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DEADBEAT, DEADBROKE OR JUST DEAD WRONG?: AN ARGUMENT IN FAVOR OF A MANDATED "TOTALITY OF THE CIRCUMSTANCES" TEST IN THE MODIFICATION OF CHILD SUPPORT ORDERS FOR PARENTS INCARCERATED FOR CRIMES AGAINST THEIR CHILDREN

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I. INTRODUCTION

A. Michael: "Deadbroke"

Consider the hypothetical story of Michael. Michael accidentally became a father at fourteen. He had grown up in a ghetto, born the fourth child of a single mother who lived on welfare. He often did not go to school because of his ADHD and when he did go to school, he was frequently suspended because of his oppositional defiance disorder. Due to severe harassment from other boys in middle school, Michael borrowed a gun from a friend. Michael was caught with the gun and two ounces of marijuana. Over the next four years, he was in detention facilities longer than he was out, for crimes both violent and petty.

Michael could not attend college because the material was too advanced for him, since his grade-school education had been consumed with fear, suspension, and disability. He attempted to get a job after high school, but due to his long criminal history, the only job he was able to get was one pumping gas in the inner city. It paid $1200 per month. His wages were garnished almost immediately, leaving him with even less income.[1]

Michael attended a technical school at night to try to improve his earning capacity. A neighborhood friend with whom Michael had a past dispute assaulted him at the gas station while Michael was working. Michael drew his gun, which he kept with him for protection from such incidents. Both young men were arrested. Michael lost his job because he was sent to jail for assault with a deadly weapon. His child support accumulated while he was in prison. After his release, he owed back-support of $20,000 and he attempted to find another job, unsuccessfully.

Michael suffers a crushing cycle of inability to pay. The court imputes income to him at the rate he made at the gas station, even though Michael cannot obtain any employment, let alone at the same rate.[2] Michael cannot afford an attorney who might be able to advocate effectively for him, so his child support arrears continue to climb. He is in and out of prison and often commits crimes to help support his child and to protect himself from

1. *See* Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY L. & POL'Y, 127, 144 (2011) ("'New hire' reporting requirements can identify newly employed wage earners immediately and expedite income withholding.").

2. *See id.* at 143.

the community in which he lives. Michael's story is not unique,[3] and, though it is a compelling problem requiring resolution, this Note is not about Michael.

B. Robert, David, and "Stevie J.": "Deadbeat"

Robert Sand enjoyed a luxurious lifestyle due to his career in the automobile auction industry.[4] He made $500,000 to $600,000 per year.[5] After his divorce, he stopped paying his support order of $750 per week for his two daughters.[6] Sand re-married and fathered an additional child in another state but soon divorced and became obligated to pay an additional $625 per week for that child.[7] Robert Sand became the face of the United States Justice Department's effort to crack down on "deadbeat" parents who willfully fail to pay their child support when he fled the country to avoid his obligations.[8] At the time of his arrest, he owed more than $1 million in back child support.[9] Robert's story is not an anomaly. According to 1997 data, 4.5 million noncustodial fathers in the United States were able to pay child support and nevertheless did not.[10] This Note is about parents like Robert.

David Adams is a cardiologist in private practice in Florida.[11] Owing more than $4 million dollars in back child support for his two children,

3. *See, e.g.*, Daniel Hatcher & Hannah Lieberman, *Breaking the Cycle of Defeat for "Deadbroke" Noncustodial Parents Through Advocacy on Child Support Issues*, 37 CLEARINGHOUSE REV. 5, 5–6 (2003); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1002–03 (2006); David Crary, *Helping Dads Who Are Deadbroke, Not Deadbeat*, L.A. TIMES (Nov. 28, 1999), https://www.latimes.com/archives/la-xpm-1999-nov-28-mn-38341-story.html.

4. Mosi Secret, *Huge Child Support Debt Doesn't Ensure Time in Jail*, N.Y. TIMES (Dec. 30, 2012), https://www.nytimes.com/2012/12/31/nyregion/top-deadbeat-parent-is-arrested-but-may-avoid-prison.html?hp.

5. *Id.*

6. *Id.*

7. *Id.*

8. *See Most Wanted "Deadbeat Parent" Sentenced to 31 Months' Imprisonment for Fleeing to Evade Over $1 Million in Child Support Obligations*, DEP'T JUST. (May 21, 2013), https://www.justice.gov/usao-edny/pr/most-wanted-deadbeat-parent-sentenced-31-months-imprisonment-fleeing-evade-over-1.

9. *Id.*

10. Tanya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 632 n.117 (2012) (citing Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. 420, 422 (2001)).

11. *Status of Deadbeats*, HHS: OFFICE OF INSPECTOR GEN., https://oig.hhs.gov/fraud/child-support-enforcement/sentenced.asp (last visited Mar. 20, 2020).

David fled the country to Israel, where he remains at large.[12] This Note is about parents like David.

Steven "Stevie J." Jordan is a Grammy-award winner and reality-television star who made $27,000 per month in 2014.[13] In addition, he earned about $10,000 per year in royalty income in 2014.[14] He deliberately refused to pay his child support for two of his six children for thirteen years.[15] The monthly amount owed was $6608, less than a quarter of his income.[16] After he plead guilty and a judge ordered him to pay restitution of over $1.3 million, the reality star complained, "This case is bulls—t."[17]

This Note is about parents like Stevie J. For the purposes of this Note and its arguments, a parent has willfully failed to pay support if they[18] have intentionally refused to pay support despite the means to do so.[19]

C. Danny and P.F.: "Dead Wrong"

Danny was a few hours shy of obtaining a bachelor's degree in engineering and earned $42,000 per year in 1995.[20] Then, following his divorce, he was sentenced to a twenty-year prison term for raping his sixteen-year-old daughter.[21] Danny complained to the court that he could not pay the ordered amount of $200 per month because he couldn't earn

12. *Id.*

13. *Id.*; *see also* Victoria Bekiempis & Denis Slattery, *"Love and Hip-Hop" Star Stevie J Ordered to Pay $1.3 Million in Child Support*, N.Y. DAILY NEWS (Feb. 1, 2017, 10:28 PM), https://www.nydailynews.com/entertainment/gossip/stevie-ordered-pay-1-3m-child-support-article-1.2962000.

14. *Manhattan U.S. Attorney Announces Arrest of Reality Television Cast Member for Failing to Pay Over $1 Million in Child Support*, DEP'T JUST. (June 10, 2014), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-arrest-reality-television-cast-member-failing-pay-over.

15. *See id.*

16. *Id.*; *see also* Bekiempis & Slattery, *supra* note 13.

17. Bekiempis & Slattery, *supra* note 13.

18. Historically, the use of the pronoun "they" and its variations has been viewed by many as incorrect when referring to a singular person in academic writing. Nevertheless, in this Note, I use the singular pronouns "they" and "their" where gender is unknown because it is important to me that I respect the identities and experiences of all people by using the non-binary gender pronouns.

19. *See, e.g.*, 18 U.S.C. § 228 (2018); *see also* United States v. Mathes, 151 F.3d 251, 253 (5th Cir. 1998) (ruling that willful failure to pay support was defined the same way as willful failure to pay taxes: having the means to pay and simply choosing not to pay); United States v. Brand, 163 F.3d 1268, 1275 (11th Cir. 1998) (holding willful failure to pay requires that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that [the defendant] voluntarily and intentionally violated that duty") (quoting United States v. Williams, 121 F.3d 615, 621 (11th Cir. 1997), *cert. denied*, 523 U.S. 1065 (1998)).

20. *See* Reid v. Reid, 944 S.W.2d 559, 561 (Ark. Ct. App. 1997).

21. *Id.* at 560.

income.[22] He even asked the court to abate the $30-per-month reduced amount.[23] Danny's ex-wife, the mother of the child who had been raped, agreed to the $30 per month reduced amount of support, but held the position that Danny should not be totally relieved of his obligation to his two daughters as a result of having raped one of them.[24]

Similarly, P.F. was a truck driver earning $450 per week.[25] He was ordered to pay $72 per week in child support for his daughter, who was under the age of 10.[26] P.F., then, for reasons unknown to stable minds, committed indecent assault and battery on the child.[27] The lower court pointed out that the victim-daughter would likely need therapy in order to cope with what her father had done to her.[28] Because he was sentenced to a prison term of at least five years, P.F. requested that the court modify his child support obligation, citing his incarceration and resultant inability to pay.[29] This Note is also about parents like Danny and P.F.

D. Carl: The Less-Obvious "Deadbroke"

Consider the following hypothetical: Carl was a UPS driver. He made $54,000 a year and in ten years never missed a child support payment for his two kids. He saw the kids every other weekend and enjoyed a deep and meaningful relationship with them, even coaching his son's basketball team. Then he made a mistake. As he was driving back to the depot in his work truck, he saw the vehicles of several of his friends at a favorite bar. It was the holiday season and Carl had been working overtime to deliver the extra volume of packages, so he hadn't seen his friends in some time. His route was complete and all he had to do was return the truck to the depot, but he knew that by the time he did so, his friends might be gone already. So, he parked the truck and popped into the bar. He had one beer and a burger with fries and headed out to drop off the truck.

When Carl arrived at the depot, his supervisor smelled the beer on his breath and fired him for drinking on the job. Unable to use UPS, the only job he'd ever had, as a reference, and with no education, Carl found it hard to find a new job. It took him six months to secure a position at Best Buy selling electronics, and the new position paid only $10 per hour.

22. *See id.*
23. *Id.* at 561.
24. *Id.*
25. *See* P.F. v. Dep't of Revenue, 64 N.E.3d 940, 944 n.7 (Mass. Ct. App. 2016).
26. *See id.* at 941.
27. *Id.*
28. *See id.* at 946.
29. *See id.* at 941.

Carl did not think to modify his child support obligation—he didn't know such a thing was possible.[30] He was aware that he was behind more than twelve months on the payments, but he thought his payment history would ensure he got a break. And besides, he was paying his ex-wife whatever he could—twenty dollars here, forty there—in cash.

When the probation office called, Carl didn't pick up—he did not want to deal with it. He had enough to worry about. Carl moved in with his mother because he couldn't afford rent anymore, but he forgot to tell the probation office of his move. When the probation office mailed Carl a notice of contempt hearing, he therefore never got it.

Carl made in-kind contributions to his children even with his financial troubles—paying for groceries and new ballet slippers for his daughter. He gave partial payments to his ex-wife here and there but scraping enough money together for even one full payment was impossible. His ex-wife was understanding and Carl appreciated that. He did not know that she was not the decision maker about what could be forgiven and what could not. Neither did she.

Finally, after several months of sleeping on his mother's sofa, working overtime at Best Buy, and shutting his eyes against the humiliation of not being able to support his kids, Carl was in luck. An old friend offered him a job opportunity in another state that would pay $60,000 with a lower cost-of-living.

Carl left immediately, lamenting the fact that he now had to drive two hours to see his kids. Three weeks into his new job, Carl was on his way to pay his first month's rent on a new apartment so that his kids could finally visit him. Instead, Carl was arrested for willful failure to pay support.[31] In searching him, the police found the $1,300 cash with which Carl was about to secure a home for himself. The judge interpreted this as evidence of his refusal to pay.[32] Carl was floored. Arrested? He

30. *See* PA. R.C.P. NO. 1910.19 cmt. 2006 ("Often, the obligor is unable or unaware of the need to file for a modification or termination, or the parties abandon the action."); *see also* Brito, *supra* note 10, at 644.

31. *See* 18 U.S.C. § 228 (2018) ("(a) Offense. Any person who . . . willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; [or] . . . travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for . . . longer than 1 year . . . . (b) Presumption. The existence of a support obligation that was in effect for the time period charged . . . creates a rebuttable presumption that the obligor has the ability to pay . . . . (c) Punishment. The punishment . . . is . . . a fine under this title, imprisonment for not more than 6 months, or both . . . .").

32. *See, e.g.*, West Virginia IV-D Agency, Comments to the Notice of Proposed Rulemaking (Jan. 15, 2015) ("While obligors in contempt actions often plead no employment and no ability to pay, if the court orders a $500 purge payment or jail time, after a few

was a good person. A good dad. He had paid what he could! What about his previously excellent payment history? How could this happen to him? What did it matter that he had left the state, that it had taken him over a year to figure things out, that he had forgotten to change his address? Now he was incarcerated and he had lost his job. Again. This Note is about parents like Carl.

This Note argues that parents like Stevie J. who willfully refuse to pay child support and parents like P.F. who have committed crimes against their children should be treated differently than downtrodden parents like Michael and Carl who want to pay and cannot.

This Note explores the final rule published by the Office of Child Support Enforcement, which prohibits states from refusing to modify child support orders of incarcerated parents.[33] The rule makes perfect sense for parents like Michael or Carl, who might use the abatement as an opportunity to start over. However, it should be revisited to include an allowed exception for parents like Stevie J. and "P.F." because the justifications for the rule do not apply to those parents, and, even if they did, those parents present additional unique and distinguishing facts requiring differentiated consideration. In these circumstances, courts should not be prohibited from denying relief to incarcerated parents. Rather, the rule should mandate that courts give consideration to all of the circumstances, including whether or not an abatement will result in more payments to the child.

Part I offers background information about child support modification and enforcement generally. It also explores incarceration as grounds for modification and state attitudes and laws regarding distinctions drawn for the nature of the crime. Part I also introduces the new rule and discusses its varied effects on different states. Part II argues that the rule has not adequately provided states with a means by which they can ensure equity when a parent with a child support order is incarcerated for a crime against their own child or for willful failure to pay support. Part III offers a case study of New Jersey and how that state's approach results in the most just outcomes.

phone calls someone usually brings the money to court. In one instance, an obligor refused to pay anything to purge his contempt and told thejudge just to send him to jail. The bailiff took the obligor into custody and in searching him found $1000 hidden in his sock. The court ordered it paid to the child support agency.").

33. *See* 45 C.F.R. § 302.56(c)(3) (2019).

II. PART I

A. Overview of Child Support Enforcement and Modification

In the United States, thirty-seven percent of children have a parent who lives separately from them.[34] Children whose parents do not live together are at greater risk of being poor or financially unstable.[35] Children from single-parent households, further, are at-risk of doing poorly academically and in life.[36] Generally, American sentiment and legal obligation dictate that when non-custodial parents pay child support, children's financial and emotional needs are better supported.[37] Thus, every United States jurisdiction imposes an affirmative obligation on non-custodial parents to pay child support.[38]

This obligation is one that most parents want to meet.[39] After all, most parents want their children to be supported, happy, financially secure, and safe.[40] Beyond an emotional assent to supporting children, federal law requires that states set initial child support amounts using numerical guidelines and that the outcomes of the guidelines must be based on the parent's income and the parent's ability to pay.[41]

Sometimes, though, what a parent desires for their child cannot be met by the resources and opportunities of the parent. The law recognizes this eventuality, and all fifty states allow for modification to child support orders periodically or due to a substantial change of circumstances.[42] A substantial change of circumstances might be the involuntary loss of

34. *See* DEP'T OF HEALTH AND HUMAN SERVS., THE CHILD SUPPORT PROGRAM IS A GOOD INVESTMENT 3 (2016), https://www.acf.hhs.gov/sites/default/files/programs/css/sbtn_csp_is_a_good_investment.pdf.

35. *See id.*; *see also* DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 4 (2d ed. 2006).

36. *See* DOUGLAS E. ABRAMS ET AL., *supra* note 35 (citing Isabel V. Sawhill, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 6 (2014)).

37. *See* DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 34, at 1.

38. *See* 45 C.F.R. § 302.56 (2017).

39. *See* DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 34, at 2.

40. Reggie Bicha & Roxane White, *Engaging Fathers in Child Support*, ASPEN INST. (Mar. 19, 2018), https://www.aspeninstitute.org/blog- posts/engaging-fathers-child-support/ ("We found that most parents wanted to engage, provide resources, and be involved in caretaking for their families.").

41. *See* OFFICE OF CHILD SUPPORT ENF'T, REALISTIC CHILD SUPPORT ORDERS FOR INCARCERATED PARENTS 1 (2012), https://www.acf.hhs.gov/sites/default/files/programs/css/changin g_a_child_support_order.pdf; *see also* Brito, *supra* note 10, at 636.

42. *See* OFFICE OF CHILD SUPPORT ENF'T, *supra* note 41.

employment, newly-suffered disability, or incarceration.[43] States vary the definition of a "substantial change of circumstances" and most do not statutorily define the term, preferring to leave the question of whether the parties' circumstances have changed to judicial discretion.[44]

1. Incarceration as "Substantial Change in Circumstances"

A majority of states consider incarceration to be evidence of a substantial change in circumstances and, thus, grounds for modification of child support orders.[45] The states' approaches to incarceration's effect on the modification of child support orders varies widely.[46] Some states take an administratively proactive approach. For example, North Dakota and Maryland statutorily prohibit the imputation of income to parents incarcerated longer than certain time periods.[47] Maine's statute even provides that incarcerated parents are to be deemed available only for such work as they are actually able to obtain during the incarceration.[48] California and North Carolina prohibit the arrearage of child support payments for obligors incarcerated for any period of time.[49] In these states, then, Michael and Carl are relieved of their child support obligations while incarcerated, but so is Stevie J.—despite his repugnant refusal to pay and apparent means to do so—and so is P.F.—even though he raped the very child for whom the support payments are owed.

Hawai'i's statute does not distinguish between parents incarcerated and parents who are not, choosing instead to calculate child support orders from income of the parties.[50] So, in Hawai'i, Michael and Carl are

43. *See id.* at 1–4.

44. *See, e.g.*, Sundstrom v. Sundstrom, 865 A.2d 358, 369 (Vt. 2004) ("There are no fixed standards to determine what constitutes a 'substantial change in circumstances'; instead, the court should be 'guided by a rule of very general application that the welfare and best interests of the children are the primary concern in determining whether the order should be changed.'" (quoting Wells v. Wells, 549 A.2d 1039, 1041 (Vt. 1988))).

45. OFFICE OF CHILD SUPPORT ENF'T, CHANGING A CHILD SUPPORT ORDER 4, https://www.acf.hhs.gov/sites/default/files/programs/css/changing_a_child_support_order.pdf (last updated Aug. 2017).

46. *See infra* Appendix I.

47. MD. CODE ANN., FAM. LAW § 12-104.1 (West 2019) (prohibiting imputation of income to parents who are incarcerated for more than eighteen months); N.D. CENT. CODE § 14-09-09.38 (West 2017) (prohibiting imputation of income to parents who are incarcerated for more than six months).

48. ME. REV. STAT. ANN. tit. 19-A § 2001(5)(d) (2019).

49. CAL. CODE REGS. tit. 22, § 115530 (2019); N.C. GEN. STAT. ANN. § 50-13.10 (West 2019) ("[A] child support payment or the relevant portion thereof, is not past due, and no arrearage accrues: . . . (4) During any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment.").

50. HAW. REV. STAT. ANN. § 576D-7 (West 2019).

still relieved of their obligations, but Stevie J. must pay because of his considerable assets and income. This approach almost gets it right, except for P.F., who now has no present income and so is relieved of his obligation. He would have been more likely than Carl or Stevie J. to secure employment in his field (truck driving) upon his release,[51] but he now benefits from raping his daughter.

Some states even go so far as to automatically take affirmative steps to modify the child support orders of incarcerated parents, whether or not the parent has filed a motion for the modification.[52] Oregon, for example, can automatically file for a modification down to zero on behalf of a parent who becomes incarcerated.[53] The incarceration is a presumed change of circumstances and can only be rebutted by a showing that the obligor cannot pay.[54] In Oregon, then, Michael, Carl, and P.F. are all treated the same despite the stark differences in the facts of the cases because they do not presently have the means to pay. Stevie J. could also be treated the same if no one rebutted the presumption that he had suffered a change in circumstances.[55] Even if someone did attempt to rebut the presumption, they could do so by a showing of Stevie J.'s present inability to pay, but not necessarily by a showing of his flagrant refusal to do so.[56] Therefore, hypothetically, Stevie J. could dispose of his assets fraudulently by giving them away to family members and be absolved of his responsibilities while in prison.[57]

Other states recognize that pitfall and take a more analytical and less automatic approach, allowing for the differences in the facts of the cases. In Indiana, for example, courts take the parent's incarceration into account, calculating the amount owed by the actual amount the parent can pay, according to *Lambert v. Lambert*.[58]

51. *See, e.g.*, William Lipovsky, *Trucking Companies that Hire Felons (Some Requiring No Experience)*, FIRST QUARTER FIN., https://firstquarterfinance.com/trucking-companies-that-hire-felons/ (last updated Sept. 27, 2018); *Trucking Companies that Hire Felons*, HELP FELONS, https://helpforfelons.org/trucking-companies-hire-felons/ (last visited Mar. 9, 2020).

52. *See, e.g.*, CAL. CODE REGS. tit. 22, § 115530 (2019); CONN. GEN. STAT. § 46b-215e (2019); OR. REV. STAT. ANN. § 416.425 (West 2019); VT. STAT. ANN. tit. 15, § 660 (West 2019). *See generally* D.C. Code Ann. § 23-112a (West 2019) (stating that if the incarcerated party is subject to child support payments, they themselves can petition to modify the child support payments, or they continue to accrue during their imprisonment).

53. *See* OR. REV. STAT. ANN. § 25.247(1) (West 2019).

54. *Id.* § 25.247(4).

55. *See id.*

56. *See, e.g.*, *id.*

57. *Id.* ("The objection must describe the resources of the obligor or other evidence that rebuts the presumption of inability to pay child support.").

58. 861 N.E.2d 1176, 1177 (Ind. 2007) ("[W]e hold that incarceration does not relieve parents of their child support obligations. On the other hand, in determining support

In *Lambert*, a father was incarcerated for sexually molesting his nieces. Since Indiana has no rigid statute like those in Maryland, Oregon, or North Carolina, the trial court analyzed the specific facts of the case and reasoned that the father's "incarceration [was] due entirely to his own voluntary actions" and it was proper "to impute income to [him] consistent with the original child support calculation."[59] In a highly cited opinion, the Supreme Court of Indiana reversed this ruling, concluding that "[t]he choice to commit a crime is so far removed from the decision to avoid child support obligations that it is inappropriate to consider them as identical."[60] In Indiana, then, Michael is appropriately relieved of his obligation and Stevie J. is not because of his assets. Yet, P.F., if he has no current income or assets, still benefits financially as a result of his crime against his daughter.

Not all states are as understanding toward incarcerated parents. A minority of states treat incarceration as a voluntary choice due to the supposedly voluntary nature of the act of committing the crime for which the parent is incarcerated. Those states therefore refuse to view incarceration as a substantial change in circumstances and for that reason refuse to modify the child support orders of incarcerated parents.[61]

For example, in Utah, an incarcerated father was ordered to pay monthly child support in an amount more than he earned because "an able-bodied person who stops working . . . 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."[62] In Tennessee, until 2020 there was a statutory bar to reducing child support orders due to incarceration,[63] to which Tennessee courts strictly adhered.[64]

orders, courts should not impute potential income to an imprisoned parent based on pre-incarceration wages or other employment-related income, but should rather calculate support based on the actual income and assets available to the parent.").

59. *Id.* at 1176–77.

60. *Id.* at 1180.

61. *See Realistic Child Support Orders for Incarcerated Parents*, OFF. CHILD SUPPORT ENF'T. (June 2012), https://www.acf.hhs.gov/sites/default/files/ocse/realistic_child_support_orders_for_incarcerated_parents.pdf; *see also, e.g.*, S.D. CODIFIED LAWS § 25-7-6.4 (2019); TENN. COMP. R. & REGS. 1240-2-4.04(3)(a)(2)(ii)(I) (2019).

62. *See* Proctor v. Proctor, 773 P.2d 1389, 1391 (Utah Ct. App. 1989), *aff'd*, Young v. Young, 201 P.3d 301 (Utah Ct. App. 2009), *abrogated on other grounds by* MacDonald v. Macdonald, 430 P.3d 612 (Utah 2018).

63. TENN. COMP. R. & REGS. 1240–02–04–.04(3)(a)(2)(ii)(I) (2019), *repealed by* TENN. COMP. R. & REGS. 1240–02–04–.01 (2020) ("[I]ncarceration shall not provide grounds for reduction of any child support obligation . . . .").

64. *See* State *ex rel.* Brown v. Shipe, No. E2014–02064–COA–R3–JV, 2015 WL 6549770, at *1, *4 (Tenn. Ct. App. Oct. 29, 2015) (remanding trial court's order reducing an incarcerated father's child support order, holding that the Tennessee child support

Ohio courts are firm that a parent's incarceration does not "excuse him from his existing child support obligation, since the criminal conduct which led to his incarceration is deemed to be a voluntary act by the obligor."[65] Thus, an incarcerated parent "may not rely upon his voluntary act to establish the substantial change in circumstances necessary to justify modification of the existing child support order."[66]

Montana courts reason that allowing child support arrears to accrue while a parent is incarcerated is not "so substantial and continuing" as to be "unconscionable" and therefore modification is not permitted.[67]

Kentucky courts agree that incarceration is to be considered voluntary unemployment. One Kentucky court reasoned colorfully,

> It is axiomatic that a parent may not voluntarily impoverish himself in order to avoid his support obligations. . . . [An incarcerated parent] would argue that his status as a prison inmate was involuntary, and that there was no evidence that he committed any crime to avoid his support obligation. Nevertheless, it is apparent that he voluntarily engaged in conduct which he should have known would impair his ability to support his children.[68]

Kansas has conveniently reviewed the law in this area for us. A Kansas court, after carefully considering the case law in all of the states, reasoned that there were three approaches a state could take when considering whether to abate a child support order: (1) complete justification, under which incarceration, with nothing more, is grounds for modification, (2) the one-factor approach, under which incarceration is to be considered judicially as one factor among several, and (3) the no-justification approach, under which incarceration, standing alone, is never justification for child support modification.[69] After outlining the pros and cons of each approach, the Kansas Supreme Court chose the "no-justification" approach, holding that "[c]riminal activity foreseeably can lead to incarceration and such activity is obviously within an individual's

guidelines are "clear and mandatory" that incarceration is not grounds for child support modification).

65. *See* Fuller v. Fuller, No. 99CA04, 2000 Ohio App. LEXIS 2736, at *3 (Ohio Ct. App. June 14, 2000).

66. *See id.*

67. *See, e.g.*, *In re* Marriage of Rahn, No. DA 12–0385, 2013 WL 341263, at *2 (Mont. Jan. 29, 2013).

68. *See* Commonwealth *ex rel.* Marshall v. Marshall, 15 S.W.3d 396, 401 (Ky. Ct. App. 2000).

69. *See In re* Marriage of Thurmond, 962 P.2d 1064, 1068–73 (Kan. 1998).

control. Public policy considerations heavily favor the no-justification rule."[70]

Of the states that treat incarceration as voluntary unemployment, Georgia's stance is perhaps the firmest. The Supreme Court of Georgia reasoned in 1981 that:

> [I]t is well settled that no person can object to the natural consequences of his own act voluntarily performed. It would emasculate our child-support laws to relieve parents of their natural and statutory child-support obligations because they have voluntarily committed offenses resulting in their imprisonment and possible inability to earn funds with which to support their children.[71]

More than twenty years later, the Supreme Court of Georgia had not budged, resolute in its stance that incarcerated parents must not be relieved of their obligations due to their incarceration. The court agreed with language in a now-overruled opinion from Oregon:[72]

> We see no reason to offer criminals a reprieve from their child support obligations when we would not do the same for an obligor who voluntarily walks away from his job . . . . A person who has a support obligation should not profit from his criminal conduct, particularly at his children's expense. . . . [A f]ather should not be able to escape his financial obligation to his children simply because his misdeeds have placed him behind bars. The meter should continue to run. Accordingly, we hold the father's support obligation continues to accrue during his incarceration.[73]

In these states, then, P.F. must continue to pay, as must Stevie J. Unfortunately, Michael and Carl must also be held to account despite their utter lack of ability to pay any amount because these states would woodenly view Michael and Carl as having intentionally made the choice to go to prison.

70. *Id.* at 1073.

71. Chandler v. Cochran, 275 S.E.2d 23, 27 (Ga. 1981).

72. Willis v. Willis, 820 P.2d 858 (Or. Ct. App. 1991), *overruled by In re* Marriage of Willis & Willis, 840 P.2d 697 (Or. 1992).

73. Staffon v. Staffon, 587 S.E.2d 630, 633 (Ga. 2003) (quoting *Willis*, 820 P.2d at 860).

2. The "Nature of the Crime" Distinction

Clearly, there is substantial disagreement among U.S. jurisdictions about whether incarcerated parents should have to pay their child support. Nevertheless, many agree: it is a different matter if the parent is incarcerated for a crime against the parent's own child or for a willful failure to pay support.[74]

Even where the commission of the crime for which the obligor is incarcerated was against the child to whom they owe support, a minority of states still affirmatively adhere to the rule that incarceration is a justification for child support modification.[75] In the Massachusetts case highlighted in the introduction to this Note, a father, P.F., was incarcerated for sexually abusing his daughter, for whom he owed support.[76] The father moved to modify his child support order because he was incarcerated and had no means to earn the $72 per month that he owed.[77] The trial judge ordered that the $72 would accrue every month during his five-year prison sentence, to be paid when he was released.[78] On appeal, the Appeals Court of Massachusetts held that the nature of the crime was an "impermissible factor" on which to base the denial of the motion and reversed, calling the trial judge's decision an "abuse of discretion."[79]

In a California case, the court was specifically asked to recognize a distinction between parents incarcerated for unrelated crimes and those incarcerated for crimes against the child.[80] The court refused to recognize any such distinction, woodenly relying on the fact that its statutory scheme only contemplates numerical figures and cannot be cognizant of such factors as the nature of a crime.[81] "We meant what we said," the court

74. *See* National Child Support Enforcement Association, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Nov. 17, 2014), https://www.regulations.gov/document?D=ACF-2014-0004-1091 (commenting to express consensus opinions of its membership: "NCSEA supports common sense limitations on the ability to use pre-incarceration earnings to set or refuse to modify support. . . . [S]uch limitation should not apply where the parent is incarcerated for a crime against the supported child or custodial parent, including intentional failure to pay child support."); *see also infra* Appendix I.

75. *See infra* Appendix I.

76. P.F. v. Dep't of Revenue, 64 N.E.3d 940, 944 (Mass. App. Ct. 2016).

77. *Id.* at 941.

78. *Id.*

79. *Id.* at 943, 945.

80. *In re* Marriage of Smith, 108 Cal. Rptr. 2d 537, 538 (Ct. App. 2001).

81. *Id.* at 545.

concluded. "The reason the parent is incarcerated is not relevant to this determination."[82]

California and Massachusetts do not reflect a majority view, however. In nine jurisdictions, either the commission of a crime against the parent's own child or a failure to pay support can cause the government to impute income to the incarcerated parent, even where a substantial change in circumstances can be made out.[83] In these jurisdictions, P.F. and Stevie J. could be treated differently than Michael and Carl, as the facts of the cases are radically different.

In another thirty-one jurisdictions, a distinction is unclear, because the state relies on judicial discretion with varied results, the state has a rule that all incarceration is an impermissible reason to modify child support orders, the state's law is contradictory, or the state has not squarely addressed the issue in a statute or published case.[84] In eleven jurisdictions, there is an express prohibition against harsher outcomes based on the nature of the crime committed by the parent.[85] Thus, looking more closely, there are only eleven U.S. jurisdictions that expressly prohibit treating incarcerated parents' child support orders differently based on the nature of the crime.[86] Only eleven jurisdictions would treat Michael the same as P.F. and Stevie J.

B. The New Rule and Its Effect

In late 2016, the Office of Child Support Enforcement ("OCSE") published a final rule that prohibits states from treating incarceration as voluntary unemployment.[87] The new rule was finalized despite

82. *Id.* Despite its general prohibition against the treatment of incarceration as voluntary unemployment, no matter the nature of the crime, California does disallow automatic suspension of child support orders for parents incarcerated for crimes against their children or for failure to pay support. *See* CAL. FAM. CODE § 4007.5 (West 2019).

83. *See infra* Appendix I (Delaware, Illinois, Louisiana, Nebraska, New York, Rhode Island, Texas, Washington, Wisconsin).

84. *See infra* Appendix I (Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wyoming).

85. *Infra* Appendix I (California, Hawai'i, Indiana, Maine, Maryland, Massachusetts, Minnesota, North Carolina, North Dakota, Oregon, Pennsylvania).

86. *Id.*

87. *See* 45 C.F.R. § 302.56(c)(3) (2017); *see also* OFFICE OF CHILD SUPPORT ENF'T: DIV. OF POLICY AND TRAINING, FINAL RULE: FLEXIBILITY, EFFICIENCY, AND MODERNIZATION IN CHILD SUPPORT ENFORCEMENT PROGRAMS 1–2, https://www.acf.hhs.gov/sites/default/files/programs/css/fem_final_rule_summary.pdf (last visited Mar. 1, 2020).

substantial misgivings from state IV-D Agencies[88] (the organizations that run state child-support programs), the National Conference of State Legislatures,[89] and the National Child Support Enforcement Association.[90] Effectively, the new rule prohibits states from treating Michael and Carl differently from Stevie J. or P.F.[91] According to the new rule, states that treat incarceration as voluntary unemployment must change their laws to conform with the federal guidelines.[92] States like Oregon, then, which are more sympathetic toward incarcerated parents, are well within the federal guidelines.[93] But states like Georgia, with its long-standing, iron-clad prohibition on reductions for incarcerated

88. Review and Adjustment of Child Support Orders, 79 Fed. Reg. 221 (proposed Nov. 17, 2014) ("The proposed rule would allow IV-D agencies to initiate a modification of a child support order if the obligor parent will be incarcerated for more than 90 days. It is unlikely that the IV-D agency in Georgia would be allowed by the courts to initiate such a modification, as it is contrary to the law and public policy of the State."); Texas Child Support Division, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 12, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-0127; *see also* Guidelines for Setting Child Support Awards, 79 Fed. Reg. 68548 (proposed Nov. 17, 2014) ("We find no national consensus in support of the proposed rule and encourage OCSE not to attempt to mandate a result based solely on the incarcerated parent's ability to pay.").

89. National Conference of State Legislatures, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 16, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-1979 ("[Hardship due to child support arrearages during prison] may not be the case for noncustodial parents with higher incomes or substantial assets. In those cases the treatment of incarceration as 'voluntary unemployment' may persuade them to pay what is owed and avoid incarceration and the accrual of interest of unpaid child support. It may be wise to allow states some flexibility here.").

90. *See* National Child Support Enforcement Association, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, https://www.regulations.gov/document?D=ACF-2014-0004-1091 (last visited Mar. 19, 2020).

91. 45 C.F.R. § 303.8(c) (2017) ("[The] standard must not exclude incarceration as a basis for determining whether an inconsistency between the existing child support order amount and the amount of support determined as a result of a review is adequate grounds for petitioning for adjustment of the order.").

92. *See* 45 C.F.R. § 302.56(c)(3) (2019) ("[I]ncarceration may not be treated as voluntary unemployment in establishing or modifying support orders."); *see also* Kentucky Child Support Enforcement, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, https://www.regulations.gov/document?D=ACF-2014-0004-0705 (last visited Mar. 19, 2020) ("[P]assing [new legislation to comply with the final rule] will be extremely difficult at best.").

93. Oregon Department of Justice, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 16, 2015) ("Oregon does not impute potential income to incarcerated obligors or otherwise treat incarceration as voluntary unemployment. Oregon supports the prohibition against treating incarceration as voluntary unemployment.").

parents, will have to make significant changes.[94] Even the states that do allow for modifications for incarcerated parents, but draw a distinction for parents who have failed to pay support or who have committed crimes against their children, will be forced to make changes.[95] At the time the rule was published, at least nine states drew such a distinction, and only eleven states clearly prohibited the distinction.[96]

III. PART II

A. The OCSE's Rule Does Not Provide Enough Flexibility to Adequately Take Account of All Incarcerated Parents

The comments in response to the rule proposed by OCSE suggested that there is a significant difference between parents incarcerated for willful failure to pay support and those incarcerated for unrelated reasons.[97] These commenters pointed out that relieving an incarcerated

94. *See* GA. CODE ANN. § 19-6-15(f)(4)(D) (2019); Staffon v. Staffon, 587 S.E.2d 630, 633 (Ga. 2003); Georgia Department of Human Services, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, https://www.regulations.gov/document?D=ACF-2014-0004-1907 (last updated Feb. 5, 2015) ("The proposed change implements a rule whereby States would not be allowed to treat an incarcerated parent's loss of income as voluntary unemployment. This raises several concerns for Georgia. First and foremost, it is the express public policy of the State that parents may not avoid their obligation to support their children when the parent has been incarcerated for a voluntary criminal act. In Staffon v. Staffon, 277 Ga. 179 (2003), the Supreme Court of Georgia made this profoundly clear by pointing out that an incarcerated parent must take full responsibility for the crimes committed and for the repercussions that accompany breaking the law. Treating an incarcerated parent's loss of income as involuntary unemployment would allow the parent to shirk his or her responsibility to a child in a way that the parent would not be allowed to do with other financial obligations. Second, the courts currently have leeway in setting a new or modified child support order using the various provisions of the child support guidelines. Requiring that a State may never treat an incarcerated parent's loss of income as voluntary unemployment would strip away some of the Georgia judiciary's ability to make decisions regarding child support based upon the best interest of the children."); *see also* Texas Child Support Division, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 12, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-0127 (explaining that Texas law would need to change if the rule were finalized and proposing that such a change would be broad and would appear to "reward bad behavior").

95. *See id.*

96. *See infra* Appendix I; *see also* Sanctuary for Families, Comment Letter on Proposed Amendments to Federal Rules Governing Child Support Enforcement Programs (Jan. 16, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-0096.

97. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93526 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301, 302, 303, 304, 305, 307, 308, 309) ("[F]our commenters believed that [the prohibition of treating incarceration as voluntary unemployment] should not apply where

parent's obligation when that parent had committed crimes against the child or willfully refused to support the child is against public policy and a distinction should be drawn so that those such situations are exempt from the new rule.[98] Nevertheless, OCSE disagreed.[99] OCSE placed the extremely small number of commenters supporting such a distinction against the relatively large number of commenters who felt that the states should be prohibited from treating incarceration generally as "voluntary unemployment."[100] The OCSE called the larger group "the overwhelming majority," which would suggest that there was a minority point of view, though one is not apparent.[101] This seemingly rhetorical justification suggests that the smaller of these groups was in opposition to the larger and that the OCSE had chosen the more widely accepted of two opposing views.

Upon closer inspection of the two proposed policies,though, it is clear that they are not mutually exclusive. Six hundred commenters proposed that the OCSE "prohibit the treatment of incarceration as 'voluntary unemployment'" and four commenters, without disagreeing with that suggestion, proposed that there be an exception based on public

the parent is incarcerated for a crime against the supported child or custodial parent . . . [or] intentional failure to pay child support.").

98. *Id.* ("These commenters thought that strong public policy dictates against affording relief to an obligor who commits a violent crime against the custodial parent or child, or an obligor who has the means to pay child support but refuses to do so."); *see also* Sanctuary for Families, Comment Letter on Proposed Amendments to Federal Rules Governing Child Support Enforcement Programs (Jan. 16, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-0096 ("Overall we are not opposed to 45 C.F.R. § 302.56(c)(5) . . . [h]owever, we ask that the Proposal mirror the New York law, which creates an exception where incarceration is 'the result of nonpayment . . . or an offense against the . . . child'. . . . Abusers should not be afforded an incentive to reduce their child support obligation by committing a crime against the custodial parent or child."); Ohio Poverty Law Center, Comment Letter on Proposed Rule Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Dec. 22, 2014), https://www.regulations.gov/document?D=ACF-2014-0004-1936 (positing that "the proposed rule change goes too far" and proposing a distinction for parents incarcerated for crimes against the child or willful failure to pay).

99. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93526 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301, 302, 303, 304, 305, 307, 308, 309).

100. *Id.* ("We agree with the overwhelming majority of commenters, and do not make changes in response to the four commenters' suggestion for an exception based on the nature of the crime." The final rule then goes on to rely on majority rules as it points out that three-quarters of the states have eliminated treatment of incarceration as voluntary unemployment).

101. *Id.*; *see also* Florida Child Support Program, Comment Letter on Proposed Rule Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 16, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-1468 ("We find no national consensus in support of the proposed rule and encourage OCSE not to attempt to mandate a result based solely on the incarcerated parent's ability to pay.").

policy grounds for parents who have committed crimes against their children and those parents who have intentionally refused to pay child support for reasons other than inability to pay.[102] The OCSE assumes that the 600 commenters proposing a ban on the treatment of incarceration as voluntary unemployment would support a view that a man incarcerated for raping his ten-year-old daughter should be relieved of his obligation to her when he becomes incarcerated for that crime or that P.F. should be relieved of his obligation to his daughter and the victim of his heinous crime. It assumes that the 600 commenters would support a view that a man who makes $27,000 per month but refuses to support his children should be relieved of that obligation when he is incarcerated for that crime[103]—that Stevie J. was correct when he said of his order to pay, "This case is bull-s—t."[104]

In fact, those 600 commenters did not address those specific questions—they may not even have considered them—but instead addressed the broader, and perhaps more pressing, problem of incarcerated obligors generally—the problem faced by Michael and Carl.[105]

For example, New Jersey's comments to the proposed rule were among those in support of the prohibition of the treatment of incarceration as voluntary, but New Jersey did not comment on the more nuanced cases of parents incarcerated for crimes against their children

102. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93526 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301, 302, 303, 304, 305, 307, 308, 309).

103. *See* New Jersey Office of Child Support Enforcement, Comment Letter on Proposed Rule Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 15, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-1649 (appreciating the prohibition of the treatment of incarceration as voluntary because "many noncustodial parents are released from prison with unreasonably high child support arrearages that are extremely difficult to collect" but remaining silent on the case of a parent incarcerated for crimes against a child or for willful failure to pay support).

104. Bekiempis & Slattery, *supra* note 13.

105. *See* Oklahoma Child Support Services, Comment Letter on Proposed Rule Prohibiting Treatment of Incarceration as Voluntary (Jan. 16, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-1937 (agreeing that incarceration should not be deemed "voluntary unemployment" but failing to expressly contemplate the situation of a parent who has committed crimes against their child or was incarcerated for failure to pay support); Ethan McKinney, Child Support Director for St. Joseph County Prosecuting Attorney's Office, Comment Letter on Proposed Rule of Flexibility, Efficiency and Modernization in Child Support Enforcement Programs (Jan. 16, 2015), https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=ACF-2014-0004 (agreeing broadly that incarceration is not "voluntary unemployment" without distinguishing for parents incarcerated for crimes against the child or for willful failure to pay support).

or for willful failure to pay child support.[106] However, despite its silence on the issue in its comment to the proposed rule, New Jersey does draw such a distinction.[107]

Even California, whose judiciary ruled so flatly that "[t]he reason the parent is incarcerated is not relevant to this determination," draws a distinction.[108] In 2012, California passed legislation that draws a clear distinction between parents incarcerated for crimes against their children or for willful failure to pay support and those incarcerated for unrelated crimes.[109]

In its response to the commenters, the OCSE reasoned that (1) a child support order is not a punishment for incarcerated noncustodial parents; (2) "collateral consequences of the treatment of incarceration as voluntary unemployment include uncollectible debt, reduced employment, and increased recidivism;" and (3) blocking incarcerated parents' ability to reduce their orders based on what is inarguably a change of circumstances results in unrealistic support orders that "undermine stable employment and family relationships." This line of reasoning

106. *See* New Jersey Office of Child Support Services, Comment Letter on Proposed Rule Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 15, 2015), https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=ACF-2014-0004 (appreciating the prohibition of the treatment of incarceration as voluntary because "many noncustodial parents are released from prison with unreasonably high child support arrearages that are extremely difficult to collect" but remaining silent about cases where a parent is incarcerated for crimes against a child or for willful failure to pay support).

107. *See* Halliwell v. Halliwell, 741 A.2d 638, 642 (N.J. Super. Ct. App. Div. 1999) ("In fact, this opinion is not designed to relieve an obligor of a support obligation where the obligor is incarcerated for refusing topay child support."); L.A. v. M.A, No. FM-15-399-10S, 2014 N.J. Super. Unpub. LEXIS 3104, at *20 (Ct. Ch. Div. Dec. 3, 2014) ("Equity mandates . . . that the court considers the specific reason for defendant's incarceration, and the fact that the child was his victim. The court further considers the unacceptability of defendant's circular logic that somehow, he should now be relieved of his ongoing child support obligation to his daughter as a result.").

108. *In re* Smith, 108 Cal. Rptr. 2d 537, 545 (Ct. App. 2001).

109. CAL. FAM. CODE § 4007.5 (West 2014) (invalidated 2015) (making an exception to its mandatory suspension for incarcerated parents if "[t]he obligor was incarcerated . . . for any offense constituting domestic violence . . . against the . . . supported child, or . . . failure to comply with a court order to pay child support"). The new legislation does not overturn the case law by treating incarceration as "voluntary unemployment." Instead, it merely provides that automatic suspension is not mandated when parents are incarcerated for certain crimes. Therefore, despite having one of the same effects as the treatment of incarceration as voluntary unemployment, the new legislation does not supersede California's case law.

makes it less likely that parents will ever pay what is owed and increases recidivism and participation in the "underground economy."[110]

This line of reasoning is well-documented as it applies to incarcerated parents generally,[111] and such reasoning would likely help Michael and Carl attempt to participate in a society in a healthier and more productive way.[112] It is, however, dubious at best when applied to parents like Stevie J. who are incarcerated for willful failure to pay child support[113] and evidently otherwise physically harmed their children.[114]

However, telling the difference between Carl and Stevie J. is not always so easy.[115] Therefore, the OCSE's rule should be revised to

110. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93526 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301, 302, 303, 304, 305, 307, 308, 309).

111. *See, e.g.*, DEP'T OF HEALTH & HUMAN SERVICES ET AL., INCARCERATION, REENTRY AND CHILD SUPPORT ISSUES: NATIONAL AND STATE RESEARCH OVERVIEW 4 (Sept. 29, 2006), http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/incarceration_report.pdf; Eli Hager, *For Men in Prison, Child Support Debt Becomes a Crushing Debt*, MARSHALL PROJECT (Oct. 19, 2015), https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt; CHRISTY VISHER ET AL., EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES 8 (Oct. 2008), https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF.

112. *See* Cammett, *supra* note 1, at 129–30.

113. *See* Brito, *supra* note 10, at 619 ("Although effective in securing payments from noncustodial parents with the means to pay, the impact of [child support collection and enforcement methods] on no- and low-income noncustodial parents and their families has been disproportionate and destructive."); *Can You Defend Yourself Against Civil Contempt & Non-Compliance?*, FUGITIVE NATION (Jan. 2, 2012) https://fugitivenation.wordpress.com/2012/01/02/can-you-defend-yourself-against-civil-contempt-non-compliance/ ("[C]hild support experts and state policymakers are detecting fundamental differences among parents who are delinquent in child support — dividing them into 'can't pay' and 'won't pay' parents. While millions of dollars nationwide are being invested into programs to help the very low-income 'can't pay' parents, states are developing more aggressive enforcement tools to pursue the 'won't pay'parents who simply refuse to acknowledge their child support obligation, despite having the financial resources to do so.").

114. *See infra* Appendix I (listing the large majority of states that deal with incarcerated parents who have committed crimes against their own children differently than those who have committed unrelated crimes); *see also* L.A. v. M.A., No. FM-15-399-10S, 2014 N.J. Super. Unpub. LEXIS 3104, at *20–21 (Ct. Ch. Div. Dec. 3, 2014) ("Equity mandates . . . that the court considers the specific reason for defendant's incarceration, and the fact that the child was his victim. The court further considers the unacceptability of defendant's circular logic that somehow, he should now be relieved of his ongoing child support obligation to his daughter as a result. The court also considers the negative economic impact such result will likely have in the long run on both the child and the custodial parent. Given these factors, the court concludes that . . . defendant's motion for a reduction in child support is itself unequitable and unjust . . . .").

115. Brito, *supra* note 10, at 664 ("Determining ability to pay will necessarily require an individualized, fact-based determination that takes into account a number of relevant

include an additional mandate that, in the case of a parent incarcerated for crimes against their own child, including failure to pay support for the child, states consider the totality of the circumstances, such as the parent's ability to pay now and in the future, the likelihood that modification will result in the child's best interest, and the fairness of the decision to the public, the child, and the incarcerated parent. The test should include a determination of whether or not the decision is likely to result in more payments to the child.

Perhaps the moral mind is offended by the thought of one individual hurting another and then being relieved of another obligation to that person as a result. Perhaps this was what inspired the commenters to the rule to attempt to preserve the distinction between those parents incarcerated for crimes against their children or criminal non-support.

Yet, despite the emotional aura around the issue, the purpose behind the exception I propose is not wholly deterrence, retributivism, or to prattle out some judgmental homily about what is moral or not, but rather merely an objective deviance from a policy in a certain class of cases because the policy's justifications do not apply in that class of cases.

1. "Child Support Obligations Not Punishment"

The OCSE justifies its decision not to create an exception to the prohibition of treatment of incarceration as voluntary unemployment by claiming that child support obligations are not a punishment to be meted out upon incarcerated parents.[116] This reasoning is obvious when applied to Michael and raises optimistic eyebrows when applied to Carl. But when applied to Stevie J. or to P.F., it raises serious questions of validity and relevance. The statement is not exactly correct as applied to parents incarcerated for failure to pay because a child support obligation that has been left unpaid, even though the parent had the means to pay, is a

factors . . . [such as] past work history, job skills, level of education, criminal record (if any), physical and mental health, and past efforts to secure employment . . . .").

116. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93524 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301, 302, 303, 304, 305, 307, 308, 309).

federal crime[117] for which restitution is not only appropriately applied but mandatory[118] and certainly best paid to the victim.

In any case, whether the child support obligation can be a form of punishment is not relevant. A punishment is an imposition of some sort of pain upon an offender that did not previously exist with the aims of deterrence, retributivism, or rehabilitation.[119] Creating an exception to the OCSE's rule where a parent has intentionally refused to pay child support despite having the means to do so or has committed a crime against the child is simply insisting that the parent fulfill an obligation that previously existed independent of the crimes. It is not imposing a punishment upon the offender; it is withholding relief that is otherwise given only where the benefits of such relief can be expected to benefit the child[120] and which is withheld because that justification does not exist on those facts.[121]

Even to the extent that the withholding of relief could be deemed to be itself a punishment, it is still justified because the relationship between the aims to be achieved (more payments to children of incarcerated parents) and relieving the obligation are far weaker for this class of parents than those incarcerated for unrelated offenses. This class of parents has already demonstrated an unwillingness to uphold the safety and security of their children. Relieving the obligation in these

117. *See Can You Defend Yourself Against Civil Contempt & Non-Compliance?*, *supra* note 113 ("Laws concerning child support guidelines and most child support enforcement mechanisms are civil in nature, but failure to pay child support may subject a parent to criminal sanctions in three situations: 1.) prosecution under a state criminal 'failure to provide support' statute, 2.) prosecution under the federal Child Support Recovery Act of 1992 (CSRA), or 3.) a finding of contempt of court for failure to obey the court's child support order."); *see also* Turner v. Rodgers, 564 U.S.431, 444–45 (2011) ("[A]bility to comply marks a dividing line between civil and criminal contempt . . . .") (citing Hicks v. Felock, 485 U.S. 624, 635 n.7 (1988)).

118. 18 U.S.C. § 228(d) (2018).

119. *Punishment*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Any pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law.").

120. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93519 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301, 302, 303, 304, 305, 307, 308, 309) ("It is not in children's best interests and counterproductive to have their parents engage in a cycle of nonpayment, illegal income generation, and incarceration.").

121. *See, e.g.*, *Assembly Committee on Judiciary Hearing*, *Hearing on AB 610*, at 1–2 (2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0601-0650/ab_610_cfa_20150403_173903_asm_comm.html (citing the key reasons behind the legislation as "to prevent build-up of uncollectible arrears, prevent recidivism . . . and, most importantly, help ensure that children receive timely child support" but explicitly excluding from the bill's effect parents incarcerated for crimes against their children or failure to pay child support).

cases, therefore, cannot reasonably be calculated to achieve the aim of increasing support payments for children. Thus, the relief makes far less sense for P.F. or Stevie J. than it does for Michael and Carl.

Therefore, the OCSE's rule should be revised to include an additional mandate that, when deciding motions to modify child support of incarcerated parents who have committed crimes against their children, including willful failure to pay support, states consider the totality of the circumstances, including the parent's ability to pay both presently and in the future as well as the fairness of the decision to the state, the child, and the incarcerated parent. The test should be whether or not the decision is likely to result in more payments to the child.

2. Uncollectible Debt and Reduced Employment

The OCSE's justifying assertion that treatment of incarceration as voluntary unemployment creates uncollectible debt for the incarcerated parent does not apply well to parents who had the means to pay child support but refused. In those instances, the debt is more likely to be collectible after release than the debts of parents who had an inability to pay before incarceration, a difference that will be further exacerbated upon release because parents who had an ability to pay were likely more educated or otherwise socioeconomically advantaged to begin with.[122] While a period of incarceration will almost certainly affect an educated or socioeconomically advantaged parent just as it would an uneducated or socioeconomically disadvantaged, the effect of incarceration on those better situated might very well allow for the payment of child support arrearages while the effect on those with an inability to pay even before incarceration likely will not. Therefore, in the case of a parent who had the ability to pay before incarceration, the justification of the dangers of "uncollectible debt" after release is not nearly as convincing as it is for those parents who had an inability to pay.

Furthermore, in the case of parents incarcerated for crimes against their children, the benefit of relieving the obligors—the possibility of lower recidivism rates among that subset, better family relations when those were unlikely to be strong to begin with, and increased employment for those who are already more employable due to their

122. VISHER ET AL., *supra* note 111, at 6 ("[I]ndividuals with weak employment and educational histories will need additional assistance with finding a job after prison."); Melissa Li, *From Prisons to Communities: Confronting Reentry Challenges and Social Inequality*, AM. PSYCHOL. ASS'N (Mar. 2018), https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities ("Incarceration has disproportionately impacted . . . individuals with low levels of education." (citing J.D. Morenoff & D.J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. SOC. 411 (2014)).

previous education, for example—are significantly outweighed by the state's interest in deterring the morally abject, violent, or perverse offenses by parents against their children. In those instances, the offenders are more likely to obtain gainful employment after release than those parents who had difficulty finding employment before incarceration because parents who had gainful employment were likely more educated, possessed job-related skills, or were otherwise socioeconomically advantaged to begin with.[123]

While a period of incarceration will almost certainly affect an educated, skilled, or socioeconomically advantaged parent just as it would an uneducated, unskilled, or socioeconomically disadvantaged parent, the effect of incarceration on those better situated might very well allow for the payment of child support arrearages while the effect on those with difficulty finding employment even before incarceration likely will not.[124]

Moreover, the OCSE's justifying assertion that treatment of incarceration as voluntary unemployment creates reduced employment prospects for the incarcerated parent does not apply well to parents who are incarcerated for crimes against their children because, while the assertion may be equally true of all incarcerated parents regardless of the nature of their crimes, the moral calculus is significantly different. In the case of parents incarcerated for crimes against their children, the benefit of relieving the obligors—increased employment for the incarcerated parent after release—is significantly outweighed by the state's interest in deterring the morally abject, violent, or perverse offenses by parents against their children. The OCSE has now blocked states from pursuing those interests.

Therefore, in the case of a parent who was gainfully employed before incarceration, the justification of the dangers of uncollectible debt and reduced employment after release are not nearly as convincing as it is for those parents who were not employed to begin with.

123. VISHER ET AL., *supra* note 111, at 6 ("[I]ndividuals with weak employment and educational histories will need additional assistance with finding a job after prison."); Li, *supra* note 122 ("Incarceration has disproportionately impacted . . . individuals with low levels of education. . . ." (citing Morenoff & Harding, *supra* note 122)).

124. Elaine Sorensen & Chava Zibman, *A Look at Poor Dads Who Don't Pay Child Support*, ASSESSING NEW FEDERALISM 5 (Sept. 2000), https://www.urban.org/sites/default/files/publication/62536/409646-A-Look-at-Poor-Dads-Who-Don-t-Pay-Child-Support.PDF ("We find that poor nonpaying (noninstitutionalized) fathers encounter many of the same employment barriers as poor nonreceiving custodial mothers. Lack of education is the most common barrier encountered by both groups of parents; 42 percent of these fathers and 43 percent of these mothers lack a high school diploma or GED.").

Thus, the OCSE's rule should be revised to include an additional mandate that, when deciding motions to modify child support of incarcerated parents who have committed crimes against their children, including willful failure to pay support, states consider the totality of the circumstances, including the parent's ability to pay both presently and in the future as well as the fairness of the decision to the state, the child, and the incarcerated parent. The test should be whether or not the decision is likely to result in more payments to the child.

3. "Increased Recidivism"

The OCSE's justifying assertion that treatment of incarceration as voluntary unemployment increases recidivism among the previously incarcerated parents[125] does not apply well to parents who are incarcerated for intentional refusal to pay child support.

This factor is extremely convincing as applied to parents incarcerated for other crimes because it creates a fresh start for those parents to pay child support where they have not shown a refusal or lack of desire to do so. In the case of parents who intentionally refused to pay support so steadfastly that it resulted in a prison sentence, it is illogical to assume those parents will be any more likely to pay the support they so doggedly refused to pay just because they were given a fresh start. For those parents, it is likely they would reoffend regardless of any fresh start, so relieving an obligation that might be fulfilled any time that parent receives a positive tax return, employment, inheritances, gambling winnings, or lawsuit proceeds—with the aim that the parent's decided aversion to paying support might be altered—makes far less sense than the policy makes for parents who wanted to pay and could not.

Furthermore, in the case of parents who committed offenses unrelated to their children—a drug offense or an armed robbery, for example—it is logical to assert that they will be less likely to reoffend if given a fresh start to begin paying their child support because their personal level of desperation will not be as high. In the case of parents who have committed crimes against their children—for example, child abuse or neglect—it makes far less sense to imagine that that parent would be more likely to abuse and neglect their child again because they have now incurred substantial child support debt. In fact, the likelihood that the parent would have enough access to the child if imprisoned for

125. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93526 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301, 302, 303, 304, 305, 307, 308, 309).

harming the child is extremely low,[126] making the OCSE's justification and reasoning completely illogical when applied to the narrow case of the parent incarcerated for crimes against the children or custodial parent.

Therefore, the OCSE's rule should be revised to include an additional mandate that, when deciding motions to modify child support of incarcerated parents who have committed crimes against their children, including willful failure to pay support, states consider the totality of the circumstances, including the parent's ability to pay both presently and in the future as well as the fairness of the decision to the state, the child, and the incarcerated parent. The test should be whether or not the decision is likely to result in more payments to the child.

4. Emotional Family Ties

The OCSE's justifying assertion that treatment of incarceration as voluntary unemployment decreases emotional family ties between parents and children does not apply well to parents who are incarcerated for crimes against their children or for willful failure to pay support.

The fact that physical harm to one's own child is grounds in every state for permanent removal of the child from the parent[127] strongly suggests that courts recognize that it is not in the child's best interest to engage in that relationship, even if it were possible to develop or continue it.[128] Moreover, a failure to pay child support is one of the most common reasons for a finding of "unfitness" underlying an involuntary termination of parental rights.[129] This strongly suggests that courts recognize that such a failure by a resourced parent is a clear indication that the parent does not want to continue a relationship with the child.

The feeling of hopelessness due to huge debt and the resulting withdrawal from the children that is often discussed regarding parents

126. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 7 (2008), https://www.ncjfcj.org/wp-content/uploads/2012/02/judicial-guide_0_0.pdf ("Generally speaking, it is considered detrimental to a child and not in his or her best interest to be placed in sole custody, joint legal custody, or joint physical custody with the abusive parent.").

127. CHILDREN'S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (2017), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf.

128. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 126, at 7 ("Generally speaking, it is considered detrimental to a child and not in his or her best interest to be placed in sole custody, joint legal custody, or joint physical custody with the abusive parent."); *see also* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES 1994).

129. DEP'T OF HEALTH & HUMAN SERVICES ET AL., *supra* note 111, at 2 ("The most common statutory grounds for determining parental unfitness include: . . . [f]ailure to support or maintain contact with the child.").

living under child support debt therefore does not apply to parents who have committed crimes or failed to support their children. A parent cannot emotionally withdraw from a child they were not particularly invested in to begin with.

Therefore, the OCSE's rule should be revised to include an additional mandate that, when deciding motions to modify child support of incarcerated parents who have committed crimes against their children including willful failure to pay support, states consider the totality of the circumstances, including the parent's ability to pay both presently and in the future as well as the fairness of the decision to the state, the child, and the incarcerated parent. The test should be whether or not the decision is likely to result in more payments to the child.

B. Parents Incarcerated for Willful Failure to Pay Child Support or for Crimes Against Their Children Present Unique Considerations

1. Double the Injury

Unlike parents who have committed unrelated crimes or were unable to pay child support, like Carl and Michael, the parent who is incarcerated for hurting their child (by either refusing to support the child or by committing a crime against the child) further injures the child when the debt they owe to the child does not accrue.[130] That debt, or a portion of it, could be paid in the future should the parent have the means to do so.[131] To commit this further injury, the incarcerated parent enlists the state as a sort of accomplice under the guise of the justifications discussed above, which do not even apply to the parent.

Certainly, a parent who refused to pay to the point of incarceration is far less likely to suddenly have a change of heart when the state gives them a break.[132] Yet, if years later this same parent happened to get an

130. *See, e.g.*, L.A. v. M.A., No. FM-15-399-10S2014, 2014 N.J. Super. Unpub. LEXIS 3104, at *15–16 (Ct. Ch. Div. Dec. 3, 2014) ("If defendant obtains a termination of his child support obligation, or reduction down to five dollars per week, he is victimizing the child twice in this process, first on a physical and emotional basis, and now on a financial basis. There is nothing in . . . any other precedential opinion which requires or supports such a result. Family court is a court of equity, and in a case of outrageous circumstances, may take appropriate steps to protect against a grossly inequitable or unconscionable result.").

131. *See, e.g.*, Parks v. Niemiec, 926 N.W.2d 297, 299 (Mich. Ct. App. 2018).

132. *See, e.g.*, Tikwana P. v. Keeshan E., No. F-09363-06/13B, 2016 WL 544651, at *3 (N.Y. Fam. Ct. Feb. 9, 2016) (discussing State's efforts to collect back child support from father who willfully refused to pay, and noting that even imprisonment was not a deterrent for the willful non-payor); *see also* Child Support Services Division, *Fresh Start Program*, OFF. ATT'Y GEN. D.C., https://cssd.dc.gov/page/fresh-start-program (excluding specifically bad faith non-payors from program for parents in arrears on child support).

inheritance, or a tax refund or gambling wins, the child would have no claim to those funds despite their double injury.[133] While this unfortunate reality might also be true of the parent who has committed an unrelated crime, the fact that that parent would have been more likely to pay voluntarily sharply distinguishes the two situations. The fact that the parent would have been more likely to be able to secure employment upon re-entry distinguishes the two situations. The fact that the parent would have been more likely to pursue a meaningful relationship with the child distinguishes the two situations.

Therefore, abating child support obligations for parents who have willfully failed to pay or who have committed crimes against their children forces a double injury upon the children, while abatement for those who have committed unrelated crimes does not. The child has been harmed, intentionally, by the parent. The state, in its abatement procedures commenced under the white-hat guise of support for re-entry, is complicit in the continuation of this intentional harm by allowing the parent not to pay.

It is possible—likely even—that the child will not be supported anyway because the monumental debt the parent faces serves as an obstacle to the parent's ability and intention to pay. It would appear that the child has a better of chance of recouping what is owed if the parent feels the debt owed is reasonable. That logic, as discussed here, does not apply to parents who had no intention to pay to begin with or who criminally ignored even the most basic best interests of the child.

Therefore, the OCSE's rule should be revised to include an additional mandate that, when deciding motions to modify child support of incarcerated parents who have committed crimes against their children, including willful failure to pay support, states consider the totality of the circumstances, including the parent's ability to pay both presently and in the future as well as the fairness of the decision to the state, the child, and the incarcerated parent. The test should be whether or not the decision is likely to result in more payments to the child.

2. Does Voluntariness Matter?

Most states have established that a parent cannot logically be deemed "voluntarily unemployed" just because the underlying act of committing

133. *See* 45 C.F.R. § 303.106(a)(3) (2020) (prohibiting retroactive modification, upward or downward, of child support orders).

the crime was voluntary.[134] Courts reason that few people who commit crimes do so with the intentional purpose of becoming incarcerated and, therefore, are unable to pay child support.[135]

To assert that a parent who committed an armed robbery did so with the intent to become incarcerated is absurd. To reason that the intentional nature of the underlying crime makes the incarceration voluntary is to defy reason—most people who commit crimes do so with the intent *not* to be caught committing the crime.[136]

But isn't a parent who intentionally refuses to pay child support voluntarily creating the consequence from which they now try to escape with a child support modification? The armed robber, it must be said, is more reasonable in hoping not to be caught; the intentional non-payor cannot rest on the excuse that they did not believe they would be caught because that belief would have been eminently unreasonable. One who commits an aggravated assault can pull up a hood, put on a mask, run away, hide, and commit the crime out of the view of witnesses, all of which might reasonably lead a criminal to believe they will not be caught and will be able to attempt to pay child support notwithstanding their crime. However, one who intentionally fails to pay support cannot reasonably believe they will not be caught—because hiding from that obligation would require them to never have on-the-books employment,[137] never file their taxes, never get married, never apply for public benefits or health insurance, never apply for a driver's license, never legally travel out of the country, and never have a checking account.[138] Intentionally avoiding child support payments would require the parent not to show even their face to too many people.[139] Many states

134. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REALISTIC CHILD SUPPORT ORDERS FOR INCARCERATED PARENTS 2–3 (2002), https://www.acf.hhs.gov/sites/default/files/ocse/realistic_child_support_orders_for_incarcerated_parents.pdf (last visited Mar. 20, 2020).

135. *See, e.g.*, Bendixen v. Bendixen, 962 P.2d 170, 173 (Alaska 1998) ("[N]on-custodial parents who engage in criminal misconduct seldom desire the enforced unemployment that accompanies incarceration."); Lambert v. Lambert, 861 N.E.2d 1176, 1180 (Ind. 2007) ("[T]he choice to commit a crime is not quite the same as 'voluntarily fail[ing] or refus[ing] to work or to be employed.' . . . The choice to commit a crime is so far removed from the decision to avoid child support obligations that it is inappropriate to consider them as identical.").

136. Rottscheit v. Dumler, 664 N.W.2d 525, 541 (Wis. 2003) (Abrahamson, C.J., dissenting) ("A parent's moral culpability in the events that [led to incarceration] is relevant . . . to the extent that it demonstrates an intent to reduce available income or assets to avoid paying child support.").

137. *See* Brito, *supra* note 10, at 658.

138. Cammett, *supra* note 1, at 130.

139. *See Child Support Enforcement*, U.S. DEP'T HEALTH & HUM. SERVS.: OFF. INSPECTOR GEN., https://oig.hhs.gov/fraud/child-support-enforcement/ (last visited Mar. 20, 2019).

publish the photographs and identifying information of parents who fail to pay child support.[140]

In order not to get caught, the perpetrator in this case would have to be aware of all of these restrictions and to abide by them, living a sort of hermit-like, on-the-run existence.[141] To believe that they will not be caught, eventually, is therefore not a reasonable belief, so their continued intentional failure not to pay support is committed with the knowledge that incarceration is a very distinct and probable consequence of their actions. This is not the case, generally, with a person who has committed an unrelated crime, so the parent who has willfully failed to pay support should not be treated the same as one who committed an unrelated crime.

However, in the case of a parent who has committed a crime against their child—criminal negligence, for example—the assertion that the parent did not intend to go to prison does in fact fit within the class of parents who committed other crimes. After all, parents who criminally neglect their children, abuse them, or sexually assault them do not commit those acts believing they will be eventually caught and sent to prison, or even with the intent to avoid paying child support. In fact, since most crimes against children occur within private homes where no one can witness or document the crime,[142] it would even seem more reasonable that this parent did not intend to be imprisoned. This perverse fit within the class of parents who did not intend to be incarcerated for their voluntary crimes should not absolve the parent who commits a crime against their child, however. Rather, the incarceration should be considered to be part of the injury to the child.

The parent committed a voluntary crime against the child, of which the incarceration is a continuing effect. When a person commits a robbery, for example, and is incarcerated for it, a civil case against that person for damages arising therefrom would result in a civil judgement would not abate because of the incarceration.

In the case of a parent who has committed a crime against a child, the child should be viewed not as a dependent of a person who now has an inability to pay, but rather as the victim of a voluntary crime, the effect of which is continuing and requiring restitution. Why should the child-victim of a parent's crime have any less right to collect amounts

140. *See, e.g.*, *Delinquent Parents*, ILL. DEP'T HEALTHCARE & FAM. SERVS., https://www.illinois.gov/hfs/ChildSupport/delinquent/Pages/default.aspx (last visited Mar. 20, 2019).

141. Cammett, *supra* note 1, at 141 (explaining that penalties for failure to pay child support are extensive and designed to make payment inescapable).

142. *See* Collin Allen, *Child Abuse: Behind Closed Doors*, PSYCHOL. TODAY (Feb. 1, 2003), https://www.psychologytoday.com/us/articles/200302/child-abuse-behind-closed-doors ("[Child] abuse is commonly overlooked because it often takes place behind closed doors.").

owed than the winning plaintiff in a civil case arising from the defendant's criminal act? If the parent had committed an unrelated crime, the incarceration would not be a continuing injury to the child; it would be an unintentional injury felt by the child, incident to the parent's unrelated crime. The difference is that between victimhood and misfortune, the former requiring restitution, the other merely sympathy.

Therefore, whether or not the parent's crime was voluntary is not a relevant determination. The relevant question is not how the parent became incarcerated, a fact the OCSE is clearly in agreement with. The OCSE stops there, though, without offering any suggestion about what is relevant, beyond the parent's ability presently to pay. The relevant and more precise question includes both of these considerations. The question is whether modifying the order can be reasonably expected to result in more payments to children. Asking this question will lead to just results, appropriately tailored to the specific circumstances of specific parents.

Therefore, in order to adequately answer that question, the OCSE's rule should be revised to include an additional mandate that, when deciding motions to modify child support of incarcerated parents who have committed crimes against their children including willful failure to pay support, states consider the totality of the circumstances, including the parent's ability to pay both presently and in the future as well as the fairness of the decision to the state, the child, and the incarcerated parent. The test should be whether or not the decision is likely to result in more payments to the child.

IV. PART III

A. A Case Study: New Jersey Got It Right

New Jersey doesn't take a hardline stance on whether incarceration constitutes a change in circumstances substantial enough to warrant a modification of child support orders. Rather, family court judges in New Jersey assess the totality of the circumstances, including the obligor's ability to pay, the obligor's motives, and whether or not collection efforts against the obligor are likely to be successful.[143]

Generally, New Jersey does not consider incarceration to be "voluntary" due to the voluntary nature of the crime.[144] In the state's leading appellate decision, the court distinguished an incarcerated

143. Halliwell v. Halliwell, 741 A.2d 638, 641 (N.J. Super. Ct. App. Div. 1999).

144. *Id.* at 647 ("We find fault with the motion judge's conclusion that criminal activity resulting in incarceration is a voluntary act which should not be rewarded by suspending the obligation to pay support during incarceration.").

obligor's situation from that of someone who voluntarily quit their job by pointing out the critical fact that the incarcerated person cannot change their situation, while the person who had quit their job can.[145] In New Jersey, courts suspend the child support orders of incarcerated parents, deferring adjudication until after the parent is released.[146] They do so because New Jersey recognizes the extreme hardship experienced by Michael and Carl[147] but also accounts for the criminal behavior of the incarcerated parent.[148] Thus, generally, incarcerated parents in New Jersey do not pay child support while in prison.[149]

Unlike the examples of California or Indiana, whose statutory or precedential schemes absolutely and woodenly demand modification,[150] New Jersey leaves room for equitable consideration of and accounting for extraordinary circumstances.[151] New Jersey uses a balancing test to determine whether or not to modify the child support orders of incarcerated parents.[152] The *Kuron* court set forth a thoughtful and flexible list of factors for trial court judges to consider, none of which is completely dispositive on its own. Factors considered in this totality-of-the-circumstances test include:

> [W]hether the payor acted with the intent to reduce his or her support obligations, i.e., in bad faith . . . . Good faith in the context of changed circumstances is concerned less with the specific

145. *Id.*

146. *Id.* at 648.

147. *See id.* at 646.

148. *Id.* at 647–48 ("If incarcerated individuals are excused from this duty, their children certainly will be burdened, the custodial parents will be burdened, and the state potentially will be burdened because it may have to step in for the incarcerated parents. In such a situation, the incarcerated parent receives the sole benefit. New Jersey is not a state that takes child support obligations or criminal conduct lightly.").

149. *Id.* at 648 ("Suspending the payment of support and postponing a decision as to future support eliminates the accrual of arrears, yet does not reward the criminal who is fully apprised that upon release the support obligation will be reinstated and, based upon his ability to pay, he will be required to pay an arrearage which will be established commensurate with his income.").

150. *In re* Marriage of Smith, 108 Cal. Rptr. 2d 537, 545 (Ct. App. 2001); Lambert v. Lambert, 861 N.E.2d 1176, 1180 (Ind. 2007) ("The choice to commit a crime is so far removed from the decision to avoid child support obligations that it is inappropriate to consider them as identical.").

151. Kuron v. Hamilton, 752 A.2d 752, 758 (N.J. Super. Ct. App. Div. 2000) ("[T]he question cannot be decided by reflexively disallowing reduction whenever a diminution of income has resulted from voluntary conduct. Such an approach, we observed, 'has the virtue of simplicity, but little else.'" (quoting Deegan v. Deegan, 603 A.2d 542, 545 (N.J. Super. Ct. App. Div. 1992))).

152. *See also* L.A. v. M.A., No. FM-15-399-10S2014, 2014 N.J. Super. Unpub. LEXIS 3104, at *21 (Ct. Ch. Div. Dec. 3, 2014).

> conduct that has led to the reduction in income and more with why the payor has adopted his or her course of action, . . . with the relationship of the payor's conduct and motives to the parties' positions . . . [and] whether the payee was aware of, approved of, or participated in any conduct on the part of the payor that resulted in a substantial reduction in income. Even if the court concludes that the payee was only aware of such conduct, it must inquire into what steps, if any, were, or could reasonably have been taken to prepare for the diminished-income eventuality . . . [and] "whether the advantage to the [payor] substantially outweighs the disadvantage to the payee" . . . . It is clear, in sum, that the issue of how voluntary conduct should affect a motion for modification is entirely fact sensitive and must be decided on a case-by-case basis after all appropriate considerations have been evaluated.[153]

The courts in New Jersey are not even restricted to those specific considerations. They also consider "the specific reason for defendant's incarceration, and the fact that the child was his victim . . . [and] the negative economic impact such result will likely have in the long run on both the child and the custodial parent."[154]

Interestingly, the OCSE's rule prohibiting the treatment of incarceration arguably has no effect on New Jersey's practices because New Jersey does not practice the prohibited conduct. Rather, it considers all of the circumstances it can and makes an equitable judgement call from the bench. Therefore, if Michael and Carl lived in New Jersey, they would not pay their child support while incarcerated and, following their release, their support obligation would be reassessed in light of their particular circumstances, including their ability to pay. P.F. might not enjoy the same fresh start benefit, however, because "the child was his victim" and the benefit to P.F. is outweighed by the benefit to the payee. Stevie J., too, might not enjoy the same fresh start as Michael and Carl because he "acted with the intent to reduce his or her support obligations."

New Jersey is still considering incarceration when it is determining child support modifications, but it is doing so in such a way that Michael and Carl (the real reason for the rule in the first place) are not affected while Stevie J. and P.F. very likely are.

153. *Kuron*, 752 A.2d at 758–59 (quoting *Deegan*, 603 A.2d at 546).
154. *Id.*

V. RECOMMENDATIONS AND CONCLUSION

The OCSE's rule prohibiting the treatment of incarceration as "voluntary unemployment" makes perfect sense for indigent parents like Michael and Carl who might use the abatement as a blank slate to start over. However, it should be revisited to include a mandate that states consider the totality of the circumstances when deciding motions to modify the child support obligations of parents incarcerated for crimes against their children. By including this mandate, courts must answer the question of whether or not their decisions can reasonably be expected to achieve more payments for the child involved, and equity is thus served.

VI. APPENDIX I

Jurisdiction	No Harsher Treatment Based on Nature of Crime	Harsher Treatment Based Nature of Crime	No Firm Rule (e.g., state relies on judicial discretion, all incarceration is a bar to modification, or the state has not addressed the issue)
Alabama[155]			X
Alaska[156]			X
Arizona[157]			X

155. ALA. R. JUD. ADMIN. 32 (2019) (prohibiting the treatment of incarceration as voluntary unemployment); Suggs v. Suggs, 54 So. 3d 921, 924–25 (Ala. Civ. App. 2010); Alabama Child Support Enforcement Division, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 16, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-1994 ("We are opposed to 302.56 which could eliminate imputing income of the noncustodial parent to establish orders and which prohibits states from treating incarceration as 'voluntary unemployment.' States should have an option in these areas. Alabama's guidelines currently take into consideration a parent's ability to pay and their subsistence needs based on the evidence that is provided.").

156. ALASKA R. CIV. P. 90.3; Bendixen v. Bendixen, 962 P.2d 170, 170–71 (Alaska 1998) (holding voluntariness is irrelevant because all parents must pay the minimum of $50 even when they are incarcerated); Douglas v. State, 880 P.2d 113, 115–16 (Alaska 1994); Clemans v. Collins, 679 P.2d 1041, 1041–42 (Alaska 1984).

157. Machado v. Machado, No. D-2004 1598, 2006 Ariz. Super. LEXIS 587, at *3, 15 (Ariz. Sup. Ct. Feb. 16, 2006) (imputing income to a father incarcerated for sexually assaulting his children's mother); Arizona Division of Child Support Services, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs (Jan. 29, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-0113 (opposing the new rule). *But see* State *ex rel.* Dep't of Econ. Sec. v. McEvoy, 955 P.2d 988, 992–93 (Ariz. Ct. App. 1998) (holding that incarceration alone is not enough to support a modification denial).

Arkansas[158]			X
California[159]	X		
Colorado[160]			X
Connecticut[161]			X
Delaware[162]		X	
District of Columbia[163]			X
Florida[164]			X
Georgia[165]			X

158. Baker v. Office of Child Support Enf't, No. CV–16–613, 2017 WL 1019039, at *1 (Ark. Ct. App. Mar. 15, 2017); Allen v. Allen, 110 S.W.3d 772, 775 (Ark. Ct. App. 2003); Reid v. Reid, 944 S.W.2d 559, 562 (Ark. Ct. App. 1997).

159. CAL. CODE REGS. tit. 22, § 115530 (2019); *In re* Marriage of Smith, 108 Cal. Rptr. 2d 537, 541–45 (Ct. App. 2001).

160. COLO. REV. STAT. § 14-10-122(1)(a) (1992); *In re* Marriage of Hamilton, 857 P.2d 542, 543 (Colo. App. 1993).

161. CONN. GEN. STAT. ANN. §§ 46b-215e, 46b-231 (2019); Fica v. Fica, No. FA030182137S, 2007 WL 125339, at *2–3 (Conn. Super. Ct. Jan. 2, 2007).

162. DEL. CODE ANN. tit. 13, § 514 (2019); DEL. FAM. CT. R.C.P. 52; DEL. FAM. CT. R.C.P. 506; Div. of Child Support Enf't *ex rel.* Morgan v. Lucas, 901 A.2d 119 (Table) (Del. 2006); Div. of Child Support Enf't *ex rel.* Harper v. Barrows, 570 A.2d 1180, 1183–84 (Del. 1990); Dalton v. Clanton, 559 A.2d 1197, 1210 (Del. 1989); HON. MICHAEL K. NEWELL, DELAWARE CHILD SUPPORT FORMULA EVALUATION AND UPDATE: REPORT OF THE FAMILY COURT JUDICIARY 4 (2018), https://courts.delaware.gov/forms/download.aspx?id=39228 ("The obligation of a parent incarcerated more than 180 days will be reduced to one-half of a 'minimum order' unless the person has the resources to pay support or is incarcerated for a crime against the support recipient or a child of the union or for nonpayment of child support.").

163. D.C. CODE §§ 16-916.01(r)(5), 2311a (2019); Lewis v. Lewis, 637 A.2d 70, 73 (D.C. 1994) (holding, in the case of an obligor who shot his wife, incarceration in and of itself is involuntary, though the court was not asked to draw a distinction based on the nature of the crime).

164. FLA. STAT. §§ 61.13, 61.14, 409.2564 (2019); Dep't of Revenue v. Jackson, 846 So. 2d 486, 491 (Fla. 2003); Wilkerson v. Wilkerson, 220 So. 3d 480, 483 (Fla. Dist. Ct. App. 2017) (per curiam); Mascola v. Lusskin, 727 So. 2d 328, 333 (Fla. Dist. Ct. App. 1999).

165. GA. CODE ANN. § 19-6-15(f)(4)(D) (2019); Staffon v. Staffon, 587 S.E.2d 630, 633 (Ga. 2003); Georgia Department of Human Services, Comment Letter on Proposed Rule of Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, https://www.regulations.gov/document?D=ACF-2014-0004-1907 (last updated Feb. 5, 2015) ("The proposed change implements a rule whereby States would not be allowed to treat an incarcerated parent's loss of income as voluntary unemployment. This raises several concerns for Georgia. First and foremost, it is the express public policy of the State that parents may not avoid their obligation to support their children when the parent has been incarcerated for a voluntary criminal act. In Staffon v. Staffon, 277 Ga. 179 (2003), the Supreme Court of Georgia made this profoundly clear by pointing out that an incarcerated parent must take full responsibility for the crimes committed and for the repercussions that accompany breaking the law. Treating an incarcerated parent's loss of income as involuntary unemployment would allow the parent to shirk his or her [sic] responsibility to a child in a way that the parent would not be allowed to do with other financial obligations. Second, the courts currently have leeway in setting a new or modified child support order using the various provisions of the child support guidelines. Requiring that a State may never treat an incarcerated parent's loss of income as voluntary unemployment would strip

Hawai'i[166]	X		
Idaho[167]			X
Illinois[168]		X	
Indiana[169]	X		
Iowa[170]			X
Kansas[171]			X
Kentucky[172]			X
Louisiana[173]		X	
Maine[174]	X		
Maryland[175]	X		
Massachusetts[176]	X		
Michigan[177]			X

away some of the Georgia judiciary's ability to make decisions regarding child support based upon the best interest of the children.").

166. HAW. REV. STAT. §§ 576D-7, 576E-14 (2019).

167. IDAHO CODE § 32-706 (2019); IDAHO ADMIN. CODE r. 16.03.03.601 (2019); Mackowiak v. Harris, 204 P.3d 504, 506 (Idaho 2009); Child Support Servs. v. Smith, 40 P.3d 133, 138 (Idaho Ct. App. 2001); Carr v. Carr, 779 P.2d 429, 431–32 (Idaho Ct. App. 1989); Nab v. Nab, 757 P.2d 1231, 1234, 1238–40 (Idaho Ct. App. 1988).

168. 750 ILL. COMP. STAT. 5/505(a)(3.3b) (2019); *In re* Burbridge, 738 N.E.2d 979, 982 (Ill. App. Ct. 2000) (listing the reason the obligor is in prison as a factor to be considered by the judge); People *ex rel.* Meyer v. Nein, 568 N.E.2d 436, 437 (Ill. App. Ct. 1991).

169. IND. CODE § 31-16-8-1(d) (2019); IND. CHILD SUPPORT RULE 3; Clark v. Clark, 902 N.E.2d 813, 815–16 (Ind. 2009); Becker v. Becker, 902 N.E.2d 818, 820–21 (Ind. 2009); Lambert v. Lambert, 861 N.E.2d 1176, 1179–80 (Ind. 2007).

170. IOWA CODE § 598.21C (2019); *In re* Marriage of Barker, 600 N.W.2d 321, 323–24 (Iowa 1999); *In re* Marriage of Walters, 575 N.W.2d 739, 743 (Iowa 1998); *In re* Smith, 860 N.W.2d 342, 342 (Iowa Ct. App. 2014); *In re* Marriage of Phillips, 493 N.W.2d 872 (Iowa Ct. App. 1992).

171. KAN. STAT. ANN. §§ 23-3005, -36,207 (2019); KAN. CHILD SUPPORT GUIDELINE V(B)(5); KAN. CHILD SUPPORT GUIDELINE II(F); *In re* Marriage of Thurmond, 962 P.2d 1064, 1068 (Kan. 1998).

172. KY. REV. STAT. ANN. §§ 403.211, 403.212 (West 2019); Commonwealth *ex rel.* Marshall v. Marshall, 15 S.W.3d 396, 401 (Ky. Ct. App. 2000).

173. LA. STAT. ANN. § 9:311.1 (2019); State v. Jones, 618 So. 2d 560, 561 (La. Ct. App. 1993); State v. Nelson, 587 So. 2d 176, 177–78 (La. Ct. App. 1991).

174. ME. REV. STAT. ANN. tit. 19-A, §§ 2001, 2007, 2009 (2019); White v. Nason, 874 A.2d 891, 895 (Me. 2005).

175. MD. CODE ANN., FAM. LAW §§ 12-104, -104.1 (West 2019); Wills v. Jones, 667 A.2d 331, 332 (Md. 1995) ("[W]e conclude that a prisoner is not 'voluntarily impoverished' unless he or she [sic] committed a crime with the intent of going to prison or otherwise becoming impoverished.").

176. MASS. CHILD SUPPORT GUIDELINES §§ E, I (2018); MASS. GEN. LAWS ANN. ch. 208, § 28 (2019); P.F. v. Dep't of Revenue, 64 N.E.3d 940, 941, 945 (Mass. App. Ct. 2016) (ruling in favor of an incarcerated father who had sexually abused the child for whom he had a child support obligation he wanted to modify because "[the court] find[s] it problematic to draw a distinction based on the nature of the parent's crime, since virtually any crime leading to incarceration could be considered injurious to the child . . . .").

177. MICH. COMP. LAWS §§ 552.605, 552.517 (2019); Piccard v. Piccard, No. 316582, 2015 WL 7283221, at *1 (Mich. Ct. App. Nov. 17, 2015); Chinchen v. Chinchen, Nos. 118100, 123333, 1991 Mich. App. LEXIS 542, at *5 (Ct. App. Jan. 7, 1991) (finding, without relying

Minnesota[178]	X		
Mississippi[179]			X
Missouri[180]			X
Montana[181]			X
Nebraska[182]		X	

on voluntary or involuntary unemployment, that "when a non-custodial parent is imprisoned for a crime other than failure to pay child support, that parent is not liable for child support while incarcerated unless it is affirmatively shown that lie or she has income or assets to make such payments").

178. MINN. STAT. § 518A.42 (2019); Severs v. Severs, No. C9-01-609, 2001 Minn. App. LEXIS 1116, at *5 (Ct. App. Oct. 9, 2001) (ruling that an obligor incarcerated for willful failure to pay support "had no opportunity to get out of jail until his sentence was complete" and was thus involuntarily unemployed and entitled to modification of his child support obligation); Franzen v. Borders, 521 N.W.2d 626, 629 (Minn. Ct. App. 1994) ("[B]ecause there is no evidence that [the obligor] sought his . . . incarceration, while he was there, his incarceration was involuntary and he was not voluntarily unemployed or underemployed.").

179. MISS. CODE ANN. §§ 43-19-34, -101, -103 (2019); Avery v. Avery, 864 So. 2d 1054, 1057 (Miss. Ct. App. 2004) (finding that an obligor who was incarcerated for "child fondling," without disclosing whether the victim was his own child, would have been entitled to a suspension of child support while he was in prison but, since the obligor had assets, the assets could be used for child support payments).

180. MO. REV. STAT. §§ 452.340, 452.370 (2019); Oberg v. Oberg, 869 S.W.2d 235, 238 (Mo. Ct. App. 1993) (explaining the factors to be considered by the courts when an incarcerated parent moves to modify a child support order, absent among which is the nature of the parent's crimes). *But see* Missouri Family Support Division, Comments to the Notice of Proposed Rulemaking (Jan. 14, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-1087) ("Voluntary unemployment for incarcerated obligors should be a state matter, not a mandate. This is a significant public policy issue with considerable state-specific case law that is not appropriate for federal regulation. What is OCSE's authority for regulating this?")

181. MONT. CODE ANN. §§ 40-4-204, -208 (2019); *In re* Marriage of Rahn, No. DA 12-0385, 2013 WL 341263, at *2 (Mont. Jan. 29, 2013) (reaffirming *Mooney* and concluding that "the District Court's denial of Dustin's motion to modify his child support payments was not an abuse of discretion"); Mooney v. Brennan, 848 P.2d 1020, 1023 (Mont. 1993) ("[I]t is not unconscionable to deny a temporary termination or reduction in child support obligations due to incarceration, notwithstanding the fact that the jailed parent earns no income while incarcerated and does not have assets which could be utilized to pay the support.").

182. NEB. REV. STAT. § 43-512.12 (2019); NEB. REV. STAT. § 43-512.15 (2017) (amended 2018 after the new rule so that there is no longer a distinction based on the nature of the crime) ("[A] person who has been incarcerated for a period of one year or more in a county or city jail or a federal or state correctional facility shall be considered to have an involuntary reduction of income unless (i) the incarceration is a result of a conviction for criminal nonsupport pursuant to section 28-706 or a conviction for a violation of any federal law or law of another state substantially similar to section 28-706, (ii) the incarcerated individual has a documented record of willfully failing or neglecting to provide proper support which he or she knew or reasonably should have known he or she was legally obligated to provide when he or she had sufficient resources to provide such support, or (iii) the incarceration is a result of a conviction for a crime in which the child who is the subject of the child support order was victimized."); NEB. CT. R. § 4-209 (2019).

Nevada[183]			X
New Hampshire[184]			X
New Jersey[185]			X
New Mexico[186]			X
New York[187]		X	
North Carolina[188]	X		
North Dakota[189]	X		
Ohio[190]			X
Oklahoma[191]			X
Oregon[192]	X		
Pennsylvania[193]	X		
Rhode Island[194]		X	

183. NEV. REV. STAT. §§ 125B.145, 201.051 (2019); Northrop v. State, Div. of Welfare and Supportive Servs., No. 64589, 2016 WL 3033750, at *2 (Nev. May 26, 2016) (allowing reduction in child support payments for incarceration but neglecting to draw a distinction between the nature of the obligor's crime); Sanders v. State, 67 P.3d 323, 328 (Nev. 2003) (noting that a court may "take incarceration into account when determining whether an individual is excused from paying child support" but without distinguishing the nature of the obligor's crime).

184. N.H. REV. STAT. ANN. §§ 458-C:2, -C:3, -C:5, -C:7 (2019); *In re* Lounder, 96 A.3d 970, 974 (N.H. 2014) (finding that incarcerated parent was not voluntarily unemployed in part because "there is no evidence that his motive for committing the crime which led to his incarceration was to avoid his child support obligations") .

185. N.J. STAT. ANN. §§ 4:50-1, 5:6A (West 2019); Kuron v. Hamilton, 752 A.2d 752, 756–57 (N.J. Super. Ct. App. Div. 2000); Halliwell v. Halliwell, 741 A.2d 638, 646–48 (N.J. Super. Ct. App. Div. 1999); L.A. v. M.A., No. FM-15-399-10S2014, 2014 N.J. Super. Unpub. LEXIS 3104, at *1–2 (Ct. Ch. Div. Dec. 3, 2014).

186. N.M. STAT. ANN. § 40-4-11.1 (2019); Thomasson v. Johnson, 903 P.2d 254, 256 (N.M. Ct. App. 1995) (noting that incarceration is only one factor to consider).

187. N.Y. DOM. REL. LAW § 236 (Consol. 2019); N.Y. FAM. CT. ACT § 451 (Consol. 2019); *In re* Hunter v. Traynor, 16 N.Y.S.3d 169, 172–73 (Fam. Ct. 2015); *In re* J.A.E. v. A.B., 805 N.Y.S.2d 811, 813–16 (Fam. Ct. 2005); Kirchner v. E.H., 755 N.Y.S.2d 793, 794 (Fam. Ct. 2003).

188. N.C. GEN. STAT. § 50-13.10 (2019); Orange Cty. *ex rel.* Byrd v. Byrd, 501 S.E.2d 109, 111–12 (N.C. Ct. App. 1998).

189. N.D. CENT. CODE §§ 14-09-08.4, -09.7 (2019); N.D. ADMIN. CODE 75-02-04.1-07 (2019); Ramsey Cty. Soc. Serv. Bd. v. Kamara, 653 N.W.2d 693, 696–97 (N.D. 2002).

190. L.B. v. T.B., No. 24441, 2011 WL 2671915, at *4 (Ohio Ct. App. July 8, 2011) (refusing to reduce the child support obligation, without discussing the nature of incarcerated parent's crimes, even though he could no longer make the $90,000 upon which it was based because "[t]he only person who would benefit from the trial court's using Husband's reduced income would be Husband, not his child"); Fuller v. Fuller, No. 99CA04, 2000 WL 807224, at *3 (Ohio Ct. App. June 14, 2000); Richardson v. Ballard, 681 N.E.2d 507, 508 (Ohio Ct. App. 1996).

191. OKLA. ADMIN. CODE § 340:25-5-178 (2019); State *ex rel.* Jones v. Baggett, 990 P.2d 235, 245 (Okla. 1999).

192. OR. REV. STAT. § 416.425 (2019); OR. ADMIN. R. 137-055-3300 (2019); *In re* Marriage of Willis & Willis, 840 P.2d 697, 698–99 (Or. 1992).

193. PA. R.C.P. No. 1910.19; Plunkard v. McConnell, 962 A.2d 1227, 1231–32 (Pa. Super. Ct. 2008).

194. 15 R.I. GEN. LAWS § 15-5-16.2(c)(x)(3) (2019) (providing that automatic state-

South Carolina[195]			X
South Dakota[196]			X
Tennessee[197]			X
Texas[198]		X	
Utah[199]			X
Vermont[200]			X
Virginia[201]			X
Washington[202]		X	
West Virginia[203]			X
Wisconsin[204]		X	

generated motions to modify the support of incarcerated parents "does not apply to those individuals who are serving a sentence for criminal nonsupport in state or federal prison, or who are found to be in civil contempt for failure to pay child support and incarcerated for that reason").

195. S.C. CODE ANN. § 20-3-160 (2019); Hawkins v. Hawkins, 742 S.E.2d 677, 684 (S.C. Ct. App. 2013); OFFICE OF CHILD SUPPORT ENF'T, CHANGING A CHILD SUPPORT ORDER IN YOUR STATE (Oct. 2013), https://www.acf.hhs.gov/sites/default/files/programs/css/sc_cs_order.pdf ("[W]hile there are no legal statutes that prevent incarcerated parents from modifying their obligations, South Carolina courts have generally held that incarceration is not a valid reason for modification.").

196. S.D. CODIFIED LAWS §§ 25-7-6.4, -6.10 (2019); Gisi v. Gisi, 731 N.W.2d 223, 227–30 (S.D. 2007).

197. TENN. CODE ANN. § 36-5-101 (2019); TENN. COMP. R. & REGS. 1240-2-4-.04 (2019); State *ex rel.* Brown v. Shipe, No. E2014-02064-COA-R3-JV, 2015 WL 6549770, at *1 (Tenn. Ct. App. Oct. 29, 2015); State *ex rel.* Laxton v. Byron, No. E2009-01707-COA-R3-JV, 2010 WL 759842, at *4–5 (Tenn. Ct. App. Mar. 5, 2010).

198. TEX. FAM. CODE ANN. §§ 154.066, 154.068, 154.123, 156.401 (West 2019); *In re* Marriage of Lassmann, No. 13-09-00703-CV, 2010 WL 3377773, at *1 (Tex. App. Aug. 25, 2010); Hollifield v. Hollifield, 925 S.W.2d 153, 156 (Tex. App. 1996); Texas Child Support Division, Texas CSD Response to NPRM (Jan. 12, 2015), https://www.regulations.gov/document?D=ACF-2014-0004-0127 ("[A] broad prohibition [against considering incarceration to be voluntary unemployment] would appear to reward bad behavior, and would likely draw staunch opposition, especially in situations where the offense that resulted in the obligor's incarceration was an offense against the family or where the obligor had high arrears prior to incarceration.").

199. UTAH CODE ANN. § 78B-12-203 (West 2019); Proctor v. Proctor, 773 P.2d 1389, 1391 (Utah Ct. App. 1989).

200. VT. STAT. ANN. tit. 15, § 660 (2019).

201. VA. CODE ANN. §§ 20.-108.1, -108.2 (2019); Mahoney v. Mahoney, No. 2269-99-4, 2001 WL 213999, at *2 (Va. Ct. App. Mar. 6, 2001); Layman v. Layman, 488 S.E.2d 658, 659 (Va. Ct. App. 1997); Hustead v. Hustead, No. CH02-328-745, 2003 WL 23171976, at *2 (Va. Cir. Ct. Feb. 12, 2003).

202. WASH. REV. CODE §§ 26.09.170, 26.19.020, 26.19.065, 26.19.071 (2019); *In re* Marriage of Blickenstaff, 859 P.2d 646, 650–51 (Wash. Ct. App. 1993) ("[A]n incarcerated parent is not 'voluntarily unemployed' within the meaning of the child support statutes unless the parent was imprisoned for a crime of nonsupport or for civil contempt for failure to pay support.").

203. W. VA. CODE §§ 48-1-1205, 48-11-105, 48-13-702 (2019); Child of John S. v. Alesha C., No. 16-1192, 2018 WL 2278094, at *2 (W. Va. May 18, 2018); Adkins v. Adkins, 656 S.E.2d 47, 50 (W. Va. 2007).

204. WIS. STAT. §§ 767.59, 767.511 (2019); *In re* Marriage of Rottscheit, 664 N.W.2d 525,

Wyoming[205]			X
Totals	11 Jurisdictions	9 Jurisdictions	31 Jurisdictions

530 (Wis. 2003) (finding that the incarcerated parent's modification request should be denied because his crimes had been intentional and because, while incarceration itself was not determinative, "[t]he totality of circumstances surrounding the incarceration deserves examination").

205. WYO. STAT. ANN. §§ 20-2-307, -304, -311 (2019); Glenn v. Glenn, 848 P.2d 819, 822 (Wyo. 1993) (relying on obligor's earned income in prison and not discussing the crime the obligor had committed against the obligee).