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Decriminalizing Poor Parents: Better Alternatives to 18 U.S.C. §228

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Abstract

When one hears "failure to pay child support," certain schemas and stereotypes can come to mind. One common stereotype is the image of the "Deadbeat Dad," an often-racialized image of an irresponsible man who does not care for their child[1], and thus blatantly dodges a Family Court's order to pay child support, sometimes by moving to a different state or country. While this may not be the reality in many circumstances, such schemas and stereotypes of a "Deadbeat Dad" sometimes inform legislation for criminal law like 18 U.S.C. §228, otherwise known as the Deadbeat Parent Punishment Act.[2] This article will begin with Part I exploring the origins and background of 18 U.S.C. §228, with some relevant statistics regarding child support in the United States. Part II will continue with a discussion of the various issues Courts have pointed out in enforcing 18 U.S.C. §228, such as the unconstitutionality of the mandatory presumption clause and the potential for Double Jeopardy when a parent has multiple children. Part III will further address the broader public policy concern that incarceration is counterproductive to ensuring or inducing payment of child support. Finally, Part IV will conclude with alternative, arguably more effective models to 18 U.S.C. §228.

Part I: Introduction

Politicians and lawmakers in the United States often respond to and enforce societal attitudes on what is considered morally wrong and use that as justification in writing criminal

[1] Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. Davis L. Rev. 991, 993–94 (2006).
[2] Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C.J.L. & Soc. Just. 233, 257–58 (2014).

statutes.[3] The 144th Congressional Record on May 12, 1998 reveals such societal attitudes from many of the House Representatives in attendance when they expressed support for passing the current version of 18 U.S.C. §228. The following statement from former Representative McCollum of Florida's 8th Congressional District exemplifies this attitude towards people who fail to meet their child support obligations: "The abdication of moral and legal duty by deadbeat parents calls for unequivocal social condemnation. This bill expresses such condemnation, even as it seeks to deter such unacceptable dereliction of duty."[4] Further comments include former Representative Hyde from Illinois stating "The punishment that we as a society direct against wrongdoing is a clear indication of what we value and of what we hold dear. This bill represents our commitment to be vigilant on behalf of our families and our children."[5]

During the same session, Former Representative Jackson-Lee of Texas expressed his hope that this bill would combat the problem of unpaid child support, specifically arrears.[6] She noted that "[i]n 1994, one in every four children lived in a family with only one parent present in the home. In the same year, the Child Support Enforcement system handled 12.8 million cases of non-payment. Yet, the system was only able to collect $615 million of the $6.8 billion due in back child support."[7] Former Representative Roukema of New Jersey also expressed her hope this bill would counteract the so-called "Enforcement Gap" between child support owed and child support collected.[8] The Bill was passed by a joint resolution, subsequently approved by former President Clinton on June 24, 1998, and remains the law today.[9]

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[3] Tonya L. Brito, *The Welfarization of Family Law*, 48 U. Kan. L. Rev. 229, 263–64 (2000).
[4] 144 Cong. Rec., H3042 (daily ed. May 12, 1998) (Statement of Rep. McCollum).
[5] 144 Cong. Rec., H3042-3 (daily ed. May 12, 1998) (Statement of Rep. Hyde).
[6] 144 Cong. Rec., H3043 (daily ed. May 12, 1998) (Statement of Rep. Jackson-Lee).
[7] *Id*.
[8] 144 Cong. Rec., H3046 (daily ed. May 12, 1998) (Statement of Rep. Roukema).
[9] 144 Cong. Rec., H7911 (daily ed. Sep. 16, 1998).

Around twenty years later, this paper aims to evaluate whether the passage 18 U.S.C. §228 accomplished its purported goals. Specifically, whether the passage of this bill accomplished what the House Representatives intended, which is reducing the billions of dollars of unpaid child support as former Representative Jackson-Lee wanted. A question arises whether the passage of 18 U.S.C. §228 helped close the "enforcement gap," as former Representative Roukema wanted. Another related question is whether families, specifically children, were protected from their parents' dereliction of duty and those parents were held responsible, as former Representatives Hyde and McCollum wanted.

The answer to these questions, unfortunately, seems to be no. In fact, if evaluating the problem in terms of total amount of money owed, the problem got exponentially worse: as of February 2020, delinquent noncustodial parents, or debtors, owed over $117 billion in past-due child support.[10] The U.S. Census Bureau, in its most recent study on who owes child support, shows that about 7 in 10 custodial parents (69.8 percent) who were supposed to receive child support in 2017 received at least some payments, while less than half (45.9 percent) of custodial parents who were supposed to receive child support received full child support payments. [11] This is a decrease from 1993, when 75.8 percent of custodial parents who were supposed to receive support received at least some payment.[12] Custodial parents are generally defined as parents that

[10] Elaine Sorensen, *Certified Child Support Arrears Shows Sharp Decline*, OFF. CHILD SUPPORT ENF'T (May 11, 2021), https://www.acf.hhs.gov/archive/css/policy-guidance/fy-2017-preliminary-data-report.

[11] TIMOTHY GRALL, U.S. CENSUS BUREAU, U.S. DEP'T OF COM., NO. P60-269, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2017, AT 1 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf.

[12] GRALL, *supra* note 11, at 13.

live with and care for their child.[13] The aggregate amount of child support that was supposed to have been received in 2017 was $30.0 billion; only 62.2 percent of that amount was received.[14]

There are race dimensions to child support issues, especially as approximately half (48.8 percent) of all Black children had a parent who lived outside their household at the time of the study.[15] There are also poverty dimensions to child support issues; the poverty rate in 2017 of all families with children owed child support under 21 years of age was 24.1 percent, which is 10.5 percentage points higher than the poverty rate of all families with children under 21 years old.[16] Approximately 6.6 million (30.1 percent) of all children, in families where child support was owed, lived in poverty in 2017.[17] Additionally, from1994 to 2018, more fathers have been becoming custodial parents.[18] In 1994, one out of every six custodial parents were fathers, while in 2018, one out of every five custodial parents were fathers.[19]

The above-referenced data from the U.S. Census Bureau includes different kinds of child support situations, including when the non-custodial parent lives in the same state[20]- meaning that 18 U.S.C. §228 is not implicated. Additionally, this data reflects child support orders that were obtained formally, through a court order, and informally, such as through an understanding between the parents.[21] Regardless, it seems that while 18 U.S.C. §228 included much condemnation against parents who failed to pay child support, it did not accomplish its intended aims of reducing the "enforcement gap," as supporters in Congress believed it would.

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[13] GRALL, *supra* note 11, at 1.
[14] GRALL, *supra* note 11, at 1.
[15] GRALL, *supra* note 11, at 1.
[16] GRALL, *supra* note 11, at 5.
[17] GRALL, *supra* note 11, at 5.
[18] GRALL, *supra* note 11, at 5.
[19] GRALL, *supra* note 11, at 5.
[20] GRALL, *supra* note 11, at 5.
[21] GRALL, *supra* note 11, at 7.

In its current form, 18 U.S.C. §228 punishes any person who (1) 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 (2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or (3) 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 2 years, or is greater than $10,000.[22] The punishment is a felony in the case of a first offense under subsection (a)(1) which is when a child support obligation goes unpaid for one year or more than $5,000.[23] It includes a fine, imprisonment in a Federal prison for not more than 6 months, or both.[24] In the case of offenses (2) or (3) when one moves to a different state or country for the purpose of avoiding child support, or their child support remains unpaid for two years or more than $10,000, or they violate (a)(1) more than once, the punishment is more severe.[25] The Defendant could receive a fine, imprisonment in a federal prison for up to two years, or both.[26] The Defendant is also required to pay mandatory restitution equal to total unpaid support on top of the fine for any and all violations of the statute.[27]

Some critical differences exist between the earlier version of the 18 U.S.C. §228 that were passed in 1992 and 1996 that are worth noting when discussing the history of this statute. There are virtually no differences between the 1992 and 1996 versions.[28] However, there are

[22] 18 U.S.C. § 228.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Compare* 18 U.S.C. § 228 (1994), *with* 18 U.S.C.A. § 228 (1996).

critical differences between the 1996 and 1998 versions of the bill, aside from the introduction of a venue clause and a definition for "Indian Tribe."[29] One of the most critical changes come from the new Presumption clause, which requires the jury to assume that the Defendant willfully intended not to pay their child support obligation.[30] The second most critical change is the definition of the offense, the 1996 version only had incarceration of 2 years and fines "in any other case," meaning if someone failed to pay child support again to a child living in a different state. [31] The 1998 version, as noted above, has an offense for over two years of not paying child support and for travelling with the intent of avoiding child support payments.[32] In summary, the current, 1998 version of 18 U.S.C. §228 has become more specific about ways a Defendant could be in violation, includes more offenses, and introduces the mandatory presumption clause.

This concludes Part I on the history and background of 18 U.S.C. §228 with some relevant statistics of the current state of child support in the United States. This article hopes to generate further discussion on the multitude of issues that have cropped up in enforcing 18 U.S.C. §228. Part II will address issues of constitutionality, especially with its presumption provision and the potential for double jeopardy in the statute. Additionally, Part III will discuss research which suggests that incarceration is an ineffective solution to obtaining childcare. Finally, in Part IV, solutions which could possibly better accomplish the intended aims of this statute will also be proposed.

Part II: Courts Around the Country Have Held or Recognized Parts of 18 U.S.C. §228 Unconstitutional

[29] *Compare* 18 U.S.C. § 228 (1996), *with* 18 U.S.C. § 228.
[30] *Compare* 18 U.S.C.A. § 228 (1996); *with*18 U.S.C. § 228.
[31] *Compare* 18 U.S.C. § 228 (1996), *with* 18 U.S.C. § 228.
[32] 18 U.S.C. § 228.

Courts around the country have taken issue with 18 U.S.C. §228's Constitutionality problems. Specifically, the Presumption clause in Section B of the statute which states the following: the "existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption."[33] This rebuttable Presumption requires a jury to assume that the Defendant willfully intended to not pay their child support obligation.[34] Various District Courts around the country have struck down the mandatory presumption clause because it arguably violates a Defendant's right to due process under the Fifth Amendment.[35] Courts reached this conclusion because this Presumption clause essentially relieves the government of the burden of proving every element of the crime, including criminal intent, beyond a reasonable doubt.[36] Additionally, the statutory language does not clarify whether someone who violates 18 U.S.C. §228 should face multiple indictments if they have multiple children, or just one indictment.[37] The potential for multiplicitous indictments under 18 U.S.C. §228 could very well contravene the prohibition on Double Jeopardy, also a violation of the Fifth Amendment.[38]

A. The mandatory presumption clause: An unwelcome and unconstitutional addition

As noted earlier in the Introduction, the mandatory presumption clause in 18 U.S.C. §228 was introduced in the last, current version of the statute in 1998.[39] One of the main cases, often cited by other Federal Courts around the country, that took issue with the mandatory presumption clause is *U.S. v. Pillor*.[40] In *Pillor*, the United States District Court of the Northern

[33] 18 U.S.C. § 228.
[34] 18 U.S.C.§ 228.
[35] *See infra* pp. 10-11 and notes 46-55
[36] *See infra* pp. 10-12 and notes 44-55.
[37] *See infra* p. 12 and notes 60-61.
[38] *See infra* p. 12 and note 62.
[39] *See supra* note 30 and accompanying text.
[40] *United States v. Pillor*, 387 F. Supp. 2d 1053, 1056 (N.D. Cal. 2005).

District of California considered defendant's argument in a Motion to Strike that the Presumption clause "(1) is mandatory rather than permissive, and (2) impermissibly shifts the burden of proof from the government to the defendant on the element of 'willfulness,'" in violation of the due process Clause of the Fifth Amendment of the U.S. Constitution.[41] The Court granted the Motion and severed the mandatory presumption from the rest of the statute.[42] The Court agreed with Defendant that the presumption was mandatory because the language of the statute did not allow the jury to accept or reject the presumption upon proof of the basic fact-whether there was an existence of a child support obligation that should still be enforced.[43] The Court reached that conclusion by looking at the plain language of the statute: "[t]he existence of a support obligation ... creates a rebuttable presumption."[44]

Now that *Pillor* decided there was a mandatory presumption, it had to consider the inevitable follow-up question: whether a mandatory presumption offends the due process clause of the Fifth Amendment which requires the government to prove all elements of a crime beyond a reasonable doubt.[45] *Pillor* held that this mandatory presumption indeed violated the due process Clause, because mandatory presumption, even if rebuttable, violates due process if it relieves the government of the burden of proof on an element of the offense.[46] An unconstitutional presumption tells the factfinder that he must find the presumed element upon proof of the basic fact, unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts.[47]

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[41] *Id*. at 1057.
[42] *Id*.
[43] *Id*. at 1056
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 1057.

The intent element of the crime is "willfulness" and the Defendant argued convincingly that the presumption of ability to pay from an existing support order is tantamount to proving willfulness.[48] In other words, if the parent did not pay the child support when there was a presumed ability to pay, the necessary conclusion is that the parent did not pay child support willfully. It is not a willful choice to not pay child support if one does not have the ability to pay.

Pillor stated that it was following the lead of *United States v. Grisby*[49] from the District Court of Rhode Island in 1999, which similarly held the mandatory presumption clause in §228 was unconstitutional and thus severed it from the rest of the statute.[50] Interestingly enough, a District Court in Colorado reached the same conclusion around six days before *Pillor* did.[51] *Pillor*'s decision that the mandatory presumption clause and should be severed from the rest of the statute was subsequently cited by and replicated in District Courts in Nevada[52], Hawaii[53], Nebraska[54], and Iowa[55].

Pillor cited to *Francis v. Franklin* in reaching its conclusion.[56] As it turns out, 18 U.S.C. §228 is not the first time that mandatory presumption clauses have come under fire in criminal statutes. In *Francis v. Franklin*, a Defendant was charged with "malice murder" in Georgia after he shot and killed someone, which Defendant claimed was by accident, while attempting to escape from jail.[57] One of the jury instructions included a rebuttable presumption clause

[48] *Id*.
[49] *Id*.
[50] *United States v. Grigsby*, 85 F. Supp. 2d 100, 109 (D.R.I. 2000).
[51] *United States v. Morrow*, 368 F. Supp. 2d 863, 866 (C.D. Ill. 2005).
[52] *United States v. Thurman*, No. 0306CR00169LRHRAM, 2007 WL 4522616, at 2 (D. Nev. Dec. 18, 2007).
[53] *United States v. Firestone*, No. CR. 07-00028 DAE, 2007 WL 2156423, at 5 (D. Haw. July 26, 2007).
[54] *United States v. Haberek*, No. CR03-3077-MWB, 2006 WL 1582462, at 1 (N.D. Iowa June 7, 2006).
[55] *United States v. Casey*, No. 8:05CR330, 2006 WL 277092, at 1 (D. Neb. Feb. 3, 2006).
[56] *Pillor*, 387 F. Supp. 2d at 1056.
[57] *Francis v. Franklin*, 105 S. Ct. 1965, 1967 (1985).

regarding criminal intent.[58] The Supreme Court struck down this presumption as unconstitutional since it relieved the government of its burden of proving every element of the crime beyond a reasonable doubt and thus violated the Defendant's due process rights.[59]

B. Multiple children, multiple charges? Multiplicitous Indictment and the potential for double jeopardy in 18 U.S.C. §228

In the Second Circuit, Kerley, a Defendant who had twin daughters for whom he failed to pay child support, took issue with another part of §228.[60] Kerley claimed he only violated one support order for both of his daughters, so he should not be charged with more than one offense.[61] The statute does not specify what should happen if one has more than one child they fail to pay child support for, and whether they should face one or multiple indictments.[62] This lack of specification creates a potential for multiplicitous indictments, which is when the government charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed.[63] Multiplicitous indictments are problematic because they violate the constitutional prohibition against double jeopardy, as Supreme Court precedent indicates.[64]

The court in *Kerley* looked at the plain language in 18 U.S.C. §228 and could not conclude from the plain language whether a Defendant who has more than one child should be charged with more than one offense.[65] The court asked both the Government and the Defense side to

[58] *Id*.
[59] *Id*. at 1977.
[60] *United States v. Kerley*, 544 F.3d 172, 178 (2d Cir. 2008).
[61] *Id*.
[62] *Id*.
[63] *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999)
[64] *See United States v. Dixon*, 509 U.S. 688, 696 (1993) (holding that "[i]n both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies").
[65] *Kerley*, 544 F.3d at 179.

provide legislative history to clarify what Congress intended.[66] Unfortunately, neither side was able to do so.[67]

In fact, the Court said, it is entirely possible that Congress assumed that each court order would mandate payment for only one child, which necessitates multiple offenses if there is more than one child owed child support.[68] Nevertheless, the court was not convinced by the Prosecution's argument that the statute meant to distinguish between "support obligation" and "Court order," which would then more easily allow indicting a parent for each violation of a "support obligation" to each child.[69] Due to the lack of clarity, the Second Circuit stated it will not, as a matter of statutory construction, charge multiple offenses from the same action in law and fact.[70] It then applied the Rule of Lenity to Kerley's case (which Kerley argued for), and found that Kerley should only be charged with one offense regarding failure to pay child support for his twin daughters.[71] The court also implored Congress to clarify the matter.[72]

C. The above-mentioned, unresolved constitutional problems in 18 U.S.C. §228 could make using the statute for criminal prosecution easier

Both above-mentioned, unresolved constitutional issues in 18 U.S.C. §228 could make using the statute for criminal prosecutions easier. Regarding the mandatory presumption clause, if the jury is required to assume that the parent had the ability to pay at the time that he or she violated 18 U.S.C. §228, the government's burden of proving a crime beyond a reasonable doubt becomes lessened.[73] One could predict that this could lead to the government having an easier

[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *See supra* notes 41-48 and accompanying text.

time proving their case and obtaining a conviction. Meanwhile the Defendant would have to rebut with additional evidence that they did not have the ability to pay for one reason or another.[74] One reason could be financial hardship from loss of employment, making their lack of payments likely not willful.

While one can commend the District Courts that struck down the mandatory presumption clause and severed it from the rest of the statute, this is not a full victory. These District Courts do not constitute a significant number of the District Courts around the country. The mandatory presumption is still a part of 18 U.S.C. §228 and can still be utilized by the federal government to obtain a guilty verdict more easily.[75] It seems that so long as the mandatory presumption clause is part of 18 U.S.C. §228, Defendants may be more likely to be found guilty of a felony, incarcerated in federal prison for six months to two years, and required to pay hefty fines and mandatory restitution.[76]

The potential for multiplicitous indictments could also make using the statute for criminal prosecution easier.[77] Due to the lack of clarification from Congress before and after passage of the statute, a Federal Prosecutor could charge multiple counts of violation of the statute if the Defendant has multiple children owed child support.[78] As discussed earlier, the Second Circuit in *U.S. v. Kerley* held that indicting for each child could result in a multiplicitous indictment which contravenes the Constitutional prohibition against double jeopardy and therefore Kerley should be charged for only one offense.[79] However, the Second Circuit is only one Circuit Court. If a

[74] *See supra* notes 47-48 and accompanying text.
[75] *See supra* notes 39, 41-48 and accompanying text.
[76] *See supra* notes 22-27, 41-48 and accompanying text.
[77] *See supra* notes 61-71 and accompanying text.
[78] *See supra* notes 61-71 and accompanying text
[79] *See supra* notes 61-71 and accompanying text.

Defendant is found guilty of every offense for every child owed child support in any other jurisdiction, the consequences could be devastating for that parent. That Defendant could have more than one conviction for a federal felony on their criminal record, they could serve a long prison sentence if the sentences are to be served consecutively, and they could be forced to pay extremely costly fines for each violation.[80]

An inevitable question arises whether lengthy incarcerations, heavy fines a Defendant may be unable to pay, and a criminal record for the non-custodial parents are beneficial to the children owed this child support. A related question is whether harsh consequences like incarceration help induce or promote the payment of child support. As Part III elucidates, the answer to that question is likely no.

III. Incarceration is Not an Effective Way to Promote or Induce Payment of Child Support

Incarcerating someone for failure to pay child support is hardly an effective solution to get parents to meet their obligations.[81] Part III aims to demonstrate that incarceration is in fact a very counterproductive measure towards achieving that aim.[82] Notably, most cases where incarceration occurs for failure to pay child support occur on the state level, resulting in jail time and not prison time.[83] On the state level, incarceration for failure to pay child support is often a result of being held in civil contempt for the most part.[84] Criminal contempt is utilized very rarely.[85]

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[80] *See supra* notes 22-27, 61-71 and accompanying text.
[81] *See infra* pp. 18-19 and notes 101-109.
[82] *See infra* pp. 18-19 and note 101-109.
[83] *Child Support and Incarceration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 4, 2019) https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx.
[84] *Child Support and Incarceration*, *supra* note 83.
[85] *Child Support and Incarceration*, *supra* note 83.

Unfortunately, it is difficult to find research, especially recent studies, on how many non-custodial parents are incarcerated for failure to pay child-support across the United States. The studies found are usually locally-based and more than a decade old, such as a study from 2009 in South Carolina which indicated 13.2 percent of county jail inmates were jailed for civil contempt related to failure to pay child support.[86] Most statistical findings also focus on how many people incarcerated have child support obligations.[87] For example, a study from 2003 estimates that one in four incarcerated people on the state or federal level have pre-existing child support obligations.[88] If that estimate is still accurate today, that means that of the around 1.8 million people incarcerated in the United States as of Spring 2021[89], around 450,000 people incarcerated owe child support.

Due to the limited research on how many people nationwide are incarcerated for failure to pay child support, one should always keep in mind the distinction between those that are incarcerated for failure to pay child support and those that are incarcerated for other reasons with a preexisting child support obligation. Regardless, the central premise of Part III is that for incarcerated parents with child support obligations, whether they were incarcerated for failing to pay child support or for an unrelated violation, being incarcerated makes it significantly harder to meet child support obligations.[90]

A. *Turner v. Rogers* and what incarceration for failure to pay child support looks like in action

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[86] *Child Support and Incarceration*, *supra* note 83.
[87] *Child Support and Incarceration*, *supra* note 83.
[88] Daniel R. Mayer & Emily Warren, *Child Support Orders and the Incarceration of Non-custodial Parents*, INST. FOR RESEARCH ON POVERTY & SCH. OF SOC. WORK UNIV. WIS. MADISON, 2 (2011), https://www.irp.wisc.edu/wp/wp-content/uploads/2018/06/Task7b-2011-12-Report.pdf.
[89] JACOB KANG-BROWN, CHASE MONTAGNET & JASMINE HEISS, VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN SPRING 2021, 1 (2021), https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf.
[90] *See infra* pp. 19-20 and note 101-109.

Incarceration for failure to pay child support came to the forefront of federal case law in *Turner v. Rogers*. Turner went to jail six times for civil contempt in South Carolina for failure to pay child support arrears between 2003-2010.[91] In his most recent jail term, Turner argued that he had a right to counsel in a court proceeding which held him in civil contempt for his failure to pay child support.[92] The South Carolina Supreme Court disagreed because, among other reasons, the right to counsel is only given for criminal contempt in the state, not civil contempt.[93] The case reached the US Supreme Court, where Justice Breyer wrote the majority opinion and concluded that indigent defendants like Turner are not automatically entitled to counsel for civil contempt cases as part of one's due process rights.[94]

However, the Supreme Court held, South Carolina and states in general must ensure there are adequate procedural safeguards in place to protect a defendant's right in civil contempt proceedings.[95] Justice Breyer held that the following procedural safeguards are required to protect a Defendant's due process rights in such cases: "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay."[96]

[91] *Turner v. Rogers*, 564 U.S. 431, 436 (2011).
[92] *Id*. at 438.
[93] *Id*.
[94] *Id*. at 441-42.
[95] *Id*. at 447.
[96] *Id*. at 447-448.

Turner did not have clear notice that "ability to pay" would be the "critical question" in his proceeding.[97] Turner was also not provided with information or forms that would have allowed him to disclose his inability to pay.[98] Therefore, the South Carolina courts erred in finding him able to pay and thus in civil contempt.[99] Forms must be provided to the defendant to elicit information about ability to pay and the court must then decide on the ability to pay before choosing to incarcerate a parent-obligor.[100]

B. Office of Child Support Enforcement's Response to *Turner v. Rogers*: Incarceration is not an effective solution

Turner caused the Office of Child Support Enforcement (OCSE), a federal agency, to publish an "Action Transmittal" in 2012, effective immediately, urging all state jurisdictions to review their judicial procedures and ensure they have procedural safeguards in place allowing obligor-parents to prove they cannot pay before they are incarcerated for civil contempt.[101] OCSE explained that "[c]ivil contempt that leads to incarceration is not, nor should it be, standard or routine child support practice. By implementing procedures to individually screen cases prior to initiating a civil contempt case and providing appropriate notice to alleged contemnors concerning the nature and purpose of the proceeding, child support programs will help ensure that inappropriate civil contempt cases will not be brought."[102]

A couple of years later in 2015, OCSE published a detailed infographic titled "Jobs, Not Jail," which compared the costs of a state providing job-related services to the costs of jailing

[97] *Id*. at 449.
[98] *Id*.
[99] *Id*.
[100] *Id*. at 447-448.
[101] VICKI TURESTKY, *Turner v. Rogers Guidance*, OFF. CHILD SUPPORT ENF'T (Jun. 18, 2012), https://www.acf.hhs.gov/css/policy-guidance/turner-v-rogers-guidance.
[102] TURETSKY, *supra* note 101.

someone for failing to pay child support.[103] The infographic was a summary of research performed by the OCSE on this topic.[104] Perhaps unsurprisingly, given the title, the infographic indicated that providing job related services was a more cost-effective alternative at $5.00 a day, as opposed to $186.00 dollars a day.[105] Additionally, the visual demonstrated that participants in a government-sponsored job program were 80% more likely to be employed after two months, 33% less likely to file unemployment, paid 51% more child support, and that families were 21% less likely to require public assistance.[106] In comparison, jailing someone results in 9 more weeks of being unemployed a year on average, annual earnings were reduced by 40%, hourly wages are 11% less, annual family income is reduced by 22%.[107]

As OCSE pointed out, incarceration is an ineffective solution for owing child support if the parent cannot afford to pay. One of the main reasons for that is because incarcerated parents fall behind on payments even more while incarcerated.[108] On average, an incarcerated parent with a child support order has the potential to leave prison with nearly $20,000 in child support debt, having entered the system with only half that amount owed.[109]

C. The differing state laws and various barriers on child support modification while incarcerated

To modify or change a child support obligation, the obligor-parent must prove a "material or significant change in circumstances" in the tribunal that ordered that child support.[110] A material or significant change in circumstances when someone is incarcerated could arise from

[103] *Jobs, Not Jail*, OFF. CHILD SUPPORT ENF'T. (2015), https://www.acf.hhs.gov/sites/default/files/documents/ocse/jobs_not_jail_final_10_02.pdf
[104] *Jobs, Not Jail*, *supra* note 103.
[105] *Jobs, Not Jail*, *supra* note 103.
[106] *Jobs, Not Jail*, *supra* note 103.
[107] *Jobs, Not Jail*, *supra* note 103.
[108] *Child Support and Incarceration*, *supra* note 83.
[109] *Child Support and Incarceration*, *supra* note 83.
[110] *Child Support and Incarceration*, *supra* note 83.

the incarceration itself or from the unemployment that results from the incarceration.[111] Some states allow incarceration to be considered a substantial change in circumstances, allowing for modification.[112] Other states do not allow incarceration alone to be a sufficient reason for modification and require the parent-obligor to show other circumstances in order to modify.[113] States will generally allow modification of a child support order in case of unemployment, so long as the unemployment is involuntary.[114] Some states do not consider incarceration an involuntary reason for unemployment.[115] While 40 states and D.C. currently treat imprisonment as involuntary unemployment, which means the obligor could request a modification, exceptions apply.[116]

One of the exceptions is if the reason for the incarceration is related to the failure to pay child support or avoidance of child support[117], which is exactly what is implicated in 18 U.S.C. §228. Additionally, it is the responsibility of the parent-obligor to notify the state that they are incarcerated so their child support can be modified.[118] Very few states modify child support payments automatically upon incarceration.[119]

Finally, a small number of states treat incarceration as voluntary unemployment because the crime, which led to the inability to work or pay child support, is considered a voluntary act, which means modification is not allowed in those states.[120] This overview of differing state laws makes it abundantly evident that there is a confusing lack of consistency and several barriers

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[111] *Child Support and Incarceration*, *supra* note 83.
[112] *Child Support and Incarceration*, *supra* note 83.
[113] *Child Support and Incarceration*, *supra* note 83.
[114] *Child Support and Incarceration*, *supra* note 83.
[115] *Child Support and Incarceration*, *supra* note 83.
[116] *Child Support and Incarceration*, *supra* note 83.
[117] *Child Support and Incarceration*, supra note 83.
[118] *Child Support and Incarceration*, supra note 83.
[119] *Child Support and Incarceration*, supra note 83
[120] *Child Support and Incarceration*, supra note 83.

across the country in state laws for modifying child custody while incarcerated. As one can imagine, this makes it significantly more difficult to properly modify a child support order to avoid ballooning debt while incarcerated.

D. Interest on arrears while incarcerated, subsequent ballooning debt, and the state collecting on owed welfare

The accumulating debt while incarcerated balloons quickly, especially as incarcerated individuals cannot make enough money to keep up with child support payments and because of interest on child support arrears. An illustrative anecdote is Earl Harris of Missouri, who went to prison in 1997 for dealing marijuana.[121] His child support obligation at the time he went in was $168.00 a month.[122] Despite his efforts to let the state know he was incarcerated and could not pay with his janitorial prison job paying him $7.50 a month, the debt continued to grow.[123] When Harris left in 2001, he owed more than 10,000 dollars in arrears, including interest.[124] Harris' situation is not unique: the Marshall Project interviewed nearly three dozen noncustodial parents in 10 states in 2015 and found that all the interviewees left prison owing between $10,000 and $110,000 in child support.[125] Those fathers were disproportionately black and poor.[126]

Additionally, children are not actually receiving any money the obligor parent was able to contribute, because the state often collects the money received from the obligor-parent for child support as repayment for various government benefits, like Temporary Assistance for Needy Families (TANF) and Medicaid, that had been provided to the family while the obligor was

[121] ELI HAGER, *For Men In Prison, Child Support Becomes a Crushing Debt*, THE MARSHALL PROJECT (Oct. 18, 2015), https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt.
[122] HAGER, *supra* note 121.
[123] HAGER, *supra* note 121.
[124] HAGER, *supra* note 121.
[125] HAGER, *supra* note 121.
[126] HAGER, *supra* note 121.

incarcerated.[127] The inevitable conclusion is that incarcerating an obligor-parent does not actually help the child obtain the financial support from their parent that they are entitled to. The child is receiving government benefits while the parent is incarcerated, which the parent must keep reimbursing until his debt to the government is paid, well after release.[128] One must question the effectiveness of incarceration as punishment for failure to pay child support, especially as children are oftentimes not receiving any benefit from their parent, nor likely seeing their non-custodial parent very often because the parent is imprisoned.

E. The resulting vicious cycle

Incarceration is usually a last resort, as states often garnish paychecks first, put liens on property, or freeze banks accounts.[129] However, with parents who have recently left incarceration and have very little to their name, there are no paychecks to garnish, no property to put a lien on, or a bank account to freeze.[130] This is especially since most states still allow a "felony-box" on employment applications for private-sectors employers, effectively barring people from many fields of employment.[131]

This ultimately means that the parent who recently left incarceration is unfortunately at risk of incarceration again for failing to meet child support obligations.[132] Thus, a vicious cycle of recidivism is created. Another potential situation is that the lack of funds and accumulating debt causes an incarcerated to commit another crime in the hopes of making money.[133] This is

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[127] Matthew Clarke, *Poor Parents Fail to Pay Child Support, Go to Jail*, PRISON LEGAL NEWS (Sept. 2, 2016), https://www.prisonlegalnews.org/news/2016/sep/2/poor-parents-fail-pay-child-support-go-jail.
[128] CLARKE, *supra* note 127.
[129] HAGER, *supra* note 121.
[130] HAGER, *supra* note 121.
[131] *Ensuring People with Convictions Have Fair A Chance to Work,* NAT'L EMP. L. PROJECT, https://www.nelp.org/campaign/ensuring-fair-chance-to-work/
[132] HAGER, *supra* note 121.
[133] HAGER, *supra* note 121.

exactly what happened to Harris who felt compelled to deal drugs again to increase cash flow.[134] Harris was subsequently arrested and spent an additional ten years in prison for the second drug dealing felony.[135] When he left, his child support debt ballooned to 25,000 dollars.[136]

As becomes clear, incarceration rarely solves the problem of being able to pay for child support while incarcerated or after release. In fact, it can make the situation significantly worse.

IV. The Potential Solutions

There are several potential solutions proposed here to the vicious cycle of incarceration and recidivism for failure to pay child support that 18 U.S.C. §228 contributes to.[137] First, Part IV will examine the progress made under the OCSE's Final Rule, the states that refused to cooperate with the Final Rule, and the potential solution to the lack of cooperation.[138] Then, Part IV will discuss the federal government potentially modeling after the legislative actions of certain states.[139] Modeling after legislation in certain states could well lead to abandoning 18 U.S.C. §228 completely or changing it drastically.[140] Finally, Part IV will also address deftly balancing the liberty interests of the parent-obligor with the needs of the child owed support.[141]

A. OCSE's Final Rule

In 2016, the OCSE published the Final Rule- Flexibility, Efficiency and Modernization in the Child Support Enforcement Program.[142] The Final Rule went into effect January 19, 2017 and

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[134] HAGER, *supra* note 121.
[135] HAGER *supra* note 121.
[136] HAGER, *supra* note 121.
[137] *See infra* pp. 23-31.
[138] *See infra* pp. 23-25 and notes 142-154.
[139] *See infra* pp. 29-30.
[140] *See infra* pp. 29-30.
[141] *See infra* p. 29.
[142] *Flexibility, Efficiency, and Modernization in Child Support Programs Final Rule*, OFF. CHILD SUPPORT ENF'T, (Jan. 9, 2017), https://www.acf.hhs.gov/css/training-technical-assistance/final-rule-resources.

was the first time the OCSE updated its regulations in 35 years.[143] Of particular focus in this section is the part of the Final Rule regarding Modification for Incarcerated Parents.[144] The crux of the Modification for Incarcerated Parents part of the Final Rule is to address the problem of states considering incarceration "voluntary unemployment," which does not allow obligor-parents to modify their child support order because of incarceration.[145] The Final Rule makes reference to extensive research that suggests that not allowing incarcerated parents to modify their child support leads to the child support debt ballooning and becoming harder to pay.[146] The Modification for Incarcerated Parents part is included in federal regulation 45 CFR 302.56(c)(3) dictates that states cannot treat incarceration as "voluntary unemployment" in establishing or modifying child support orders.[147] Another federal regulation, § 303.8(c), also dictates that states must not treat incarceration as a legal bar for petitioning and receiving an adjustment for a child support order.[148]

While the Final Rule is a much-needed step forward, and firmly based in research about the inability of recently incarcerated parents to pay child support, an enforcement problem remains. Around nine states refuse to implement the Final Rule: Montana, South Dakota, Kansas, Oklahoma, Arkansas, Kentucky, Tennessee, Virginia, and South Carolina.[149] These nine rogue

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[143] Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, (Dec. 20, 2016), (to be codified at 42 C.F.R. pt. 433), https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-29598.pdf.

[144] *Modification for Incarcerated Parents Flexibility, Efficiency, and Modernization in Child Support Programs Final Rule*, OFF. CHILD SUPPORT ENF'T DIV. POLICY & TRAINING, https://www.acf.hhs.gov/sites/default/files/documents/ocse/fem_final_rule_incarceration.pdf [hereinafter *Modification*].

[145] *Modification*, *supra* note 144.

[146] *Modification*, *supra* note 144.

[147] *Modification*, *supra* note 144.

[148] *Modification*, *supra* note 144.

[149] Kenya N. Rahmaan, *Incarceration Should Not Be Considered Voluntary Unemployment in Child Support Cases*, THE CHILD SUPPORT HUSTLE, (Feb. 19, 2021), https://thechildsupporthustle.com/2021/02/19/incarceration-should-not-be-considered-voluntary-unemployment-in-child-support-cases/.

states can continue considering incarceration as "voluntary unemployment" because the OCSE federal guidelines are merely guidelines, not statutes, and do not have any enforcement power.[150]

A potential solution is to pass a Congressional statute which mirrors the federal guidelines with explicit preemptory language. One must acknowledge that family law matters, like child support, are usually within the states' purview.[151] Therefore, foreseeable questions arise in this scenario regarding preemption regarding commandeering and the federal government overstepping its authority.[152] One potential solution is to pass a Congressional statute which mirrors the Federal Regulation language, with expressly peremptory language against states who still consider incarceration "voluntary unemployment."[153] Congress could also offer incentives such as federal funding for job placement programs for unemployed parents with child support obligations, or funding for state diversionary programs, in order to provide or promote "the general welfare" of the American citizenry that owes child support by helping them avoid ballooning child support debt.[154] Such diversionary programs are examined in the next section.

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[150] RAHMAAN, *supra* note 149.

[151] Robert Brammer & Barbara Davis, *Family Law: A Beginner's Guide – Part 1: Formation and Dissolution of Marriage*, LIBR. CONG. (Jun. 10, 2014), https://blogs.loc.gov/law/2014/06/family-law-a-beginners-guide-part-1-formation-and-dissolution-of-marriage/

[152] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) (describing that "[t]]he legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority").

[153] *Id*. at 1480 (noting that: "[o]ur cases have identified three different types of preemption—'conflict,' 'express,' and 'field,'… but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted").

[154] *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (noting that "[t]he Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)…").

B. State diversionary programs as an alternative model to incarceration under 18 U.S.C. §228

There are a couple of states leading the way in alternative models to incarceration for those that fall behind on child support payments. For example, Virginia's General Assembly created the Intensive Case Monitoring Program (ICMP).[155] ICMP is a diversion program for noncustodial parents who failed to pay child support, resulting from a court or administrative order referring those parents.[156] The program then refers parents to "(i) employment services, to include employment assessment, employment search, and employment training; (ii) family services, including parenting skills, co-parenting skills, and relationship-building activities for parents and children; (iii) educational services, including GED preparation and GED testing; (iv) housing services, including referrals to organizations that operate shelters and provide subsidies; (v) document assistance, including referrals to organizations and assistance in securing vital records, driver's licenses, commercial driver's licenses, or other documents; and (vi) social services, health and mental health services, substance abuse services, or other services that may be necessary to enable the person to pay child support owed in the future."[157] As one can see, these services are quite extensive in order to promote the goal of helping a non-custodial parent keep up with their child support obligations.

Georgia has made efforts to create a diversionary program for child support obligors who have been held in contempt for not paying child support, by passing the 2015 Georgia HB 310.[158] This bill creates a diversion center, where parent-obligors stay, and allows them to travel to and from their employment and working.[159] The parent obligor must remain in the diversion center

[155] *Child Support and Incarceration*, *supra* note 83.
[156] *Child Support and Incarceration*, *supra* note 83.
[157] *Child Support and Incarceration*, *supra* note 83.
[158] *Child Support and Incarceration*, *supra* note 83.
[159] *Child Support and Incarceration*, *supra* note 83.

for the duration of the sentence, with the exception of going to and from work.[160] The center requires the parent to pay alimony or child support as previously ordered, including arrears.[161] It also allows the parent to participate in educational or counseling programs offered at the center.[162]

Finally, if the parent does not comply with the diversion center's requirements, other alternatives to incarceration are offered.[163] It is not completely clear what those alternatives are, as Georgia HB 310 simply states the following: "[i]f the respondent fails to comply with any of the requirements imposed upon him or her in accordance with this Code section, nothing shall prevent the sentencing judge from revoking such assignment to a diversion program and providing for alternative methods of incarceration."[164] However, a subsequent section addresses what sanctions the Department of Community Supervision (DCS) can impose, with permission of the Court, "as an alternative to judicial modifications or revocations for probationers who violate the terms and conditions of the sentencing options system established under this article."[165] Some of these sanctions include probation boot camp, electronic monitoring, reporting to a DCS center, and community service.[166]

In Texas, there is a court diversion program that assists unemployed or underemployed noncustodial parents find and maintain employment called the NCP (Non-Custodial Parent) Choice Program. Participants spend 30 hours a week looking for a job, meet with the Workforce Counselor every week until employment is found, attend all court hearings and program

[160] *Child Support and Incarceration*, *supra* note 83.
[161] *Child Support and Incarceration*, *supra* note 83.
[162] *Child Support and Incarceration*, *supra* note 83.
[163] *Child Support and Incarceration*, *supra* note 83.
[164] H.B. 310, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015)
[165] *Id*.
[166] *Id*.

appointments, comply with the child support order, and stay in communication with their Workforce Counselor monthly following employment.

The results of these programs are very promising: In Texas, the following statistics from a 2011 study were reported: non-custodial parents paid $57 more child support 47 percent more often, showing a 51 percent increase in total collections.[167] These results continued for 2-4 years after programs participation.[168] Participants paid their child support 50 percent more consistently over time Participants were employed at 21 percent higher rates than non-participants, an effect that also persisted at least two to four years after the program.[169] Participants were about one third less likely to file an unemployment claim in any given month in the first year after the program.[170] Finally, the custodial parents associated with NCP Choices obligor parents were 21 percent less likely to receive TANF benefits in the first year after the program, and 29 percent less likely two to four years after the program. [171] Meanwhile, in Virginia, where the program was first implemented in 2008, a study showed that through December 2011, the program had collected over $3 million dollars, showing significant increases in average monthly child support payments among those in the program and those who graduated the program.[172]

A question arises on whether a diversionary center, like Georgia's, is functionally carceral. After all, a parent must comply with the diversion center's requirement or risk sanctions, as just delineated, and one must stay in the diversionary center for as long as required.[173] The best answer to this question is that while this program requires compliance with

[167] *Child Support and Incarceration*, *supra* note 83.
[168] *Child Support and Incarceration*, *supra* note 83.
[169] *Child Support and Incarceration*, *supra* note 83.
[170] *Child Support and Incarceration*, *supra* note 83.
[171] *Child Support and Incarceration*, *supra* note 83.
[172] *Child Support and Incarceration*, *supra* note 83.
[173] *Child Support and Incarceration*, *supra* note 83.

its parameters, the program is likely much more helpful to the non-custodial parent who owes child support than actual incarceration. As previously mentioned, these diversionary programs offer a variety of educational and job-related services not typically offered in a carceral setting.[174] These programs also allow the parent-obligor to keep their job, at a pay rate they had before entering the program.[175]

Keeping a parent out of jail and in a diversionary program that promotes job-placement arguably supports the goal of balancing the child's interests in being provided for and the liberty interest of the non-custodial parent. A custodial parent must apply for TANF and other government benefits like Medicaid when the non-custodial parent cannot meet their child support obligations, whether or not the non-custodial parent is incarcerated.[176] The non-custodial parent is then required to pay back the government for the benefits it provided in lieu of child support.[177] In 2013, for example, $30 billion in child support was owed by noncustodial parents to state and federal governments for TANF reimbursement.[178] As delineated earlier in the "Jobs, Not Jail" OCSE infographic, non-custodial parents on average spend a longer time unemployed after incarceration.[179] The unemployment could mean that the parent would be unable to pay back the government for the support it provided the family, as the parent-obligor is required to do.[180]

Similarly, jobs in jail or prison could pay less than minimum wage in incarceration, as seen in the Earl Harris example above.[181] The limited pay could mean the obligor- parent would

[174] *Child Support and Incarceration*, *supra* note 83.
[175] *Child Support and Incarceration*, *supra* note 83.
[176] CLARKE, *supra* note 127.
[177] CLARKE, *supra* note 127.
[178] CLARKE, *supra* note 127.
[179] *Jobs, Not Jail*, supra note 103.
[180] CLARKE, supra note 127.
[181] HAGER, *supra* note 121.

be unable to fully pay back the government for the support it provided the family while the parent is incarcerated, as the parent is required to do.[182] Thus, the burden could easily fall on the taxpayer to provide for the benefits for these needy families, without the government ever being fully reimbursed by the obligor-parent because the obligor-parent is unemployed or underemployed, in or out of incarceration. With that in mind, a diversionary program that promotes job placement could mean that the government would be more likely to be reimbursed if it provides benefits to the needy family, the child's needs would still be met, and the parent-obligor's liberty interests would be preserved.

If the federal government were to seek these diversionary programs instead of incarceration and costly fines, then 18 U.S.C. §228 may need to be abandoned entirely. Alternatively, it could be drastically changed. Eliminating the mandatory presumption could be the first step to drastically changing the statute, so that ability to pay child support could be determined.[183] The second step, if determining the parent does not have ability to pay child support, should be to refer a parent to diversionary programs instead of incarceration and costly fines.

V. Conclusion

Incarcerating parents for inability to pay child support often means, among other devastating consequences already discussed, that the incarcerated parent is spending less time with raising and being with their children.[184] Generally, it is a core value in society that parents spend quality time with and can rear their children, even if the parents are no longer together. It

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[182] CLARKE, *supra* note 127.
[183] *See supra* note 101-102 and accompanying text.
[184] JULIE POEHLMANN, DANIELLE DALLAIRE, ANN BOOKER LOPER, & LESLIE D. SHEAR, AM. PSYCHOL., AM. PSYCHOL. ASS'N, CHILDREN'S CONTACT WITH THEIR INCARCERATED PARENTS: RESEARCH FINDINGS AND RECOMMENDATIONS (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4229080.

is time to follow the recommendations of the OCSE which requires modifying child support orders as necessary based on ability to pay and emphasizing job-placement and diversionary programs.[185] Incarceration can be avoided that way and so would ballooning, insurmountable child support debt, which can create a vicious cycle for the parent-obligor and does not benefit the child.[186]

Quality time is not recognized when courts are determining whether a parent has complied with their child support order.[187] Although termed "noncash child support" and alluded to in some child support studies, contributions that non-custodial parents make to their children's welfare, for example buying them clothes, food, school books, or other necessities are also not recognized as complying with child support orders[188] Hopefully, society shifts away from incarcerating parents, enforcing costly fines, and insurmountable child support debt towards diversionary programs which ensure parents are complying with their child support obligations. In that process of shifting to better solutions to unpaid child support, perhaps other contributions that non-custodial parents make for their children could also be considered.

[185] *Modification*, *supra* note 144
[186] *Modification*, *supra* note 144.
[187] GRALL, *supra* note 11, at 1.
[188] GRALL, *supra* note 11, at 11-12.