, could the delinquent non-custodial parent be paying child support?

By not enforcing the child support obligation of the incarcerated delinquent non-custodial parent, courts create an unpalatable situation whereby the criminal behavior<sup>85</sup> of those already incarcerated is ignored merely because they are incarcerated. At the same time, those who are not already incarcerated and do not pay the required child support are often incarcerated.<sup>86</sup> While there have been some efforts to educate inmates about their child support obligations in hopes of making them more responsible,<sup>87</sup> there is rarely any effort made to enforce a child support order of a delinquent non-custodial parent who is already incarcerated. Voluntarily choosing not to work is not a valid defense for failing to provide child support, nor is voluntarily quitting one's job. Apparently, however, in many jurisdictions, voluntarily committing a crime, is a perfectly valid defense for failing to provide child support.

There is a mechanism that would allow for the enforcement of a child support order against a delinquent non-custodial parent who is already incarcerated. The threat of

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<sup>84</sup> 25 AM. JUR. 2D *Duress and Undue Influence* § 1 (2002).

<sup>85</sup> The willful failure to pay child support is a crime in all fifty states. *See, e.g.*, ARIZ. REV. STAT. § 25-511 (2000); GA. CODE ANN. § 15-1-4(c) (2000); KAN. STAT. ANN. § 21-3605(a) (2000); NEB. REV. STAT. § 42-354.13 (2001); OHIO REV. CODE ANN. § 2705.03.1(E) (2001); VA. CODE ANN. § 16.1-292B (Michie 2000); W. VA. CODE § 48-2-22 (2000).

<sup>86</sup> *Halliwell v. Halliwell*, 326 N.J. Super. 442, 458 (N.J. Super. Ct. App. Div. 1999).

<sup>87</sup> Press Release, Commonwealth of Massachusetts, Cellucci Encourages Inmates to meet Child Support Obligations (Sept. 27, 2000), *available at* <http://www.state.ma.us/gov/press/pr09-27-00.htm>.

incarceration in the future has been demonstrated to quantifiably improve child support compliance.<sup>88</sup> Through the use of a delayed imposition sentence,<sup>89</sup> a child support order can be enforced even though the delinquent non-custodial parent is currently incarcerated.

### **The Delayed Imposition Sentences**

#### *An Overview of the Delayed Imposition Sentence*

To aid in child support collection, state child support enforcement agencies use a variety of administrative and judicial enforcement remedies. Administrative remedies include income garnishments, property liens, intercepting state and federal income tax refunds, reporting child support debts to credit agencies, booting of vehicles, and requesting the suspension of driving and other licenses.<sup>90</sup> Furthermore, in all fifty states, either by statute or through a court's contempt powers, delinquent non-custodial parents can be incarcerated for their failure to pay their child support.<sup>91</sup> The goal of both administrative and judicial child support enforcement mechanisms is to create in the delinquent non-custodial parent a pattern of payment compliance: by getting the delinquent non-custodial parent to pay the required child support, to pay consistently, and to pay on-time.<sup>92</sup>

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<sup>88</sup> Drew A. Swank, *Incarceration's Impact on Child Support Compliance*, 2001 INT'L FAM. L. 131 (2001).

<sup>89</sup> See *infra* notes 99-103 and accompanying text.

<sup>90</sup> See generally Swank, *supra* note 1 (detailing various child support enforcement mechanisms).

<sup>91</sup> See also Swank, *supra* note 88, at 131. See generally ARIZ. REV. STAT. § 25-511 (2000); GA. CODE ANN. § 15-1-4(c) (2000); KAN. STAT. ANN. § 21-3605(a) (2000); NEB. REV. STAT. § 42-354.13 (2001); OHIO REV. CODE ANN. § 2705.03.1(E) (2001); VA. CODE ANN. § 16.1-292B (Michie 2000); W. VA. CODE § 48-2-22 (2000) (examples of such statutes).

<sup>92</sup> Nancy Thoennes & Jessica Pearson, Center for Policy Research, *Multiple Intervention Grant: Longer Term Evaluation of Colorado's Driver's License Suspension*, at <http://www.acf.dhhs.gov/programs/cse/pubs/reports/colorado/bk03ar01.html> (Feb. 2000).

One of the most effective judicial child support enforcement mechanisms is the delayed imposition sentence.<sup>93</sup> Under a delayed imposition sentence, a delinquent non-custodial parent is found in contempt for failure to provide previously ordered child support and is given a sentence, but is not immediately remanded to jail. Rather, the imposition of the jail sentence is delayed to a review date, normally several months later, giving the delinquent non-custodial parent the opportunity to comply with the child support order. If the delinquent non-custodial parent complies with the court's order, the sentence may be suspended. If not, the delinquent non-custodial parent is required to serve the previously adjudicated sentence.<sup>94</sup> There are several advantages to a delayed imposition sentence. First, it gives the delinquent non-custodial parent the additional incentive to work, earn money and pay the previously ordered support with the understanding that not paying the child support will result in incarceration.<sup>95</sup> Second, the delayed imposition sentence saves the government money if payment can be induced without the cost of actually incarcerating the delinquent non-custodial parent.<sup>96</sup>

Compliance with a child support order can be measured by comparing the court or administratively ordered amount of support with the support actually paid over a set period of time, creating a compliance ratio (CR). To determine the effectiveness of an enforcement mechanism, the CRs for the period before and after the enforcement mechanism was used are compared. An increase in the CR after the application of an enforcement mechanism would demonstrate the mechanism's positive effect on the payment

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<sup>93</sup> Swank, *supra* note 88, at 132-33.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 134 n.23.

<sup>96</sup> The cost of the average federal inmate is \$21,926 per year. Annual Determination of Average Cost of Incarceration, 64 Fed. Reg. 43,882 (1999). The average cost for state inmates is approximately the same. James J. Stephan, Bureau of Justice Statistics, *State Prison Expenditures 1996*, available at <http://www.ojp.usdoj.gov/bjs/abstract/spe96.htm> (Aug. 1999).



of child support.<sup>97</sup> A recent study examined the short-term<sup>98</sup> effects on child support compliance of three types of sentences imposed for failing to provide child support—actual time served, suspended, and delayed imposition sentences.<sup>99</sup> While the study demonstrated that all three sentences quantitatively improved child support compliance, delayed imposition sentences were consistently the best at improving both the number of delinquent non-custodial parents paying and the amount they were paying each month.<sup>100</sup>

Based on a new study of nine jurisdictions in central Virginia, 121 cases with delayed imposition sentences were examined for up to a three-year period.<sup>101</sup> Six months prior to sentencing, on average only 22% of current child support owed was paid. Compliance fell to 17% three months prior to sentencing, with many cases having no payments at all. In the year after being given a delayed imposition sentence, however, on average 61% of the cases had payments each month, with the payments averaging 85% of what was owed, a monthly increase of 68%. Over the entire three-year period after a delayed imposition sentence, in only two of the 121 cases were there no payments at all, while forty-seven cases (39%) consistently met or exceeded their monthly child support obligation. In a majority of the cases, the non-custodial parents were paying at least half of what they owed each month. While the number of cases in which payments were being made each month slowly decreased over the three-year period, as would be expected,<sup>102</sup> the amount paid each month remained constant between 77% and 98% of what was owed. Even after three years, delayed imposition sentences were extremely effective at improving not only the number of cases in which payments are made, but the amount of those

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<sup>97</sup> Swank, *supra* note 88, at 131.

<sup>98</sup> Three to six months before and after the adjudication of a sentence.

<sup>99</sup> Swank, *supra* note 88, at 131.

<sup>100</sup> *Id.*

<sup>101</sup> Drew A. Swank, *Delayed Imposition Sentences* (2001) (unpublished report, on file with author).

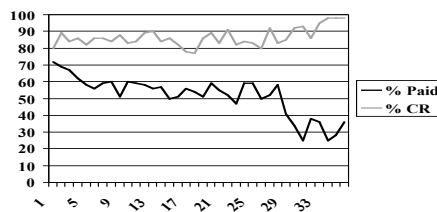
<sup>102</sup> The deterrent value of a sanction decreases as the threat of the sanction is further removed in time. After the delayed imposition sentence has been suspended, it further loses its deterrent value.

payments as well.<sup>103</sup> In most cases the delayed imposition sentence may not have resulted in a full payment every month, but when payments were made, they were for most of what was owed, with the amount paid each month actually increasing over time.

*Using the Delayed Imposition Sentence to Enforce Child Support Obligations of the Incarcerated*

Despite the fact that many inmates work and are paid during their incarceration in either state or federal prisons,<sup>104</sup> realistically most inmates will not be able to fully meet their child support obligations until they have been released from prison and find work. The main purpose of child support enforcement is to induce future payments rather than punish for past failures.<sup>105</sup> A delayed imposition sentence, therefore, would be an effective means to enforce the child support obligation of the currently incarcerated. The delinquent non-custodial parent inmate could be found in civil contempt or in violation of a statute for not paying child support during incarceration, but the sentence would not be imposed until well after the parent is released from prison. Such a system

<sup>103</sup> The effect of delayed imposition sentences is shown graphically over the entire three-year period. Compliance, calculated as a percentage of what is paid compared to what is owed, is depicted on the vertical axis. Time, expressed in months, is depicted on the horizontal axis. The lower line depicts the percentage of cases in which a payment was made over time. The upper line depicts the average compliance ratio of those cases in which a payment was made over time. Over 36 months, the percentage of cases with a payment decreased; for those cases, however, the average compliance ratio slightly increased.



<sup>104</sup> See *supra* notes 53-55 and accompanying text.

<sup>105</sup> *Seay v. Seay*, 678 So.2d 1189, 1190 (Ala. Civ. App. 1996); *Diggs v. Diggs*, 663 P.2d 950, 951 (Alaska 1983).

would give the non-custodial parent the opportunity to begin working and paying the child support. While a delayed imposition sentence would not be effective with a delinquent non-custodial parent in prison for life, on average most inmates are sentenced to three years or less and serve even less time than their sentence mandates.<sup>106</sup> Based upon Department of Justice data, even violent offenders spend on average only three and a half years in prison.<sup>107</sup>

Furthermore, knowing that more jail time awaits them if they do not start working and paying their child support after their release from prison would give the delinquent incarcerated non-custodial parent further incentive to reenter society as a productive, responsible member. The goal of a delayed imposition sentence is to give delinquent non-custodial parents every opportunity to succeed. They alone, by their efforts, control whether they have to ultimately serve the sentence. If, at the sentence imposition review date, through no fault of their own, they still have not made payments, the court can always give them more time before deciding to implement the sentence. This would be appropriate if the inmate's actual release from incarceration was delayed, or if it could be proven to the court's satisfaction that the non-custodial parent made good faith efforts to secure employment but could not.

Some would argue that the incarcerated delinquent non-custodial parent should be given the benefit of the doubt, that after release from prison, if the parent does not honor the obligation, then the court should enforce the child support order. Such a policy, however, would be essentially allowing a delinquent non-custodial parent to promise to pay based on

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<sup>106</sup> See LEGIS. COUNCIL STAFF, SENTENCE LENGTH AND AVERAGE LENGTH OF STAY OF PRISON INMATE 55 (Jan. 2001), available at [http://www.state.co.us/gov\\_dir/leg\\_dir/lcsstaff/2001/comsched/CriminalReport/01CRIMChapt5.pdf](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2001/comsched/CriminalReport/01CRIMChapt5.pdf); FLA. DEP'T OF CORRECTIONS, 2000-2001 ANNUAL REPORT, available at [http://www.dc.state.fl.us/pub/annual/0001/stats/ia\\_sentence\\_length.html](http://www.dc.state.fl.us/pub/annual/0001/stats/ia_sentence_length.html) (last visited Nov. 5, 2002).

<sup>107</sup> U.S. Dep't of Justice, *Prison Sentences and Time Served for Violence*, available at <http://www.ojp.usdoj.gov/bjs/abstract/psatsfv.htm> (last modified Aug. 12, 1998).

the “honor code.” Considering that the typical delinquent non-custodial parent has not complied with the child support order during the period of incarceration, and in many cases even before incarceration, the non-custodial parent should not be given the benefit of the doubt. The non-custodial parent should be the one to bear the responsibility of proving to courts that he or she will comply with the child support order after being released from prison. Otherwise, the custodial parent and the child would be forced to bear the burden of pursuing the delinquent non-custodial parent even though the custodial parent and the child have done nothing wrong.

Others might agree to use delayed imposition sentences in cases where no child support was paid prior to incarceration, because the incarceration does not excuse the pre-incarceration failure to pay. But they would not hold the inmate accountable for failing to pay after the government has “forced” him or her into prison. This position also shifts the responsibility from the incarcerated non-custodial parent to the custodial parent and child, allowing those who have committed crimes to escape a responsibility that they would have to meet if they had not been incarcerated. Incarceration does not absolve the delinquent non-custodial parent of any other financial obligation. Collection measures can be taken despite one’s incarceration, such as the repossession of property for lack of payments. Incarceration, then, should not absolve the non-custodial parent of his or her child support obligations. Without the use of a delayed imposition sentence, the custodial parent and the child would have no collection recourse other than to wait and see if they are ever paid.<sup>108</sup>

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<sup>108</sup> *Charette v. Charette*, 1997 Conn. Super. LEXIS 1168, \*19 (Conn. Super. Ct. 1997).

### **Conclusion**

While it is true that many non-custodial parents will be unable to pay their child support while incarcerated, their own voluntary misconduct should not shield them from their obligation to their children. A delayed imposition sentence will hold incarcerated non-custodial parents accountable for their child support obligations. The delayed imposition sentence would be adjudicated while the non-custodial parent is incarcerated but not imposed until the parent's release, and only in the event the child support obligation is not met. Such a sentence would not impede the incarcerated non-custodial parent's rehabilitation and successful reintegration into a productive society. On the contrary, a delayed imposition sentence would be an additional incentive for the parent to succeed. Holding incarcerated delinquent non-custodial parents accountable with a delayed imposition sentence would treat them no better, and no worse, than non-incarcerated delinquent non-custodial parents.<sup>109</sup> Perhaps more importantly, however, it would keep the non-custodial parent responsible for paying child support, rather than making the custodial parent and child responsible for pursuing the much needed support.

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<sup>109</sup> *Marshall v. Marshall*, 15 S.W.3d 396, 402 (Ky. Ct. App. 2000); *Halliwell v. Halliwell*, 326 N.J. Super. 442, 458 (N.J. Super. Ct. App. Div. 1999) (“[C]ourts do not permit parents to evade their duty to support their children by quitting their jobs or by taking lower-paying jobs, regardless of any good or bad faith in doing so. . . . Incarcerated parents should be treated no differently.”).

