
NOTES

Hitting Deadbeat Parents Where it Hurts: “Punitive” Mechanisms in Child Support Enforcement

This Note discusses the crisis created by “problem parents” who fail to meet their child support obligations. Alaska has not escaped this crisis. This Note traces the efforts in Alaska to exact payment from child support obligors through both civil and criminal provisions. In particular, it discusses the recent expansion of criminal provisions, including the criminalization of aiding and abetting nonpayment of child support obligations and the suspension, revocation or denial of driver’s and occupational licenses. The Note suggests several ways in which Alaska can strengthen its criminal provisions to improve enforcement, and it analyzes the constitutionality of Alaska’s license revocation/suspension provisions. Finally, the Note suggests another method by which to increase the rate of child support payment, namely the use of “most wanted” lists.

I. INTRODUCTION

The crisis in child support in the United States, and in Alaska, is one of immense proportions. This crisis can be traced directly to the failure of numerous noncustodial parents to make their child support payments. In 1992, only 54% of single-parent families with children had an established child support order.¹ Of those families, only about one-half received the full amount due.² Studies indicate that two-fifths of divorced fathers in the United States

Copyright © 1997 by Alaska Law Review

1. See H.R. CONF. REP. NO. 104-430, § 101(4) (1995), available in 1995 WL 767839, at *21. This statistic does not indicate that the remaining 46% of single-parent families have no method of child support. Some of those families have a private legal agreement or a more informal agreement. However, these private agreements are not enforceable through the child support enforcement mechanisms discussed in this Note.

2. See *id.*

do not pay child support.³ In Alaska, more than \$416 million in child support is overdue.⁴ Officials estimate that 8% of the nation's Aid to Families with Dependent Children ("AFDC") caseload could be wiped out if all child support debts were collected.⁵ Since the average number of children receiving AFDC was 9.3 million in 1992,⁶ eradication of even a small portion of the welfare rolls would affect a large number of children.

Over the years, the United States Congress and the Alaska State Legislature have each enacted numerous provisions to combat this problem. Although overall collections have increased due to these enactments, there remains a stubborn core of noncustodial parents who are delinquent in their child support payments and simply refuse to pay. Reflecting a trend frequently called a "crackdown on deadbeat dads," more stringent enforcement provisions have recently been added to deal with "problem parents" who flagrantly refuse to support their children. These new child support enforcement provisions have been highly publicized and include the following: (1) criminal statutes punishing nonpayment of child support;⁷ (2) revocation, denial and suspension of licenses of individuals who are delinquent in their child support payments;⁸ and (3) publication of "most wanted" lists consisting of individuals whose delinquency in their child support payments is both egregious and contemptible.⁹ Alaska currently has in effect criminal statutes and statutes authorizing the revocation, denial and suspension of licenses for nonpayment of child support.

The criminalization of the nonpayment of child support obligations is not a new phenomenon in Alaska.¹⁰ What is new, however, is the recent expansion of criminal provisions in this area to cover the aiding and abetting of nonpayment of child support obli-

3. See Janet Dayal, *Population: Marriage and Motherhood Can be a Path to Poverty*, Inter Press Service, May 30, 1995, available in LEXIS, NEWS Library, CURNWS File (citing POPULATION COUNCIL, *FAMILIES IN FOCUS: NEW PERSPECTIVES ON MOTHERS, FATHERS AND CHILDREN* (1995)).

4. See *No Driving for Parents Who Owe*, ANCHORAGE DAILY NEWS, Oct. 13, 1996, at B1.

5. See Desda Moss, *Agencies Declare War on Deadbeat Parents*, USA TODAY, Apr. 18, 1995, at 4A. About 11 million families are owed child support. See *id.*

6. See H.R. CONF. REP. No. 104-430, § 101(5)(A)(i)(IV) (1995), available in 1995 WL 767839, at *21.

7. See *infra* notes 71-143 and accompanying text.

8. See *infra* notes 144-209 and accompanying text.

9. See *infra* notes 210-238 and accompanying text.

10. See, e.g., Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws § 5 (codified at ALASKA STAT. § 11.51.120 (Michie 1996)).

gations.¹¹ Also, federal law was recently expanded to criminalize nonpayment of child support obligations with respect to children who reside in other states.¹² In addition to these criminal provisions, the Alaska legislature has recently enacted a law, as required by a recent public law passed by the United States Congress,¹³ that requires the Department of Public Safety to suspend the driver's licenses of obligors who are not in substantial compliance with a child support order.¹⁴ Indeed, licensing agencies may not issue or renew certain occupational and professional licenses of delinquent obligors.¹⁵ Although Alaska currently has no provisions authorizing the posting of "most wanted lists" of delinquent obligors, creating such provisions has previously been considered in Alaska and may someday be enacted.¹⁶

The underlying goal of criminalization of nonsupport, license revocation or denial and "most wanted" posters of delinquent obligors is to "hit deadbeat parents where it hurts"—by taking away a deadbeat parent's freedom, by taking away the driver's or occupational license essential for earning a livelihood and by harming a deadbeat parent's reputation in the community. Commentators have criticized this goal, arguing that "punitive" efforts in child support enforcement are misplaced because they fail to address the reasons why many delinquent obligors disregard their child support obligations.¹⁷ While criminal provisions (which include the

11. See, e.g., Act of June 6, 1994, ch. 86, 1994 Alaska Sess. Laws § 3 (codified at ALASKA STAT. § 11.51.122 (Michie 1996)).

12. See Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994).

13. See Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 369, 110 Stat. 2105, 2251 (1996) (amending 42 U.S.C.A. § 666 (a)(16) (West Supp. 1997)). The law requires states to implement procedures which would give the state authority to withhold or suspend the licenses of individuals owing overdue support. The bill applies to driver's licenses, professional licenses, and recreational licenses. See *id.*

14. See ALASKA STAT. § 25.27.246 (Michie 1996).

15. See *id.* § 25.27.244.

16. See Op. Alaska Att'y Gen. No. 366-688-83 (July 11, 1983); see also Informal Op. Alaska Att'y Gen. No. 661-89-0405 (May 30, 1989).

17. See Monica J. Allen, *Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 FAM. L. Q. 293, 312-13 (1992). Some commentators have suggested that noncustodial parents might disregard child support obligations because (1) they "think of child support as a payment to their former partners rather than as fulfillment of an obligation wed to the children directly", (2) "they are dissatisfied with custody or visitation arrangements", (3) "they resent new enforcement measures" or (4) they resent the fact that "child support orders . . . sever the duty to support one's children from the right to control their actions." *Id.* (citing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 265 (1985); Leslie J. Harris et

possibility of significant jail time) are clearly punitive, the punitive aspects of the license revocation, denial and suspension programs and the publication of "most wanted" lists are perhaps not as obvious. The argument is that punishing a delinquent obligor with revocation or denial of his or her license will merely prevent the obligor from working to meet his or her obligations, thus frustrating the goal of recovery of support.

In addition, some critics have reacted unfavorably to the effort to "shame" delinquent obligors into meeting their obligations.¹⁸ In essence, this criticism assumes that punitive provisions are improper and ineffective and that enforcement provisions ought to include incentives rather than punishment. In response to this criticism, legislators generally point to two factors: (1) there is strong public support of the "punitive" efforts;¹⁹ and (2) the "punitive" efforts have proven quite effective so far.²⁰

This Note examines recent efforts in Alaska to "hit deadbeat parents where it hurts" through punitive child support enforcement provisions, focusing on practical and legal issues raised by each provision. Although these provisions may be regarded as punitive, the Note argues that their underlying policies and their suc-

al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689 (1990)); see also Raymond I. Parnas & Sherry Cermak, *Rethinking Child Support*, 22 U.C. DAVIS L. REV. 759, 761 (1989) (concluding that research does not support financial inability as the primary reason for nonpayment of child support).

18. See, e.g., Roger J.R. Levesque, *Targeting "Deadbeat" Dads: The Problem With the Direction of Welfare Reform*, 15 HAMLIN J. PUB. L. & POL'Y 1, 32 (1994) (arguing in part that "the preoccupation with the absent father's fault and irresponsibility displaces awareness of the limited resources of many absent fathers and of the administrative costs of 'making them pay'").

19. See, e.g., *Hearings Before the Alaska House Judicial Comm.*, 18th Leg. tape 94-58, side A, n.850 (1994). During that meeting, Mary Gay, Director, Child Support Enforcement Division ("CSDE"), testifying in support of House Bill 362, enacted as Alaska Statute sections 11.51.122 (Michie 1996), made the following statement: "I also believe that this legislation, when one or two cases occur, will send a message to society: That this type of activity is going to be met with a penalty. And they will refrain from [failing to make child support payments or aiding such failure]." Representative Jeannette James replied, "I like that position." *Id.*

20. In Fiscal Year 1996, \$12 billion in child support was collected. *Hearings Before the U.S. House of Representatives Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong., 1st Sess. (1997) (statement of David Gray Ross, Deputy Director, Office of Child Support Enforcement, U.S. Dept. of Health & Human Services). This amount exceeds President Clinton's budget projection of \$11.5 billion. See *id.* Most significantly, the amount collected represented a 50% increase in collection since Fiscal Year 1992, and the number of paying child support cases had also increased—by an impressive 36%. See *id.*

cess in increasing the recovery of child support justifies the use of these provisions in Alaska. Before turning to these mechanisms, Part II of this Note briefly discusses the civil child support enforcement provisions currently available and why it was necessary to adopt the stricter, punitive enforcement mechanisms. Part III then analyzes the criminal sanctions available through Alaska state law and federal law for enforcing payment of child support obligations and provides suggestions for strengthening the state law provisions. Part IV discusses Alaska's new law that revokes, suspends or denies licenses of delinquent obligors and analyzes the law's constitutionality. Finally, Part V encourages the enactment of a "most wanted list" in Alaska to complement existing punitive legislation and to increase the success of exacting child support payments from "problem parents."

II. BACKGROUND

A. Civil Child Support Enforcement Provisions

The civil provisions currently in effect in Alaska encourage payment of child support obligations in a variety of ways. Most obviously, Alaska has enacted legislation empowering an administrative agency to oversee collection and enforcement efforts.²¹ In addition, Alaska has provisions designed to encourage the enforcement of child support obligations that arise in another state.²²

Enforcement of child support payments is achieved through several means. Under Alaska Statutes section 25.25.305, the superior court and the Child Support Enforcement Division ("CSED") have not only the power to issue support orders, they are also empowered to do the following: (1) order income withholding;²³ (2) specify a method of payment for arrearages;²⁴ (3) enforce orders by civil or criminal contempt, or both;²⁵ (4) set aside property for satisfaction of the support order;²⁶ (5) place liens and order execution on the obligor's property;²⁷ (6) order the obligor to seek appropriate employment by specified methods;²⁸ (7) award attorney fees

21. See ALASKA STAT. §§ 25.27.010 et seq. (Michie 1996).

22. See Uniform Interstate Family Support Act, ALASKA STAT. §§ 25.25.101 et seq. (Michie 1996).

23. See ALASKA STAT. § 25.25.305(b)(3) (Michie 1996); see also *id.* § 25.27.062. The CSED can also order withholding from unemployment benefits. See *id.* § 23.20.401.

24. See *id.* § 25.25.305(b)(4).

25. See *id.* § 25.25.305(b)(5).

26. See *id.* § 25.25.305(b)(6).

27. See *id.* § 25.25.305(b)(7); see also *id.* §§ 25.27.230-.253.

28. See *id.* § 25.25.305(b)(10).

and costs;²⁹ (8) report payment history of obligor to credit bureaus and lending institutions;³⁰ and (9) "grant any other available remedy."³¹ Indeed, the "administrative remedies available to [the] CSED provide the agency with an exceptional degree of power."³²

In addition, under Alaska Statutes section 09.38.065(a)(1)(A), a "creditor may make a levy against exempt property of any kind to enforce a claim for child support."³³ Although 45% of the annual Permanent Fund Dividend ("PFD") is ordinarily exempt from any remedy for collection of debt, no part of an individual's PFD is exempt from child support obligations.³⁴ The Alaska legislature has also provided for a lenient statute of limitations for the time during which actions to establish judgments for child support payments must be brought.³⁵ Finally, the legislature has placed limitations on loans to persons who are in arrears on child support payment obligations.³⁶

In addition to the procedures currently available through Alaska law, there are additional methods by which payment of child support obligations can be encouraged, or forced, under federal law. For example, the Full Faith and Credit for Child Support Orders Act³⁷ is a complement to state laws such as the Uniform Interstate Family Support Act³⁸ ("UIFSA") relating to enforcement and modification of out-of-state child support orders, and it establishes national standards for the enforcement of out-of-state child

29. See *id.* § 25.25.305(b)(11).

30. See *id.* § 25.25.305; see also *id.* § 25.27.273.

31. *Id.* § 25.25.305.

32. *State v. Allsop*, 902 P.2d 790, 794 (Alaska 1995) (citing ALASKA STAT. § 25.27.250 (Michie 1996) (granting CSED the power to issue orders to withhold and deliver obligors' real or personal property)); see ALASKA STAT. § 25.27.230 (providing that CSED may record liens upon obligors' real or personal property); see also *id.* § 25.27.253 (providing that CSED may record liens that direct the state to withhold earnings and tax refunds).

33. ALASKA STAT. § 09.38.065(a)(1)(A) (Michie 1996).

34. See *id.* § 43.23.065.

35. See *id.* § 09.10.040(b) (providing that "an action may be brought to establish a judgment for child support payments that are 30 or more days past due under a support order . . . if the action is commenced by the date on which the youngest child covered by the support order becomes 21 years of age").

36. See Alaska Agricultural Loan Act, ALASKA STAT. § 03.10.030(i) (Michie 1996); Scholarship Loan Program, ALASKA STAT. § 14.43.125(a)(4) (Michie 1996); Commercial Fishing Loan Act, ALASKA STAT. §§ 16.10.300-370 (Michie 1996); ALASKA STAT. § 18.56.096(a)(7) (Michie 1996); *id.* §§ 18.56.440(6), 26.15.130, 27.09.020, 45.88.020, 45.89.030.

37. Pub. L. No. 103-383, 108 Stat. 4063 (1994) (codified at 28 U.S.C.A. § 1738B (West Supp. 1996)).

38. ALASKA STAT. §§ 25.25.101 et seq. (Michie 1996).

support orders.³⁹ Since interstate cases account for 30% of the nation's 17 million cases,⁴⁰ this law affects a significant portion of child support enforcement efforts. The act requires states to "enforce according to its terms a child support order made consistently with this section by a court of another state," and forbids states from "seek[ing] or mak[ing] a modification of such an order."⁴¹ The rendering state has continued, exclusive jurisdiction over the order as long as the child for whom support is ordered resides in the state *or* the state remains the residence of *any* contestant in the matter.⁴² In the enforcement of out-of-state child support orders, the law of the *forum* state applies.⁴³ This act was designed "to facilitate the enforcement of child support orders among the [s]tates . . . [and] to avoid jurisdictional competition and conflict among [s]tate courts in the establishment of child support orders."⁴⁴

In addition to the requirements for uniform enforcement of out-of-state child support orders, the federal government has several provisions designed to enhance enforcement. These provisions include the following: (1) mandatory garnishment of federal employees' pay;⁴⁵ (2) attachment of the insurance and annuity payments of government employees;⁴⁶ (3) a requirement that all credit reporting agencies must include information on overdue child support obligations for the preceding seven years;⁴⁷ and (4) mandatory withholding of past-due support from federal tax refunds.⁴⁸ In order "to provide incentives to reduce welfare dependency, promote self-sufficiency, [and] increase child support payments," the federal government will also provide a bonus to each state that provides job training to "absent parents of children receiving aid to families with dependent children . . . who subsequent

39. *See id.*

40. *See Moss, supra* note 5, at 4A.

41. Pub. L. No. 103-383, § 3, 108 Stat. at 4064.

42. *See id.* § 3, 108 Stat. at 4064.

43. *See id.* § 3, 108 Stat. at 4065. However, when *interpreting* an out-of-state child support order, the law of the rendering state applies. *See id.* Also, the forum state's court must apply the statute of limitations of the forum state or the rendering state, whichever is longer. *See id.*

44. *Id.* § 2, 108 Stat. at 4064.

45. *See* 5 U.S.C.A. § 5520a (West 1996).

46. *See* 5 U.S.C. § 8437(e)(3) (1994).

47. *See* 15 U.S.C.A. § 1681s-1 (West Supp. 1996).

48. *See* 42 U.S.C. § 664 (1994). This withholding applies only when the amount of the past-due support owed at the time of the withholding is equal to or greater than \$500. *See id.* § 664 (b)(2)(A). The amounts withheld will be disbursed to the state agency for distribution. *See id.* § 666(a)(1).

to such training pay child support for their children."⁴⁹

Congress has also set forth a list of procedures that the states are statutorily required to undertake in order to improve the effectiveness of child support enforcement.⁵⁰ States are now required to implement the following procedures: (1) withholding income;⁵¹ (2) withholding from state income tax;⁵² (3) imposing liens against real and personal property for amounts of overdue support;⁵³ (4) releasing information regarding the amount of overdue support owed by an absent parent to any consumer reporting agency;⁵⁴ and (5) including provisions for withholding from wages in all child support orders.⁵⁵

B. Weaknesses of the Civil Child Support Enforcement Provisions

Of all the child support enforcement provisions available, wage withholding is by far the most effective enforcement technique, accounting for 55% of the total collections nationally in fiscal year 1994.⁵⁶ Withholding of unemployment compensation and federal and state income tax refunds are also powerful enforcement tools.⁵⁷ However, these mechanisms often miss a significant portion of noncustodial parents. While wage-earning obligors who are one month late in making their payments can have their wages withheld,⁵⁸ obligors who are self-employed, who are independent contractors, or who change jobs frequently—in short, obligors who do not earn a wage that can be attached—are not subject to wage withholding. Noncustodial parents can defeat withholding by purposefully changing employers or willfully hiding income to elude

49. 29 U.S.C. § 1791 (1994).

50. See 42 U.S.C. § 666 (West Supp. 1997).

51. See *id.* § 666(a)(1).

52. See *id.* § 666 (a)(3)(A). The amount by which the refund is reduced shall be distributed to the child or parent to whom such support is owed. See *id.* § 666 (a)(3)(B).

53. See *id.* § 666(a)(4).

54. See *id.* § 666(a)(7).

55. See *id.* § 666(a)(8)(A).

56. See OFFICE OF CHILD SUPPORT ENFORCEMENT, NINETEENTH ANNUAL REPORT TO CONGRESS (1994). Wage withholding "is the most effective enforcement mechanism when an obligor has a regular source of income because it allows for the collection of current support and arrearages." MARGARET CAMPBELL-HAYNES ET AL., CHILD SUPPORT ENFORCEMENT MANUAL § VII (1989).

57. See OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 56. Collectively, they account for an additional 9% of total collections during fiscal year 1994. See *id.*

58. See ALASKA STAT. § 25.27.062(c)(2) (Michie 1996).

their child support obligations.⁵⁹ In addition, obligors who are not due any tax refund will not be affected by tax refund interception. Successful tax interception also proves difficult, since a request for tax interception may be delayed for years.⁶⁰

The latest statistics show that although the return on the money spent under child support enforcement programs is positive—\$3.98 is collected for each enforcement dollar spent—the net collections are rather dismal.⁶¹ Of the approximately \$35 billion in child support payments owed nationwide, more than \$27 billion remained uncollected at the end of fiscal year 1992.⁶² During that year, more than 5.7 of the 8.5 million noncustodial parents owing child support made no payment on the amount owed.⁶³ In addition, while 43% of unmarried mothers above the poverty level receive child support, only 25% of unmarried poor mothers receive child support.⁶⁴ In Alaska, the CSED is currently handling 42,400 child-support cases involving 68,000 children,⁶⁵ and it is receiving collections only from approximately 46% of their case load.⁶⁶

In an effort to collect from these elusive noncustodial parents, for whom the existing civil mechanisms do not work, legislatures and child support enforcement agencies across the country have increasingly turned to alternative mechanisms as a last resort. Included in these mechanisms are criminal sanctions for nonsupport. Criminal sanctions have four main advantages over the numerous civil remedies available for enforcing child support orders: (1) a local prosecutor may provide swifter enforcement than a backlogged

59. See Janelle T. Calhoun, Comment, *Interstate Child Support Enforcement: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921, 933 (1995).

60. See *id.* at 935 (citing *Child Support Enforcement, 1994: Hearings Before the U.S. Senate Subcomm. on Federal Servs., Post Office, and Civil Serv. of the Senate Comm. on Gov'tal Affairs*, 103d Cong., 2nd Sess. (1994) (statement of Pat Addison, Program Specialist, Virginia Division of Child Support Enforcement)).

61. See Ellen Debenport, *GOP Welfare Reform Set for House Vote*, ST. PETERSBERG TIMES, Mar. 24, 1995, at 1A (citing 1993 statistics listed in the 1994 GREEN BOOK, a compilation of data by the House Ways and Means Committee). A recent report by a congressional conference indicated that only 18% of the caseload has any collection at all. See H.R. CONF. REP. NO. 104-430, § 101(4) (1995), available in 1995 WL 767839, at *21.

62. See GENERAL ACCOUNTING OFFICE REPORTS & TESTIMONY, CHILD SUPPORT ENFORCEMENT: CREDIT BUREAU REPORTING SHOWS PROMISE (1994).

63. See *id.*

64. See *id.*

65. See *Child-Support Agency to Get More Funding*, ANCHORAGE DAILY NEWS, Apr. 6, 1995, at D4.

66. See *Hearings Before the Alaska House Comm. on Health & Human Servs.*, 18th Leg. tape 94-61, side B, n.927 (1994) (statement of Phillip Petrie, Acting Operations Manager, CSED).

child support enforcement agency; (2) criminal enforcement may act as a deterrent, reducing recidivism for a particular defendant and reducing the tendency of the rest of the population to commit the crime; (3) the threat of extradition in interstate cases may encourage compliance with court orders; and (4) the criminalization of the nonpayment of child support demonstrates state and federal legislatures' realization that it is "a serious threat not only to the children who suffer, but to society as a whole."⁶⁷

III. PUNITIVE PROVISIONS

The Alaska State Legislature's condemnation of a parent's failure to meet his or her child support obligations is clearly set out in Chapter 144 of the 1984 Alaska Session Laws, which is an act designed to "enhance efforts to enforce the requirements that parents pay the cost of rearing their children and thereby enhance the quality of life for all Alaskans."⁶⁸ The legislature found that "the effect on the general public of the failure of parents to support their children is vast and far reaching. The harmful effects of unpaid child support touch not only the poor but reach far beyond, diminishing the overall quality of life for all Alaskans."⁶⁹ The legislature further stated:

[A] disproportionately high percentage of lower-income, single-parent families are headed by women. The difficulties in obtaining child support from noncustodial parents contributes significantly to the hardship of those families. The fact that the general public bears the huge monetary cost of supporting families on public assistance because of inadequate support from noncustodial parents is only one of the most obvious effects of the problem of unpaid child support. In addition, it is recognized that the failure of parents to support their children is a major factor contributing to the broader social problems of child abuse and delinquency. Even when families are able to survive without public assistance, the hardship experienced by a family, and particularly by the children in that family, is usually substantial.⁷⁰

These findings provide the rationale for Alaska's criminalization of nonpayment of child support.

A. State Criminal Provisions

1. *Alaska Statutes section 11.51.120.* Reflecting the view that

67. Eleanor H. Landstreet, *State and Federal Criminal Nonsupport Prosecution*, FAIR\$HARE, July 1993, at 16.

68. Act of July 3, 1984, ch. 144, 1984 Alaska Sess. Laws § 1(d) (codified at ALASKA STAT. § 01.10.070 (Michie 1996)).

69. *Id.* § 1(a).

70. *Id.* § 1(b).

nonpayment of child support obligations is an activity (or, to be precise, a nonactivity) so heinous that it affects not only the family but society as a whole, the legislature enacted Alaska Statutes section 11.51.120, which criminalized nonsupport under certain circumstances.⁷¹ This statute defines the crime of criminal nonsupport as “fail[ing] without lawful excuse to provide support for [a] child,” the support of whom is that person’s legal responsibility.⁷² The statute further defines “support” as including “necessary food, care, clothing, shelter, medical attention, and education,” and it defines criminal nonsupport as a class A misdemeanor.⁷³ The statute appears to have been most frequently used for abuse situations, including failure to obtain medical services,⁷⁴ rather than for nonpayment of child support.

An official with the CSED has explained the scarcity of prosecutions under the statute as arising from the CSED’s primary goal, which is to recover child support payments, not to incarcerate delinquent obligors:

Our experience, at least, in the last five to six years, is that we’re not getting incarceration, and even in criminal nonsupport cases, that our primary aim is to recover the money, and not to incarcerate people, and we wouldn’t use this against people that don’t have the assets to pay. If there is any incarceration, it’s been for very short periods of time, and usually within that short period of time they come up with the money or a substantial part of the money. Most recently, in 1992, two men spent four days in jail over a weekend until they could come up with the money, \$10,000 and \$10,400 [respectively], (before each) could come out. And it was a matter of arranging the financing. I don’t anticipate realistically that even under the [c]lass A felony that any judge in the state would sentence someone to a period of incarceration.⁷⁵

71. See ALASKA STAT. § 11.51.120 (Michie 1996); see also *Moss v. State*, 834 P.2d 1256, 1258 (Alaska Ct. App. 1992). The court noted that the principal purpose of civil contempt is to compel compliance, while the purpose of criminal contempt is “primarily to punish an individual for past noncompliance [T]he Court may punish the past willful failure to pay child support by criminal contempt.” *Id.* (citing *Diggs v. Diggs*, 663 P.2d 950, 951 (Alaska 1983); *Johansen v. State*, 491 P.2d 759, 763-66 (Alaska 1971)).

72. ALASKA STAT. § 11.51.120.

73. *Id.* A class A misdemeanor carries a sentence of not more than one year. ALASKA STAT. § 12.55.135(a) (Michie 1996).

74. See, e.g., *S.R.D. v. State*, 820 P.2d 1088 (Alaska Ct. App. 1991); *State v. Green*, 810 P.2d 1023 (Alaska Ct. App. 1991); *Wentz v. State*, 777 P.2d 213 (Alaska Ct. App. 1989); *Sweetin v. State*, 744 P.2d 424 (Alaska Ct. App. 1987).

75. *Hearings Before the Alaska House of Representatives Judicial Standing Comm.*, 18th Leg., tape 94-58, side B, n.040 (1994) (statement of Phillip Petrie, Acting Operations Manager, CSED).

Another official stated that "the division is more focused on deterring the situation than they are on prosecuting [delinquent obligors]." ⁷⁶

Although prosecutions under it appear to have been rare, the statute has seen occasional use. In *Couch v. State*,⁷⁷ the defendant was convicted under a plea of no contest to the charge of criminal nonsupport.⁷⁸ For ten years the defendant had failed to make monthly support payments—in disregard of orders from courts of Alaska and Nevada.⁷⁹ Because his history suggested he would not be amenable to probation, the court sentenced him to 180 days (with ninety suspended) in jail.⁸⁰ "[H]is crime was an offense against the family . . . [H]is victims were his own children."⁸¹

The lack of prosecutions under Alaska Statutes section 11.51.120 may be attributed to several deficiencies in the section's language. For example, section 11.51.120 does not identify what punishment violators will potentially face.⁸² Also, the statute does not explicitly require a particular mens rea; nonetheless the Alaska Court of Appeals has held that the offense requires proof of a knowing failure to provide support, accompanied by a reckless disregard for ability to pay.⁸³ The statute further fails to indicate whether inability to pay should be an affirmative defense or whether it should be an element of the crime which must be proved by the state.⁸⁴ Although the statute is triggered when an obligor "fails . . . to provide support,"⁸⁵ the statute does not indicate what length of time, if any, must pass before a person can be prosecuted under the statute; nor does it indicate what amount of arrearage is owed.⁸⁶ Finally, the statute fails to differentiate be-

76. *Hearings Before the Alaska House Comm. on Health & Human Servs.*, 18th Leg., tape 94-61, side B, n.701 (1994) (statement of Mary Gay, Director, CSED).

77. 795 P.2d 1291 (Alaska Ct. App. 1990).

78. *See id.* at 1291.

79. *See id.* at 1292.

80. *See id.*

81. *Id.*

82. *See* ALASKA STAT. § 11.51.120 (Michie 1996). However, ALASKA STAT. §§ 12.55.035-.036 (Michie 1996) provide that the maximum penalty for a class A misdemeanor is \$5,000 or one year, but not both.

83. *See Taylor v. State*, 710 P.2d 1019, 1022 (Alaska Ct. App. 1985).

84. *Taylor* explicitly rejected the interpretation of "without lawful excuse" as a designation of inability to pay as an affirmative defense; instead, the court chose to make the state bear the burden of proving a defendant's ability to pay. *See id.* at 1021 n.2.

85. ALASKA STAT. § 11.51.120.

86. *See id.*

tween possible levels of seriousness under the statute.⁸⁷

2. *Alaska Statutes section 11.51.122.* The deficiencies in section 11.51.120 stand in contrast to Alaska Statutes section 11.51.122,⁸⁸ which criminalizes the aiding and abetting of nonpayment of child support obligations. Before the passage of this statute, unscrupulous employers could enter into employment arrangements that would allow noncustodial parents to avoid their child support obligations by avoiding the wage withholding requirements of Alaska Statutes section 25.25.305.⁸⁹ To convict someone of aiding criminal nonpayment of child support, it must be proven that, knowing that a noncustodial parent had child support obligations, a person “intentionally participat[ed] in a commercial, business, or employment arrangement with the obligor, knowing at the time that the arrangement is made that it will allow the obligor to avoid paying all or some of the support.”⁹⁰

Section 11.51.122 is “targeted at people who deliberately evade child support by placing assets in someone else’s name or [by] creating companies in someone else’s name.”⁹¹ Indeed, the Director of the CSED indicated that it was “common practice for obligors to list their assets under other people’s names to avoid support” obligations.⁹²

The Senate Judiciary Committee first modified the bill to include subsection (b), which would have provided that it was “not a defense that the . . . defendant did not intend to assist the obligor in the nonpayment of child support . . . or [that the] obligor did not intend to avoid paying child support.”⁹³ Finally, the bill was amended for the last time by the Senate, which accepted Senator Donley’s proposal that “not” be deleted from subsection (b), making “lack of intention to assist,” a defense.⁹⁴

Unlike section 11.51.120, Alaska Statutes section 11.51.122 has

87. *See id.*

88. *Id.* § 11.51.122.

89. *Id.* § 25.25.305.

90. *Id.* § 11.51.122(a)(2)(B). This statute also allows for conviction of a person who “intentionally withhold[s] information about the residence or employment of the obligor when that information is requested by a child support enforcement agency.” *Id.* § 11.51.122(a)(2)(A).

91. *Hearings Before the Alaska House Comm. on Health & Human Servs.*, tape 94-61, side B, n.055 (1994) (statement of Phillip Petrie, Acting Operations Manager, CSED).

92. *Id.*, n.675 (1994) (statement of Mary Gay, Director, CSED).

93. Senate Journal, 18th Leg., 2d Sess. 4220 (May 2, 1994); *see* H.R. 362, 18th Leg., 2d Sess. (Alaska 1994).

94. Senate Journal, 18th Leg., 2d Sess. 4674 (May 10, 1994); *see* H.R. 362, 18th Leg., 2d Sess. (Alaska 1994).

several strengths, including the clear identification of potential penalties, a clear statement of the required mens rea and a clear requirement that thirty days must pass before the statute is triggered.⁹⁵

3. *Recommendations for amendments that would strengthen and clarify Alaska Statutes section 11.51.120.* Prosecutions seem to be rarely pursued under section 11.51.120. As discussed above, this scarcity of prosecutions could perhaps be attributed to the section's deficiencies. Although the Alaska Court of Appeals has held that section 11.51.120 is not impermissibly vague,⁹⁶ the statute would become clearer were these deficiencies addressed. By examining Alaska case law as well as the statutes of several other states that criminalize the nonpayment of child support obligations, this Note will make various suggestions about how Alaska could make its statute stronger.

a. *The statute should explicitly state that it applies to nonpayment of child support.* In *Taylor v. State*,⁹⁷ the court of appeals interpreted section 11.51.120 broadly to apply to nonpayment of child support.⁹⁸ The court declined to delineate the parameters of "support" under section 11.51.120, holding merely that "in criminal nonsupport prosecutions under [section] 11.51.120, proof of failure to make court-ordered support payments will, at the very least, suffice to establish a prima facie case of nonsupport."⁹⁹ If the legislature were to include explicit statutory language indicating that the statute applies to court-ordered support payments, the improved clarity might have a greater deterrent effect on obligors. In addition, as the statute is currently written, it could be interpreted to apply to noncustodial parents who have no court-ordered child support obligations and who do not contribute to the support of their children. The problem with such an application is that the statute gives no indication when and under what circumstances such parents would become liable. As the court of appeals noted in *Olp v. State*,¹⁰⁰ "there is a real risk that were we to interpret the statute [in the suggested manner], the statute would become void for vagueness."¹⁰¹ To avoid possibly questionable applications of the

95. See ALASKA STAT. § 11.51.122.

96. See *Taylor v. State*, 710 P.2d 1019, 1023 (Alaska Ct. App. 1985) (holding that the statute affords adequate notice of the conduct it prohibits).

97. 710 P.2d 1019 (Alaska Ct. App. 1985).

98. See *id.* at 1022.

99. *Id.*

100. 738 P.2d 1117 (Alaska Ct. App. 1987).

101. *Id.* at 1119 (refusing to apply section 11.51.120 to stepparents).

statute while encouraging applications which are within the contemplation of the legislature, section 11.51.120 should be amended to indicate explicitly what types of nonpayment of child support it covers.

b. *The statute should be divided into graduated levels of offenses with corresponding levels of punishment.* Alaska Statutes section 11.51.120(c) currently defines the violation of a parent's legal responsibility to provide support for a child as a class A misdemeanor.¹⁰² No distinction is made between a past due amount of \$50 and \$50,000; under the terms of the statute, both amounts could subject obligors to a misdemeanor violation. While this might be an adequate deterrent for an obligor whose arrearage is only a few thousand dollars, it might be too severe a punishment for someone with a small arrearage, and it would certainly be too lenient for repeat or flagrant offenders. The Alaska legislature should consider instituting a graduated scale, so that offenders will face punishment commensurate with their deeds. In formulating such a scale, the laws of other states ought to be examined.

Several states penalize failure to pay child support according to a graduated scale, with first-time offenders punished as misdemeanants and repeat or flagrant offenders punished as felons.¹⁰³ Furthermore, some states have graduated levels within the misdemeanor and felony categories.¹⁰⁴ The basis for the gradations is usually one of the following: (1) the amount of unpaid child support equals a floor monetary figure;¹⁰⁵ (2) the amount of unpaid child support equals a certain number of monthly support obligations (for example, six months worth of unpaid support); (3) during a specific period of time, the parent has failed to pay a particular number of payments (for example, six payments during the preceding twelve months); or (4) some combination of the previous possibilities (for example, the greater of \$2000 or six times the monthly support obligation).¹⁰⁶ In addition, several states heighten the level of offense from a misdemeanor to a felony if a person leaves the state for the purpose of evading child support obliga-

102. See ALASKA STAT. 11.51.120(c) (Michie 1996). An obligor convicted of a class A misdemeanor may be sentenced to a "definite term of imprisonment of not more than one year." *Id.* § 12.55.135(a).

103. See, e.g., KY. REV. STAT. ANN. § 530.050 (Banks-Baldwin 1995); TENN. CODE ANN. § 39-15-101 (1991). The Model Penal Code takes a more lenient approach, suggesting merely a misdemeanor for a person who persistently fails to provide support. See MODEL PENAL CODE § 230.5 (1962).

104. See, e.g., N.D. CENT. CODE § 12.1-37-01 (Supp. 1995).

105. See, e.g., R.I. GEN. LAWS § 11-2-1.1(a) (Supp. 1995) (punishing arrearages of past due support in the amount of \$30,000 as a felony).

106. See, e.g., MO. ANN. STAT. § 568.040(4) (West Supp. 1997).

tions.¹⁰⁷ These provisions generally have neither a monetary threshold requirement nor a requirement of a prior offense.¹⁰⁸

In formulating a graduated statutory scale, the Alaska legislature could also look to previous bills that it has considered in this area. In the original version of the House Bill for Alaska Statutes section 11.51.122,¹⁰⁹ which criminalizes the aid of nonpayment of child support, Representative Martin's proposal included gradations of the severity of the offense. Each level would have required the child support payment to be past due by thirty days, but the bill set up specific distinctions according to the amount of support due: (1) a class B misdemeanor if less than \$1000 were due; (2) a class A misdemeanor if between \$1000 and \$5000 were due; and (3) a class C felony if at least \$5000 were due.¹¹⁰ During committee meetings in the Alaska House of Representatives, many legislators remarked on the discrepancy between the penalties provided by section 11.51.120 and those that were proposed in House Bill 362.¹¹¹ The representatives were in general agreement that it would be improper to punish nonpayment of child support as a class A misdemeanor while punishing aiding nonpayment of child support as a class C felony, and members of the Health, Education and Social Services committee expressed an interest in having the punishment for nonpayment of child support raised to a class C felony.¹¹²

c. *The statute should specify the required state of mind for the*

107. See, e.g., GA. CODE ANN. § 19-10-1(b) (1991) (making this offense a felony but providing that the first two convictions for this offense are reducible to a misdemeanor); OKLA. STAT. ANN. tit. 21, § 852B (West Supp. 1994) (making fleeing the state for this purpose a felony punishable by up to 4 years imprisonment, a fine of \$5000, or both); S.D. CODIFIED LAWS § 25-7-16 (Michie Supp. 1996) (making it a felony for a parent to leave the state during a violation and remain absent for more than 30 days).

108. For example, Montana recognizes the offense of "aggravated nonsupport," which occurs when a person either (a) has been previously convicted of nonsupport or (b) "has left the state without making reasonable provisions" for support. MONT. CODE ANN. § 45-5-621(2)(a) (1995). The penalty for this offense is a fine not to exceed \$50,000, imprisonment not to exceed 10 years, or both. See *id.* § 45-5-621(7)(c).

109. H.R. 362, 18th Leg., 2d Sess. (Alaska 1994).

110. See *id.* However, at the suggestion of Representative Brown, House Journal, 18th Leg., 2d Sess. 3427 (Apr. 14, 1994), the penalty was changed to a class A misdemeanor, and all gradations were removed. See H.R. 362.

111. See *Hearings Before the Alaska House Comm. on Health, Educ. & Social Servs.*, 18th Leg., tape 94-61, side B, nn.234-591 (1994) (statement of Phillip Petrie, Acting Operations Manager, CSED).

112. See *id.*

criminal nonsupport statute. In *Taylor v. State*, the court held that because the statute “does not specify any culpable mental state,” the default levels of criminal intent of Alaska Statutes section 11.81.610(b) should be applied—“knowingly” for conduct and “recklessly” for results.¹¹³ The court held that application of Alaska Statutes section 11.81.610(b) “leads to the conclusion that the offense of criminal nonsupport requires proof of a knowing failure to provide support, accompanied by a reckless disregard for ability to pay.”¹¹⁴ Because the level of criminal intent adopted in *Taylor* might not properly reflect the desire of the legislature if they were to amend the statute and adopt some of the recommendations included in this Note, the legislature should give special consideration to the applicable culpable mental state.

Again, an examination of laws from other states proves helpful. Briefly, the mental state required under other state statutes varies. While some require willfulness or intent,¹¹⁵ others require only knowledge.¹¹⁶ A few states’ statutes even allow conviction upon a theory of negligence.¹¹⁷

d. *The statute should be amended to indicate that inability to pay is an affirmative defense.* Almost all states with criminal penalties for failure to pay child support also provide an affirmative defense of inability to pay.¹¹⁸ Proof of this defense requires more than merely being out of work at the moment, however. For example, a Wisconsin statute criminalizing failure to pay child support obligations states that “a person may not demonstrate inability to provide child . . . support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his

113. *Taylor v. State*, 710 P.2d 1019, 1022 (Alaska Ct. App. 1985) (citing ALASKA STAT. § 11.81.610(b) (Michie 1996)).

114. *Id.*

115. *See, e.g.*, MASS. ANN. LAWS ch. 273, § 1(4) (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS § 25-7-16 (Michie Supp. 1996).

116. *See, e.g.*, MINN. STAT. ANN. § 609.375(1) (West Supp. 1997); MO. ANN. STAT. § 568.040(a) (West Supp. 1997); MONT. CODE ANN. § 45-5-621(1) (1995).

117. Connecticut allows conviction of “any person who neglects or refuses to furnish reasonably necessary support.” CONN. GEN. STAT. ANN. § 53-304(a) (West Supp. 1994). On the other hand, Nebraska seems to have a mixed mens rea requirement. *See* NEB. REV. STAT. § 28-706 (1995). Under this statute, a person is guilty of criminal nonsupport if he or she “intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obligated to provide.” *Id.*

118. *See, e.g.*, COLO. REV. STAT. ANN. § 14-6-101(1) (Supp. 1996); IND. CODE ANN. § 35-46-1-5(d) (Michie Supp. 1996).

or her earnings or assets."¹¹⁹ Texas' definition of inability to pay reaches beyond employability, providing in pertinent part:

An obligor may plead as an affirmative defense . . . that the obligor:

- (1) lacked the ability to provide support in the amount ordered;
- (2) lacked property that could be sold, mortgaged, or otherwise pledged to raise the funds needed;
- (3) attempted unsuccessfully to borrow the funds needed; and
- (4) knew of no source from which the money could have been borrowed or legally obtained.¹²⁰

As an affirmative defense, the burden of proof usually rests with the parent seeking child support.¹²¹

As it is currently written, Alaska Statutes section 11.51.120 fails to indicate whether inability to pay should be an affirmative defense or whether it should be an element of the crime that must be proved by the state. However, in *Taylor v. State*, the Alaska Court of Appeals held that the state must bear the burden of proving a defendant's inability to pay.¹²² Because this decision was based on statutory interpretation and was not a reflection of any constitutional requirement, the legislature could change the statute without constitutional effects. Therefore, if it were to amend the statute, the legislature may designate who is to bear the burden of proof. Prosecution under this statute would be considerably easier if inability to pay were an affirmative defense. After all, a defendant under this section is in the best position to know about alternative financial means that could be used to meet the child support obligation.

B. Federal Criminal Provisions

Under the Child Support Recovery Act of 1992¹²³ ("CSRA"), Congress has criminalized the "willful[] fail[ure] to pay a past due support obligation with respect to a child who resides in another [s]tate."¹²⁴ Much like many of the state statutes examined above, this statute has graduated levels of offenses and a threshold requirement. While the punishment for a first offense is a fine or imprisonment for not more than six months (or both), for "any other case" the punishment is a fine or imprisonment for not more than

119. WIS. STAT. ANN. § 948.22(6) (West 1996).

120. TEX. FAM. CODE ANN. § 157.008(c) (West 1996).

121. See, e.g., WIS. STAT. ANN. § 948.22(6) (West 1996).

122. See *Taylor v. State*, 710 P.2d 1019, 1021 & n.2 (Alaska Ct. App. 1985).

123. 18 U.S.C. § 228 (1994).

124. *Id.* § 228(a).

two years (or both).¹²⁵ The past due support obligation also must have “remained unpaid for a period longer than one year” or be “greater than \$5,000.”¹²⁶ However, even if these requirements are met, prosecution is not automatic. Despite the fact that the Justice Department recently staged a high visibility campaign to intimidate violators of the CSRA, the overwhelming nature of the problem prevents the government from taking action directly on complaints from most victims.¹²⁷ Instead, “because this remedy is reserved for only the most egregious cases,” a custodial parent must exhaust “all reasonable available remedies” at the state level before prosecution will be undertaken.¹²⁸

At the present time, no CSRA cases have been brought in the district of Alaska, and only a few cases have been heard in the Ninth Circuit. Because the arguments made for and against the constitutionality of the CSRA have been thoroughly examined in many recent law review articles,¹²⁹ this Note will not examine them here. Nevertheless, it will briefly mention the Ninth Circuit’s specific holdings.

In *United States v. Mussari*¹³⁰ and its companion case *United States v. Schroeder*,¹³¹ the District Court of Arizona declared the CSRA unconstitutional.¹³² The court invalidated the statute on several grounds: (1) the CSRA is a “criminal statute aimed at an area of activity which has already been addressed by the [s]tates”

125. *Id.* § 228(b).

126. *Id.* § 228(d)(1)(B).

127. See DEPARTMENT OF JUSTICE, DEADBEAT DAD ENFORCEMENT: DOJ ON TIGHTROPE 5 (1995).

128. OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 56.

129. See, e.g., Cindy Boer, Comment, *The New and “Improved” Commerce Power C Can the Federal Child Support Recovery Act Survive Lopez?*, 13 COOLEY L. REV. 677 (1996); Kathleen A. Burdette, Comment, *Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez*, 144 U. PA. L. REV. 1469 (1996); Ronald S. Kornreich, Note, *The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery Act of 1992 After United States v. Lopez*, 64 FORDHAM L. REV. 1089 (1995); Dawn L. Rudenko, Note, *Child Support Recovery Act: Unification or Usurpation? The CSRA in the Aftermath of United States v. Lopez*, 31 NEW ENG. L. REV. 267 (1996); Amy E. Watkins, Comment, *The Child Support Recovery Act of 1992: Squeezing Blood from a Stone*, 6 SETON HALL CONST. L. J. 845 (1996); Rebecca A. Wistner, Comment, *Abusing the Power to Regulate: The Child Support Recovery Act of 1992*, 46 CASE W. RES. L. REV. 935 (1996).

130. 894 F. Supp. 1360 (D. Ariz. 1995), *rev’d*, 95 F.3d 787 (9th Cir. 1996).

131. 894 F. Supp. 360 (D. Ariz. 1995), *rev’d sub nom.* *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

132. See *Mussari*, 894 F. Supp. at 1361. *Schroeder* and *Mussari* were both written by Judge Rosenblatt; except for the background facts, the two opinions are identical. For simplicity, this Note will cite only to *Mussari*.

and therefore it cannot be sustained as a regulation of an activity that substantially affects interstate commerce;¹³³ (2) the CSRA violates notions of federalism and comity by requiring federal courts to review and apply state orders;¹³⁴ and (3) “[b]ecause the CSRA is an exercise of powers beyond those given to Congress by the Constitution, the CSRA infringes upon those powers reserved for the [s]tates by the Tenth Amendment.”¹³⁵ On a motion for reconsideration, the district court further ruled that the CSRA could not be upheld as a valid exercise of Commerce Clause authority because it failed to establish that interstate commerce existed.¹³⁶ The district court also implied that because the “true focal point . . . [of the CSRA] is clearly the requirement that the parent and child live in different states,”¹³⁷ the CSRA was in reality an attempt by Congress to create diversity jurisdiction in a child support matter, in disregard of the domestic relations exception to the use of diversity jurisdiction.¹³⁸

The Ninth Circuit Court of Appeals reversed the district court,¹³⁹ holding that (1) the CSRA was a constitutional exercise of Congress’s power under the Commerce Clause as a regulation of the channels of interstate commerce,¹⁴⁰ (2) the CSRA did not violate the Tenth Amendment reservation of state powers because Congress acted under one of its enumerated powers,¹⁴¹ and (3) the domestic relations exception has no application here because this is not “a case of jurisdiction based on diversity but [a case of] jurisdiction conferred by congressional employment of congressional power under the Commerce Clause.”¹⁴²

The court of appeals’s decision in *United States v. Mussari* is clearly in accord with the weight of authority.¹⁴³ Because the stat-

133. *Id.* at 1364.

134. *See id.* at 1367.

135. *Id.* at 1368.

136. *See id.* at 1253-55.

137. *Id.* at 1254.

138. *See id.* at 1254-55 (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (“[T]he domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees.”)).

139. *See Mussari*, 95 F.3d 787, *rev’g*, 894 F. Supp. 1360 and *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995).

140. *See id.* at 790.

141. *See id.* at 791.

142. *Id.*

143. Other than the lower court decisions in *Mussari* and *Schroeder*, only one other case has held the CSRA unconstitutional: *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995). In contrast, at least 15 other cases have upheld the constitutionality of the CSRA. *See, e.g.*, *United States v. Lewis*, 936 F. Supp. 1093 (D.R.I. 1996); *United States v. Ganaposki*, 930 F. Supp. 1076 (M.D. Tenn. 1996);

ute has withstood multiple constitutional challenges, it is likely that enforcement of the CSRA in Alaska will be held constitutionally valid.

C. General Weaknesses of the State and Federal Criminal Statutes

Although it is not clear precisely why prosecutions are rarely pursued under the statutes criminalizing the nonpayment of child support and the aid of nonpayment of child support, there are a few possible explanations. The most obvious explanation is the difficulty of proving these crimes "beyond a reasonable doubt." Administrative provisions, such as those discussed in Part II, or the license revocation, denial and suspension provisions examined in the next part, are perhaps less burdensome to enforce and can be undertaken on a larger scale. In addition, Alaska Statutes section 11.51.120 (punishing the nonpayment of child support) is too broad to be an effective tool in the arsenal of child support enforcement provisions. Finally, the CSRA is limited only to those families in which the delinquent obligor resides in a different state from his or her children. While a large number of families fit this description, the majority of child support cases in Alaska do not. Despite the relative under-enforcement of these statutes, Alaska has considered (and enacted) other enforcement provisions that will allow it to meet the twin goals of the criminal statutes, namely making enough deadbeat parents feel the pinch of enforcement and increasing child support collections. Included in these new statutes are provisions that require the revocation, suspension or denial of licenses of delinquent obligors.

IV. REVOCATION, SUSPENSION OR DENIAL OF LICENSES

The most recent, and perhaps the most controversial, change in Alaska's child support enforcement provisions is the enactment of legislation in 1996 that threatens to hit delinquent parents in a most sensitive area by revoking their driver's and occupational licenses. Specifically, Alaska Statutes section 25.27.244¹⁴⁴ requires licensing agencies to restrict the issuance and renewal of occupational and professional licenses of child support obligors who are

United States v. Nichols, 928 F. Supp. 302 (S.D.N.Y. 1996); United States v. Johnson, 940 F. Supp. 911 (E.D.Va. 1996); United States v. Sage, 906 F. Supp. 84 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996); United States v. Hampshire, 892 F. Supp. 1327 (D. Kan. 1995), *aff'd*, 95 F.3d 999 (10th Cir. 1996); United States v. Murphy, 893 F. Supp. 614 (W.D. Va. 1995), *vacated on other grounds*, 934 F. Supp. 736 (W.D. Va. 1996).

144. ALASKA STAT. § 25.27.244 (Michie 1996).

not in "substantial compliance" with their child support order.¹⁴⁵ Alaska Statutes section 25.27.246¹⁴⁶ uses the same "substantial compliance" standard to allow suspension and revocation of driver's licenses.¹⁴⁷ Although the statutes are very similar in content and form, there are important distinctions between them.

Under the terms of section 25.27.244, every month the CSED must create a list of all obligors who are not in substantial compliance¹⁴⁸ and forward the list to all licensing entities subject to the statute.¹⁴⁹ Before placing an obligor on the list, the CSED must give him or her at least sixty days written notice of the arrearages.¹⁵⁰ This section takes no action against delinquent obligors who currently hold occupational licenses; however, it affects delinquent obligors who apply to a licensing entity for issuance or renewal of an occupational license, and the entities "may not issue or renew" a license for a person on the list until the entity receives a release from the CSED.¹⁵¹ After receiving an application for an occupational license, the licensing entity must (1) notify the applicant of the licensing entity's intention to withhold issuance or renewal of the license¹⁵² and (2) issue a temporary license valid for 150 days to applicants who are otherwise eligible for a license.¹⁵³

Under the terms of section 25.27.246, the CSED must create "a list of obligors who have a driver's license and are not in substantial compliance," and it must give the obligor at least 60 days written notice of his or her arrearages before placing an obligor on the list.¹⁵⁴ The CSED must also serve notice to each person on the list that the "driver's license will be suspended in 150 days, and will not be reissued or renewed the next time it is applied for . . . unless the licensee receives a release from the agency."¹⁵⁵ This statute has a much different effect from the statute relating to occupational licensure. On the one hand, it calls for *suspension* of existing licenses, unlike section 25.27.244. On the other hand, section

145. *Id.* § 25.27.244(b). "Substantial compliance" is defined as having either "no arrearage or . . . an arrearage in an amount that is not more than four times the monthly obligation under the support order or payment schedule." *Id.* § 25.27.244(q)(6).

146. *Id.* § 25.27.246.

147. *See id.* § 25.27.246(c). The definition of "substantial compliance" in section 25.27.246(n)(5) is the same as in section 25.27.244(q)(6).

148. *See id.* § 25.27.244(a).

149. *See id.* § 25.27.244(b).

150. *See id.* § 25.27.244(a).

151. *Id.* § 25.27.244(b).

152. *See id.* § 25.27.244(c).

153. *See id.* § 25.27.244(d).

154. *Id.* § 25.27.246(a).

155. *Id.* § 25.27.246(b).

25.27.246 applies only to obligors *who already have a driver's license*; it does not apply to obligors who have yet to apply for a driver's license, while section 25.27.244 applies to *all* obligors.

Under the terms of both statutes, licensing entities will issue or renew licenses only after receiving a release from the CSED. Such a release must be issued in any one of the following situations: (1) if the applicant is found to be in substantial compliance with his or her support orders or if the applicant has negotiated an agreement with the CSED for a payment schedule on arrearages; (2) if the applicant submits a timely request for review to the division or a judicial request for review, but the request will not be reviewed within the 150-day grace period; or (3) if the applicant has obtained a judicial finding of substantial compliance.¹⁵⁶

Section 25.27.244 specifically includes the following occupational "licens[es], certificate[s], permit[s], registration[s], [and] other authorization[s]":¹⁵⁷ (1) boxing or wrestling licenses; (2) licenses required for occupations regulated under Alaska Statutes section 08 (which includes certified public accountants, physicians, nurses, dentists, veterinarians, social workers, barbers and hairdressers, real estate brokers and appraisers, architects, marine pilots, morticians and hunting guides); (3) teacher certificate; (4) emergency medical services authorization; (5) asbestos worker certification; (6) boiler operator's license; (7) certificate of fitness to engage in electrical wiring or plumbing; (8) hazardous painting certification; (9) security guard license; (10) insurance license; (11) employment agency permit; (12) broker-dealer, agent or investment adviser registration; (13) pesticide applicator certification; (14) storage tank worker or contractor certification; and (15) water and wastewater works operator certification.¹⁵⁸ It specifically excludes (1) commercial fishing licenses, (2) vessel licenses, (3) licenses required to operate child care facilities, (4) business licenses issued under Alaska Statutes section 43.70¹⁵⁹ (required for taxation purposes), (5) entry permits or interim-use permits and (6) driver's licenses.¹⁶⁰

156. See *id.* §§ 25.27.244(g), 25.27.246(f).

157. *Id.* § 25.27.244(q)(2)(A).

158. See *id.*

159. See *id.* § 43.70; see also Op. Alaska Att'y Gen. No. 3. (1959) ("The statute is a tax statute. It has no regulatory features and is not designed to limit the doing of business in Alaska on the basis of any determination of the fitness of the person subject to the tax to engage in his business or profession.").

160. See ALASKA STAT. § 25.26.246(q)(1)(B) (Michie 1996). This applies to licenses issued under Alaska Statutes section 28.15: basic driver's licenses and school bus licenses. See *id.* § 28.15. Commercial driver's licenses are issued under a different subsection. See *id.* § 28.33.100.

Alaska is not the first state to consider enacting statutes that require adverse action against delinquent obligor's licenses. Indeed, twenty-eight states have enacted statutes that require or allow revocation, suspension or denial of licenses for those who are delinquent in child support payments. Roughly one quarter of these states provide for the revocation, suspension or denial of driver's licenses;¹⁶¹ and another quarter provide for the revocation, suspension or denial of occupational or professional licenses.¹⁶² Almost half of those states that have enacted statutes in this area provide for a combination of revocation, suspension or denial of driver's, professional or occupational licenses.¹⁶³ In addition, a handful of states provide for the revocation, suspension or denial of recreational licenses, including hunting and fishing.¹⁶⁴

A recent review of state license revocation programs by the Department of Health and Human Services ("HHS") indicates that this enforcement method is quite successful.¹⁶⁵ HHS estimates that license revocation could increase total child support collections by as much as \$2.5 billion over the next ten years.¹⁶⁶ In 1987, officials in South Dakota estimated that child support collections increased by \$5 million since the implementation of its license suspension statute two years before.¹⁶⁷ In addition, approximately 4,000 repayment agreements had been reached with delinquent obligors, while only seven driver's licenses had been revoked.¹⁶⁸

Maine's license suspension statute has proven to be similarly successful. Less than two years after its statute was enacted, more

161. See, e.g., COLO. REV. STAT. § 26-13-123 (1996); 625 ILL. COMP. STAT. 5/7-702 (West Supp. 1996); KY. REV. STAT. ANN. § 186.570 (Banks-Baldwin Supp. 1996); N.D. CENT. CODE § 14-08.1-07 (Supp. 1995); R.I. GEN. LAWS § 31-2-23 (Supp. 1996).

162. See, e.g., ARIZ. REV. STAT. ANN. § 12-2452 (West 1994); Iowa CODE ANN. § 598.23A (West 1996); KAN. STAT. ANN. § 74-147 (SUPP. 1996); N.M. STAT. ANN. §§ 40-5A-1 to 40-5A-13 (Michie Supp. 1996); VT. STAT. ANN. tit. 15, § 795 (Supp. 1996).

163. See, e.g., CAL. WELF. & INST. CODE § 11350.6 (West Supp. 1997); MINN. STAT. ANN. §§ 171.186 (West Supp. 1997), 214.101 (West 1992); N.C. GEN. STAT. §§ 110-142.1, 110-142.2 (1995); OHIO REV. CODE ANN. §§ 2301.373, 2301.374 (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 43, § 139.1 (West Supp. 1997).

164. See, e.g., MASS. ANN. LAWS ch. 119A, § 16 (Law. Co-op. 1994); TEX. FAM. CODE ANN. §§ 232.001-.016 (West 1996).

165. See Dept. of Health and Human Services, *Child Support Report* (Mar. 1995) <<http://www.acf.dhhs.gov/ACFPrograms/CSE/new/csr9503.html#9503d>>.

166. See *id.*

167. See *id.*, (Nov. 1995) <<http://www.acf.dhhs.gov/ACFPrograms/CSE/new/csr9511.html#9511a>>.

168. See *id.*

than \$25 million in child support had already been paid by delinquent obligors who were sent letters warning of impending suspension of their licenses if they did not pay.¹⁶⁹

Alaska was required to pass such laws by a recent public law passed by the United States Congress. Section 369 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹⁷⁰ requires states to have in effect procedures that would give the state authority to withhold or suspend the licenses of individuals owing overdue support.¹⁷¹

Although the Alaska Statutes sections requiring adverse action against delinquent obligor's licenses have not been in effect very long, they will undoubtedly be subject to future constitutional challenges. These challenges will likely include the following: (1) a substantive due process argument that the state's interest in collecting child support is not sufficiently compelling to overcome the individual's interest in supporting a family by procuring or maintaining an occupational or professional license; (2) a procedural due process argument that the statute deprives individuals of their licenses without providing constitutionally adequate procedures under the Due Process clause of the Fourteenth Amendment; and (3) an argument that the inclusion of certain types of occupational licenses and the exclusion of others violates the Equal Protection clause of the Fourteenth Amendment.¹⁷²

A. Substantive Due Process Argument

If Alaska Statutes sections 25.27.244 and 25.27.246 are deemed to infringe on a fundamental right, such as freedom in family relationships, courts will rigorously scrutinize the state's denial of issuance or renewal of an occupational license or the suspension of a driver's license.¹⁷³ If the statutes are deemed to impact a lesser right, such as the economic interest in the right to

169. *See id.*, (Apr. 1995) <<http://www.acf.dhhs.gov/ACFPrograms/CSE/new/csr9504.html#9504a>>.

170. Pub. L. No. 104-193, § 369, 110 Stat. 2105, 2251 (1996) (amending 42 U.S.C.A. § 666 (a)(16) (West Supp. 1997)).

171. The bill applies to driver's licenses, professional licenses, and recreational licenses. *See id.*

172. For a good analysis of these and other constitutional issues raised by an Arizona licensure suspension statute, see Susan Nicholas, Note, *Collecting Child Support From Delinquent Parents: A Constitutional Analysis of An Arizona Enforcement Mechanism*, 34 ARIZ. L. REV. 163 (1992).

173. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding unconstitutional a statute that prevented noncustodial fathers who owed child support from marrying); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1971) (declaring unconstitutional a city housing ordinance that infringed on the interest of "freedom of personal choice in matters of marriage and family life").

work, courts will apply a more deferential level of scrutiny under the rational basis test.¹⁷⁴

At first glance, the interest affected by denial of an occupational license seems to be economic. It would result in an individual's inability to work in a particular field. However, taken one step further, the inability to work might prevent an individual from supporting a current family as well as preventing him from meeting his child support obligations. Thus, one could argue that the denial of an occupational license interferes with family relationships, an area protected by the United States Constitution, and thus demands strict scrutiny. Similarly, one could argue that the denial of a driver's license could so hamper an individual's ability to travel to work that he or she would be prevented from supporting a family or meeting child support obligations.

Closer analysis reveals the weakness of these arguments. There should be no disruption of the obligor's ability to work, because a temporary license is issued immediately to obligors who are otherwise eligible for the issuance or renewal of an occupational license.¹⁷⁵ Similarly, there should be no disruption of an obligor's ability to drive, because there is no suspension of driver's licenses before 150 days have passed from the time notice is given to the obligor.¹⁷⁶ During the 150 days following notice under the statutes, the obligors can do one of several things: (1) come into substantial compliance with their child support orders; (2) enter into a payment agreement with CSED, or; (3) obtain a modification of support order.¹⁷⁷ By following one of these three options, even obligors who are financially unable to meet their child support obligations can avoid denial of an occupational license or suspension of their driver's license. Of course, it is the obligor's responsibility to act with diligence in following one of these options.¹⁷⁸ Since the denial of an occupational license under section 25.27.244 or the suspension or revocation of a driver's license under section 25.27.246 does not necessarily result in the loss of a job, there is no reason for these sections to be viewed as affecting family relationships in an improper manner. Therefore, the rational basis test would apply.

For a statute to withstand challenge under the rational basis test, there must be a rational connection between the legislation

174. See, e.g., *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (upholding the suspension of a physician's license).

175. See ALASKA STAT. § 25.27.244(q)(2)(A) (Michie 1996).

176. See ALASKA STAT. § 25.27.246(b) (Michie 1996).

177. See *id.*

178. See *id.*

and the government's purpose.¹⁷⁹ The strongest challenge to the rationality of any connection between license suspension or denial is that sections 25.27.244 and 25.27.246 do not regulate on the basis of occupational competence or driving ability. Instead, they seem to regulate licenses based upon an individual's ability or willingness to meet the financial and moral obligations of child support. Although legislatures have broad discretion to regulate many activities and occupations, a state's regulatory power is generally limited by the requirement that the regulations have a rational basis.¹⁸⁰ Most regulatory provisions in this area are based on the rationale "that the public is exposed to an unacceptable risk of harm if the activity or occupation is performed incompetently, recklessly, dishonestly, or with intent to injure."¹⁸¹ While the courts have acknowledged that "the government possesses the power to revoke the license of someone whose conduct demonstrates his or her unfitness to continue in that activity or occupation,"¹⁸² it is unclear whether this governmental power includes the power of suspension or denial of driver's and occupational licenses for failure to pay child support.

In the only federal case that has examined the issue, *Thompson v. Ellenbecker*,¹⁸³ three individuals brought a constitutional challenge to South Dakota statutes sections 32-12-116 and 25-7A-56,¹⁸⁴ which restrict the issuance or renewal of driver's and professional licenses to anyone owing more than \$1,000 in child support arrearages.¹⁸⁵ The district court held that the plaintiffs did not have standing to challenge section 25-7A-56, "because none of the plaintiffs have the type of professional or business license subject to restriction under the statute."¹⁸⁶ Since the plaintiffs all had driver's licenses and section 32-12-116 had been applied to deny the renewal of their driving permits, the court held that the plaintiffs did have standing to challenge the constitutionality of the statute restricting the renewal or issuance of driver's licenses.¹⁸⁷

179. See *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 83, 84 (1978).

180. See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) ("A state can require high standards of qualification, such as good moral character or proficiency . . . [.] but any qualification must have a rational connection with the applicant's fitness or capacity to practice.").

181. *State v. Zerkel*, 900 P.2d 744, 753 (Alaska Ct. App. 1995).

182. *Id.*

183. 935 F. Supp. 1037 (D.S.D. 1995).

184. S.D. CODIFIED LAWS §§ 25-7A-56, 32-12-116 (Michie 1995).

185. See *Thompson*, 35 F. Supp. at 1038.

186. *Id.* at 1039.

187. See *id.* The plaintiffs each received temporary driver's licenses pending the resolution of the case. See *id.* at 1038.

The court began by noting that “[t]he statute at issue is presumed constitutional as it does not involve suspect classifications or fundamental rights,”¹⁸⁸ and the plaintiffs therefore had the burden of proving that the statute had no rational basis. The plaintiffs argued that “it is arbitrary and irrational to restrict an individual’s driver’s license for conduct unrelated to that individual’s ability to safely operate a motor vehicle.”¹⁸⁹ The state countered this assertion, arguing that “a rational basis exists between nonpayment of child support and restriction on the obligor’s license to drive” for the following reasons:

When an obligor is more than \$1,000 in arrears for child support, the state is able to ascertain an obligor’s current address when he or she seeks to renew his or her drivers license. Additionally, restrictions on one’s ability to drive inhibits one’s ability to move from job-to-job, state-to-state or location-to-location. Without a valid drivers license[,] it is more difficult to move or change jobs with the specific intent of avoiding payment of child support.¹⁹⁰

Persuaded that these reasons rationally supported the restrictions on the child support obligors’ driver’s licenses, the court held that the statute does not deny substantive due process.¹⁹¹

As discussed in a recent law review note by Susan Nicholas, at least one state court has examined the constitutionality of a statute restricting the occupational license of a delinquent obligor.¹⁹² Nicholas notes that an Arizona superior court ordered the professional license of a psychologist suspended for failure to pay child support, finding that

[t]he failure of a professional to financially support his or her child clearly demonstrates . . . a lack of appropriate character and fitness of the subject professional. If a professional is inclined to financially abandon her own flesh and blood, it is not unrealistic to assume that this same professional would turn away from her own client for little or no justification.¹⁹³

If the Alaska courts adopt the reasoning outlined in these cases, then sections 25.27.244 and 25.27.246 will probably be found to be a reasonable regulatory mechanism. However, it is not clear that such an attenuated argument will find favor with Alaska courts. These statutes clearly do not regulate on the basis of occupational competence or driving ability. Instead they regulate licenses based upon an individual’s ability or willingness to meet a

188. *Id.* at 1040 (citing *MSM Farms v. Spire*, 927 F.2d 330, 332 (8th Cir. 1991)).

189. *Id.*

190. *Id.* at 1040.

191. *See id.*

192. *See Nicholas, supra* note 172 (analyzing *Flores v. Board of Psych. Exam’rs*, No. CV 90-33689 (Ariz. Super. Ct. Apr. 24, 1991) (slip op.)).

193. *Id.* at 183 (quoting *Flores*, No. CV 90-33689, at 34).

financial or moral obligation.

Consideration of the "unexpected consequences [which may result] from the implementation"¹⁹⁴ of these statutes may lead the Alaska Supreme Court to reject the analysis in *Thompson v. Ellenbecker* and *Flores v. Board of Psychological Examiners*. The Attorney General noted the following problems that "will need to be addressed . . . so that they do not create insurmountable legal or practical problems":¹⁹⁵

[T]he denial of a license may have an impact beyond its affect on the delinquent obligor. For example, the denial of a license may adversely impact an insurance firm if the obligor is the compliance officer or the principal for a firm. Without the required individual licensee, the firm's license may be in jeopardy, leading to . . . adverse impacts . . . that could extend to closure of the business. Small rural communities may be affected . . . if the community's only certified wastewater plant operator has his or her certification revoked. Some remote communities may be left in difficult circumstances if the EMT's license is revoked or denied and there are no other local candidates for EMT licensure within a community.¹⁹⁶

Overall, it is not clear whether the Alaska courts will find sections 25.27.244 and 25.27.246 constitutional under a rational basis test for a substantive due process challenge.

B. Procedural Due Process Arguments

Of the three potential challenges to a statute requiring the suspension of a driver's license or the denial of the issuance or renewal of an occupational license listed above, a challenge on the basis of procedural due process will probably be the easiest to overcome. The United States Supreme Court and the Alaska Supreme Court have both classified a driver's license as an important property interest, requiring that the state grant a hearing to a driver before his license is revoked.¹⁹⁷ Sections 25.27.244 and 25.27.246 mandate that all applicants who will be denied issuance or renewal of occupational licenses and all drivers whose licenses will be suspended be given notice.¹⁹⁸ Licensees and applicants may challenge their impending suspension or denial of renewal or issuance by making a written request for review.¹⁹⁹ The statutes also

194. Op. Alaska Att'y Gen. No. 883-95-0078 (June 15, 1995).

195. *Id.*

196. *Id.*

197. See *Bell v. Burson*, 402 U.S. 535, 539 (1971); *State v. Zerkel*, 900 P.2d 744, 751-52 (Alaska Ct. App. 1995) (citing *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981)).

198. See ALASKA STAT. §§ 25.27.244(c), 25.27.246(b) (Michie 1996).

199. See *id.* §§ 25.27.244(e), 25.27.246(d).

provide review procedures allowing applicants and licensees “to have the underlying arrearages and relevant defenses investigated.”²⁰⁰ This combination of notice and opportunity for review should satisfy any procedural due process challenge.²⁰¹

C. Equal Protection Argument

A legal challenge alleging violation of the equal protection clause of the Fourteenth Amendment could arise because certain types of occupational licenses are exempted from these provisions.²⁰² However, as noted in a 1995 opinion issued by the Alaska Attorney General’s office, “the excluded licenses are reasonably distinguished from the others so that the distinctions should survive a constitutional challenge on equal protection grounds.”²⁰³ For section 25.27.244 to survive a challenge on these grounds, a court would have to find that there is a legitimate purpose for the statute²⁰⁴ and that “the distinctions [the legislature has] drawn bear a fair and substantial relationship” to the statute’s purpose.²⁰⁵ The purpose of the statute is to “increase the effectiveness of the child support collection program to assist in family self-sufficiency and meet federal program requirements.”²⁰⁶ To explain the distinction between the types of occupational licenses, the Attorney General gave the following rationales: (1) “there are policy reasons to promote the maintenance of foster care and daycare licenses that do not apply to the other types of licenses covered by the bill”; (2) “business licenses . . . are less substantive and individualized than

200. *Id.* §§ 25.27.244(f), 25.27.246(e).

201. In *Thompson v. Ellenbecker*, 935 F. Supp. 1037 (D.S.D. 1995), discussed *supra* in notes 183-91 and accompanying text, the court also rejected plaintiffs’ challenge on procedural due process grounds. Plaintiffs objected to a statutory provision that required them to sign a stipulation and agreement in which they would promise to remain current in child support payments. *See Thompson*, 935 F. Supp. at 1040. Although such a provision is not included in Alaska Statutes sections 25.27.244 or 25.27.246, the court’s response is worth noting. Specifically, the court found the provisions did not violate procedural due process protections:

[t]his law would be a toothless tiger if a person who had not paid child support payments as previously ordered could orally agree to make child support payments in order to get a drivers license and then cease making payments as soon as he or she actually received the new license. The stipulation provides a means by which the [s]tate could . . . enforce the child support obligations by seeking to cancel or suspend a drivers license issued as a result of such stipulation.

Id. at 1041.

202. *See supra* notes 157-60 and accompanying text.

203. Op. Alaska Att’y Gen. No. 883-95-0078 (June 15, 1995).

204. *See Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984).

205. *Sonneman v. Knight*, 790 P.2d 702, 705 (Alaska 1990).

206. ALASKA STAT. § 25.27.244(q)(2)(A) (Michie 1996).

the included types of licenses"; and (3) "a fisherman's limited entry permit . . . has an intrinsic value" and the "CSED can lien, seize and sell" it.²⁰⁷ The Attorney General concluded that "[t]hese characteristics distinguish the exempted types of licenses from those included, and the distinctions are fairly and substantially related to the purpose of obtaining support for children."²⁰⁸ If the Alaska courts accept these conclusions, section 25.27.244 will survive a challenge based on equal protection grounds.²⁰⁹

In summary, the statutes' provisions dealing with the denial of issuance or renewal of occupational licenses are most vulnerable to challenges under the due process clause. The pivotal question in such a challenge will be whether a denial under these circumstances implicates a fundamental right. It is most likely that courts will decide that a fundamental right is not implicated. It is less clear whether these provisions bear a rational relation to the government's purpose. The provisions for both suspension of driver's licenses and the denial of issuance or renewal of occupational licenses seem to satisfy the procedural requirements of the due process clause. Finally, because the distinctions between the exempted types of licenses from those included appear fairly related to the purpose of enforcing child support, section 25.27.244 will probably survive a challenge under the equal protection clause.

V. NEGATIVE PUBLICITY THROUGH "MOST WANTED" LISTS

Despite the increasing comprehensiveness of national computer databases, which contain extensive information on delinquent noncustodial parents, many custodial parents are able to avoid their child support obligations by changing their names, social security numbers or birth dates to evade detection through computer searches.²¹⁰ Where technology has failed, old-fashioned methods often succeed. The newest enforcement technique in the arsenal of available punitive mechanisms designed to force delinquent noncustodial parents to meet their obligations is the "most wanted" list. A typical "most wanted" list consists of profiles, and

207. Op. Alaska Att'y Gen. No. 883-95-0078.

208. *Id.*

209. In *Thompson v. Ellenbecker*, 935 F. Supp. 1037 (D.S.D. 1995), the court summarily rejected plaintiffs' equal protection argument, stating:

Restrictions on renewal of drivers licenses imposed on child support obligors owing more than \$1,000 in arrearages is different than the remedies available to collect debts from persons owing other types of debts. However, the Court does not find such treatment is so unrelated to the achievement of the legitimate purpose of collecting child support so as to be irrational.

Id. at 1041.

210. See Calhoun, *supra* note 59, at 921.

sometimes pictures, of the ten most egregious child support obligors in a state. For example, Mississippi's statute authorizing the creation of such a list allows its child support enforcement agency to

release to the public the name, photo, last known address, arrearage amount and other necessary information of a parent who has a judgment against him for child support and is currently in arrears in the payment of this support. Such release may be included in a "Most Wanted List" or other media in order to solicit assistance.²¹¹

These lists are generally published in newspapers within the state²¹² and turned into posters which are then posted in public buildings.²¹³ Many are also posted on sites on the World Wide Web.²¹⁴ The rationale behind this technique is obvious: publicly shame these "dead-beat parents" into paying up.²¹⁵ Media involvement in a shame campaign has proven to be effective.²¹⁶ It serves several purposes: it can strongly convey the message that society will not tolerate nonpayment of child support obligations; it can stimulate the eyes and ears of the public to be on the lookout for child support scofflaws; and it can convince many runaway parents to stop running and face the support obligations they have to the children they have abandoned.²¹⁷ Alaska should consider enacting such a law to complement the existing punitive measures designed to reduce nonpayment of child support obligations. The Alaska legislature can model this law after similar efforts in other states.

Several states are currently working on legislation that would allow production and publication of "most wanted" lists.²¹⁸ An

211. See MISS. CODE ANN. § 43-19-45 (1993).

212. See *Payments Increase Around Holidays*, MILWAUKEE J. SENTINEL, Dec. 24, 1995, at 3.

213. See Frances Schwartzkopff, *Two on Deadbeat-Dads Poster are Located*, ATLANTA CONST., Aug. 24, 1994, at C2.

214. See Matthew Bowers, *Virginia Will Jump Onto the Internet to Try to Locate Deadbeat Parents*, VIRGINIAN-PILOT AND LEDGER-STAR (Norfolk), Feb. 19, 1996, at B1. The address for Massachusetts's child support Web site is <<http://www.mst.oe.net/ten.html>>. See *id.*

215. As noted in a recent Hawaii bill, "[p]ublic assistance and embarrassment have located many parents and caused others to come forward to meet their responsibilities before they appear on a poster." S. 599, 18th Leg. Sess. § 1 (Haw. 1995).

216. See, e.g., *New List Out of Deadbeat Parents*, COLUMBUS DISPATCH (Ohio), Oct. 31, 1995, at 3C (citing impressive statistics for Franklin County, Ohio: "Nine out of 10 past poster parents have been tracked down and turned in. Of 53 parents featured on the first six posters, 48 have been found.").

217. See *id.*

218. See, e.g., S. 2260, 79th Leg., Reg. Sess. § 1 (Miss. 1996).

Arizona bill would allow the publication of "the top ten most wanted for child support posters statewide in local newspapers."²¹⁹ The bill also provides that these lists shall be posted in the following places: (1) cable television stations; (2) state offices; (3) United States post offices; and (4) "any other place that would enhance the public's awareness of the top ten most wanted for child support."²²⁰ Hawaii's pending legislation would only affect obligors who are twelve or more months in arrears.²²¹ In addition, it requires the child support enforcement agency to give notice to the obligors and to provide an opportunity to the obligor to avoid publicity through payment of arrearages or by entering into a payment agreement.²²²

This method of enforcement has proven to be quite effective. For example, since Massachusetts began using "most wanted" posters three years ago, twenty-four out of thirty-one fugitive delinquent obligors have been located and \$350,000 has been recovered.²²³ Other states have reported similarly impressive statistics. In Franklin County, Ohio, 90% of delinquent noncustodial parents formerly featured on "most wanted" posters have been tracked down and turned in.²²⁴ Even more impressive, over 172 fugitive parents have been apprehended since 1989 under Oklahoma's poster program.²²⁵

The most obvious legal concern raised by the use of "most wanted" posters is violation of an obligor's right to privacy. The Alaska Attorney General's office has released two opinions on this issue—one in 1983, which recommended against "publication of information regarding obligors who are allegedly in arrears,"²²⁶ and one in 1989, which advised that release of a list of child support obligors who are in arrears is permissible.²²⁷ In the 1983 opinion, the Attorney General noted that "[t]here is no specific or implied provision in the state statutes that a publication such as the one proposed in the regulation would be a means of child support," and that therefore "the only purpose . . . attribut[able] to this pro-

219. S. 1214, 42d Leg., 2d Reg. Sess. § 1(B) (Ariz. 1996).

220. *Id.*

221. See S. 599, 18th Leg. Sess. § 2 (Haw. 1995).

222. See *id.*

223. See Joe Heaney, *Governor Unveils New Deadbeat Parents' List*, BOSTON HERALD, Nov. 9, 1995, at 20.

224. See *New List Out of Deadbeat Parents*, COLUMBUS DISPATCH (Ohio), Oct. 31, 1995, at 3C. Since Franklin County's poster program began three years ago, more than \$118,000 has been collected. See *id.*

225. See *Ten Absent Parents Listed; 172 Caught Since 1989*, DAILY OKLAHOMAN, Apr. 9, 1995, at 26.

226. Op. Alaska Att'y Gen. No. 366-688-83 (July 11, 1983).

227. See Informal Op. Alaska Att'y Gen. No. 661-89-0405 (May 30, 1989).

posed regulation is that an obligor might be threatened or shamed into paying."²²⁸ Citing *Tollefson v. Price*,²²⁹ the Attorney General in 1983 suggested that publication of a list of delinquent child support obligors "for the express purpose of humiliating, harassing, vexing and annoying" them so that they will ultimately meet their child support obligations is not permissible, even if authorization to do so were embodied in regulations.²³⁰ However, in the 1989 opinion, the Attorney General based his opinion regarding this issue on Alaska's public records statutes, which requires that all records in the possession of state agencies are to be considered public unless they are required to be kept confidential by state or federal law.²³¹ Since "there is no state statute . . . [or] federal law . . . which prohibits release of this information . . . [,] the analysis turns on whether the privacy clause of the Alaska Constitution prohibits disclosure."²³²

This analysis requires a balancing test, in which the public interest in disclosure is weighed against the individual's reasonable expectation of privacy.²³³ In the area of child support enforcement, any expectation of privacy has been lowered by the many statutes designed to enhance the enforcement of child support obligations.²³⁴ The public interest in the dissemination of this information is also quite high: "The legislature finds that the effect on the general public of the failure of parents to support their children is vast and far reaching. The harmful effects of unpaid child support touch not only the poor, but reach far beyond, diminishing the overall quality of life for all Alaskans."²³⁵ While "sensitive personal information" may be subject to protection under the right of privacy,²³⁶ the Attorney General noted in 1989 that "[a] good ar-

228. Op. Alaska Att'y Gen. No. 366-688-83.

229. 430 P.2d 990 (Or. 1967) (holding that it was an invasion of privacy for a merchant to publish notice of a bad debt). *Tollefson* was severely limited by *Anderson v. Fisher Broadcasting Co.*, 712 P.2d 803 (Or. 1986), which held that the publication of the fact of legitimate debt would not constitute a tort. The Alaska Courts have yet to decide this issue. See Informal Op. Alaska Att'y Gen. No. 661-89-0405.

230. See Op. Alaska Att'y Gen. No. 366-688-83.

231. See Informal Op. Alaska Att'y Gen. No. 661-89-0405; see also ALASKA STAT. § 09.25.120 (Michie 1996).

232. Informal Op. Alaska Att'y Gen. No. 661-89-0405.

233. See *id.*

234. See *supra* notes 21-55 and accompanying text.

235. Act of July 3, 1984, ch. 144, 1984 Alaska Sess. Laws ch. § 1 (codified at ALASKA STAT. § 01.10.070 (Michie 1996)).

236. *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986) (holding that the type of information subject to protection under the right of privacy includes "the type of personal information which, if disclosed even to a friend,

gument can be made that the fact that a child support obligor is in arrears, while 'sensitive' . . . , is not 'personal.'"²³⁷ "When a matter does affect the public, directly or indirectly, it loses its private character, and can be made to yield when an appropriate public need is demonstrated."²³⁸ In light of the fact that the nonpayment of child support obligations affects children, custodial parents and the public at large, the balancing test should weigh in favor of "disclos[ure] in response to a public records request under state law."²³⁹ Therefore, the Alaska legislature should consider enacting a publication provision allowing the dissemination of information concerning delinquent child support obligors; such a provision should withstand a challenge under the constitutional right to privacy.

VI. CONCLUSION

When the current Alaska provisions for enforcement of child support are compared to those of other states, several weaknesses become apparent. As noted earlier, the Alaska statute providing for prosecution and conviction for failure to pay child support has rarely been utilized.²⁴⁰ The statute providing for conviction for aiding another to avoid paying child support has yet to be used.²⁴¹ As the statute providing for prosecution and conviction for failure to pay child support is currently written, there are no threshold requirements for conviction—no distinction is made between parents who fail to meet one month's child support obligation and parents who have failed to meet their obligations for years. The problem with this lack of distinction is that there is insufficient guidance on which cases are egregious enough for a criminal conviction. As a result, courts and prosecutors might rely almost exclusively on the civil provisions—which they currently do. This would result in de facto under-enforcement of a criminal activity that the legislature has clearly indicated should be punished. While this crime ought to have levels of offenses, the proper way to distinguish between these levels of criminal activity is not with enforcement and non-enforcement. Instead, Alaska ought to make flagrant nonpayment of child support a felony and reserve misdemeanor convictions for those with less egregious conduct.

Although application of these criminal provisions appears dif-

could cause embarrassment or anxiety").

237. Informal Op. Alaska Att'y Gen. No. 661-89-0405.

238. *Id.* (quoting *Doe*, 721 P.2d at 630).

239. *Id.*

240. See *supra* notes 75-76 and accompanying text.

241. Search of Westlaw, AK-CS database, for cases containing "AS 25.25.305" (Apr. 3, 1997).

ficult due to deficiencies in the statutes, application of Alaska Statutes sections 25.27.244 and 25.27.246, which allow suspension of driver's licenses and denial of issuance or renewal of occupational licenses, should not pose as many problems. Similarly, should Alaska enact legislation allowing the publication of "most wanted" child support obligor lists, such legislation would be more easily applied than criminal provisions.

License restrictions and "most wanted" lists have other advantages over the criminal statutes. Most obviously, although these alternative provisions punish criminal conduct, they provide penalties that are much less harsh than loss of liberty. For this reason, judges and prosecutors might be more inclined to enforce license restrictions and to utilize "most wanted" lists in situations where they are now reluctant to impose jail sentences. This would enable them to reserve prosecution under the criminal provisions as a last resort—for those obligors for whom the license restrictions and "most wanted" lists were not successful. These hard-core, egregious cases are more suitable candidates for criminal penalties than the average delinquent obligor.

In Alaska's child support enforcement system last year, there were collections in only 17.2% of the 45,638 total cases.²⁴² These percentages placed Alaska thirty-fourth among the fifty states and the District of Columbia.²⁴³ The criminalization of the aiding and abetting of nonpayment of child support, the move to implement license restrictions, and the continued interest in publication of "most wanted" lists all "clearly indicate[] society has an active interest in achieving high[er] levels of compliance with parental child support obligations. Simply put, society benefits through stricter enforcement of private obligations by avoiding an unnecessary drain on the public coffers."²⁴⁴ Although serious concerns remain about the use of punitive mechanisms as a means of "vindicating" society's interest in responsible payment of child support,²⁴⁵ the deterrent effect which will most likely result in fewer prosecutions, thereby limiting the potential for damaging the parent-child relationship. The overwhelming success of these punitive mechanisms and society's interest in the fulfillment of parental obligations should encourage judges, prosecutors and the Alaska legislature both to enforce the available punitive mechanisms and to implement additional punitive mechanisms.

Pamela Forrestall Roper

242. See Moss, *supra* note 5, at 4A. The rates of collection ranged from 5.4% (Arizona) to 38.5% (Vermont). See *id.*

243. See *id.*

244. Allen, *supra* note 17, at 315.

245. See *id.*