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INTRODUCTION

> The [Clinton] Administration estimates that the potential amount of child support obligations that could be collected yearly is $47 billion annually (if *every* custodial mother had a child support order(s), support payments averaged *$5400* per year, and the *full amount were paid*). However, only $20 billion in child support obligations have actually been legally established, and in FY 1993 only $13 billion was paid. Thus, the gap between estimated potential child support payments and actual payments was $34 billion annually. The Administration attributes this gap to the lack of a legally established support order, the low amount of existing awards, and the failure of States to collect child support in a majority of cases.[1]

Non-collection of child support is a multifaceted social and economic problem that disproportionately affects women—especially poor women. In its most recent report (1995), the United States Census Bureau identified some baseline information for 1991, finding that 11.5 million parents have custody of children less than twenty-one years of age.[2] Of these parents, 9.9 million (86%) are mothers, and 1.6 million (14%) are fathers.[3] Of women entitled to support orders, only 39 percent of mothers below the poverty line have support orders compared to 56 percent of women generally.[4] In addition to the lack of support orders, poor enforcement and the unsuccessful collection of payments are also serious

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1 *Child Support: Changes Enacted or Proposed in the 103rd Congress*, Cong. Res. Serv. Rep. (EPW) No. 95-142, at 3 (Jan. 9, 1995).

2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES NO. P60-187, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, at 1 (1995).

3 *See id.*

4 *See id.* at 7.

problems. Fifty-two percent of women who had a child support award received full payment, 24 percent received partial payment, and the remaining 24 percent received no payment at all.[5]

Non-custodial, incarcerated parents are an overlooked potential source of child support payments. The prison population in the United States is staggering (an estimated 1.6 million people in 1995).[6] Using currently available statistics, we calculate that approximately 37,820 custodial parents are owed approximately $122 million in child support by people in prison.[7] The Child Support Recovery Act of 1992 (CSRA) criminalizes the willful failure to pay a child support obligation when (1) the child lives in another state, (2) the obligation has not been paid for more than a year, and (3) the amount owed is more than $5,000.[8] Since interstate cases—cases where the noncustodial parent lives in a different state from his or her child(ren)—comprise a third of all non-payment cases,[9] a large number of nonpaying parents are criminally liable under

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[5] *See id.*

[6] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Pub. No. NCJ-161132, Prison and Jail Inmates, 1995, at 1-2 (1996). Of these, 96 percent were serving a sentence of at least one year. *See id.* at 3. In the past five years, the incarcerated population has grown by 6.7 percent per year. *See id.* at 2. If this trend continues, there will be 2.2 million people incarcerated by the year 2000.

[7] In calculating these statistics, we make the following assumptions: (1) the percentage of people who owe child support in prison (in the United States) is equal to the percentage of people in the general population who owe child support (2.38%); and (2) the average amount owed in child support by an inmate equals the average amount owed by a person in the general populace. These two assumptions may bias the calculations, but since they pull in opposite directions (i.e., the percentage of inmates who actually owe child support may be greater than it is in the general U.S. population, while the average dollar amount owed by those incarcerated may actually be lower than the unincarcerated's average) we conclude that these figures are good indications of the magnitude of the issue. The formulas used are as follows:

1) The percentage of incarcerated persons in the United States is determined by the following formula:

$$\frac{\text{\# of inmates}}{\text{\# of adults in the U.S.}}$$

Therefore:

$$\frac{1{,}600{,}000}{261{,}600{,}000} = .61\%$$

2) The amount of child support in the United States is $20 billion. *See supra* note 1 and accompanying text.

Therefore, the amount of child support owed by inmates is estimated to be:

$$\$20 \text{ billion} \times .61\% = \$122 \text{ million.}$$

3) The number of custodial parents who are owed child support in the United States is 6,200,000. *See* BUREAU OF THE CENSUS, *supra* note 2, at 5-6.

Therefore, the number of custodial parents who are owed child support by inmates is:

$$6{,}200{,}000 \times .61\% = 37{,}820.$$

[8] Child Support Recovery Act of 1992, 18 U.S.C. § 228 (Supp. IV 1992).

[9] *See id.*

the CSRA. Since many of these non-paying parents are incarcerated, theoretically, the number of inmates affected by the Act is also immense.[10]

A non-custodial, incarcerated parent's obligation to pay child support, when he or she has been incarcerated for a crime other than non-payment, varies from state to state. As will be shown below, some states excuse payment because the parent in prison is determined to have had a material change in circumstances.[11] Other states, however, find that such a change in circumstances has been brought on by the parent's own illegal conduct, and therefore find it contrary to public policy to forgive support obligations.[12] This article describes the different approaches taken by the various state courts which have examined this issue. We demonstrate that there is no cohesive policy. The absence of a cohesive policy creates inequitable inconsistencies, rendering the law vague, unwieldy, and impracticable. We argue that when balancing the rights of convicted criminals against children who require support regardless of parental circumstances, the welfare of children must take precedence. We propose that state and federal governments work together to develop and implement a uniform system of determining the obligations of incarcerated parents with respect to support payments and their collection.

I. COURT DECISIONS

There is no federal case law that addresses the issue of child support when the payor is incarcerated for offenses other than contempt for non-payment of support orders; divorce laws and prisons are under the purview of the states.[13] Even though state cases often refer to other states' laws and rulings, either for support or in distinguishing the court's reasoning, one thing is clear: this is not a settled area of law.[14]

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10 *See supra* note 7.

11 *See infra* Part I.A.

12 *See infra* Part I.C. & Part II.

13 *See, e.g.*, U.S. CONST. amend. X. Of course, this presumption excludes divorce cases that are in bankruptcy and fails to acknowledge the purview of federal prisons. The basic premise is valid, however, since the states have jurisdiction over family law matters.

14 The five states with the largest state prison populations in 1995 were California (135,646), Texas (127,766), New York (68,484), Florida (63,879) and Ohio (44,677). *See* BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 5. Policies regarding collection of child support from prisoners and their obligations are not expressly addressed in California and Texas. New York leaves decisions regarding such obligations to the court's discretion. *See* N.Y. FAM. CT. ACT § 411 (McKinney 1983 & Supp. 1983-1997). While not specifically addressing child support obligations, New York will not release a parent's duty of contact with his or her child and has determined that incarceration of a parent is not a defense to a finding of abandonment; if a child is abandoned, parental rights can be terminated. NY SOC. SERV. LAW § 384-b (McKinney 1992). Florida also leaves these decisions to the court's discretion. Florida's annotated statute, FLA. STAT. ANN. § 61.08 (West 1997), cites a case holding that the trial court did not err in denying a husband's request to have his duty to pay child support

We divide the analyses of state courts into three categories. First, when determining whether an order for child support payment should be modified, state courts consider whether the incarcerated parent's ability to pay has been altered by a change in circumstances.[15] Most states have divorce laws and statutes which allow for changes in support arrangements when the paying parent experiences a change of circumstances. When analyzing whether a change of circumstances has occurred, state courts take into account the significance, definition, duration, and circumstances of the change.[16]

Second, state courts take into account the incarcerated parent's assets, or lack thereof, when determining the parent's ability to pay.[17] In this regard, courts have taken into account prior assets accrued from income, current assets from equity in property and pension, income from prison work, and sometimes, future income potential.[18] Also involved is the issue of accrual of default payments.[19]

Third, state courts consider whether incarceration was voluntary or involuntary. Courts that find incarceration to be voluntary will often not allow incarceration to be used as a factor in determining whether to modify a child support order.[20] Courts that find incarceration to be involuntary do not bar the use of incarceration as a factor in determining whether or not to modify a child support order.[21] However, these courts still vary in their application of the law—some courts give more weight to the fact that the parent is incarcerated than do others.[22]

A. CHANGE IN CIRCUMSTANCES

Some state courts have held that incarceration alone may constitute a change in circumstances sufficient to warrant modification of the parent's support obligation. For example, the highest court of Maryland held, in *Wills v. Jones*,[23] that "a prisoner's incarceration may constitute a

terminated during his incarceration. *See* Tompkins v. Tompkins, 362 So.2d 689 (Fla. Dist. Ct. App. 1978). Ohio, on the other hand, has legislated that incarceration may be a reason for termination of a support order. OHIO REV. CODE ANN. § 3109.05 (Anderson 1996). However, courts have held in Ohio that support orders can, and should be, continued while a parent is in prison. *See, e.g.*, Cole v. Cole, 590 N.E.2d 862 (Ohio Ct. App. 1990).

15 *See infra* Part I.A.

16 *See infra* Part I.A.

17 *See infra* Part I.B.

18 *See infra* Part I.B.

19 *See* discussion *infra* Parts I.B, I.C, II.

20 *See infra* Part I.C.

21 *See infra* Part I.C.

22 *See infra* Part I.C.

23 667 A.2d 331 (Md. 1995).

material change of circumstance if the effect on the prisoner's ability to pay child support is sufficiently reduced due to incarceration."[24]

Similarly, the Idaho Court of Appeals held in *Nab v. Nab*[25] that "a change of economic circumstances due to incarceration may form a valid basis for inability to comply with a contempt order."[26] Mr. Nab had received an eight-year indeterminate sentence for a crime unrelated to child support.[27] Nonetheless, before his incarceration, Nab had diverted funds to his legal defense and other purposes instead of making child support payments.[28] Thus, he was in contempt of court for his failure to pay support prior to his incarceration.[29] The court of appeals disagreed with the trial court, which had determined that Nab's contempt status precluded him from obtaining a modification of the support obligation,[30] and asserted that "[i]mposing upon the incarcerated parent a continuing support obligation, beyond his ability to pay, does not help the child. It simply adds to an accumulating burden which falls upon the parent at a time when he is least able to bear it . . . ."[31]

The state courts which have held that incarceration constitutes a change in circumstances have nonetheless recognized that "if an obligor has assets available to meet a support obligation, a different conclusion might be reached."[32] Additionally, it is fairly well settled that being incarcerated should not shift the burden of proof from the movant, but that the burden is on the party seeking to modify a support order to prove a material change of circumstances.[33]

In other states, incarceration alone, albeit a change in circumstance, is not enough to alter a parent's obligation to pay child support. In *Thomasson v. Johnson*,[34] the Court of Appeals of New Mexico reasoned that while an individual's incarceration may provide a basis in a proper case for modifying an order for the payment of child support, such is only a factor to be considered, and "proof of incarceration standing alone does not demonstrate an inability to pay support."[35] The court then con-

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24 *Id.* at 332.

25 757 P.2d 1231 (Idaho Ct. App. 1988).

26 *Id.* at 1238.

27 *See id.* at 1233.

28 *See id.*

29 *See id.*

30 *See id.*

31 *Id.* at 1238.

32 Cole v. Cole, 590 N.E.2d 862, 865 (Ohio Ct. App. 1990); *see also infra* Part I.B.

33 *See Nab*, 757 P.2d at 1238 (holding that noncustodial father who was imprisoned for a crime other than nonsupport was not liable for payments while incarcerated unless he had income or assets to make such payments); Leasure v. Leasure, 549 A.2d 225, 227 (Pa. Super. Ct. 1988) (holding that child support payments may be suspended during the time of incarceration, but that the support order must be reviewed upon release).

34 903 P.2d 254 (N.M. Ct. App. 1995).

35 *Id.* at 256.

sidered other factors, such as, whether the incarcerated parent possessed assets or other sources of income which would allow payment of child support, the length of the parent's incarceration, the best interests of the child, the clean hands doctrine, and whether incarceration was voluntary.[36]

In *Cole v. Cole*, the Ohio Court of Appeals held that the modification of a child support order involves a two-step process.[37] First, the trial court must decide whether there has been a change of circumstances, and then, considering all of the relevant factors, it can determine with "considerable discretion" whether a child support order should be modified.[38] In *Voecks v. Voecks*,[39] the Court of Appeals of Wisconsin concluded that "[incarceration] is a change in circumstances that gives a trial court competence to review a child support order," and the court may consider incarceration as a factor when determining whether it should modify a parent's child support obligation.[40]

In *Voecks*, Cheryl Voecks had appealed an order reducing her ex-husband's child support obligation from $55 per week to $25 per month, based on a decrease in William Voecks's income due to his incarceration.[41] William had been convicted of being a party to cocaine delivery and was sentenced to seven years at a federal correctional institution.[42] The appellate court took into account the trial court's finding that William had undergone a dramatic reduction in income resulting from the closing of his business operation, and his incarceration.[43] Furthermore, the appellate court noted that William was in debt and had a limited earning capacity; Cheryl was in a reasonable economic condition; and William's daughter would reach the age of majority before his release from prison.[44] The court of appeals found the circumstances proper to grant a reduction in William's child support obligation and affirmed the trial court's order.[45]

Also holding that a modification order requires consideration of a variety of factors, the Supreme Court of Nebraska in *Ohler v. Ohler*[46] took into account the obligated parent's financial means, the needs of the

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36 *See id.* at 256-57.

37 590 N.E.2d 862, 864 (Ohio Ct. App. 1990).

38 *See id.* The trial court determined that incarceration did not satisfy the change of circumstances requirement in the two-step process because the change was due to the willful act of the incarcerated parent. *See id.*

39 491 N.W.2d 107 (Wis. Ct. App. 1992).

40 *Id.* at 109.

41 *Id.* at 108.

42 *See id.*

43 *See id.* at 110.

44 *See id.*

45 *See id.*

46 369 N.W.2d 615 (Neb. 1985).

child, the good or bad faith motive of the obligated parent in sustaining a reduction of means, and the permanence of the change.[47] In that case, the appellant-Ohler's application for a modification order alleged a material change in his circumstances in that he had been sentenced to fifteen years in prison and was "'totally devoid of any funds, savings, stocks, bonds or any other liquidable [sic] or salable assets either real or personal.'"[48] Ohler was unemployed and did not have wages, other earnings, or income from any source available to him.[49]

Regardless, the court rejected Ohler's petition, finding that he had no cause of action.[50] While the court conceded that there is no question but that incarceration constitutes an alteration and passage from one condition to another, it stated the issue as "whether the altered condition is such as to warrant a suspension, [or] a temporary termination, of one's child support obligation."[51] The court noted that "'[a]lthough unemployment or diminution of earnings is a common ground for modification, a petition for modification will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets.'"[52] Accordingly, the court declined to suspend Ohler's child support obligation.[53]

After finding a change in circumstances, most courts consider the degree of "permanence" to the change in order to determine whether that change in circumstances substantially affects the parent's ability to pay support. While some states require a parent to show that a change is "permanent" in order to claim a "change in circumstances," there is no consensus as to what constitutes "permanence" for purposes of warranting a modification order. In 1980, an Idaho case, *Fuller v. Fuller*,[54] reiterated the standard that "a modification of child support payments can be made only where there is shown to be a material, permanent, and substantial change in conditions and circumstances."[55]

Nonetheless, in *Nab*, the Idaho Court of Appeals, while acknowledging *Fuller*, noted that no other Idaho cases or statutes mention permanence as a requirement for modification.[56] For example, section 32-709 of the Idaho Code, which addresses the modification of support provi-

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47 *See id.* at 616-17 (citing Morisch v. Morisch, 355 N.W.2d 784 (Neb. 1984)).

48 *Id.* at 616 (quoting appellant-Ohler's application).

49 *See id.*

50 *See id.* at 616, 618.

51 *Id.* at 617.

52 *Id.* (quoting Noddin v. Noddin, 455 A.2d 1051, 1053 (N.H. 1983)); *see also infra* Part I.C. (discussing further the issue of "fault," or "voluntariness").

53 *See Ohler*, 369 N.W.2d at 618.

54 607 P.2d 1314 (Idaho 1980) (increasing a non-incarcerated father's child support payments when he went from working part-time to full-time).

55 *Id.* at 317.

56 Nab v. Nab, 757 P.2d 1231, 1238 (Idaho App. 1988).

sions in divorce decrees, states that modification can be made only upon a "showing of a substantial and material change of circumstances."[57] The *Nab* court cited that statute and noted that in it there was no mention of "permanent."[58] Thus, the court held:

> [a]lthough we are not inclined to construe I.C. § 32-709 as nullifying the rule that a change in circumstances must be "permanent" to justify a modification, neither are we prepared to hold that incarceration and the associated possibility of reduction in income for an extended, but nonetheless limited, period is insufficient in permanence for a court to modify the amount of support required. Instead, we believe the period for which a change in circumstances is anticipated to exist, and its permanence, should be two of the factors to be considered by the trial court in determining whether a change in circumstances is "substantial."[59]

The court in *Nab* therefore concluded that "Nab's motion [to modify] should not be denied merely because Nab [would most likely] not be incarcerated for the remainder of his life."[60]

In *In re Marriage of Vetternack,*[61] where the issue was whether an order for child support payments should have been modified because the father became incarcerated for a felony, the Iowa Supreme Court expounded the principles that:

> (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be *permanent* or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.[62]

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57 IDAHO CODE § 32-709 (1997).

58 *Nab*, 757 P.2d at 1239.

59 *Id.*

60 *Id.* The father in *Nab* was incarcerated for eight years for a criminal offense unrelated to the payment of child support.

61 334 N.W.2d 761 (Iowa 1983).

62 *Id.* at 762 (emphasis added).

A court in Pennsylvania, in *Leasure v. Leasure*,[63] chose to compare the concept of permanence to the situation in which a parent loses a job.[64] When a parent loses a job, his "change in circumstances" is indefinite in that he may secure employment within a very short time or he may be out of work for several years.[65] Similarly, the incarcerated parent in *Leasure* was sentenced to serve one or two years in prison; though he could have only served nine months with pre-release, it was also possible that he could serve the entire two-year period.[66] Thus, the court allowed for a modification order and refused to deny the order; the court did not want to base a denial of an order on the fact that the parent would not be incarcerated forever.[67]

Thus, there is a loose consensus that incarceration is akin to a permanent change. This is perhaps a reason why courts, usually, will not *per se* reject incarceration as a possible factor to consider for a modification order. In fact, as indicated above, some courts have allowed incarceration to be used as the sole factor for instituting the modification proceeding. However, one could argue that imprisonment with possibility of parole is actually no more permanent than employment at will, where the employee could be laid off or fired, could quit, or could be injured at any time.

B. ASSETS

Another consideration in determining ability to pay is the incarcerated parent's assets, or lack thereof. As will be shown, some states take a narrow view of what constitutes "having assets," while other states interpret the term broadly. In 1981, a court of appeals in Oregon held that "[i]mprisonment and resulting indigency constitute a significant change of circumstances such as to permit a court to modify a support obligation,"[68] and that a parent should "not [be] liable for such payments while incarcerated unless it is affirmatively shown that he or she has income or assets to make such payments."[69]

This Oregon case, *In re Marriage of Edmonds,* was overruled in 1991 by *Oregon ex rel. Willis v. Willis (In re Marriage of Willis).*[70]

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63 549 A.2d 225 (Pa. Super. Ct. 1988).

64 *See id.* at 227.

65 *See id.*

66 *See id.*

67 *See id.*

68 *In re* Marriage of Edmonds, 633 P.2d 4, 5 (Or. Ct. App. 1981), *overruled by* 820 P.2d 858 (Or. Ct. App. 1991), *rev'd*, 840 P.2d 697 (Or. 1992).

69 *Id.* at 5.

70 820 P.2d 858 (Or. Ct. App. 1991), *rev'd*, 840 P.2d 697 (Or. 1992) [hereinafter *Willis I*].

However, in 1992, *Willis I* was reversed.[71] Thus, the current state of the law in Oregon follows *Willis II*, which held that even though incarceration *alone* does not demonstrate inability to meet an existing child support obligation, if a parent's remaining assets are insufficient to meet his support obligations during his incarceration, a substantial change of circumstances can be found and the parent's child support obligation may be modified.[72]

An incarcerated parent's liability for child support also depends on the jurisdiction's determination of whether assets other than income can be used for the support. In *L.C.S. v. S.A.S.*,[73] a Virginia court did not need to decide the issue of whether an incarcerated parent is "voluntarily unemployed" due to incarceration, because the known resources of the payor parent provided an alternate means of computing an award.[74] In this case, the incarcerated father had $500,000 worth of financial resources to produce the income necessary to meet his support obligations.[75] The Virginia court used guidelines found in the Virginia Code that establish a rebuttable presumption where child support is calculated as a percentage of the parents' combined gross monthly income.[76] The court also relied on the section 20-108.1(B)(11) of the Code, which lists the factors to be considered as the "[e]arning capacity, obligations and needs and financial resources of each parent" and "[i]mputed income to a party who is voluntarily unemployed or under employed."[77]

The court also said that in determining the ability of a parent to pay support, a court must consider "any assets owned by the . . . parent and 'actual earnings and . . . capacity to earn, whether from . . . personal exertions or . . . property.' "[78] The court held that the financial resources of a parent, whether incarcerated or not, include the value of any assets and any potential income from those assets.[79] The court further found that the trial court abused its discretion by failing to deviate from the presumptive amount of support from income, and by not considering the husband's financial resources and the potential income from other resources.[80]

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71 *See* Oregon *ex rel.* Willis v. Willis (*In re* Marriage of Willis), 840 P.2d 697 (Or. 1992) [hereinafter *Willis II*].

72 *See id.* at 699.

73 453 S.E.2d 580 (Va. Ct. App. 1995).

74 *Id.* at 585.

75 *See id.* at 584.

76 *See id.* at 585 (citing VA. CODE ANN. § 20-108.2 (Michie 1995)).

77 *Id.*

78 *Id.* (quoting Robertson v. Robertson, 211 S.E.2d 41, 44 (Va. 1975)).

79 *See id.*

80 *See id.*

Another Virginia case, *Donnell v. Donnell*,[81] agreed that when making an award based on income, the trial court is authorized to consider earning capacity as well as actual income, but further stated that "the award must be based upon circumstances as they exist at the time of the award."[82] In that case, the husband retired from his position with the Central Intelligence Agency (CIA) in "anticipation of a jail sentence" (imposed because the father coerced sexual acts against the parties' daughters—one as young as four).[83] Since "circumstances that led to the dissolution of the marriage [did not need to be considered, having] had no effect upon marital property, its value, or otherwise,"[84] the court reasoned that despite the fact that the "husband's misconduct . . . may have contributed to his reduction in income by forcing his retirement," the husband did not retire to avoid any support obligation, and he at least guaranteed his pension by retiring.[85]

The court also held that basing income on uncertain future circumstance is not permitted.[86] In coming to this holding, the court cited a 1987 Virginia case, which found that in divorce cases, while the court is authorized to consider not only earnings but also earning capacity, "the award must be based upon the circumstances in existence at the time of the award. An award 'premised upon the occurrence of an uncertain future circumstance . . . ignores the design and defeats the purpose of the statutory scheme.'"[87] This holding was followed in *L.C.S. v. S.A.S.* where, although known resources were used to compute a child support award, the court held that since the husband was barred from the practice of law due to the loss of his license, his "former employment [was] a legal impossibility, and any imputation of income based on that would be speculative."[88]

People arguing both sides of the issue—those arguing that support obligations should be suspended until after incarceration has ended, and those arguing that any assets from which payments can be made should be used to make support payments—have relied upon the Oregon rule that the court should suspend the incarcerated father's support obligation if there is an absence of any other income or assets from which to make payments.[89] The Court of Appeals of Michigan, for example, held that

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81 455 S.E.2d 256 (Va. Ct. App. 1995).

82 *Id.* at 258.

83 *Id.* at 257.

84 *Id.* at 258 (citing Aster v. Gross, 371 S.E.2d 833, 836 (Va. Ct. App. 1988)).

85 *Id.* at 258.

86 *See id.*

87 Payne v. Payne, 363 S.E.2d 428, 430 (Va. Ct. App. 1987) (quoting Jacobs v. Jacobs, 254 S.E.2d 56, 58 (Va. 1979)).

88 L.C.S. v. S.A.S., 453 S.E.2d 580, 585 (Va. Ct. App. 1995).

89 *See In re* Marriage of Edmonds, 633 P.2d 4, 5 (Or. Ct. App. 1981), *overruled by* 820 P.2d 858 (Or. Ct. App. 1991), *rev'd*, 840 P.2d 697 (Or. 1992). Note that *Willis II* also ordered

"where a noncustodial parent is imprisoned for a crime other than nonsupport that parent is not liable for child support while incarcerated unless it is affirmatively shown that [the parent] has income or assets to make such payments."[90]

A court in New York similarly found that a father imprisoned for a crime other than nonsupport was not liable for child support payments while incarcerated unless it could be affirmatively shown that the father had income or assets to make the payments.[91] Special Term had declined to reduce completely the father's support obligations, finding that the father had an asset since he owned a half-interest in the marital premises.[92] However, the supreme court, appellate division, reversed and stated, "'a release of the husband's equity in a house which is being used as a residence by the wife, and is probably not going to be sold, is an inappropriate and unsatisfactory way to provide for the support of a child which obviously requires current cash.'"[93] The court added that more concern should be with liquid assets, "unless there is some indication, not present [in this case] that the parent is deliberately holding down his earning capability."[94]

Some states are less timid about considering equity. For instance, the Iowa Supreme Court held, in its first appeal presenting the claim that a support order should be modified because of incarceration, that courts should take into consideration each parent's earning capacity, economic circumstances and cost of living, and that "the petitioner's equity in the house should be charged for the support payments he is unable to meet during the period of his incarceration."[95] The Supreme Court of Delaware similarly held that a father should be required to liquidate his assets in order to discharge his child support obligation.[96] The court reasoned that "[i]n the event that a parent becomes incarcerated, children continue to need support. It would be inequitable to have the support obligation discharged by one parent, or society, while the incarcerated parent retains available assets."[97]

Likewise, section 30-3-5 of the Utah Code Annotated gives the trial court broad equitable power to order the payment of child support.[98] In

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a modification of the father's child support obligation, primarily because the father's remaining assets were insufficient to enable him to meet his support obligations. 840 P.2d at 699.

90 Pierce v. Pierce, 412 N.W.2d 291, 292 (Mich. Ct. App. 1987).

91 *See* Foster v. Foster, 471 N.Y.S.2d 867, 868 (App. Div. 1984).

92 *See id.* at 868.

93 *Id.* at 869 (quoting Lea v. Lea, 399 N.Y.S.2d 219, 221 (App. Div. 1977)).

94 *Id.*

95 *In re* Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983).

96 *See* Harper v. Barrows, 570 A.2d 1180, 1185 (Del. 1990).

97 *Id.* at 1184.

98 UTAH CODE ANN. § 30-3-5 (1987).

Proctor v. Proctor,[99] the trial court was therefore not required to exercise its equitable powers to protect the incarcerated's assets from his children, since his "inability to provide for his children from an income . . . was a direct consequence of his own misconduct."[100] The court of appeals also found "no Utah authority equating . . . the 'ability to earn' with only actual income or earnings,"[101] but rather stated that the "trial court appropriately took into account the home equity awarded to [the incarcerated father] and his lack of living expenses during incarceration as factors relevant to determining the amount of prospective child support."[102]

Whether an inmate's incentive pay should be subject to child support obligations is another issue of interest. One case is directly on point, and despite an aggressive dissent, the court answered in the affirmative.[103] The case involved an incarcerated father who was sentenced to life imprisonment for attempted first degree murder; he shot his ex-wife in front of one of their children.[104] The father then petitioned for a modification of his child support order on the basis that his life sentence constituted a change in circumstance.[105] The court did enter a reduction, but still ordered that ongoing payments of child support were to be paid out of the state penitentiary's incentive pay program; the incarcerated father appealed.[106] The father argued that his monthly personal expenses for items not provided by the state penitentiary met or exceeded his monthly income, so he had nothing left with which to pay child support.[107]

The appellant contended that he should not have had to pay anything since "the order in which the items [were] listed establishe[d] their priority," and "therefore . . . child support obligations are a lower priority than personal necessities . . . ."[108] Appellant argued that "an incarcerated parent is not liable for child support unless it can be shown that he has income or assets sufficient to make the payments."[109] However, the *Glenn* court pointed out that the father did have the ability to pay something since he was receiving incentive pay.[110]

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99 773 P.2d 1389 (Utah Ct. App. 1989).

100 *Id.* at 1391.

101 *Id.* at 1390.

102 *Id.* at 1390-91.

103 *See* Glenn v. Glenn, 848 P.2d 819, 821-22 (Wyo. 1993).

104 *See id.* at 820.

105 *See id.*

106 *See id.* at 821.

107 *See id.* at 820. The incentive pay program is authorized by WYO. STAT. ANN. § 7-16-203 (Michie 1997), which allows a person in confinement to receive compensation which is to be used for personal necessities, victim compensation, support of dependents, reimbursement for the services of a public defender or a court appointed lawyer. *See Glenn*, 848 P.2d at 821.

108 *Glenn*, 848 P.2d 819 at 821.

109 *Id.* at 822.

110 *Id.*

The court acknowledged that many courts follow the old Alaska approach,[111] that the incarcerated parent does not have to pay child support during his incarceration if he does not have an income.[112] However, the court decided to follow the rule announced in *Pierce*, that if the incarcerated parent does have assets or income while in prison, that income can properly be applied against the outstanding support obligation.[113] The court, therefore, ruled that when an incarcerated parent has income, that income can fairly be applied to the child support obligation.[114]

The new law in Alaska requires that noncustodial parents meet a minimum support obligation regardless of their inability to pay.[115] As interpreted by the Supreme Court of Alaska, it does not matter if the parent is incarcerated and has "an income of less than the poverty level or no income at all."[116] Even though Douglas had no means of income, had no assets, did not receive a permanent fund dividend, and was not personally eligible for public assistance payments, she was required to pay at least the legal minimum of $50 per month.[117] The court reasoned that indigent incarcerated parents should not be treated differently from other indigent parents who are also subject to the rule.[118] Thus, in Douglas's circumstances, her debt would most likely accrue as would any other debts she owed.[119] The court said that Douglas would be able to satisfy the debt "upon her release from prison and reentry into the work force, or upon any improvement in her financial circumstances."[120]

C. VOLUNTARINESS

One factor that weighs against modification of a support order is the voluntariness of the incarceration, or the fault of the incarcerated parent in bringing on the change in circumstance. The effect given to the voluntariness aspect of incarceration differs among states, and seems to revolve around subjective views and semantics. One view is that people should be responsible for their own actions, and that those who are incar-

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111 *See, e.g.*, Clemans v. Collins, 679 P.2d 1041 (Alaska 1984). Note, however, that Civil Rule 90 superseded *Clemans*. *See* Douglas v. Alaska Dep't of Corrections, 880 P.2d 113, 116 (Alaska 1994). In *Douglas*, the Alaska Supreme Court interpreted Civil Rule 90.3 as subjecting incarcerated parents to the same child support obligations as those not in prison. *See id.* *See generally* ALASKA ADMIN. CODE tit. 15, § 125.010 (1987) (adopting Civil Rule 90.3 as the child support guidelines for the Alaska Department of Revenue).

112 *See Glenn*, 848 P.2d at 822.

113 *See id.* (citing Pierce v. Pierce, 412 N.W.2d 291, 292-93 (Mich. Ct. App. 1987)).

114 *See id.* at 822-23.

115 *See Douglas*, 880 P.2d at 115 (interpreting Alaska Civil Rule 90.3).

116 *Id.*

117 *See id.* at 116-17.

118 *See id.* at 116.

119 *See id.*

120 *Id.*

cerated are imprisoned as a result of illegal actions they voluntarily performed.[121]

For example, in 1983, the Supreme Court of Iowa heard its "first appeal presenting the claim that a support order should be modified because of the incarceration of the parent ordered to pay."[122] In *Vetternack*, where it was alleged that petitioner "fired a firearm" through the window of his ex-wife's home while she and their children were at home,[123] the husband wanted his child payment responsibilities modified because of his alleged change in circumstances.[124] In reasoning why the request for modification would be denied, the court noted a trend: "any voluntariness in diminished earning capacity has become increasingly an impediment to modification."[125] Like the *Vetternack* court, other state courts which have held that incarceration is not a change of circumstance requiring suspension or termination of a support order have emphasized the willful nature of the conduct that led to incarceration.[126]

One might ask how a plaintiff could assert that his incarceration was forced upon him, and was hence involuntary, when he voluntarily undertook an action that would almost certainly lead to incarceration. Yet, some courts reason that where incarceration was not due to some act that was intended to relieve the defendant from child support obligations, the incarceration cannot be deemed voluntary.[127] In Oregon, for example, an incarcerated parent would only be foreclosed from demonstrating a change in circumstances due to a reduction of his or her financial status if the crime committed was for the primary purpose of avoiding his or her support obligation.[128]

Part of that view likely stems from a presumption that no one normally volunteers to be incarcerated; most people vehemently oppose the idea and fight hard in their own defense to avoid such a sentence. In this regard, contrast the Supreme Court of Nebraska's holding in *Ohler* with the law of Idaho in *Nab*. In *Ohler*, the court said that the defendant was engaged in criminal activity and his reduced financial ability was due to his own fault.[129] The rationale behind the holding in *Nab*, however, was that "[t]he incarceration of the contemnor [was] not a voluntary or bad

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121 *See, e.g., infra* notes 123-26 and accompanying text.

122 *In re* Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983).

123 *Id.* at 761-62.

124 *See id.* at 761.

125 *Id.* at 763.

126 *See supra* notes 34-36, 50-53 and accompanying text; *infra* note 134 and accompanying text.

127 *See infra* notes 128, 130-32 and accompanying text.

128 *See Willis II*, 840 P.2d 697, 698-99 (Or. 1992).

129 Ohler v. Ohler, 369 N.W.2d 615, 617 (Neb. 1985).

faith change in circumstances in the sense that the contemnor's act [was] self-disabling."[130]

Such contrasting views on the issue of voluntariness are representative of how the states differ in their policies regarding child support obligations of incarcerated parents. In a case where a father was convicted of first degree manslaughter and was sentenced to a term of five to fifteen years, a New York appellate court found that the defendant's default in child support payments due to incarceration was not willful, and therefore his support obligation could be retroactively reduced.[131] The court ruled that the obligation to pay child support would be suspended until the date he was released from prison.[132]

However, since the New York State legislature has not specifically made policy concerning child support obligations of prisoners, it is possible for a contrasting view to be upheld in a different appellate court (or department) of the state. Thus, without overturning the *Foster* decision, the New York Court of Appeals in *Knights v. Knights*[133] upheld a nearly contrary decision of a lower court in a different department. The New York Court of Appeals stated:

> it is undisputed that petitioner's current financial hardship is solely the result of his wrongful conduct culminating in a felony conviction and imprisonment. Thus, it cannot be said that Family Court abused its discretion in determining that these "changed financial circumstances" warranted neither a reduction of petitioner's child support obligation nor a suspension in the accrual of the support payments during the period of petitioner's incarceration.[134]

Courts also debate whether the loss of income due to being incarcerated is more like a person's inability to work because of a disability, or whether it is more akin to a person's quitting a job. In *In re Marriage of Blickenstaff*,[135] since the statute did not define "voluntary unemployment," the court relied on the dictionary and concluded that the term should be defined as "unemployment . . . brought about by one's own free choice and is intentional rather than accidental."[136] With this definition, the court held that an incarcerated parent is not "voluntarily unem-

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130 Nab v. Nab, 757 P.2d 1231, 1238 (Idaho Ct. App. 1988).

131 Foster v. Foster, 471 N.Y.S.2d 867, 869 (App. Div. 1984).

132 *See id.* at 869.

133 522 N.E.2d 1045 (N.Y. 1988).

134 *Id.* at 1046.

135 859 P.2d 646 (Wash. Ct. App. 1993).

136 *Id.* at 648 (relying on WEBSTER'S NEW WORLD DICTIONARY 1592 (2nd College ed. 1976)).

ployed" within the meaning of the child support statutes unless the parent was imprisoned for a crime of nonsupport or for failure to pay support.[137] Since the court found the incarceration to be involuntary, the trial court could have properly considered the father's lack of income due to his imprisonment when deciding whether to grant his modification petition.[138] Also rejecting an analogy of incarceration to a voluntary decrease in income, the Superior Court of Pennsylvania found incarceration to be involuntary.[139]

Nonetheless, other courts have concluded that lack of work income due to incarceration does not eliminate the duty to provide for children pursuant to support orders. For example, in Utah, where a father was convicted of raping a child and given a minimum mandatory sentence of five years in prison, the court held that "an able bodied person who stops working, as an exercise of personal preference or as a result of punishment for an intentional criminal act, nonetheless retains the ability to earn and the duty to support his or her children."[140] In Ohio, a court held that "the accrual of a child support obligation while incarcerated as a result of a voluntary act is no more discriminatory than imposing that same obligation on one who is voluntarily unemployed."[141]

Another area where the law has seen some shifts is in the application of the "clean hands doctrine" as applied to application for equitable relief from child support requirements. The clean hands doctrine is premised on the reasoning that one seeking equitable relief cannot take advantage of one's own wrongdoings.[142] In *Willis II*, the Oregon Supreme Court held that the equitable doctrine of "unclean hands" does not bar an incarcerated parent from seeking a modification of child support if the parent's reduction in income due to incarceration was not taken for the primary purpose of avoiding the support obligation.[143] However, for a brief period of time, Oregon used the "clean hands" doctrine: "if an obligor, acting in bad faith, voluntarily worsen[ed] his financial position so that he [could] not meet his obligations, he [could] not obtain a modification of support."[144] The court reasoned that "the incarcerated parent has control over his actions and should be held to the consequences,"[145] and that the parent "should not be able to escape his financial obligation to

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137 *Id.* at 650-51.

138 *See id.* at 651.

139 *See* Leasure v. Leasure, 549 A.2d 225, 227 (Pa. Super. Ct. 1988).

140 Proctor v. Proctor, 773 P.2d 1389, 1391 (Utah Ct. App. 1989).

141 Cole v. Cole, 590 N.E.2d 862, 866 (Ohio Ct. App. 1990).

142 *See* Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc., 471 N.E.2d 554, 558 (Ill. 1984).

143 *See Willis II*, 840 P.2d 697 (Or. 1992), *rev'g*, 820 P.2d 858 (Or. Ct. App. 1991).

144 *Willis I*, 820 P.2d 858, 859 (Or. Ct. App. 1991), *rev'd*, 840 P.2d 697 (Or. 1992).

145 *Id.* at 860.

his children simply because his misdeeds have placed him behind bars."[146]

Willis II brought Oregon back to its pre-*Willis I* precedent, that an incarcerated and obligated parent with no income should not be required to pay child support until he is capable of gainful employment.[147] Today the law in Oregon is that even if a "father's own misconduct has resulted in his imprisonment," application of the clean hands doctrine would be improper "in the absence of some showing that he became imprisoned in order to avoid his support obligation."[148]

Contrast the Oregon law with the Nebraska Supreme Court's decision in *Ohler*, which held:

> Incarceration of the applicant necessarily means that he was found to have violated a criminal statute. Where one seeks relief from the obligation to pay child support on the basis that he or she is incarcerated, the violation of the statute which resulted in the incarceration is directly connected with the matter of child support. Under those circumstances equity should not and will not act to give relief.[149]

II. PUBLIC POLICY ISSUES

Equally undetermined are the states' conclusions on issues of public policy. Of course, several different and, at times, competing rights must be considered. One public policy aspect that has some consensus is the idea that one should not reap a benefit from committing a crime. Under this theory, the Utah Court of Appeals in *Proctor* found that "in light of the latitude given the trial court to provide for the children's needs in an equitable manner, [there was] no abuse of discretion and no impermissible extra penalty on appellant in the court's order [that child support payments can be charged against appellant's equity interest in the marital home]."[150]

However, the Supreme Court of Oregon held that the test was whether the reduction in income was self-imposed or in bad faith; absent a showing that incarceration was a result of a parent's deliberate attempt to avoid child support obligations, an order of modification may be appropriate.[151] The court noted that "incarceration alone does not demon-

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146 *Id.*

147 *See In re* Marriage of Edmonds, 633 P.2d 4, 5-6 (Or. Ct. App. 1981), *overruled by* 820 P.2d 859 (Or. Ct. App. 1991), *rev'd*, 840 P.2d 697 (Or. 1992).

148 *Id.* at 6; *see Willis II*, 840 P.2d at 699.

149 Ohler v. Ohler, 369 N.W.2d 615, 618 (Neb. 1985).

150 Proctor v. Proctor, 773 P.2d 1389, 1391 (Utah Ct. App. 1989).

151 *See Willis II*, 840 P.2d at 699.

strate inability to meet an existing child support obligation," and found that every motion must be considered on a case-by-case basis.[152]

The policy against reaping benefit from a crime is balanced against the policy that a person should not be punished twice for the same crime. In this regard, there is debate over whether or not there should be accrual of the incarcerated parent's child support obligations that are not paid. In 1985, the Nebraska court stated that there is no reason why those "who have had to step in and assume the applicant's obligations should not be reimbursed by the applicant should his future position enable him to do so."[153] Yet in Michigan in 1987, a court came to the conclusion that "a noncustodial parent's support arrearage which accrued while the parent was imprisoned should be discharged unless there is some showing that the parent became incarcerated in order to avoid his support obligation."[154]

The strongest voice against allowing accrual of child support is found in Judge Krivosha's dissent in *Ohler*, where he reasoned that even though "the parent against whom the judgment runs has been convicted of violating a law and has brought the problem into being by reason of his own act," the accrual is an imposition of an additional penalty and is not appropriate since the State addressed the violation, and the individual is now paying the penalty.[155] Judge Krivosha's dissent also points out that "the pressures of paying a child support judgment," in many cases long after the child has grown, does "little, if anything, to assist in rehabilitating the prisoner."[156]

Courts in other jurisdictions have cited the dissent in *Ohler*. For instance, the Idaho court deciding *Nab* held that barring an incarcerated and indigent parent from seeking a modification due to past contempt provides no present benefit to the child, and only overburdens the parent.[157] Yet, the Supreme Court of Iowa pointed out that "the crucial thing is that, during petitioner's incarceration, it will continue to be necessary to care, feed, and provide for his children. He remains responsible for those expenses."[158] Additionally, the court in *Ohler*—which stands as good law—stated that it could not "see how the best interests of the children for whom the support was ordered would be served by temporarily terminating the applicant's child support obligation."[159]

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152 *Id.*

153 *Ohler*, 369 N.W.2d at 618.

154 Pierce v. Pierce, 412 N.W.2d 291, 293 (Mich Ct. App. 1987).

155 *Ohler*, 369 N.W.2d at 619 (Krishova, J., dissenting).

156 *Id.*

157 Nab v. Nab, 757 P.2d 1231, 1238 (Idaho Ct. App. 1988); *see also* text accompanying *supra* note 31.

158 *In re* Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983).

159 *Ohler*, 369 N.W.2d at 618.

PROPOSALS AND CONCLUSION

Since the law of the states is not cohesive and settled, it is vital that courts carefully reflect on the policy behind their proclamations. We are in agreement with the rationale of the courts which hold that where assets exist, those assets should be prioritized towards the payment of child support. First, this rationale makes for sound policy and fiscal sense. Such a policy would relieve the various state and federal government agencies of the undue burden of caring for those children who are not being adequately supported by their incarcerated parents. Second, a uniform rule would prevent expectations and obligations from being in a state of flux among jurisdictions.

One way of addressing the problem is to analyze who is inconvenienced by the policy choice that determines whether non-custodial incarcerated parents should be required to continue to pay child support or pay the accrued child support upon release from prison. In most situations, the children would be at greater risk of harm if the incarcerated parents *were not* required to pay than would be the incarcerated parents if they *were* required to pay. It is axiomatic that a person should be held responsible for his or her actions. Incarcerated parents first took the responsibility of becoming parents, and then, by their own actions acted in such a way that resulted in their incarceration. By virtue of their illegal actions, they should not be relieved of all responsibilities to their children. When people are incarcerated, they are not relieved of their other financial responsibilities, such as making car payments.[160] A child should be afforded at least the same legal status.

A reasonable response to the question of whether a non-custodial incarcerated parent has a continuing obligation to pay child support would be to fashion the law so that if an incarcerated parent has the ability to pay—either from savings, salary, pension, or other assets—that parent should pay. Incarcerated parents are no longer financially responsible for their own food, clothing and shelter, and therefore may have assets that no longer need to be reserved to provide for their own basic needs. These assets should be used to meet the needs of their children, for whom their responsibility does not end.

The courts and legislatures should be compelled to recognize that the needs of children are not in any way lessened when an obligor is imprisoned. Children still require money to cover their basic needs such as food, clothing, shelter, childcare, and education. Millions of dollars owed by incarcerated parents are still needed to support these children. It is common sense and sound policy to require an incarcerated parent to meet any child support obligations to whatever extent possible.

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160 *See, e.g.*, Douglas v. Alaska Dep't of Corrections, 880 P.2d 113, 116 (Alaska 1994).

When the imprisoned obligor is unable to pay while in prison, the state and welfare system often come to the aid of the obligor's children. However, the state should not be viewed as providing relief to the incarcerated parent; rather, it should be viewed as supporting the child *temporarily* while the obligor is unable to do so. Additionally, assuming the incarcerated parent completes the sentence or is released, the obligor should be required to reimburse the state as he or she is able.

A prison sentence is often referred to as payment for a debt to society. However, a prisoner's debt is hardly being paid if the prisoner is simultaneously incurring another debt to society by failing to pay child support obligations. Therefore, if the parent is unable to pay child support during incarceration, this "second" debt can and should be repaid upon release.[161] This is not an additional punishment or fine, but is a simple reimbursement to the state for what the parent was obligated to pay in the first place. Likewise, public policy considerations require that other family members or private individuals who paid the child support owed by the obligor during the obligor's incarceration, should be reimbursed for their expenditures. Private individuals should not be forced to assume the responsibility and obligations of the incarcerated parent any more than the state should.

These policies should not be terribly difficult or expensive to implement. Mechanisms already exist to track child support obligations, and as of October 1, 1997, every state is required to have an approved automated tracking and monitoring system for child support obligations.[162] By requiring that prisoners be held responsible for child support orders, millions of dollars from state welfare programs will be saved, and attention will properly be re-focused on the best interests of our children.

In the midst of rampant welfare reform, the commitment to bolstering child support orders has never been stronger:

> For more than two decades, the Federal Government has played a leading role in requiring States to establish and conduct strong child support enforcement programs.

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161 Accrual should only apply when there is a possibility of repayment. Often, when the parent is sentenced to life in prison without possibility of parole, it makes no sense to have the debt accrue, because there is no possibility that the prisoner will be able to earn enough money to pay the state or others back. However, even when a prisoner has no assets, his or her circumstances could change while he or she is incarcerated. For example, he or she could become an heir to an estate or could be named a beneficiary to a trust, at which point, a new modification order would be required to reflect this change in circumstances.

162 *See* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988). The original deadline for the system was October 1, 1995, but has been extended each year as the tracking requirements have become more rigorous. *See* 42 U.S.C. § 653 (1994), *as amended by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2216 (1996). *See generally* Child Support Enforcement Act, 42 U.S.C. §§ 651-69 (1994), *as amended by* § 344, 110 Stat. at 2234-37.

> The fundamental goal of these programs . . . is to increase the financial security of children who live with one parent. This goal enjoys nearly universal support among members of Congress and among the American public.[163]

Nevertheless, technology has been outpacing policy. The federal and state governments are tracking deadbeat parents, using one of the largest computer databases.[164]

It hardly needs be argued that being incarcerated results in a change of circumstances for the person convicted. Likewise, the question of voluntariness of incarceration is largely an issue of semantics: granted no one *wants* to be incarcerated, yet performing illegal activities that lead to incarceration can be blamed on no one other than the person convicted. We conclude that the analyses and policy implementation should be uniform, and that the monetary liability of the parents be determined by balancing the needs of the child with the incarcerated parent's ability to pay. The needs of children do not disappear with the convicted's cessation of liberty, determined to be just under our legal system. Freedom to move and ability to pay are not necessarily mutually exclusive, and a term of imprisonment should not be the determinative factor. The aim is not to further punish an incarcerated, noncustodial parent. The aim is to have a system that logically requires payment when it is at all feasible for the parent to do so. Where the assets exist, they should be tapped.

Federal guidelines are necessary for several reasons. First, it is unjust to seemingly reward criminal behavior with a cessation of financial obligations. Such a policy is unsound in the first instance, and the injustice is compounded when it is applied only to some prisoners, in some states. Second, when support is not paid by a non-custodial incarcerated parent, it must come from other sources. Often government agencies pick up the burden, which means that it is in the states' best interest to implement laws that do not encourage the payment of governmental benefits when other sources of money are available. If the incarcerated parent has the ability to pay support using liquidable assets during the incarceration, there is no reason the government should be spending its tax dollars. Similarly, states should keep records of amounts they paid for a parent's support obligation if the incarcerated parent is unable to pay while incarcerated. In the event that the parent is released from prison and makes enough money to repay the government or other in-

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163 H.R. REP. No. 104-651, at 1440 (1996). The reforms brought by the Personal Responsibility and Work Opportunity Act of 1996 were described by Senator Presler as "the toughest child support laws ever passed by Congress." 142 CONG. REC. S9396 (daily ed. Aug. 1, 1996).

164 *See* Robert Pear, *Vast Worker Database to Track Deadbeat Parents*, N.Y. TIMES, Sept. 22, 1997, at A1.

terim sources of support, it makes sense that the parent should make the repayment. There is no intent to make non-custodial parents' lives more difficult; we only want to ensure that they continue to meet their responsibilities. This policy should not vary from state to state, but should be uniform across the country in the interest of justice and equity.

In order to achieve the ultimate goal of providing for the welfare of children of incarcerated parents, state and federal governments must work together to develop and implement a uniform system for determining support payments and their collection. In so doing, the interests of the child, the incarcerated parent and the state are addressed, and an optimal solution is reached.