Child Support Orders and the Incarceration of Noncustodial Parents

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Substantial policy attention and some research attention has recently been paid to the way the child support system interacts with the criminal justice system. Interest in this topic comes from a variety of directions. One factor leading to renewed interest has been a growing awareness of the high rates of incarceration in the United States, and the especially high rates for young African American men, many of whom are noncustodial parents. Simultaneously, the child support system has become more aware that the level of arrears is quite high, and that much of it may be uncollectable. This awareness has led to increased attention to factors related to nonpayment, and the high rate of incarceration of noncustodial parents has become a prevalent explanation for why nonpayment is so high. Finally, there has been an increased interest in the way various social policies interact with each other, as well as a desire to understand whether policies in different areas are mutually inconsistent.

This cluster of issues led the Wisconsin Department of Workforce Development to commission a paper by Jennifer Noyes, titled "Review of Child Support Policies for Incarcerated Payers" (2006).[1] The report covered estimates of the number of child support cases affected by incarceration, a review of how various states were handling child support orders when noncustodial parents were incarcerated, and more specific information on six states. Policy and practice issues were discussed. The paper by Noyes was used to help design a project in Milwaukee in which child support orders were suspended during incarceration. This project's most recent evaluation, an interim evaluation completed in December 2009, found limited short-term effects of the reform but some suggestions that there could be longer-term effects (Cancian, Noyes, Chung, Kaplan, and Thornton, 2009). The final evaluation of this project is underway and is expected in spring 2012.

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[1] http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/Noyes-Task5A-2006.pdf

This brief report updates and extends the previous work by Noyes, and is similar in that it focuses on national issues, rather than those specific to Wisconsin or the Milwaukee project. In particular, we examine the more recent literature for updated national estimates of the extent of overlap between the child support and criminal justice systems; we explore information about how the child support system in other states is responding when obligors are incarcerated; and we review recent estimates of the effects of different types of policy responses (with a particular focus on the level of arrears). This brief report provides background and context for any examinations of whether the child support guidelines should specifically address modifications to orders when obligors are incarcerated.

UPDATED ESTIMATES OF THE EXTENT OF OVERLAP BETWEEN THE CHILD SUPPORT AND CRIMINAL JUSTICE SYSTEMS

In 2006, Noyes noted that a majority of prisoners have minor children, and reviewed estimates of the number of incarcerated non-custodial parents. While national data on this topic remains difficult to find, the most recent figures estimate that 53 percent of those incarcerated in state or federal prison in 2007 were parents of minor children (Glaze and Maruschak, 2008). Further, an estimated one-quarter of inmates in federal or state prison have open child support cases (CLASP, 2003). As of 2007, an estimated 1.7 million children had an incarcerated noncustodial parent (Glaze and Maruschak, 2008). Studies of new births in large cities using Fragile Families data put incarceration rates of noncustodial parents even higher, and highlight the racial disparities in incarceration rates. For example, 40 percent of African American fathers had been incarcerated by their child's first birthday, compared to 18 percent of white fathers (Geller, Garfinkel, and Western, 2011). While the estimates have some limitations, the high numbers of incarcerated noncustodial parents clearly make this a significant policy issue.

POLICIES REGARDING ORDERS DURING INCARCERATION

A difficult and sometimes contentious issue has been whether, and at what level, a child support order should be set if a noncustodial parent is incarcerated. While the issue can be conceptually divided into (1) policies surrounding initial orders when a noncustodial parent is incarcerated and (2) policies surrounding whether existing orders should be modified when a noncustodial parent becomes incarcerated, the issues are quite similar and we focus most of our discussion on the issues surrounding modification. Often the issue has been framed in terms of whether incarceration is voluntary unemployment (so an initial order should be based on imputed income and a current order should not be modified) or involuntary (so an initial order should be set in the same way other initial orders are for zero-income, involuntarily unemployed cases, and any existing order should be modified to take into account the new, lower income).

In the past, many states treated incarceration as voluntary unemployment, and, as a result, orders were not modified when obligors became incarcerated. This practice began to change in the 1990s, and by the mid-2000s, there was substantial variation across states in whether incarceration was seen as voluntary or involuntary unemployment (Pearson, 2004; Noyes, 2006). As of the Noyes report in 2006, no state automatically lowered a child support obligation when the noncustodial parent became incarcerated. Some states considered incarceration as a change in circumstance that would permit a reduced order, but the burden was almost always on the incarcerated parent to be aware of the possibility of a revised order, and to then actually make the request. Since 2006, states have overall become somewhat more inclined to allow modifications for incarcerated non-custodial parents, though it remains the case that no state automatically reduces an order based on incarceration. For this report we have updated the information on each state's policy through web-based descriptions of policy and practice in each state. Table 1 shows

Table 1: State Policies on Whether Orders Can Be Modified Upon Incarceration

A: Incarceration is not a justification for order modification	B: Incarceration is one factor that can be considered in order modification	C: Incarceration in and of itself can be a justification for order modification
Arkansas	Alabama	California
Delaware	Alaska	Connecticut
Florida	Arizona**	Hawaii
Georgia	Colorado	Idaho
Kansas	Illinois	Maine
Kentucky*	Indiana**	Maryland***
Louisiana	Iowa	Massachusetts
Montana	Missouri*	Michigan
New Hampshire	Nebraska**	Minnesota
New York	Nevada	Mississippi
North Dakota*	New Mexico	New Jersey
Ohio	Pennsylvania**	North Carolina
Oklahoma*	Rhode Island	Oregon
South Carolina	Texas	Tennessee
South Dakota*	Wisconsin	Vermont
Utah		Washington
Virginia		West Virginia
		Wyoming

*imputes income based on prior earnings or full-time minimum wage work
**approach changed since 2006 from Type A to Type B
***approach changed since 2006 from Type A to Type C
Updated from tables found in Pearson (2004) and Turetsky (2008), using state statutes and relevant court cases.

our best estimate of the current policy in each state, as well as whether this has changed since 2006. We divide states into three types: Type A states are the most restrictive—incarceration is not stated as a reason to modify an order; Type B states consider incarceration as one possible factor that could lead to modification; and Type C states consider incarceration in and of itself as a reason to consider modifying an order. The table shows that seventeen states fit Type A, fifteen states are considered Type B, and eighteen states are Type C. Although only 46 states were categorized in 2006, the table still reflects movement away from Type A (21 states in 2006, down to 17 currently), toward Type B (11 in 2006, up to 15 currently) and toward Type C (14 in 2006, up to 18 currently). In cases where modification rules have changed, the adjustment was usually the result not of a legislative change, but rather of court cases brought by incarcerated non-custodial parents challenging the law or tradition of no modification in that state (Turetsky, 2008). These cases had various outcomes, some resulting in states affirming their decision to not allow modifications based on incarceration (Kentucky's *Avery v. Cabinet for Health and Family Services),* and others resulting in a reversal of previous state policy with incarceration now being considered as grounds for order modification (Indiana's *Lambert v. Lambert,* Pennsylvania's *Nash v. Herbster)* (Levingston and Turetsky, 2007; Turetsky, 2008). Still, in general the trend is toward more modifications being possible during incarceration.

EFFECTS OF CHILD SUPPORT RESPONSES TO INCARCERATION

The historical approach of not modifying orders has been linked to substantial amounts of arrears, as no (or very few) noncustodial parents make payments during incarceration. By the time of the Noyes report, arrears that accrued during incarceration were receiving increased attention. Today, this concern continues due to evidence that the amount of child support arrears is growing and becoming increasingly concentrated among a small proportion of obligors with

the least ability to pay, often due to previous or current incarceration. While there is little national data on the extent of arrears that accumulate during incarceration, basic data on arrears help set the context of the seriousness of this issue. As of 2010, the arrears owed in six states (California, Florida, Michigan, New York, Ohio, and Texas) accounted for half of the total arrears owed nationally (DHHS, 2011). Moreover, a small number of non-custodial parents increasingly owe a disproportionate amount of child support arrears (McLean and Thompson, 2007). In the nine states with the most arrears, 11 percent of the non-custodial parents with child support orders collectively owed 54 percent of the total arrears in those states (Sorensen, Sousa, and Schaner, 2007). Arrears accumulated during incarceration are often exacerbated by the fact that noncustodial parents often have other substantial debts after release from prison, including court costs, fines, and victim restitution (McLean and Thompson, 2007).

Three of the states with the largest balance of arrears (Florida, New York, Ohio) do not permit orders to be modified during incarceration because incarceration is considered to be a voluntary change in circumstances. Some states in which incarceration is not considered to be a complete justification for order modification will impute income based on the obligor's pre-incarceration wages, if they were employed, or based on full-time minimum-wage earnings in that state (Turetsky, 2008). It is perhaps not surprising, then, that states that impute income for orders during incarceration have cases with higher arrears per obligor than states that do not use that practice (Sorensen, Sousa, and Schaner, 2007). While at least five states still impute income for incarcerated parents, this practice is increasingly uncommon, and is considered to be excessively punitive and ineffective in getting obligors to pay either during or post-incarceration (Turetsky, 2000).

Because states with the highest levels of arrears are also states that do not typically modify orders, this suggests that policies of not modifying orders during incarceration may lead to higher arrears. There have also been several demonstration projects testing strategies to decrease incarcerated obligor debt, and several of these projects focused on more explicitly informing obligors of their right to request a modification. Noyes (2006) found that most projects related to order modification were more process- than outcome-based, and thus provided little evidence as to best practices for addressing child support orders for incarcerated parents. Additionally, studies often were of very short duration or conducted with such a small treatment group as to provide little or no generalizability. Noyes (2006) also noted that a wide variation of preferences for handling orders for incarcerated obligors is permitted under federal law, and these preferences can vary or change based on judicial outcomes, which can in turn impact relevant strategies.

The issues raised by Noyes regarding the relative absence of evidence-based research on child support orders for incarcerated parents remain relevant today, although a few demonstration projects have tested some of the currently popular strategies. Again, demonstration projects are often conducted for only a small treatment group and over a limited period of time. Current strategies have focused on two main areas for intervention—strategies for modifying orders during the incarceration period, and those for adjusting orders upon release.

Strategies for addressing child support obligations during incarceration have included movement toward incarceration as involuntary unemployment to allow for modification (as described above), automatic modification of child support payments at the time of incarceration, and speeding up and simplifying the modification process for incarcerated parents to encourage them to seek a modified order. There are some demonstration projects focused on these

interventions, although few have been subject to rigorous evaluation. Because most modification policies are intended to avoid the accumulation of arrears during incarceration, modified orders are generally reduced to zero or a minimum level such as $50 per month (DHHS, 2007). Another strategy being used to reduce arrears is to target incarcerated obligors who have significant state-owed arrears prior to incarceration, and develop procedures for forgiving or reducing the debt. This approach is being tested in Washington and Colorado (DHHS 2007).

The most common strategy is expedited order modification wherein states that allow modifications for incarcerated parents speed up or simplify the modification process to encourage obligors to seek a modification. The normal process for modifying an order takes an average of three to seven months to complete, and the application process is often cumbersome (Pearson 2004; DHHS, 2007). To expedite the process, some jurisdictions such as Los Angeles County have implemented a passive approval method for order modifications, with a hearing held only if either party objects to the modification. Minnesota and Illinois have created simplified paperwork for obligors, and a child support enforcement official will visit the incarcerated obligor in prison in order to assist with the process (DHHS 2007). So far, the results of demonstration projects that focus on either simplifying or expediting procedures for modifying orders for incarcerated obligors indicate that the extra intervention is time-intensive for child support workers, and many obligors still do not follow through with order modification (Center for Policy Research, 2009). Perhaps with this concern in mind, Colorado has implemented a two year pilot project (2009–2011) in which non-custodial parents being incarcerated for two or more years have their orders automatically reduced to $50 per month during their sentence (DHHS, 2011).

One notable project occurred in Milwaukee County. In this project, incarcerated obligors had their child support orders reduced to zero during the period of their incarceration (Cancian et al., 2009). An evaluation of this Milwaukee prison project is currently underway. When this evaluation is completed in 2012, it will substantially increase what is known about the effects of modifying orders during incarceration. In contrast to the demonstrations described above, the Milwaukee project has a substantial number of cases affected as well as a sophisticated evaluation plan that compares cases with modified orders to comparable cases without modified orders.

CHILD SUPPORT POLICIES AFTER RELEASE FROM INCARCERATION

A few strategies have been pursued in order to motivate an obligor to begin paying child support after release, as well as to make those payments more financially feasible. These strategies have included implementing a grace period on child support payments after release from prison, reentry programs focusing on eliminating barriers to finding employment and housing, and programs that allow for forgiveness of arrears accrued during incarceration (or otherwise) as long as certain conditions are met.

Strategies aimed to encourage payments from the obligor after release from prison are usually focused primarily on common reentry issues, but one strategy related to order modification after release is a grace period for payments. In 2003, Oregon amended its child support review guidelines so that modified orders for obligors set at zero during incarceration extended to 60 days after release, giving the obligor more time to re-establish himself and find housing and employment (McLean and Thompson, 2007). The Office of Child Support Enforcement has highlighted this strategy as a means of reducing arrears accumulation, in conjunction with modifying an obligor's order during the incarceration period (DHHS, 2006).

Reentry groups have also promoted this strategy, based on either a 60- or 90-day grace period, as has the Council of State Governments (2005), but this policy remains largely unimplemented. Most other efforts related to newly released obligors have addressed employment and housing barriers common among this population (DHHS, 2006). Thus, there is currently little evidence base on best practices for child support order modification post-release.

A final policy area relevant to those released from incarceration involves programs to reduce or forgive a portion of arrears that have accumulated during incarceration. Policies in this area have not usually focused specifically on arrears that resulted from incarceration, but rather more generally on cases with high levels of arrears; for a review of these policies, and the program in Racine County, see Heinrich, Burkhardt and Shager (2010). In general, there is some evidence of positive effects for policies that forgive arrears in response to payments.

SUMMARY

In summary, the most recent figures continue to show substantial overlap between the prison population and child support cases. Child support guidelines in most states do not explicitly address how the order is to be set during a period of incarceration. Most of the policy discussion has been about whether orders should be modified during incarceration, and whether the modification should be automatic or not. While there have been a variety of demonstrations and exploration of different types of policies, there is at this point no research consensus that could guide best practice. Thus, although changes to the guidelines to explicitly address incarceration could be considered, there is little empirical evidence on which to base a change.

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