

5-2019

The Child Support Debt Bubble

Tonya L. Brito

Follow this and additional works at: <https://scholarship.law.uci.edu/ucilr>

 Part of the [Family Law Commons](#)

Recommended Citation

Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953 (2019).

Available at: <https://scholarship.law.uci.edu/ucilr/vol9/iss4/5>

This Article is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Law Review by an authorized editor of UCI Law Scholarly Commons.

The Child Support Debt Bubble

Tonya L. Brito*

This Article examines the widespread phenomenon of exorbitant child support debt owed by noncustodial fathers in no- and low-income and predominately Black families. Drawing from qualitative data—including a court-based ethnography and in-depth interviews with lawyers, litigants, and judges—this Article explores the inflated and arbitrary nature of the debt, detailing how states utilize family law rules, child support system practices, and court processes to construct burdensome child support arrears that many poor noncustodial fathers will never have the means to pay off. It concludes by arguing that inflated child support arrears should be questioned and challenged.

Introduction	954
I. A Snapshot of Child Support Enforcement in Poor Families.....	956
II. Mechanisms of Child Support Debt Inflation.....	969
A. Jeanetta Henderson v. Franklin Davis Child Support Hearing.....	970
1. Case Background	970
2. The Motion Hearing.....	971
B. Legal Treatment of Child Support Obligations During Incarceration	973

* Jefferson Burrus-Bascom Professor of Law, University of Wisconsin Law School. The author thanks participants in the UC Irvine School of Law CLEAR Symposium on Debt, Race & Inequality for their helpful comments on the ideas presented in this article; Gwyn Leachman, David Schwartz, and Mitra Sharafi for their helpful comments on an earlier draft of this Article; Galo Falchetorre for help creating the charts used in this Article; Emily Frank, Gina Longo, and Chad Zachman-Brockmeyer for their assistance with case files and citations; and Jennifer Hanrahan for her exemplary administrative assistance. This study is supported by two research awards provided by the National Science Foundation (NSF) under Grant No. SES-1323064 and Grant No. SES-1421098. This study would not have been possible without the support of NSF and other funders, including the University of Wisconsin Law School, the Institute for Research on Poverty, the Russell Sage Foundation Visiting Scholars Program, the Sheldon B. Lubar Research Chair, the University of Wisconsin-Madison Graduate School, the University of Wisconsin-Milwaukee Spaights Endowment, and the University of Wisconsin-Milwaukee Fromkin Award. I also acknowledge with appreciation the assistance of the officials of the courts where this research was conducted. Finally, I am especially grateful to the many participants in this study who have been willing to share their experiences and perspectives on access to justice for low-income litigants in child support enforcement proceedings.

C. Parents in Prison: What Does the Data Tell Us?	974
D. Incarcerated Parents' Arrears Growth While Doing Time	976
E. States' Assessment of Interest on Child Support Debt.....	978
Conclusion.....	982

INTRODUCTION

Child support debt is a significant yet underexamined problem in the United States. The magnitude of the debt is staggering, on a national, individual, and family level, particularly for those who are no- and low-income. Since 1975, total child support arrears in the United States have accumulated to more than \$117 billion.¹ This figure represents a 263% increase over the past thirty years.² The debt is likely to continue to grow exponentially, year after year, because the parents who owe the most child support debt are also the least able to pay.³ Approximately a quarter of the noncustodial parents in the child support system are referred to as “deadbroke dads” and “unable nonpayers,” meaning they have a limited ability to pay the support they owe.⁴ The issue is that they owe a disproportionate amount of the national child support debt.⁵ In their oft-cited, government-commissioned study examining child support arrears in nine large states, Urban Institute researchers, Sorensen, Sousa, and Schaner, found that noncustodial parents who had no reported income or annual incomes of less than \$10,000 owed 70% of the accumulated debt.⁶

Child support debt is a pervasive phenomenon in the United States, and it must be questioned and challenged because of its inherent unfairness and inequity. The poorest parents have disproportionately high (relative to income) monthly child support obligations.⁷ As compared to other parents, the poorest parents owe more in arrears on an individual basis⁸ and owe a disproportionately larger share of the national child support debt.⁹ For the poorest parents, the debt is insurmountable and unsustainable.

1. OFFICE OF CHILD SUPPORT ENF^T, U.S. DEP^T OF HEALTH AND HUMAN SERVS., PRELIMINARY REPORT FY 2017, at 90 tbl.P-85, https://www.acf.hhs.gov/sites/default/files/programs/css/fy_2017_preliminary_data_report.pdf?nocache=1529610354 [<https://perma.cc/K2ZR-L9M8>] (last visited Mar. 29, 2019).

2. National child support debt stood at \$117,356 billion in 2017, *see id.*, as compared to \$44,619 billion in 1997. *See id.*

3. *See infra.*

4. *See infra.*

5. *See infra.*

6. *See* ELAINE SORENSEN ET AL., THE URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 22 (2007), <https://www.urban.org/sites/default/files/publication/29736/1001242-Assessing-Child-Support-Arrears-in-Nine-Large-States-and-the-Nation.PDF> [<https://perma.cc/9S8U-H7FH>].

7. *See infra.*

8. *See infra.*

9. *See infra.*

This Article investigates the longstanding and widespread phenomenon of exorbitant child support debt owed by noncustodial fathers to custodial mothers in low-income and predominately Black families. It argues that child support debt is problematic for poor families not only because it is a crushing economic burden but also because it is a “financial bubble.” I use this term to characterize child support debt because for many families, particularly families living in deep poverty, this debt is artificially inflated, largely uncollectible, and potentially destructive. The child support system constructs the debt partly through laws based on policymakers’ “magical thinking”¹⁰ about what impoverished fathers should earn in the labor market. It is also manufactured by a series of institutional practices—layered one on top of the other—that cause low-wage noncustodial parents to rapidly accrue ever-mounting arrears. The system generates fantastical debts, sometimes in the tens of thousands of dollars. As in other contexts where debts are unduly burdensome and seem exploitative—such as payday loan and rent-to-own contracts, subprime mortgages, for-profit college student loans, and debts generated through municipal fee and fine schemes—excessive child support debts imposed on poor parents should be challenged and interrogated in both the legal system and in the broader sociopolitical arena.

This Article draws from a qualitative empirical study I conducted that examines cases where the state is pursuing child support from low- and no-income noncustodial fathers, many of whom lack the financial resources to pay the support they owe and are unrepresented in court proceedings. The study includes an extensive court-based ethnography and in-depth interviews of over 145 lawyers, litigants, and judges who are all involved in child support proceedings. My research team conducted a qualitative study of IV-D child support enforcement cases at six county courthouses in two Midwestern states, which are referred to in this Article as State A and State B.¹¹ The IV-D program, which is authorized under Title IV-D of the Social Security Act, provides child support services to families in the United States through a partnership between the federal government and state, local, and tribal governments.¹² As part of this partnership, the federal government provides funding to state and tribal child support agencies, and the federal Office of Child Support Enforcement (OCSE) provides oversight and guidance.¹³

The actors involved in the child support cases we studied include child support attorneys, judges (and, in State A, family court commissioners), custodial parents, noncustodial parents, and, to a much lesser extent, defense attorneys. Child support

10. *See infra*.

11. The findings are drawn from a more extensive qualitative study that investigates how attorney representation and other, more limited forms of legal assistance affect civil court proceedings for low-income litigants. The study examines child support enforcement hearings in State A and State B to understand how right to counsel and more limited forms of legal assistance impact civil contempt proceedings for low-income litigants.

12. Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a) (88 Stat. 2337) 2351–58 (codified as amended at 42 U.S.C. §§ 651–60 (2006)).

13. *Id.*

attorneys are government lawyers who represent the interests of the state's child support agency. Judges preside over legal proceedings and render decisions in child support cases; however, in State A enforcement actions are initially heard by family court commissioners. The custodial parents owed support are the petitioners and the noncustodial parents owing support are the obligors (i.e., defendants) in these cases. In the counties we studied, the defendants were most often low-income Black fathers who lacked counsel. Though defense counsel were rarely present in the observed hearings, they were sometimes appointed or hired to represent defendants in enforcement actions.

Section II of this Article provides a brief overview of child support law and policy with a focus on the experience of needy families within the child support system and analyzes the numerous state practices that construct and inflate arrears. These debts burden poor families, particularly low-income Black families in which the parents never married. Section III shows how state-constructed child support debt (premised on inflated, imputed earnings) places fathers under an economic burden that is almost impossible to discharge and, as long as it persists, subjects them to an endless loop of repeated enforcement actions and near-continuous government supervision. The debt entangles poor families in protracted and increasingly punitive court proceedings, which several fathers in the study described as demeaning. In Section IV, the Article closely examines two mechanisms that have enormous significance for child support debt accumulation: (1) states' approaches to incarcerated parents, specifically whether states are willing to suspend child support obligations when noncustodial parents are doing time; and (2) states' routine assessments of interest on past due support. Both practices have the potential to artificially inflate arrears rapidly and exponentially. Lastly, Section V utilizes an ethnographic account of the *Jeanetta Henderson v. Franklin Davis* hearing to illustrate how these mechanisms operate in practice and to demonstrate how arrears can quickly escalate to alarming levels. The Article concludes with a series of simulations showing that, even when making timely monthly payments, many child support debtors will never be able to pay off their arrears. Remarkably, their arrears will instead continue to mount, seemingly forever trapping them in a prison of debt. It further argues that the phenomenon of poor fathers owing exorbitant child support debt also reinscribes political narratives about so-called "deadbeat dads" and, in so doing, keeps societal attention focused on their alleged failure to support their children rather than on addressing the fact that our social welfare system fails to meet the needs of poor children and their families.

I. A SNAPSHOT OF CHILD SUPPORT ENFORCEMENT IN POOR FAMILIES

This Section examines the experience of needy families within the child support system and illuminates the mechanisms that contribute to unwarranted debt accumulation when the state pursues support from no- and low-income fathers. The system's practice of aggressively enforcing support laws against "unable

nonpayers” has come under sharp criticism.¹⁴ In the final weeks of the Obama administration, the federal government enacted extensive regulations designed to address some of this criticism.¹⁵

To fully grasp the child support debt crisis, some understanding of fundamental child support law is needed. Thus, this Section begins with an overview of child support law, focusing primarily on how orders are established and enforced, and concludes with an analysis of the rules and practices that lead to family court

14. See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006); Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J.L. & PUB. POL’Y 95 (2008); Gabriela Sandoval, *The Costs of Child Support*, 24 POVERTY & RACE RES. ACTION COUNCIL 2 (2015); Noah D. Zatz, *A New Peonage? Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 929 (2016); Dwyer Gunn, *Not Just a Deadbeat Dad*, PAC. STANDARD (July 12, 2016), <https://psmag.com/news/not-just-a-deadbeat-dad> [<https://perma.cc/FX4X-ECH5>]; Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, WASH. POST (Oct. 18, 2015), https://www.washingtonpost.com/politics/formen-in-prison-child-support-becomes-a-crushing-debt/2015/10/18/e751a324-5bb7-11e5-b38e-06883aacba64_story.html?noredirect=on&utm_term=.b0e4dfc34b42 [<https://perma.cc/7T7P-H2TL>]; Raheem F. Hosseini, *Government Interest Rates Make It Less Likely for Sacramento’s Low-Income Parents to Pay Child Support*, SACRAMENTO NEWS & REV. (May 1, 2014), <https://www.newsreview.com/sacramento/government-interest-rates-make-it/content?oid=13342074> [<https://perma.cc/JAL3-HJCA>]; Jennifer Ludden, *From Deadbeat to Dead Broke: The “Why” Behind Unpaid Child Support*, NPR (Nov. 19, 2015), <https://www.npr.org/2015/11/19/456352554/from-deadbeat-to-dead-broke-the-why-behind-unpaid-child-support> [<https://perma.cc/ZGE3-78NU>]; J. Emory Parker, *Cost Is High to Jail Parents for Missed Child Support*, POST AND COURIER (Apr. 24, 2015), https://www.postandcourier.com/archives/cost-is-high-to-jail-parents-for-missed-child-support/article_8814a61c-2a35-58bd-92f8-f6f526feaa05.html [<https://perma.cc/P3N8-WJLH>]; Frances Robles & Shaila Dewan, *Skip Child Support. to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html> [<https://perma.cc/YZ3P-UJQU>]; Carmen Solomon-Fears, Alison M. Smith & Carla Berry, *Child Support Enforcement: Incarceration As the Last Resort Penalty for Nonpayment of Support*, CONG. RES. SERV. (2012), <https://www.ncsea.org/documents/CRS-Report-on-CSE-and-Incarceration-for-Non-Payment-March-6-2012.pdf> [<https://perma.cc/7ZC8-DZ9X>]; Elizabeth Stuart, *How Anti-Poverty Programs Marginalize Fathers*, THE ATLANTIC (Feb. 25, 2014), <https://www.theatlantic.com/politics/archive/2014/02/how-anti-poverty-programs-marginalize-fathers/283984/> [<https://perma.cc/X62N-EQ9X>]; Jonathan Walters, *Is Jailing Deadbeat Dads Effective?*, GOVERNING MAG. (July 16, 2013), <https://www.governing.com/topics/health-human-services/col-jailing-deadbeat-dads-effective-child-support-payments.html> [<https://perma.cc/BF5Z-ZZZ6>]; see generally Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL’Y 2, 19 (2011); Robert Crosnoe & Elizabeth Cozzolino, *Revamp Child Support Policies*, SAN ANTONIO EXPRESS NEWS (June 14, 2017), <https://www.mysanantonio.com/opinion/commentary/article/Revamp-child-support-policies-11220477.php> [<https://perma.cc/2TC9-ZHHN>].

15. See Hager, *supra* note 14; Tanasia Kenney, *Obama Plans to Reform Child Support Payment Rules for Incarcerated Parents*, MIAMI TIMES (Oct. 16, 2016), https://www.miamitimesonline.com/news/obama-plans-to-reform-child-support-payment-rules-for-incarcerated/article_3418134c-93bf-11e6-a8d6-43796a63e61d.html [<https://perma.cc/CFD5-9LDM>]; see also Ayesha Rascoe, *Obama Administration Revamps Child Support Rules for Prisoners*, REUTERS (Dec. 19, 2016), <https://www.reuters.com/article/usa-criminaljustice-childsupport/obama-administration-revamps-child-support-rules-for-prisoners-idUSL1N1EE1RQ> [<https://perma.cc/G5GD-CUCW>]; Robles & Dewan, *supra* note 14.

dockets being filled with large numbers of poor fathers who have substantial and uncollectible child support arrears.

Existing scholarship provides thorough overviews of how child support works in the United States.¹⁶ To put the analysis into proper context in this Article, a brief summary of that prior work is presented here. All parents are under a legal duty to support their children, whether or not their children reside with them.¹⁷ This mandate is generally unquestioned in American society. The assumption that economic fatherhood follows biological fatherhood is taken as the only possible outcome. Through reforms of the welfare system, the United States has increasingly shifted financial responsibility for poor children from the state to their low-income parents.¹⁸ In situations where the family is not intact—due to divorce, separation, or because the parents never married—it is typically the noncustodial (or lesser-time) parent who is under a legal duty to pay child support to the custodial (or greater-time) parent.¹⁹ The amount of the child support order is determined by application of the state’s child support guidelines, which are essentially mathematical formulas that take into account relevant factors, such as the number of children who are the subject of the child support order, the income of the noncustodial parent, and (in some jurisdictions) the income of the custodial parent.²⁰

Reforms of child support law at the federal level led to the development and mandatory use of state guidelines to calculate the amount of child support orders.²¹ The legislative goals behind these reforms included a desire to increase the predictability and uniformity of the amount of an order.²² Child support guidelines in the United States fall mostly within two types: the Percentage of Income Model

16. See Tonya L. Brito, David J. Pate Jr. & Jia-Hi Stefanie Wong, “I Do for My Kids”: Negotiating Race and Racial Inequality in Family Court, 83 FORDHAM L. REV. 6, 303–36 (2015); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1036–41 (2007); Milton C. Lee, *Fatherhood in the Child Support System: An Innovative Problem-Solving Approach to an Old Problem*, 50 FAM. CT. REV. 1, 60–61 (Jan. 2012); Maldonado, *supra* note 14, at 3–4; see also Patterson, *supra* note 14, at 98–101.

17. See June Carbone, *Child Support Comes of Age: An Introduction to the Law of Child Support*, in CHILD SUPPORT: THE NEXT FRONTIER 3, 9 (2000) (noting that the policy of pursuing child support in AFDC cases was not controversial because parents’ legal duty to support their children is “well established” and “axiomatic”); see, e.g., N.Y. FAM. CT. ACT § 413.

18. See Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20 GEO J. ON POVERTY L. AND POL’Y 1, 1–3 (2012).

19. *Id.*

20. See Family Support Act of 1988, Pub. L. No. 100-485 (102 Stat. 2343) (codified as amended in scattered sections of 42 U.S.C.); LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS § 1.03 (2d ed. 2010) (describing various child support models).

21. See Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a) (88 Stat. 2337) 2351–58 (codified as amended at 42 U.S.C. §§ 651–60 (2006)).

22. See *Stogner v. Stogner*, 739 So. 2d 762, 766–67 (La. 1999) (discussing what the guidelines are intended to do); see also *Westgate v. Westgate*, 887 P.2d 737, 738 (1994) (“The new [child] support guidelines intentionally depart from traditional practice in which courts exercised broad discretion in determining [] awards.”)

and the Income Shares Model.²³ State A and State B both used the Percentage of Income Model to calculate child support. In this model, the child support order is set at a percentage of the noncustodial parent's (gross or net) income, with the percentage amount varying according to the number of children at stake.²⁴ Some states permit upward and downward deviations from,²⁵ adjustments to,²⁶ and supplements to²⁷ the guideline calculation in certain situations.

Additional federal reforms in the 1980s and 1990s, which sought to dramatically strengthen enforcement, culminated in passage of major welfare reform legislation in 1996.²⁸ The underlying premise of welfare reform was that custodial mothers receiving cash assistance would be required to move from welfare to work, and their low wages would be supplemented with child support payments made by noncustodial fathers in order to lift them above the poverty line.²⁹ Welfare reform proponents and government policymakers failed to acknowledge and address the financial challenges faced by underemployed noncustodial fathers, large

23. See MORGAN, *supra* note 20, § 1.03, tbl.1–3. Both the percentage-of-income and income-shares formulas for calculating child support are based on a “continuity of expenditure” rationale, which establishes a child support amount that, if combined with the presumed amount spent on the child by the custodial parent, approximates what the parents would have spent on the child had they remained an intact family. *Id.* § 1.03(b)–(c).

24. *Id.* § 1.03(c)(1). The state of Texas, for example, uses a percentage-of-income formula where the noncustodial-parent's monthly net income is multiplied by 20% to calculate the monthly support amount for one child. TEX. FAM. CODE ANN. § 154.125 (West 2009). The percentage rate increases to 25% for two children, 30% for three children, 35% for four children, and 40% for five or more children. *Id.* Applying this formula, if the noncustodial parent's monthly net income is \$3,000, then the monthly child support order will be \$750 for one child, \$900 for two children, \$1,050 for three children, and so on. In most cases, the child support guideline calculation is the presumptive amount of child support and, in most cases, the order is set at that amount. See 42 U.S.C. § 667(b)(2) (2012) (“There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded.”).

25. Deviations from the presumptive guideline calculation are allowed when the guideline amount is deemed to be “unjust or inappropriate” in a particular case. Common grounds for deviation include situations where an obligor has additional child support obligations to children from previous or subsequent relationships or in cases where the parties have reached an agreement concerning the child support amount. See 45 C.F.R. § 302.56 (2010).

26. Some states have special rules or modified child support formulas that apply in cases of split custody, shared placement, high-income cases, low-income cases, and prior and subsequent children. *Id.* Under the common law, courts have jurisdiction to modify child support awards when there is a material change in circumstances, including reduced earnings. See MORGAN, *supra* note 20, § 5.01. Some states have codified this standard in their child support guidelines. See, e.g., N.Y. DOM. REL. LAW § 240(1-b) (McKinney 1998); OKLA. STAT. ANN. tit. 43, § 118I(A)(1) (West 2018) (“Child support orders may be modified upon a material change in circumstances which includes . . . an increase or decrease in the income of the parents . . .”).

27. When determining the child support amount, child care expenses and extraordinary medical or educational costs are often treated as permissible supplements to the basic guideline calculation. See Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION (M. Haynes ed., U.S. Dep't of Health & Human Servs. 1994).

28. See Tonya Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 626–30 (2012).

29. See Brustin, *supra* note 18.

numbers of whom were unlikely to earn enough to meet a self-sufficient standard of living even before making any child support payments.³⁰ The political rhetoric from that period of time demonized fathers who did not pay support and largely ignored arguments made in favor of alternative policy measures, such as increased public support for poor families.³¹

Though the child support system has many tools at its disposal for enforcing compliance with child support orders, the most common and effective mechanism is income withholding, or wage garnishment.³² This is a process by which child support payments are deducted from the wages of the parent who is under a support order.³³ Because the procedure is automated and set up through the noncustodial parent's employer, child support payments continue to be made on a regular basis and do not depend on the noncustodial parent's willingness to pay.³⁴ Other enforcement techniques include garnishing federal or state benefits (e.g., unemployment compensation, Social Security, etc.); suspending or revoking licenses (drivers, professional, or occupational); intercepting federal or state tax returns; placing liens on property; and denying or revoking passports.³⁵

The OCSE studied who owed child support debt, and the 2017 findings are revealing. "As of April 2017, 5.5 million delinquent noncustodial parents, or debtors, owed over \$114 billion in past-due child support. Approximately twenty percent of the total arrears are owed to the government."³⁶ This occurred because "when families apply for Temporary Assistance for Needy Families (TANF) cash assistance, they are required to sign over to the state their right to child support. Any child support owed while the family receives TANF cash assistance is owed to the government."³⁷ For the most part, the child support debt is not owed by noncustodial parents who "won't pay"; instead, it is owed by parents who "can't pay." As a result of the legislative reforms that strengthened and automated child support enforcement, noncustodial parents who have the money to pay support, in

30. *Id.*

31. Brito, *supra* note 28.

32. In fiscal year 2015, child support agencies in the United States collected \$32 billion in support, 75% of which was collected through garnishment of the noncustodial parents' wages. See OFFICE OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ANNUAL REPORT TO CONGRESS FY 2015, at 6 (2017), https://www.acf.hhs.gov/sites/default/files/programs/css/fy2015_part_01.pdf [<https://perma.cc/83D2-FYXN>].

33. Solomon-Fears, Smith & Berry, *supra* note 14, at 3.

34. *Id.*

35. *Id.* at 2–3.

36. DENNIS PUTZE, OFFICE OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH AND HUMAN SERVS., WHO OWES THE CHILD SUPPORT DEBT? (Sept. 15, 2017), <https://www.acf.hhs.gov/css/ocsedatablog/2017/09/who-owes-the-child-support-debt> [<https://perma.cc/8DF5-Y55T>].

37. OFFICE OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH AND HUMAN SERVS., MAJOR CHANGE IN WHO IS OWED CHILD SUPPORT ARREARS 1 (March 2014) ("Federal policy regarding assignment and distribution of child support has changed over time, favoring less assignment to the government and more distribution to families who receive or used to receive TANF cash assistance.").

fact, do so. “That problem has been solved,” according to Vicki Turetsky, a former commissioner of the OCSE.³⁸

The findings from this study confirm Commissioner Turetsky’s assertion. When asked, judges and lawyers in this study stated that they rarely saw cases where the noncustodial parent easily qualified as “deadbeat dads”; that is, fathers with regular employment and ample resources who stubbornly refused to support their children and purposefully evaded their economic responsibilities. Likewise, a miniscule number of the hearings observed as part of the ethnography involved fathers who clearly had the means to pay the support they owed. When an obviously shirking father appeared in court, his case glaringly stood out from the rest. Judge Ronald O’Neil, in the following transcript excerpt, dressed down an affluent self-employed father who resisted paying child support, comparing his ability to pay support to the economic situation of the poor noncustodial parents he usually presided over in court.³⁹

JUDGE O’NEIL: We’re getting late in the day and I’m going to have to make a temporary ruling here. I just want to tell you about some of the things that I think about when I’m sitting in this job. Sir, I’ve been sitting in this courtroom for a year and a half. I’ve yet to have anyone come in front of me with anywhere near your assets or your ability to pay. Many times the fathers that come in front of me do not own a motor vehicle. They certainly don’t own a house. They own no other toys. Most of them are just barely getting by. That is the common thread in this courtroom, is the economy is very crushing and oppressive to a large segment of our population here today in this country, and it’s hard on poor people.

As opposed to their situation, you’ve done dramatically well. You’ve got—you’ve got a lot of nice toys. I’ll start with what you’ve got. You’ve got a house in Ames County that you think is probably worth 200K, 200,000 for the record. You’re living pretty much for \$180 a month in Tempe, Arizona, in what sounds like a pretty nice place to live: gated community, nice golf course nearby. You’ve got this trike which is basically a powered hang glider, a nice-looking little airplane. You’ve got a motorcycle that’s a dated Suzuki, but it’s a motorcycle. You’ve got a Jaguar. It’s not brand new but it’s a Jaguar. You’ve got a credit card with 219,000 Skymiles on it. I don’t know what that’s worth. I’m not going to factor much into that, but I’m just going to say a lot of people come in front of me don’t even have a credit card because they can’t get a credit card because they don’t have credit. You’ve got 6.17763 acres in the Philippines, oceanfront. You are geometrically, astronomically, better poised to pay child support than anyone who’s ever come before me in the last year and a half. That doesn’t

38. See Ludden, *supra* note 14.

39. All participant and location names are pseudonyms.

necessarily make you a target, but what it tells me is that you have the capability and the ability.⁴⁰

For needy families, however, the child support system just does not work effectively. The painful reality is that most impoverished custodial parents need financial support the most, yet they are the least likely to receive it. This means that the child support collection rate is low in cases involving indigent families. The U.S. Census reports that in 2015, 26.7% of the custodial parents who were supposed to get child support lived below the poverty threshold.⁴¹ Of these parents, 39.2% received their full child support payment from the noncustodial parent, 28.1% received partial payments, and 32.6% received no payments at all.⁴² Given that the income of these families falls below the poverty line, it is not surprising that child support payments represent a significant portion of their overall family income.⁴³ For example, for the poor custodial parents who received full payments, the child support was 58% of their overall family income.⁴⁴

Because poor women tend to partner with equally poor men,⁴⁵ it is not surprising that there are low rates of child support collections. Indeed, 60% of poor custodial parents do not even have a child support order in place.⁴⁶ Two primary reasons were reported when parents were asked why they forego seeking a formal child support order: 39% state the noncustodial parent does not have the money to pay an order and 38% state that the noncustodial parent provides support informally to the extent that they are able.⁴⁷

Numerous studies confirm that most fathers who do not pay child support are “unable nonpayers” because they are poor and have great difficulty finding and

40. Transcript of Hearing on All Remaining Issues at 60–61, *Simpson v. Hardy* (Cir. Ct. 2nd Div. State B 2014) (No. 13-F-2901).

41. TIMOTHY GRALL, U.S. CENSUS BUREAU, *CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015* (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/P60-262.pdf> [<https://perma.cc/6DUX-E5C2>].

42. *Id.* at 12.

43. “For all custodial parents who received child support in 2011, the average amount received was \$5,088 and their average yearly income was \$31,517. For custodial parents with incomes below poverty, the average amount of child support received was \$4,503 and their average total yearly income was \$8,676. Thus, average child support represented 52 percent of the average income for custodial parents below poverty who received child support, compared with 16 percent for all custodial parents.” OFFICE OF CHILD SUPPORT ENF’T, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *CUSTODIAL PARENTS LIVING IN POVERTY 2* (2014), https://www.acf.hhs.gov/sites/default/files/programs/css/sbtn_custodial_parents_living_in_poverty.pdf [<https://perma.cc/V9G5-FZYK>].

44. GRALL, *supra* note 37, at 13.

45. Irwin Garfinkel, Dana Gleib & Sara S. McLanahan, *Assortative Mating Among Unmarried Parents: Implications for Ability to Pay Child Support*, 15 J. OF POP. ECON. 3, 417–32 (2002).

46. OFFICE OF CHILD SUPPORT ENF’T, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *WHY DON’T MORE POOR CUSTODIAL PARENTS HAVE A CHILD SUPPORT ORDER? 1* (2016), https://www.acf.hhs.gov/sites/default/files/programs/css/why_dont_more_poor_cps_have_a_cs_order_sbtn_6.pdf [<https://perma.cc/AT5F-U87H>].

47. *Id.* at 3.

retaining jobs that would enable them to be self-supporting and pay child support.⁴⁸ I cataloged these in a recent publication:

About twenty-six percent of noncustodial fathers (about 2.8 million) are poor, and the vast majority of this group (approximately eighty-eight percent) does not pay any child support. These fathers earn an average of \$5627 annually. One study found that only one-quarter of noncustodial fathers with incomes less than one-hundred-thirty percent of the poverty line worked full-time year round, and their average income was only \$6989 (just above the \$6800 poverty level for a single adult).

Another study found that sixty percent of poor fathers who do not pay child support are racial and ethnic minorities, and twenty-nine percent were institutionalized (mostly in prison) at the time of interview. Only forty-three percent of men not in prison were working, and those employed in 1996 worked an average of just twenty-nine weeks and earned \$5627 that year. Their barriers to employment were also considerable: forty-three percent were high-school dropouts, thirty-nine percent had health problems, and thirty-two percent had not worked in three years.⁴⁹

The amount of child support that courts order many no- and low-income fathers to pay often bears no relationship to their actual incomes.⁵⁰ The mismatch between court-ordered support amounts and low-income fathers' financial means results from several systemic institutional practices. These practices—piled one on top of the other—contribute to the construction and exacerbation of the child support debt problem.

One such practice is that a significant number of child support awards are established as default orders in court proceedings when noncustodial parents do not appear for the hearing.⁵¹ Another is that child support orders are frequently

48. See Brito, *supra* note 28, at 646–47.

49. *Id.*

50. OFFICE OF CHILD SUPPORT ENF^YT, U.S. DEPT. OF HEALTH & HUMAN SERVS., ESTABLISHING REALISTIC CHILD SUPPORT ORDERS: ENGAGING NONCUSTODIAL PARENTS, (2012), https://www.acf.hhs.gov/sites/default/files/ocse/establishing_realistic_child_support_orders.pdf [<https://perma.cc/69FD-DTNF>].

51. Brito, *supra* note 28, at 639–41; see also Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 244, 93530 (Dec. 20, 2016) (“the rate of default orders were increasing inappropriately”); REBECCA MAY & MARGUERITE ROULET, CTR. FOR FAMILY POLICY & PRACTICE, A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT: ENFORCEMENT, COURT AND PROGRAM PRACTICES 40 (2005), <https://www.cpr-mn.org/Documents/noncompliance.pdf> [<https://perma.cc/8C2Q-LKRT>] (“Default orders, in which the noncustodial parent or alleged father fails to appear in court and so paternity and a child support order are established in his absence, are at the root of many of the cases that result in child support debt and subsequent arrest for child support nonpayment.”). See generally Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 2 (2011); D. James Greiner & Andrea Matthews, The Problem of Default, Part I (2015) (draft based on incomplete data), https://q-aps.princeton.edu/sites/default/files/q-aps/files/problem_of_default_draft_20150408.pdf [<https://perma.cc/TLY5-ENQD>]; JON LEIBOWITZ, WILLIAM E. KOVACIC, J. THOMAS ROSCH, EDITH RAMIREZ & JULIE BRILL, FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT

calculated on an income level that is imputed—often on the presumption that the parent should and could obtain a stable, full-time, minimum-wage job rather than on the noncustodial parent’s actual earnings.⁵² Third, at the time an initial child support order is established, it is not uncommon for the noncustodial parent to already be deemed in debt for retroactive support dating back several years or to repay the state for additional costs (such as birth expenses) that were previously incurred by the state.⁵³ Fourth, noncustodial parents often have child support orders in place that exceed their current ability to pay because the order was not reduced following a reduction in their earnings due to job loss or other similar circumstances.⁵⁴ Finally, for noncustodial parents with multiple child support orders, their overall obligation can be staggering and economically unrealistic, especially in light of federal guidelines that permit total monthly child support obligations to be as high as 65% of an obligor’s pretax earnings.⁵⁵

Due to these systemic practices and already disadvantaged socioeconomic status, it is not surprising that low-income noncustodial fathers have a low rate of payment and develop significant arrears. No- and low-income parents are responsible for the greatest portion of unpaid child support, according to a 2008 OCSE study of arrears in nine large states. The OCSE found that a scant number of child support obligors (11%) owed the majority of the arrearages: more than \$30,000 each.⁵⁶ The OSCE also found that 70% of the arrears were owed by obligors who either had no reported income or who earned between \$1 and \$10,000.⁵⁷ By contrast, obligors with more than \$40,000 in annual income were responsible for only 4% of the debt.⁵⁸ The problem has worsened over time. According to a 2004 OCSE report, of the more than \$70 billion in child support debt owed in 2003, noncustodial parents who had no quarterly earnings or earned

COLLECTION LITIGATION AND ARBITRATION (2010), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<https://perma.cc/R698-HSH7>]; SUSAN SHIN & CLAUDIA WILNER, NEW ECONOMY PROJECT, THE DEBT COLLECTION RACKET IN NEW YORK: HOW THE INDUSTRY VIOLATES DUE PROCESS AND PERPETUATES ECONOMIC INEQUALITY 6 (2013), <https://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf> [<https://perma.cc/QSE5-WWHH>].

52. See Jacquelyn L. Boggess, *Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency Systems*, 55 FAM. CT. REV. 107, 111 (Jan. 2017); see also MAY & ROULET, *supra* note 51, at 40.

53. See, e.g., MICH. DEP’T OF HEALTH AND HUMAN SERVS., MICHIGAN IV-D CHILD SUPPORT MANUAL 6.06, at 4 (2017), <https://dhhs.michigan.gov/ChildSupport/policy/Documents/2.05.pdf> [<https://perma.cc/4HWY-8ZXS>]; see also KIM SWISSDORF, WISCONSIN LEGISLATIVE FISCAL BUREAU, CHILD SUPPORT ENFORCEMENT PROGRAM 15 (Jan. 2013).

54. See Brito, *supra* note 28, at 643; Patterson, *supra* note 14, at 114.

55. See Ludden, *supra* note 14.

56. OFFICE OF CHILD SUPPORT ENF’T, U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE STORY BEHIND THE NUMBERS: UNDERSTANDING AND MANAGING CHILD SUPPORT DEBT (2008), https://www.acf.hhs.gov/sites/default/files/ocse/im_08_05a.pdf [<https://perma.cc/E4QG-LMN2>].

57. *Id.*

58. *Id.*

less than \$10,000 annually owed 70% of all arrears.⁵⁹ Additionally, 29% of child support debtors earned between \$1 and \$10,000, and 34% had no reported earnings.⁶⁰ The problem is nationwide; child support caseloads in every state include impoverished noncustodial parents who have accumulated significant child support debt.⁶¹

The injustice and irrationality of child support enforcement are brought into sharp relief in proceedings brought by the state against these “deadbroke” noncustodial fathers, many of whom, as noted, have unrealistically high orders. It is these fathers who are summoned to court for their failure to pay support, not the fathers of higher socioeconomic status. Conventional enforcement tools, such as wage garnishment, liens, and asset seizure, work very efficiently with noncustodial parents who have regular earnings or assets. These methods, however, are practically useless for collecting child support from fathers without stable, consistent employment and financial assets. When payments are made by these no- or low-income fathers, they are typically partial payments on a sporadic basis.

Unable to reliably collect support using these traditional administrative methods, the state commences court enforcement proceedings, which are often cyclical in that obligors experience multiple enforcement hearings for the same unpaid child support debt. Meanwhile, their child support debt continues to accumulate, sometimes expanding into the tens of thousands of dollars. When the debt remains unpaid, the state resorts to civil incarceration or the threat of it.⁶² Federal law requires that civil contempt only be used when the noncustodial parent can pay but is willfully avoiding that obligation.⁶³ The goal of the civil contempt process is to coerce the defendant into making the payment. However, in the majority of IV-D contempt cases, the noncustodial parents’ circumstances involve unemployment and below poverty wages.

59. OFFICE OF CHILD SUPPORT ENF^T, U.S. DEP^T OF HEALTH AND HUMAN SERVS., THE STORY BEHIND THE NUMBERS: WHO OWES THE CHILD SUPPORT DEBT (2004), https://www.acf.hhs.gov/sites/default/files/ocse/im_04_04a.pdf [<https://perma.cc/W6DW-HVT6>].

60. *Id.*

61. OFFICE OF CHILD SUPPORT ENF^T, U.S. DEP^T OF HEALTH AND HUMAN SERVS., UNDERSTANDING CHILD SUPPORT DEBT: A GUIDE TO EXPLORING CHILD SUPPORT DEBT IN YOUR STATE (2004), https://www.acf.hhs.gov/sites/default/files/ocse/dcl_04_28a.pdf [<https://perma.cc/VL85-REVB>].

62. Incarceration (and the threat of incarceration) through a civil contempt proceeding is commonly used as a remedy to enforce child support orders against indigent noncustodial parents. Contempt is widely understood as conduct that intentionally disobeys a court order. A finding of civil contempt for nonpayment of child support requires that an obligor was under an order of support and was able to comply with the order, but failed to do so. Civil contempt is a remedial sanction that is intended to compel compliance with a court order. The underlying reasoning is that an individual who can comply with a court order will do so when facing imprisonment for their willful failure to do so. If the obligor is unable to pay their child support order, and thus did not willfully violate the order, civil contempt is not an appropriate response.

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

Academics, advocates, and policymakers who have studied the child support system have been critical of the practice of doggedly pursuing and locking up parents because of their poverty.⁶⁴ The practice of jailing poor fathers for their child support debt has also garnered national press coverage in a series of critical articles.⁶⁵ Incarcerating these fathers for child support nonpayment has been compared to debtors' prisons.⁶⁶ The practice is widely viewed as unfair and morally wrong, because the most economically vulnerable parents in the child support system are trapped in an endless cycle where the threat of jail hangs over them like the sword of Damocles.⁶⁷

Impoverished noncustodial parents have little or no ability to reliably and consistently pay their inflated child support order. Because of that, they will inevitably accumulate child support arrears. Their failure to pay and mounting arrears leads to a contempt of court ruling for "willful" nonpayment of their child support order and possibly incarceration.⁶⁸ Even if they are incarcerated and

64. See Brito, *supra* note 28; see also Cammett, *supra* note 14; Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 6 (2010); Hatcher, *supra* note 16; Maldonado, *supra* note 14; Zatz, *supra* note 14; JOY MOSES, A BLUEPRINT FOR ECONOMIC SECURITY, CENTER FOR FAMILY POLICY AND PRACTICE 10 (2017), <https://cffpp.org/wp-content/uploads/A-Blueprint-for-Economic-Security.pdf> [<https://perma.cc/2TPC-LFDC>].

65. See Jacquelyn Boggess, Kenneth Braswell, Colleen Eubanks & Kezia Willingham, *Collecting Child Support Without Making Matters Worse*, N.Y. TIMES (Apr. 23, 2015), <https://www.nytimes.com/roomfordebate/2015/04/23/collecting-child-support-without-making-matters-worse> [<https://perma.cc/5UYM-TJEZ>]; Tina Griego, *Locking Up Parents for Not Paying Child Support Can Be a Modern-Day Debtor's Prison*, WASH. POST (Sept. 26, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/09/26/locking-up-parents-for-not-paying-child-support-can-be-a-modern-day-debtors-prison/?noredirect=on> [<https://perma.cc/AUN4-BZ3K>]; Jeff Guo, *How Our Child Support System Can Push the Poor Deeper into Poverty*, WASH. POST (Sept. 26, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/09/26/the-unintended-consequence-of-child-support/?utm_term=.e80477a5d68c [<https://perma.cc/DS49-C7RC>]; Ludden, *supra* note 14; Parker, *supra* note 14; Robles & Dewan, *supra* note 14; Lauren Sausser, *Walter Scott Dogged by System That "Criminalizes" Debt*, POST AND COURIER (Apr. 9, 2015), https://www.postandcourier.com/news/walter-scott-dogged-by-system-that-criminalizes-debt/article_e211c5c9-c6ba-5ded-a92e-a2fc363d179c.html [<https://perma.cc/9499-X7LQ>].

66. See Patterson, *supra* note 14.

67. See Parker, *supra* note 14 ("Many of these men can't escape this in-and-out cycle of incarceration," said Lee Moultrie, a community activist.').

68. The majority of states use civil contempt to enforce child support orders. Although there is limited data available concerning how often it is used, there are estimates that 50,000 parents are currently civilly incarcerated for failure to pay child support. See Eli Hager, *Why Was Walter Scott Running?*, MARSHALL PROJECT (Apr. 10, 2015), <https://www.themarshallproject.org/2015/04/10/why-was-walter-scott-running> [<https://perma.cc/6N35-ANPM>]. There are a handful of studies that provide information about imprisonment at the state or regional level. For example, surveys of South Carolina determined that one in eight imprisoned individuals was there as a result of civil incarceration for nonpayment of child support. See Irin Carmon, *How Falling Behind on Child Support Can End in Jail*, MSNBC (Apr. 19, 2015), <https://www.msnbc.com/msnbc/how-falling-behind-child-support-can-end-jail#56748> [<https://perma.cc/Z7WE-3M6U>]. Similarly, there is no systematic tracking of the costs associated with civil incarceration for nonpayment of support. See NAT'L CONFERENCE OF STATE LEGISLATURES, CHILD SUPPORT AND

eventually released, the child support debt does not go away but continues to mount, leaving fathers with a constant fear of incarceration because they face a seemingly endless cycle of civil contempt proceedings.⁶⁹

One tragic incident that drew national attention to this phenomenon and the fear it instills in poor noncustodial fathers was the fatal shooting of Walter Scott by police in 2015 in South Carolina.⁷⁰ Scott was a Black father of four with over \$18,000 in child support debt that he struggled to pay.⁷¹ Following a traffic stop, he ran from the police and was shot in the back as he fled.⁷² On three previous occasions, Scott was jailed for falling behind on his child support payments.⁷³ His family members were convinced it was fear of another child support jailing that led Scott to run from the police.⁷⁴ Scott was not alone in his fear; studies confirm that many noncustodial fathers who lack the means to pay child support fear incarceration and other penalties.⁷⁵

The OCSE during the Obama administration acknowledged that there are problems with how the child support system operates in cases involving fathers who lacked the means to pay.⁷⁶ Turetsky, then commissioner of OCSE, pointed out in an interview: “They don’t earn enough, and they’re accruing mountains of debt in back child support.”⁷⁷ She was critical of states’ practice of imputing earnings, identifying it as a significant contributing factor. “One problem, she [said], is that when there’s no evidence of income, many jurisdictions ‘impute’ it, often basing payments on a full-time minimum wage job.”⁷⁸ Turetsky referred to this approach as “magical thinking” and further stated: “You could call it the income we think you should have. But the bottom line is that it is income that does not exist.”⁷⁹

Under the leadership of Turetsky, there were numerous OCSE efforts to influence state child support practices that negatively impacted very poor noncustodial parents, particularly routinely imputing income, ability to pay determinations, and civilly incarcerating child support debtors. In short, the OCSE

INCARCERATION (2018), <https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx> [<https://perma.cc/DPL4-ABQ9>].

69. Additionally, for the most impoverished parents, child support orders based on imputed income, a presumed amount that has little basis in fact, does not result in financial support for children.

70. See Hager, *supra* note 68; see also Parker, *supra* note 14; Sausser, *supra* note 65.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. A federal study of low-income fathers’ views and experiences with the child support system found that about 33% of fathers with lower orders (i.e., below the national median of \$364 per month) reported that they were often fearful of potential penalties for not meeting their child support obligations. See Elizabeth Clary, Pamela Holcomb, Robin Dion & Kathryn Edin, *Providing Financial Support for Children: Views and Experiences of Low-Income Fathers in the PACT Evaluation*, OPRE REP. 2017-14, at 7-8 (Feb. 2017); Hager, *supra* note 14.

76. See Ludden, *supra* note 14.

77. *Id.*

78. *Id.*

79. *Id.*

sought to prevent the accrual of burdensome and uncollectible arrearages and avert unwarranted incarceration by persuading states to “right size” child support orders so that child support orders reflected a parent’s actual earnings rather than an inflated, presumptive earning capacity. Federal efforts included explaining the recommended shift in policy at trainings, workshops, and professional conferences for state child support directors and personnel.⁸⁰ Additionally, it issued policy guidance in the form of Action Transmittals⁸¹ and Dear Colleague letters⁸² to state agencies. These federal efforts were not successful in persuading states to make the suggested changes. Instead, state child support agencies persisted in their same practices.⁸³ This included bringing civil contempt actions with potential for imprisonment in cases where poor noncustodial parents lacked sufficient resources to pay their orders.⁸⁴ To justify continuing these practices, states often invoke the “best interests” of financially needy single parents and their children, along with the strong moral judgment that fathers are responsible for the children they bring into the world.

Federal reform efforts continued and, following an unsuccessful legislative effort,⁸⁵ ultimately culminated in the enactment of new child support regulations.⁸⁶ The Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs final rule was issued on December 20, 2016, exactly one month before

80. For example, Turetsky presented a keynote address at the National Child Support Enforcement Association 2011 Annual Conference & Expo. *See* NAT’L CHILD SUPPORT ENF’T ASS’N, 2011 ANNUAL CONFERENCE & EXPO, <https://www.ncea.org/wp-content/uploads/2012/02/2011-AC-Detailed-Schedule-Final.pdf> [<https://perma.cc/L7VX-GVXR>].

81. *See* Alternatives to Incarceration Information Memorandum from the Office of Child Support Enf’t to State Agencies Administering Child Support Enforcement 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/A7T4-HCMX>] (notifying state agencies of Department of Justice letter related to incarceration for nonpayment when ability to pay is at issue and directing that courts may not incarcerate a person for nonpayment of fees and fines without first conducting an indigency determination and establishing that the failure to pay was willful); *Turner v. Rogers* Guidance Action Transmittal from the Office of Child Support Enf’t to State Agencies Administering Child Support Enforcement Plans under Title IV-D of the Social Security Act and Other Interested Parties (June 18, 2012), <https://www.acf.hhs.gov/css/resource/turner-v-rogers-guidance> [<https://perma.cc/WL29-NFTY>] (providing clarity to courts regarding their legal duty to inquire about a parent’s ability to pay prior to incarceration for nonpayment).

82. *See* Justice Department Announces Resources to Reform Practices Letter from Office of Child Support Enf’t to All State and Tribal IV-D Directors (Mar. 21, 2016), <https://www.acf.hhs.gov/css/resource/justice-department-announces-resources-to-reform-practices> [<https://perma.cc/5AY3-ZDVG>].

83. *See* Boggess, *supra* note 52.

84. *Id.*

85. *Id.*

86. *See* Final Rule: Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs Action Transmittal from Office of Child Support Enf’t to State Agencies Administering Child Support Enforcement Plans under Title IV-D of the Social Security Act and Other Interested Parties (Dec. 20, 2016), <https://www.acf.hhs.gov/css/resource/final-rule-flexibility-efficiency-and-modernization-in-child-support-enforcement-programs> [<https://perma.cc/V2NC-7ZFG>].

President Obama's term in office concluded.⁸⁷ The new rule addressed ability to pay,⁸⁸ imputation of income,⁸⁹ and civil contempt⁹⁰ (including criteria to consider when evaluating ability to pay⁹¹ and setting realistic orders⁹²). The new rules have not yet been fully implemented at the state level, and that process will be ongoing for several years.⁹³ The new rules primarily set forth preferred standards and criteria to guide state decision making, not firm directives. Thus, states retain nearly all of their existing discretion to decide how to handle cases involving unemployed and underemployed noncustodial parents who are behind in their child support payments. There is considerable doubt that the new rules go far enough to solve the problem of impoverished noncustodial fathers being threatened, punished, and incarcerated by the state on the ground that they are able to pay support but willfully refuse to do so.⁹⁴ The federal government acknowledged these harsh and troubling practices and, following several years of unsuccessful efforts at reform, enacted regulations aimed at ameliorating the problem.

II. MECHANISMS OF CHILD SUPPORT DEBT INFLATION

In this Section, my analysis examines how the treatment of incarcerated noncustodial parents who owe support and the states' routine assessment of interest on past-due support artificially inflates the debt owed. Of the child support measures adopted over time, these two particular institutional policies and practices have contributed to the rise of child support arrears. To illustrate these phenomenon, I analyze a child support hearing involving an incarcerated father that

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Further, they were enacted just weeks before a new federal administration of the opposing political party took office. The current political landscape suggests that their future impact is made even more uncertain due to political rivalries. Many news commentators have observed that the current administration consistently has either reversed or sought to undermine the laws and regulations enacted during Obama's presidency. See Perry Bacon Jr., *Is Trump Delivering On His Promises To Reverse Obama's Policies?*, FIFETHIRTYEIGHT (Jan. 31, 2018), <https://fivethirtyeight.com/features/is-trump-delivering-on-his-promises-to-reverse-obamas-policies/> [<https://perma.cc/X7QD-GWS8>]; Russell Berman, *Barack Obama's Seven-Year Presidency*, ATLANTIC (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/barack-obamas-seven-year-presidency/521928/> [<https://perma.cc/B56A-E8TL>]; Philip Bump, *What Trump Has Undone*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/politics/wp/2017/08/24/what-trump-has-undone/?utm_term=.5085add29fd3 [<https://perma.cc/AZQ3-A6SQ>]; Juliet Eilperin & Darla Cameron, *How Trump Is Rolling Back Obama's Legacy*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.b37179715e84 [<https://perma.cc/ZA9S-S74N>].

94. The practice of incarcerating poor noncustodial parents in circumstances where they do not have the money to pay their child support order amounts to what Professor Kaaryn Gustafson refers to as the criminalization of poverty, a wider societal phenomenon affecting poor people who experience homelessness, credit difficulties, and charges of welfare fraud, among others. See generally Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009).

I observed one afternoon in March 2017 in the Family Court Commission's IV-D hearing room. Debt accumulation is especially consequential for noncustodial parents who have child support orders and face prison terms. The *Henderson v. Davis* case illustrates an unsuccessful attempt by an incarcerated father to obtain a modification of his child support order while serving time in prison. My on-the-ground account provides a close-up view of how noncustodial parents experience enforcement proceedings. The analysis that follows examines the policies and mechanisms that contribute to inflated levels of child support debt.

A. Jeanetta Henderson v. Franklin Davis Child Support Hearing

1. Case Background

My background knowledge leading up to the hearing was gleaned from a review of the public case file. The parents, referred to here as Jeanetta Henderson and Franklin Davis, gave birth to a son in December 2011. They were unmarried and very poor, and the state filed a petition for paternity in June 2012. Jeanetta Henderson appeared pro se at the October 2012 court hearing, but Franklin Davis was not present and no counsel appeared on his behalf. The court entered a default judgement of paternity as to Davis but held open the issue of child support. The order entered in the case included a handwritten notation: "Father is currently incarcerated."

More than four years later, in February 2016, the case was before the court on the State's motion to set child support. Their motion listed Davis's change in income as the change in circumstances that justified a modification of the child support order and further elaborated: "[Franklin Davis] is no longer incarcerated and has employment and wages sufficient to have an order set. The State requests an order be set for [Franklin Davis]. [Jeanetta Henderson] is receiving [TANF] benefits."

Neither of the parents appeared at the February 2016 hearing. And, in light of the fact that they were still both very poor, it is not surprising that they were again unrepresented. Henderson was receiving government assistance, including TANF, food stamps, child care assistance, and Medicaid. Davis was employed at a sausage-making company, and his monthly gross income was \$1,327. The commissioner proceeded in their absence to enter a child support order. In calculating the order amount, the commissioner first determined that Davis's adjusted gross income was \$952 because he was a serial payor⁹⁵ with two older adjudicated children and had a monthly child support order of \$375. Further, because his adjusted gross income fell below the federal poverty guideline for a household of one, the commissioner

95. See Tonya Brito, *Child Support Guidelines and Complicated Families: An Analysis of Cross-State Variation in Legal Treatment of Multiple-Partner Fertility*, INST. FOR RES. ON POVERTY, U. WIS.-MADISON (2005), https://www.irlp.wisc.edu/research/childsup/csde/publications/brito_05.pdf [<https://perma.cc/RGF8-E74H>].

deviated from the guideline calculation and set support at \$87 per month/\$20 per week to be collected through income withholding.

I observed the next hearing in the case, which took place in March 2017, roughly one year later. In the intervening period, Davis became reincarcerated as a result of a parole violation. The case was back before the court on a motion to modify support.

2. *The Motion Hearing*

Present for the hearing were Davis (via phone), Family Court Commissioner Frances Colwell, State's Attorney Martha Jensen, and two women seated at the clerk's desk. When I arrived in the hearing room, Jensen was looking at her computer screen and Colwell was reviewing a case file. One of the clerks appeared to be in the process of training the other. Shortly after they welcomed me, one of the clerks called the *Henderson v. Davis* case, which was the first case listed on the afternoon calendar. Colwell then placed a phone call to the prison to get the hearing started.

The hearing lasted approximately 7.5 minutes.

COMMISSIONER COLWELL: Hello, Mr. Davis?

FRANKLIN DAVIS: Yes.

CC: This is the court calling. Sir, are you there?

FD: Okay, sir.

STATE'S ATTORNEY JENSEN: Ms. Henderson is not present. Attorney Martha Jensen appears on behalf of the state.

CC: Sir, how long are you incarcerated?

FD: Um, until January 1st, 2018, but I'm released December 26th, 2017.

CC: Okay, and the state is showing . . .

SA JENSEN: It appears you're in custody for the 2005 felony armed robbery case but only because you were revoked in 2011. Correct?

FD: No, I actually just received a revocation in 2016 [long pause] for an unrelated incident.

SA JENSEN: Okay.

FD: What are—You were convicted in the past of doing something to Ms. [Henderson]?

[A brief conversation ensued between Colwell and Jensen regarding Davis's other criminal matter as they viewed their computer screens and appeared to consult online government data sources to verify information concerning the matter. The conversation concluded with Jensen clarifying that the matter was dismissed but without prejudice.]

CC: Okay, okay.

DAVIS: There was a domestic violence incident between me and [another woman].

CC: And how long are you incarcerated?

FD: Until December 26th, 2017.

SA JENSEN: I guess we'll have to go with that. Department of Corrections says it's 1/1/18.

CC: So, you'll be out December 26th?

FD: Yes.

[It then shifted to a discussion about whether Davis met the legal standard for a modification of his child support order. The colloquy between Colwell and Davis was punctuated with several unusually long pauses during their back and forth.]

CC: What is the substantial change in circumstances that would cause me to change your child support order?

FD: Well, I'm unemployed right now. I can't really pay anything toward my child support obligations.

CC: And why are you unemployed?

FD: Because I'm incarcerated.

CC: And why are you incarcerated?

FD: Because of the domestic violence issue.

CC: And so you think you should benefit from that behavior?

FD: No, I don't think that I should benefit from it but . . . I mean . . . it's just gonna accumulate . . . so it's happened once before where I was incarcerated and it was suspended until 60 days after my release. And so, I figured I'd try to do it this time and see if I can pick back up on my obligations once I'm released. [pause] It only makes sense.

CC: It only makes sense to you? [long pause] I guess I ask that question, sir, because I'm . . . you get a benefit from doing something, well, one, it's not good and, two, it's against the law. [pause] Right?

FD: I don't see what the benefit would be if it's suspended that doesn't mean that I'm not still obligated to pay.

CC: But for that time period it would stop. That's your benefit. Because why else would you be asking for it? [uncomfortably long pause]

FD: Is that a denial?

CC: I'm still thinking about it because I'm not really sure. It's difficult how this cuts. [pause]

FD: I'm already, I believe, over \$25,000.

CC: Correct.

FD: So, it's possible that if I get released by then I could have a warrant for my arrest for unpaid child support.

SA JENSEN: No, there would have to be an order to show cause.

CC: They would have had to file an order to show cause. That's what the state is saying. Um, they would bring you in to see what was going on. To help you try to find a job first, and that kind of thing. I mean that logic is you owe \$25,000 anyways, so by that point there could be one whether I stop this or not. [pause] I'm just trying to decide if it's prudent for me to believe that there's a substantial change

in circumstances because you're incarcerated because you can't work but the reasons you're incarcerated are wholly your own.

FD: When I was just out, I was paying child support. I was working and I have actually managed to hold onto my job. They are interested in rehiring me upon my release. [pause] So, I will be immediately getting back to paying my obligations. But, in this situation, which I understand that it is my fault for why I'm in here, this situation prevents me from paying anything toward child support.

CC: Right, and I guess I'm like . . . thinking about when people come in here and ask because there's a disability or injury or there's something. You know, you see what I'm saying?

FD: Yes.

SA JENSEN: The case with Miss Henderson is the only one that's here. And in that case the order's only \$20 per week and we were getting payments in September of 2016 and the arrears of record are \$589.27. So, if he owes a total of \$25,000 it's not on this case.

FD: Yeah, that's for the one I previously . . .

SA JENSEN: Yeah, so we're only talking about this case.

CC: Sir, at this point I'm not finding that it is a substantial change of circumstances. I am denying your request this afternoon.

FD: Okay. Alright. Thank you.

CC: Thank you very much. Good bye.

B. Legal Treatment of Child Support Obligations During Incarceration

The *Henderson v. Davis* case illustrates an unsuccessful attempt by an incarcerated father to obtain a modification of his child support order while serving time in prison. Motions to modify support, whether or not the parent is imprisoned, must demonstrate a material and substantial change in circumstances. Reduced earnings due to job loss usually meets this standard, as long as the job loss was not voluntary. Likewise, if someone purposely terminates employment or becomes underemployed in order to evade paying support, a court will not find that the parent satisfies the substantial change in circumstances standard.

States differ on whether incarceration meets the requisite "substantial change in circumstances" standard justifying a modification.⁹⁶ Currently, a small number of states prohibit it on grounds of incarceration.⁹⁷ The rationale underlying this approach is that incarceration should be treated as voluntary unemployment because the payor made a deliberate choice to engage in criminal conduct and, as a consequence, their subsequent inability to pay support while in prison results from their voluntary behavior. As such, modification of child support during

96. Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 POVERTY L. & POL'Y 313, 327–28 (2006).

97. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 68.

incarceration has not been allowed in those states. However, after the new federal rules take effect in these states, they will no longer be permitted to categorically reject incarceration as a basis for a motion to modify child support.⁹⁸ They will join the other thirty-six states and District of Columbia, which treat incarceration as involuntary unemployment⁹⁹ and where incarcerated parents can file a motion seeking a modification of their child support order.¹⁰⁰

In these states, incarceration is a possible ground for modifying a support order and is one of many factors considered by the court. As demonstrated in the *Henderson v. Davis* case, judges have a tremendous amount of discretion concerning whether or not to grant an incarcerated parent's request to modify an order.¹⁰¹ And judges do not take a uniform approach in such cases.¹⁰² Even Davis, who had two child support cases in the same jurisdiction, experienced disparate outcomes. During an earlier prison term, his order was suspended, but in the hearing described above, the judge denied his request. Notwithstanding the fact that incarcerated parents experience a precipitous drop in their income, many judges (as Colwell does) reject motions to suspend child support on the grounds that the noncustodial parent should not benefit at the expense of the economic needs of the custodial parent and child.¹⁰³

The outcome in *Henderson v. Davis* would still be possible under the new federal rules. Judges will continue to play an important role in deciding whether incarceration is sufficient grounds to justify revision of a child support order. Likewise, the new rules do not prohibit judges from reaching judgments that emphasize blame for criminal behavior and disregard the undisputed fact that low-income incarcerated parents lack the financial wherewithal to pay their child support obligations while serving time. Such outcomes have tremendous financial consequences for the families affected because arrears will accumulate during the prison term. Because the Bradley Amendment prohibits retroactive modification of child support arrearages, it is nearly impossible for these parents to be relieved of the debt after it accumulates.¹⁰⁴

C. Parents in Prison: What Does the Data Tell Us?

As noted throughout this Article, there are high levels of incarceration in the United States, especially among the most socioeconomically disadvantaged, and

98. 45 C.F.R. §§ 301-09 (2018).

99. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 68.

100. *Id.*

101. Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES' J. 5 (2004), <https://csgjusticecenter.org/wp-content/uploads/2007/09/Building-Debt-While-Doing-Time-Child-Support-and-Incarceration.pdf> [<https://perma.cc/3735-U88G>].

102. *Id.*

103. See Cammett, *supra* note 96, at 327–28.

104. Congress enacted the Bradley Amendment in 1986 to limit judicial discretion to reduce child support arrearages on findings of “good cause.” Under the legislation, with limited exceptions, it is impossible for a child support debtor to obtain a reduction in his/her existing arrears. *Id.* at 325.

most state and federal inmates are parents.¹⁰⁵ Data from the Department of Justice reports that at midyear in 2007 more than half of the male prisoners (51% of state inmates and 63% of federal inmates) were parents of minor children.¹⁰⁶ Race disparities in this area are significant. More than 40% of the fathers in prison were Black, and of the approximately 1.5 million children with a father in prison, almost half (46%) were the children of Black fathers.¹⁰⁷ Overall, the growth of the number of parents in prison has been tremendous. Between 1991 and 2007, the number of incarcerated parents of minors increased by 79%.¹⁰⁸

Many incarcerated parents are engaged with the IV-D child support system and have child support orders in place.¹⁰⁹ The National Conference of State Legislatures (NCSL), referencing a 2003 study, reported that about one-quarter of inmates in prisons had a child support case.¹¹⁰ Extrapolating that finding out to the present and taking into account current prison populations, NCSL estimates that 400,000 inmates have a child support case.¹¹¹ Federal studies show that the figures for incarcerated parents with child support orders range “from 13 percent of inmates in Texas state jails in 2004, to 26 percent of inmates in Colorado state prisons in 2001, and 26 percent in Massachusetts state prisons in 2003.”¹¹² Examining fathers in prison in five states, a recent federal study revealed that one-third of men reported that they already had a child support order in place before their incarceration.¹¹³ This finding, which relies on self-reporting by incarcerated fathers, appears to be an undercount, however. The study further determined, based

105. Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, WASH. POST (Oct. 18, 2015), https://www.washingtonpost.com/politics/for-men-in-prison-child-support-becomes-a-crushing-debt/2015/10/18/e751a324-5bb7-11e5-b38e-06883aacba64_story.html?utm_term=.ab456fe99166 [<https://perma.cc/UQG4-R545>].

106. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 3 (2008), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/TD3L-FKEY>].

107. *Id.* at 2.

108. *Id.* at 1.

109. See Pearson, *supra* note 101, at 6–12.

110. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 68.

111. *Id.*

112. OFFICE OF CHILD SUPPORT ENF'T, DEP'T. OF HEALTH & HUMAN SERVS., INCARCERATION, REENTRY, AND CHILD SUPPORT: NATIONAL AND STATE OVERVIEW 3–4 (2006), https://www.acf.hhs.gov/sites/default/files/programs/css/incarceration_report.pdf [<https://perma.cc/E7AH-Q2DZ>].

113. See OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, DEP'T OF HEALTH & HUMAN SERVS., MULTI-SITE FAMILY STUDY OF INCARCERATION, PARENTING AND PARTNERING: EARNINGS AND CHILD SUPPORT PARTICIPATION AMONG REENTERING FATHERS 2 (2017), <https://aspe.hhs.gov/system/files/pdf/257731/MFSIPChildSupport.pdf> [<https://perma.cc/NB8D-A5L4>] (The Multi-Site Family Study on Incarceration, Parenting and Partnering (MFS-IP), overseen by the Department of Health and Human Services, examined pre- and post-incarceration wages and child support participation. It used study data from five states: Indiana, Ohio, New York, New Jersey, and Minnesota.).

on its review of administrative data, that twice as many incarcerated fathers—fully 60%—had child support orders in place.¹¹⁴

As noted above, incarcerated parents with child support involvement have court-ordered obligations that far exceed their ability to pay, and this is because both their wages are low before entering prison and their earnings are paltry while in prison. Additionally, the prison population is much younger and less educated than the general population.¹¹⁵ Prior to their prison term, most had no income or earned low wages.¹¹⁶ One study looking at current and formerly incarcerated parents in the Illinois IV-D caseload determined that “forty-one percent of those incarcerated parents had an average income of \$10,136 per year prior to incarceration [and the] remaining 59 percent had no income prior to incarceration.”¹¹⁷ Also, as noted above, not only do parents entering jail have low earning capacity but they also have current orders that are high relative to their income¹¹⁸ and are already behind in their child support payments, with studies showing arrears on average exceeding \$10,000.¹¹⁹

D. Incarcerated Parents’ Arrears Growth While Doing Time

Noncustodial parents typically leave prison owing much more child support debt than they did upon entering. Prison wages are far below the federal minimum wage and currently average 86 cents per hour (ranging from no pay in a handful of states to \$2 an hour in Minnesota), making compliance with existing child support orders practically impossible.¹²⁰ Indeed, data shows that most incarcerated parents with current child support orders do not pay or pay a very minimal amount, during

114. *Id.*

115. *See* Hager, *supra* note 105.

116. *See* NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 68.

117. *Id.*

118. *See* OFFICE OF CHILD SUPPORT ENF’T, DEP’T. OF HEALTH & HUMAN SERVS., INCARCERATION, REENTRY, AND CHILD SUPPORT: NATIONAL AND STATE OVERVIEW 4 (2006), https://www.acf.hhs.gov/sites/default/files/programs/css/incarceration_report.pdf [<https://perma.cc/E7AH-Q2DZ>]. (“Current order amounts are high for NCPs in prison with little or no income. In Massachusetts state prisons in 2001, the average monthly child support owed by 973 parents with orders was \$198 per order, or \$227 across all orders for those fathers with children by different women.”).

119. Studies examining imprisoned noncustodial parents in Colorado and Massachusetts found on average they had child support arrears of \$10,249 and \$10,543, respectively, at the time that they entered prison. *Id.*

120. “The average of the minimum daily wages paid to incarcerated workers for non-industry prison jobs is now 86 cents, down from 93 cents reported in 2001. The average maximum daily wage for the same prison jobs has declined more significantly, from \$4.73 in 2001 to \$3.45 today.” Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/37ND-4JZ9>]. Additionally, prisoners are required to pay a host of additional correctional fees, such as medical care received while incarcerated. Amanda Geller et al., *Paternal Incarceration and Support for Children in Fragile Families*, 48 DEMOGRAPHY 25, 27 (2011).

their prison term.¹²¹ For example, noncustodial parents serving time in 2001 and 2003 in Massachusetts paid just 5% of their current support orders.¹²²

As discussed earlier, most incarcerated parents' child support orders are not modified, which means that the order amount no longer reflects their actual ability to pay. Their preexisting orders often remain in effect either because they do not have the wherewithal to successfully bring a motion to modify support at the time they enter prison.¹²³ Additionally, even if they file such a motion, as happened with Davis, a court may reject their request on the ground that their incarceration is a type of voluntary unemployment and they should not benefit from a reduction. In either instance, their child support order remains in place and their debt piles up month after month.¹²⁴

Parents with a child support order can expect that debt to double during their prison term, from approximately \$10,000 to nearly \$20,000 on average.¹²⁵ Another study estimates the amount of arrears owed by prisoners to be three times that of the non-prison population.¹²⁶ The data from one study, which drew from interviews with almost three dozen incarcerated fathers in 10 states, showed a wide range of child support debt upon release from prison: between \$10,000 and \$110,000.¹²⁷

It can be even harder for these fathers to pay child support after leaving prison than it was prior to serving their sentence. They remain as poor and poorly educated as when they entered prison, but now they are also burdened by increased child

121. OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 118, at 4.

122. *Id.*

123. To obtain a modification of their child support order, an inmate needs to file a motion seeking such relief from the court. This process is challenging for many pro se plaintiffs and is made even more difficult when a noncustodial parent is imprisoned. First, the inmates must be aware that they can avail themselves of the modification process, but many lack this knowledge. Sociologist Lynn Haney reported that none of the fifty incarcerated fathers she interviewed in Florida as part of her study were aware that modifying their child support was even an option. See Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124 AM. J. SOC. 22 (2018). Other inmates do not seek a modification through the court process because they assume that, at when they enter prison, the child support system will suspend their order automatically. See Cammett, *supra* note 96, at 328. From their point of view, it should be obvious that they cannot pay child support while serving time. *Id.* The inmates who are aware of the need to file the motion to suspend or lower child support face another set of challenges, such as researching the applicable legal rules and court process, getting their paperwork completed properly and submitted to the right court, and coordinating with the prison staff to arrange for their participation in a court hearing by phone or video. *Id.*; Pearson, *supra* note 101.

124. Data from the National Corrections Reporting Program show that state prisoners serve an average sentence of twenty-nine months before their first release, with a median of sixteen months. The data also show a significant race disparity, with Black prisoners serving an average sentence of thirty-two months compared with White prisoners serving twenty-six months. GLAZE & MARUSCHAK, *supra* note 106. The most recent data available is from 2009. Longitudinal data show that state prisoners' average sentence before first release has increased significantly over the past fifteen years. In 1994, the average sentence served was twenty-two months while the median was thirteen. Incarcerated parents typically pay about 5% of their child support obligation while they are serving time.

125. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 68.

126. Haney, *supra* note 123, at 19.

127. See Hager, *supra* note 105.

support arrears and the additional employment obstacles that stem from their imprisonment.¹²⁸ Finding work in the formal economy can be challenging and, even if they find a job, they tend to receive below-poverty wages.¹²⁹ Their low wages, unsurprisingly, negatively impact their families' financial situation. Men who have served time provide their families with about \$1,300 less annually as compared to men who have never been incarcerated.¹³⁰ Even more troubling is that their child support payments were often held by the state as payback for government benefits received by the custodial mother and/or children during their prison term.¹³¹ Thus, poor children and mothers who did not receive child support while the father was incarcerated were further deprived by the state of his payments even after his release.

E. States' Assessment of Interest on Child Support Debt

States' practice of levying interest on unpaid child support has contributed significantly to arrears growth in the United States. The 2003 California Collectibility Study found that California's child support arrears had "grown dramatically" over the prior ten-year period, from \$2.5 billion in 1992 to \$17 billion in 2001.¹³² It also concluded that California's rate of arrears accrual exceeded that of the rest of the nation.¹³³ At that time, the state's share of the national child support debt was 20% while its caseload comprised only 10% of the entire caseload in the United States.¹³⁴ A primary factor contributing to such large arrears, according to the study, was the fact that California was assessing interest on late payments at 10% per year.¹³⁵ Indeed, fully 27% (\$3.9 billion) of California's child support debt in 2000 was unpaid interest.¹³⁶

Comparing data from both California and New York, the study revealed that California's 1992 decision to levy interest on child support debt played an outsized role in the astronomical growth of its arrears. California and New York had comparable levels of arrears in 1992: \$2.5 billion and \$1.9 billion, respectively.¹³⁷ Unlike California, New York did not then charge interest on past due support.¹³⁸ Beginning in 1993, California's accumulation of child support debt began to rapidly

128. See OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, *supra* note 113, at 8.

129. *Id.*

130. Amanda Geller et al., *supra* note 120, at 43.

131. See Hager, *supra* note 105. "The majority of families of incarcerated parents (*i.e.*, custodial parents and children) with child support cases in Texas and Massachusetts are currently receiving Medicaid or public assistance or received one or both in the past; percents range from 55 percent in Texas to 92 percent in Massachusetts." OFFICE OF CHILD SUPPORT ENF'T, *supra* note 112, at 3.

132. See ELAINE SORESENSEN ET AL., *supra* note 6.

133. *Id.*

134. *Id.*

135. *Id.* at 15.

136. *Id.* at 18.

137. *Id.* at 2-3.

138. *Id.*

outpace New York's.¹³⁹ By 2001, only nine years later, California's had amassed \$17 billion in child support debt while New York's debt had increased to only \$3.2 billion.¹⁴⁰

California's 10% interest rate for late child support payments was set at an unjustifiably high level. As pointed out by the Collectibility Study's authors, a 10% assessment far exceeded market interest rates, the rate charged by the Internal Revenue Service (IRS), and the interest rate set forth in the California Constitution for money judgments.¹⁴¹ Rather than penalize parents who were behind on their support with an arbitrarily high interest rate that burdened them with even more debt, the Collectibility Study urged California to adopt an approach that resembled how the IRS treats taxpayers who underpay.¹⁴² Had California followed this recommendation, its interest rate would have been lowered to 4%, and the charges imposed on noncustodial parents for their late payments would have reflected the actual time value of money. Instead, California disregarded the study's recommendation and retained its arbitrarily high interest rate.¹⁴³ Even today, fifteen years after the Collectibility Study, California's interest rate remains at 10%.¹⁴⁴

California's experience is not unique—other states similarly can attribute their exorbitant rise in child support arrears to, at least in part, their decision to impose higher than justified interest rates on past due support. A 2007 Urban Institute study commissioned by the OCSE examined child support arrears in nine large states and nationwide.¹⁴⁵ The nine states covered by the study—Arizona, Florida, Illinois, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Texas—together accounted for 39% of arrears in the United States in 2006.¹⁴⁶ The researchers concluded that “assessing interest on a routine basis has been the single most important factor contributing to arrears growth during the past fifteen years.”¹⁴⁷ Examining nationwide data, the study found that states that routinely charged interest had a tenfold increase in arrears from 1987 to 2006 and grew twice as fast as child support debt in other states.¹⁴⁸ Of the nine states in the study, only two—Arizona (10% rate) and Texas (12% rate until 2003 and 6% afterward)—

139. *Id.*

140. *Id.*

141. *Id.* at 22 (“The IRS estimates the time value of money at 3 percentage points above the interest rate on 13-week Treasury bills. This figure has not reached 10 percent since 1990 and is currently 4 percent.”).

142. *Id.*

143. *Id.*

144. NAT'L CONFERENCE OF STATE LEGISLATURES, INTEREST ON CHILD SUPPORT ARREARS (Apr. 29, 2013), <https://www.ncsl.org/research/human-services/interest-on-child-support-arrears.aspx> [<https://perma.cc/YH6S-GYLP>].

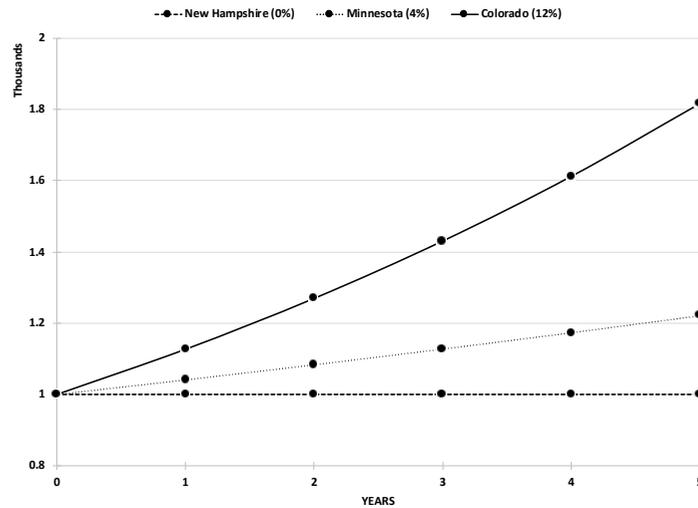
145. *See* SORENSEN ET AL., *supra* note 6.

146. *Id.* at 1.

147. *Id.* at 54.

148. *Id.* Arrears in those states went “from \$5.4 billion in FY 1987 to \$58.7 billion in FY 2006.” *Id.* at 55.

Figure 2. Interest Accumulation Over 5 Years—\$1,000 Arrears & Three Rates



Despite this accumulated evidence confirming the negative impact of assessing interest on child support debt, thirty-five states continue to charge interest.¹⁵⁰ Though a handful have set their rates at more reasonable levels, as Figure 1 above shows, most continue to charge interest in the range of 4% to 12%,¹⁵¹ rates that are unwarranted in today’s market and impose a crushing financial burden on the poor noncustodial parents. As Figure 2 above reveals, arrears accumulate very rapidly—even on a \$1,000 debt—when a high interest rate is levied. With a 12% interest rate, a \$1,000 child support debt balloons to \$1,860 in only five years, an increase of over 80%. This vastly exceeds the \$1,221 of debt that would accrue with a 4% interest rate.

Consider again the more than \$25,000 in child support debt owed by Franklin Davis. Standing alone, that figure sounds enormously large and allows one to readily form assumptions about him and the nature of the debt itself. One likely views Davis as a long-time deliberate shirker of his financial responsibilities to his children. Would the perception of him differ if he owed \$5,000 or \$10,000 instead? One also probably unquestioningly accepts the \$25,000 debt figure as valid, as an accurate accounting of what he “owes” in child support. If Davis, a man who worked a low-wage job in a sausage factory, had \$100,000 or even \$500,000 in child

150. See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 144.

151. *Id.*

support debt,¹⁵² would one pause to wonder how on earth that could be possible? At what point does one become skeptical of the legitimacy of enormous arrearages owed by economically disadvantaged noncustodial parents?

Davis's child support debt needs to be interrogated: What role did the state's interest rate play? To what extent is the \$25,000 debt burden a state construction? His child support orders are in a state with an interest rate that has fluctuated over time between 18%, 12% and 6%. How much of his \$25,000 debt is purely interest? What would the debt be if his case were in a state that did not charge any interest on arrears? Or if he were in a state with a 4% interest rate? In short, should child support debt burdens be treated as wholly legitimate when—even in cases with identical factual circumstances—the accumulations can vary tremendously from state to state solely due to the interest rate levied on the debt? When interest rates play an outsized role in manufacturing child support debt, can what the noncustodial parent really owes be evaluated?

One must challenge states' practice of charging unjustifiable interest rates in circumstances such as these, particularly when child support officials are well aware that the parents who fall behind in their payments live far below the poverty line. Child support debt inflation of this magnitude is avoidable, unwarranted, and harmful to families. That it results from state action is deeply troubling, especially because part of the child support owed is payback to the state for welfare expenditures provided to the custodial mother and children.¹⁵³ One must ask: "What justifies states imposing rates of interest on disadvantaged families that dwarfs those at which the government itself borrows money?"

CONCLUSION

The problem of child support debt has persisted for decades. Numerous government-commissioned studies have been conducted to understand the characteristics of the noncustodial parents who owe support, the dynamics of how much is owed, by whom, and under what circumstances the debt is accrued, the factors that contribute to the accrual of large amounts of debt, how much of the existing debt is actually collectible, and what steps can be taken to reduce existing debts and prevent arrears buildup.¹⁵⁴ There is now a massive amount of information

152. See Haney, *supra* note 123, at 23–24 (study findings identified a father in California who owed over \$500,000 in past-due child support).

153. Child support debt in the United States has two components. A portion of the national debt is owed to the state for the purpose of reimbursing the state for financial assistance provided to the custodial parent (in the form of cash welfare benefits, childcare assistance, medical assistance, and other forms of aid). The other portion of the national debt is owed by noncustodial parents to the custodial parents themselves.

154. SORENSEN ET AL., *supra* note 6; OFFICE OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUMAN SERVS., CURRENT COLLECTIONS AND ARREARS MANAGEMENT PEER-TO-PEER TRAINING CONFERENCE SUMMARY NOTES (Dec. 7, 2006), <https://www.acf.hhs.gov/css/resource/current-collections-and-arrears-management-peer-to-peer-training-notes> [<https://perma.cc/N9CV-D3WW>]; CARL FORMOSO, WASH. STATE DEP'T OF SOC. & HEALTH SERVS.,

available to states—including findings and recommendations at both the state and national levels. What one understands from reviewing the studies is that the findings are relatively consistent—the amount of debt is “alarming,”¹⁵⁵ it is largely uncollectible, and there exist a panoply of suggested reforms to address the problem. Unfortunately, despite decades of studies and state- and local-level demonstration projects testing out various reform ideas, the debt has not only persisted but has soared.

Child support debt continues to climb even though states have a remarkable amount of influence on how or whether it is generated. State policymakers and child support agency personnel construct and inflate debt through their policy choices and on-the-ground practices. South Dakota provides a revealing example of how quickly debt can escalate through state action or inaction. South Dakota saw the highest rate of growth in unpaid child support as compared with other states between 2012 and 2016, with the amount of unpaid child support growing by more than \$43 million, to more than \$191 million.¹⁵⁶ The increase did not come about because fewer parents were paying support.¹⁵⁷ Rather, the arrears accumulation was due in part to the fact that South Dakota has been slower than other states to modify

DETERMINING THE COMPOSITION AND COLLECTIBILITY OF CHILD SUPPORT ARREARAGES, VOLUME 1: THE LONGITUDINAL ANALYSIS (2003), <https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/cvol1prn.pdf> [<https://perma.cc/EFJ7-HH86>]; OFFICE OF CHILD SUPPORT ENF^T, U.S. DEP^T OF HEALTH & HUMAN SERVS., MANAGING CHILD SUPPORT ARREARS: AN EVOLVING DISCUSSION FRAMEWORK (2013), https://www.acf.hhs.gov/sites/default/files/programs/css/managing_child_support_arrears_an_evolutionary_discussion_framework.pdf [<https://perma.cc/6YLH-UYE3>]; JESSICA PEARSON & ESTHER ANN GRISWOLD, CTR. FOR POLICY RESEARCH, NEW APPROACH TO CHILD SUPPORT ARREARS: A SURVEY OF STATE POLICIES AND PRACTICES (2001), <https://www.child-support-affidavit-template.com/form/80046054-Child-Support-Arrears-Compilation-of-Three-Reports-2001> [<https://perma.cc/9TLU-7CZY>]; ELAINE SORENSEN & TESS TANNEHILL, THE URBAN INST., PREVENTING CHILD SUPPORT ARREARS IN TEXAS BY IMPROVING FRONT-END PROCESSES (2006), <https://www.urban.org/sites/default/files/publication/30091/411829-Preventing-Child-Support-Arrears-in-Texas-by-Improving-Front-end-Processes.PDF> [<https://perma.cc/3A7Y-6KL7>]; Paula Roberts & Elaine Sorensen, *Strategies for Preventing the Accumulation of Child Support Arrears and Managing Existing Arrears: An Update*, CTR. FOR L. & SOC. POL'Y (2005), <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/0247.pdf> [<https://perma.cc/VDE2-BF5Q>]; OFFICE OF CHILD SUPPORT ENF^T, U.S. DEP^T OF HEALTH & HUMAN SERVS., THE STORY BEHIND THE NUMBERS: UNDERSTANDING AND MANAGING CHILD SUPPORT DEBT (2008), https://www.acf.hhs.gov/sites/default/files/ocse/im_08_05a.pdf [<https://perma.cc/D8DW-Q5ES>]; OFFICE OF CHILD SUPPORT ENF^T, U.S. DEP^T OF HEALTH & HUMAN SERVS., THE STORY BEHIND THE NUMBERS: WHO OWES THE CHILD SUPPORT DEBT? (2004), https://www.acf.hhs.gov/sites/default/files/ocse/im_04_04a.pdf [<https://perma.cc/KG5V-JXAC>]; OFFICE OF CHILD SUPPORT ENF^T, U.S. DEP^T OF HEALTH & HUMAN SERVS., UNDERSTANDING CHILD SUPPORT DEBT: A GUIDE TO EXPLORING CHILD SUPPORT DEBT IN YOUR STATE (2004), https://www.acf.hhs.gov/sites/default/files/ocse/dcl_04_28a.pdf [<https://perma.cc/VL85-REVB>].

155. Carolyn J. Heinrich et al., *Reducing Child Support Debt and Its Consequences: Can Forgiveness Benefit All?*, 30 J. POL'Y ANALYSIS & MGMT. 755 (2011).

156. Jonathan Ellis, *Child Support: Overdue Payments Surge in South Dakota*, ARGUS LEADER (Jan. 20, 2018), <https://www.argusleader.com/story/news/2018/01/20/child-support-overdue-payments-surge-south-dakota/1044489001/> [<https://perma.cc/A8GB-T22H>].

157. *Id.*

child support orders when noncustodial parents have reduced earnings due to unemployment or incarceration.¹⁵⁸

Other states similarly have seen their child support debt totals either rapidly increase or decline in recent years.¹⁵⁹ For example, Louisiana's debt rose 23% from 2013 to 2016; during that same time period, Michigan experienced a 29% drop in its debt.¹⁶⁰ As in the case of South Dakota, it is highly unlikely that Louisiana's massive debt increase was due to an inexplicable increase in the numbers of noncustodial parents who suddenly evaded their support obligations. Likewise, it is equally improbable that Michigan's remarkable reduction in debt resulted from large numbers of formerly delinquent parents making large lump-sum payments on their child support arrears. Instead, it is far more likely that policy making and institutional decision making produced these large swings in state arrears.

States' debt loads and their radical fluctuations have a speculative quality to them. This is not altogether unsurprising in light of the fact that these debt bubbles are driven in part by economically irrational views about what impoverished fathers should be paying to support their children. Recall again the case of Franklin Davis. In his hearing, he appealed to common sense when he argued that he should not be expected to pay support while he was in prison because he would not earn enough money to pay the order. He worried that his debt would increase even further. Commissioner Colwell described the situation as "difficult" and, in denying the motion to modify, explained that his case was different from cases where people who cannot pay support because they have disabilities or some kind of injury. From Colwell's perspective, if Davis's child support were modified while he was serving his prison term, he would "benefit" from his criminal activity. While some may find political salience in Colwell's reasoning about why Davis did not deserve to have his child support order modified, his decision produces even more child support debt, both for Davis and the state in which he resides. And, as importantly, the decision is economically irrational because the debt is virtually uncollectible and will increase inexorably, even if payments are made regularly.

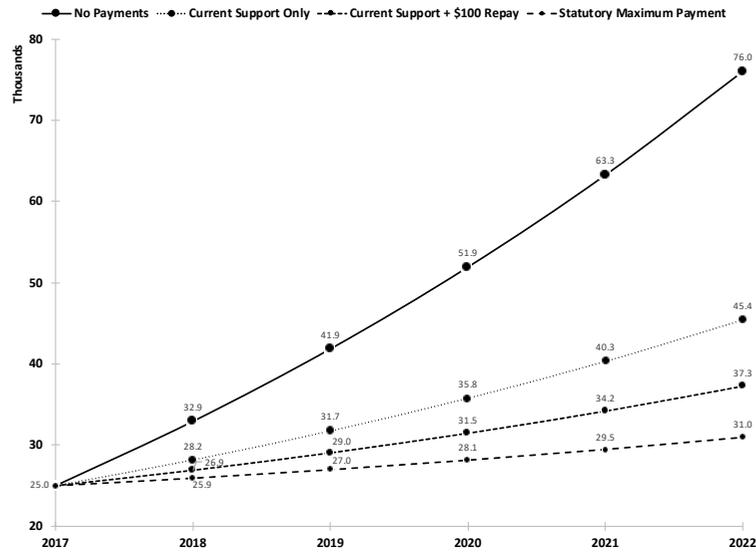
A brief examination of the projections in Figure 3 proves that this decision does not make sense. Davis has two child support orders: \$375 per month and \$87 per month. At the time of his hearing, his child support arrears totaled \$25,587 (\$25,000 for one case and \$587 for the other). Davis was right to worry about the prospect of accumulating child support debt while in prison.

158. Another contributing factor is that the state has increased its minimum wage, which is used to calculate the amount of child support owed by parents; if they are unemployed or incarcerated, the state presumes an income comparable to full time minimum wage. *Id.*

159. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 144.

160. *Id.*

Figure 3. Davis's Child Support Arrears Accumulation—Projections Over 5 Years at 12% Rate



Davis's financial picture remained bleak at his release from prison, even if, as he expected, he resumed his low-wage job at the sausage plant. Figure 3 projects debt accumulation with a 12% interest rate over five years with four different simulations, all of which demonstrate that his debt will never be paid off.¹⁶¹ One simulation assumes that Davis makes no payments over the course of five years. The debt skyrockets in this scenario, nearly tripling to more than \$76,000 in only five years. The second simulation imagines that Davis pays current support in full each month, but makes no additional payments on the arrears. The debt would still quickly escalate to more than \$45,000 within five years, or nearly doubling. The third simulation assumes that Davis pays his current support order in full each month and pays an additional \$100 per month toward the arrears. It is common for parents to have total monthly child support obligations that encompass two payments—one for current support and a smaller payment, anywhere from \$10/month to \$100/month or more, that is a repayment toward arrears. Even in this scenario, which would leave him with only \$601 per month to live on

161. The four simulations include (1) no child support payments paid for five years; (2) payments on current support due, but no payments on the existing arrears; (3) payments on the existing support and a \$100 per month repayment on the arrears; and (4) the statutory maximum payment of 55% of Franklin Davis's net earnings, which would amount to a monthly payment of \$639, including \$177/month payment on the arrears.

(after deducting child support from monthly net earnings), the arrears would continue to grow.

The final simulation serves as an indictment of the current institutional approach to debt accumulation. This scenario—the most onerous for Davis—imagines that he makes the statutory maximum child support payment of 55% of his net earnings.¹⁶² Even under these conditions, the debt would still grow. Davis would pay \$639 per month for child support (current order plus \$177/month toward arrears), but he would have only \$523 per month left for his living expenses. He would be working a full-time, low-wage job and making the maximum child support payment permissible under law, but still his debt would continue to increase by more than \$5,000 in five years. He would never pay off his arrears. Instead, they would grow more onerous over time. It is safe to say that Davis will remain in a child support debt trap for the rest of his life.

The projections in Figure 3 starkly reveal the economic realities of poor families who are involved with the child support system. It is nearly impossible for low-wage workers to satisfy their basic subsistence needs with their earnings, even when working a full-time job.¹⁶³ Low-wage workers who are also paying child support and arrears do not have enough money left over to make their own ends meet. Fathers living in these dire circumstances sometimes resort to off-the-books jobs in the informal economy (or criminal activity) to earn additional money and/or shield some of their earnings from potential wage garnishment imposed by a child support agency. Sometimes they feel so trapped and discouraged that they stop paying support altogether and even withdraw from their children's lives.

It bears emphasizing that Franklin Davis is not alone. Of the 5.5 million noncustodial parents who owe past-due support,¹⁶⁴ it is estimated that approximately a quarter are “unable nonpayers.” Thus, there may be hundreds of thousands, possibly even more than a million, noncustodial parents with

162. Federal law permits a maximum withholding of 50–65% of earnings for child support payments. The 55% withholding limit would apply to Davis. See OFFICE OF CHILD SUPPORT ENFT, U.S. DEP'T OF HEALTH & HUMAN SERVS., PROCESSING AN INCOME WITHHOLDING ORDER OR NOTICE (May 17, 2017), <https://www.acf.hhs.gov/css/resource/processing-an-income-withholding-order-or-notice> [<https://perma.cc/C62K-M56V>]. A 2002 federal report revealed that the child support orders of low-income obligors were, on average, 69% of their reported earnings, despite the federal limit of 50–65%. This figure also exceeds the national average of 40%. See Pearson, *supra* note 101, at 5. Likewise, over 50% of Walter Scott's 2011 earnings were garnished by the child support agency, even though his salary placed him below the poverty line. See also Robles & Dewan, *supra* note 14.

163. Many low-income, hourly wage workers simply cannot afford even modest housing in their communities. See ANDREW AURAND, DAN EMMANUEL, DIANE YENTEL, ELLEN ERRICO & MARJORIE PANG, NAT'L LOW INCOME HOUSING COALITION, OUT OF REACH: THE HIGH COST OF HOUSING (2017), https://nlihc.org/sites/default/files/oor/OOR17_MembersLaunch_Webinar_060917.pdf [<https://perma.cc/UW67-GP3G>]. The average hourly wage needed to rent a two-bedroom home (\$21.21) is nearly three times higher than the federal minimum-wage of \$7.25. *Id.* There are only twelve counties in the entire United States where a minimum-wage worker can afford a one-bedroom unit. *Id.*

164. PUTZE, *supra* note 36.

insurmountable child support burdens that they will never pay off, given their low and precarious wages and that they are prohibited from modifying retroactively. The new federal rules, which encourage states to adopt more realistic practices that take account of what parents can actually pay and to prevent debt accumulation, do not address the child support debt that already exists. This group of parents will continue to be viewed as deadbeats and remain under indefinite court supervision—through repeated Order to Show Cause hearings—and face evermore punitive enforcement measures designed to coerce them into complying with their support orders by making payments on a debt that will never go away. For these parents, the persistence of the debt becomes a prison with lasting effects on the debtor and their families.¹⁶⁵

The problem of child support debt extends beyond the excessive and unwarranted burden it places on poor noncustodial parents. The unfairness extends to low-income mothers and children too because, as shown above, far too many of them are not receiving the financial support the state tells them they are owed by fathers. For these families, any expectations they have that the poor fathers in their lives will pay them what's "owed" will be met with disappointment. Broader society's expectations about what poor fathers can and should pay to support their children are similarly influenced by inflated child support numbers. The illusion created by the child support debt bubble—and the policies and practices that produce it—is that child support enforcement will somehow magically solve the problem of poverty for single mother families and take the burden and responsibility of doing so off the state. Inflated arrears fuel narratives about "parental responsibility" and obscure the fact that our social welfare system does not sufficiently meet the needs of poor families. Put another way, societal obligations to alleviate child poverty can be avoided so long as the state generates stories about dads who owe thousands of dollars of support.

165. Other unintended negative consequences follow when noncustodial parents accrue burdensome child support debt that they are unable to pay off, including increased interpersonal conflict between custodial and noncustodial parents, reduced contact between the noncustodial parent and the child, *see* Heinrich, *supra* note 155, at 157, and a decline in noncustodial parents' work in the formal labor market. *See* Daniel P. Miller & Ronald B. Mincy, *Falling Further Behind? Child Support Arrears and Fathers' Labor Force Participation*, 86 SOC. SERV. REV. 604 (2012).

