
UC DAVIS LAW REVIEW ONLINE

VOL. 58



DECEMBER 2024

NOTE

Behind and Beyond Bars: Children of Incarcerated Parents

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“My God, my God,’ I said to myself, ‘It’s the Children’s Crusade.’”¹

INTRODUCTION

When I was in high school, my mother received a humorless letter from California’s Child Support Services that made her laugh. Enclosed was a check made out to her name: “Twelve dollars and zero cents.” It was our first and last time receiving a child support payment from my incarcerated biological father.

As a child, I spent many Sundays waking up at four in the morning to make the trek from Los Angeles to penitentiaries in central California. My paternal grandmother accompanied me and my older brother on these trips, and I grew up with a hyper-awareness of prison visitation etiquette: I worried about wearing permissible colors,² the documents I needed for entry,³ packing our quarters in a Ziploc bag for the vending machines,⁴ and reserving the seat facing the front of the visitation room for my father.⁵ Violation of such guidelines could, and sometimes did, result in a denial of entry or suspended visitation rights.⁶ Being so

¹ KURT VONNEGUT, *SLAUGHTERHOUSE-FIVE, OR THE CHILDREN’S CRUSADE: A DUTY-DANCE WITH DEATH* 106 (1969).

² See *Attire Restrictions*, CAL. DEP’T OF CORR. & REHAB., <https://www.cdcr.ca.gov/visitors/attire-restrictions/> (last visited Oct. 28, 2024) [<https://perma.cc/4SQA-U2K9>] (requiring visitors to wear “[c]lothing that resembles state-issued clothing that an incarcerated person wears to visiting”).

³ See *Identification Required for Visiting*, CAL. DEP’T OF CORR. & REHAB., <https://www.cdcr.ca.gov/visitors/identification-required-for-visiting/> (last visited Oct. 29, 2024) [<https://perma.cc/RHH5-YW2S>] (requiring a copy of a minor’s birth certificate for visitation).

⁴ See *Items a Visitor May Bring*, CAL. DEP’T OF CORR. & REHAB., <https://www.cdcr.ca.gov/visitors/items-a-visitor-may-bring/> (last visited Oct. 28, 2024) [<https://perma.cc/NHC6-JMYQ>] (detailing the restrictions imposed upon items that a visitor may bring into the prison).

⁵ See *In the Visiting Room*, CAL. DEP’T OF CORR. & REHAB., <https://www.cdcr.ca.gov/visitors/in-the-visiting-room/> (last visited Oct. 29, 2024) [<https://perma.cc/3GEU-3BD4>] (“There is usually a podium or control booth [in the visiting room] where at least one [correctional] officer will sit Incarcerated people are usually required to sit facing the podium or control booth.”).

⁶ I recall a devastating instance in which my grandmother did not have one of our documents and we were turned away, forced to make the four-hour drive back home after waiting an hour in processing. That day, we were not allowed so much as a phone

young, I also grappled with understanding the concept of incarceration itself. “One time,” my father told me in a recent conversation, “I was saying goodbye and you started crying and did not want to let me go, asking why I couldn’t come home with you. That wrenched my heart, tore at my soul, and I just felt so bad that I had to put you through that. That moment really made me feel like such a failure.” After a while, my entanglement with the prison system became too heavy for a child to bear, so I phased these visits out of my life around age ten. Though the visits ceased, my anxiety and discomfort surrounding incarceration remained.

To analyze my justice-impacted⁷ rearing within the legal context, it is relevant to understand my parents’ backgrounds. Both first-generation Asian-Americans, they were each raised by immigrant parents who worked so hard to adjust to America that they had little time to be effective disciplinarians. Largely left to their own devices, my parents became involved in gang activity as teenagers in a subconscious search for community. The pair met as leaders of their gang and were soon consumed by a lifestyle riddled with drugs, crime, violence, and growing RAP sheets.⁸ When my mother and father were sixteen and seventeen

call with my father to explain the situation, and we had to reapply for another visit (for which approval took several weeks). See *Visiting Information*, CAL. DEP’T OF CORR. & REHAB., <https://www.cdcr.ca.gov/ombuds/ombuds/visiting/#:~:text=The%20review%20and%20approval%20process,her%20responsibility%20to%20notify%20you> (last visited Oct. 29, 2024) [<https://perma.cc/A77W-URQN>] (“The review and approval process could take 4-6 weeks.”). The mental, emotional, and physical exhaustion of such an ordeal for both the inmate and visitors cannot be understated.

⁷ The term “justice-impacted” has surfaced to refer to individuals who have been affected by the criminal justice system, either directly or through loved ones. Jhody Polk & Tyler Walton, *Legal Empowerment Is Abolition*, 98 N.Y.U. L. REV. ONLINE 282, 285 n.9 (2023). Similar terms that are often used interchangeably include “justice-involved” or “system-impacted.” See *Justice-Impacted Students*, TCHRS. COLL. COLUM. UNIV., <https://www.tc.columbia.edu/tcnext/identity-and-career/justice-impacted/> (last visited Oct. 29, 2024) [<https://perma.cc/7QJG-UY53>]; *Justice-Impacted*, RUTGERS-NEWARK CAREER RES. & EXPL., <https://careers.newark.rutgers.edu/channels/justice-impacted/> [<https://perma.cc/FXS8-CKGS>].

⁸ “RAP” is an acronym used to refer to an individual’s “Record of Arrests and Prosecutions,” or a list of one’s criminal history containing all contact with the criminal justice system. This includes “arrests, charges, convictions, acquittals, dismissals, pleas, sentences, and open warrants.” *What Is a RAP Sheet and Why Is It Important?*, ROOT & REBOUND, <https://roadmap.rootandrebound.org/understanding-cleaning-up-your-criminal->

years old, respectively, their lives were further muddled with the birth of my older brother. Yet despite their young age and tumultuous marriage, they possessed natural intelligence and were resilient parents. They completed high school and financially supported each other as my father obtained a software engineering license and my mother became a licensed vocational nurse. But when I was born five years after my brother, my parents separated, and my father began his first fifteen-year prison sentence shortly thereafter.⁹

During this time, my mother fell into a deep depression that rendered her incapable of caring for her children: “I left you with Grandma and told her I’d be back in a day. I came back a year later.” My maternal grandparents cared for me and my brother while my mother battled addiction, homelessness, and jail. Miraculously, it was my father’s final sentencing that caused her to resurface, and she reclaimed us with a renewed determination to overcome our circumstances. But without a co-parent’s contributions, my mother struggled with the financial adjustment of suddenly becoming our sole provider. Even if we had received child support from my father, the pennies he earned as a prison laborer paled in comparison to the cost of raising two children.¹⁰

From poor finances to mental health afflictions, my upbringing featured several characteristic manifestations of being a prisoner’s

record/key-concepts-for-understanding-your-criminal-recor/types-of-criminal-records/rap-sheets/what-is-a-rap-sheet-and-why-is-it-important/ (last visited Nov. 18, 2024) [<https://perma.cc/9NJL-UVPY>].

⁹ My father served his first sentence from 2001–2015, fell victim to recidivism only six months after release, then began his current life sentence in 2016.

¹⁰ When my father began his first prison job assignment in 2001, he earned eight cents an hour. Over the course of his two sentences, he worked several jobs, all ranging from wages of eight to eighty cents. He has since progressed to a specialized role as a Peer Literacy Mentor after obtaining two associate degrees, earning a career-topping hourly rate of \$1 in 2024. See generally THE CAL. BUDGET PROJECT, MAKING ENDS MEET: HOW MUCH DOES IT COST TO RAISE A FAMILY IN CALIFORNIA? (1999), <https://www.sccoe.org/depts/educational-services/early-learning-services/Documents/Making%20Ends%20Meet%20-%20How%20much%20does%20it%20cost%20to%20raise%20a%20family%20in%20California.pdf> (discussing “the difficulties that families face in meeting basic living expenses”); *infra* Part II.B.

child.¹¹ Our little family moved frequently and always into cramped apartments. Before settling back into Los Angeles, my mother moved us across the country for her rigorous addiction treatments and then to the Philippines for her college degree.¹² For years, she worked as a teacher on weekdays, a nurse on the weekends, and somehow squeezed in earning her master's and doctoral degrees in education. My mother's perseverance kept us afloat, but my brother and I still struggled individually against unseen adversaries. We "acted out" in our own ways, always frustrated and angry but not knowing why or towards whom. Despite being a very bright child, my high school academic performance dwindled due to stress and disinterest, and my already strained relationship with my estranged father fell into complete disrepair as I grew ashamed of having an incarcerated parent.

Perhaps the most damaging impact from my father's incarceration was the latent toll it took on my young psyche. Having a "bad actor" as a father made me feel as if I was born inherently "bad," and the adversities I faced were punishments I needed to endure to rectify his crimes against society. I nursed an internalized self-deprecation that led me to subliminally overcompensate in adulthood. I needed to be outstanding to prove my worth; I needed to become a lawyer and uphold the law more than my father broke it; I needed to put as much distance between myself and the type of person I held responsible for my family's suffering. As motivating and productive as these misguided notions ultimately proved themselves to be, they were, nevertheless, egregious misconceptions of the social order. I sought to unravel these misconceptions by exploring the root causes of incarceration — severe

¹¹ Children of incarcerated parents typically have disrupted lifestyles, including increased interaction with the criminal justice system, poverty, lack of stability, mental health issues, and lower access to education. *See infra* Part I.B.

¹² "When getting clean," my mother recounted, "I had to get out of Los Angeles because of the old circle I ran with. I needed someone to help me. I knew I could do it, but I couldn't do it alone."

lack of mental health resources,¹³ recidivism rates and contributors,¹⁴ and the prison labor industry.¹⁵ Eventually, I learned enough to ask the question pervading my own lived experiences: why must prisoners' children "do time" along with their parents?

THE EVOLUTION OF FAMILY DYNAMICS WITHIN THE AMERICAN DREAM

For years, the American Dream featured a white picket fence and a nuclear family: hardworking father, stay-at-home mother, 2.5 carefree children, and Fido the lovable rascal.¹⁶ The single-family home epitomized the American paragon of stability,¹⁷ and the parents therein were expected to provide for their children financially, emotionally, and physically in furtherance of that collective goal.¹⁸ However, as time progressed, new familial ideals began to emerge, and modernity embraced a wider array of non-traditional notions surrounding relationships.¹⁹ These emerging family types introduced climbing rates of spousal separation as socioeconomic independence outside of

¹³ See ELISA JACOME, STAN. INST. FOR ECON. POL'Y RSCH., HOW BETTER ACCESS TO MENTAL HEALTH CARE CAN REDUCE CRIME 2 (July 2021), <https://siepr.stanford.edu/publications/policy-brief/how-better-access-mental-health-care-can-reduce-crime> [<https://perma.cc/5FDR-LTEY>].

¹⁴ RYAN COTTER, U.S. SENT'G COMM'N, LENGTH OF INCARCERATION AND RECIDIVISM 6 (June 2022) ("Recidivism 'refers to a person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime.'").

¹⁵ See *infra* Part I.A.

¹⁶ See John Archer, *The Resilience of Myth: The Politics of the American Dream*, 25 TRADITIONAL DWELLINGS & SETTLEMENTS REV. 7, 7 (2014) (discussing the prevalence of the desire to have a single-house family in America).

¹⁷ *Id.* at 10 (referencing the "[suggestion] that ownership of property in the form of single-family homes was, in effect, a patriotic duty: 'No greater contribution could be made to assure the stability of the Nation, and the advancement of its ideals, than to make it a Nation of home-owning families'").

¹⁸ Jessica Feinberg, *Parent Zero*, 55 U.C. DAVIS L. REV. 2271, 2273 (2022) ("Legal parentage provides an individual with critical rights and obligations relating to the child. . . . The legally recognized parent-child relationship also provides the child with essential rights and protections in areas such as, *inter alia*, inheritance, healthcare, support, and social security.").

¹⁹ See generally Courtney G. Joslin, *The Evolution of the American Family*, 36 HUM. RTS. 2 (2009) (describing late-nineteenth and early-twentieth century developments resulting in the evolution of the modern American family).

marriage became more accessible, resulting in split custody or nonmarital children.²⁰ Despite this evolution of the modern family from a single unit to multiple fragments, a parent's obligation to sustain their children's well-being persevered by way of moral and legal duties.²¹ Legislators were thus tasked with ensuring that a physical distance between separated parents and their children did not also lead to a financial divide.²² As a result, various solutions have unfolded that are relative to the degree of familial separation present in each case.²³ It follows that the more unique a family's circumstances are, the more complex of a solution they require;²⁴ it is increasingly difficult to hold a parent accountable to their children if they are less involved, wholly uninvolved, or physically absent.²⁵ Of the various types of divided families, those featuring an incarcerated parent are amongst the smallest and, arguably, most complicated. When a family loses a parent to the carceral system, the fulfillment of child support suffers a severe negative impact due to an incarcerated individual's complete exclusion from society and sharply increased likelihood of financial hardship.²⁶

²⁰ See generally *id.* (discussing a twentieth-century increase in divorce rates and unmarried cohabiting couples).

²¹ See Feinberg, *supra* note 18, at 2273.

²² See Thomas H. Bates, *Introduction* to JULIE BATZ, JUDITH DAVID & JANET SCHNEIDER, AN ANALYSIS OF THE CALIFORNIA CHILD SUPPORT SYSTEM (Sherry Novick ed., 1988) ("Policymakers and law enforcement officials face the challenge of ensuring that in spite of living with only one parent, these children receive support from both their parents — the one with whom they live and the one outside the home.").

²³ See, e.g., *Managing and Navigating Your Child Support Payments*, ROOT & REBOUND, <https://roadmap.rootandrebound.org/family-children/managing-navigating-spousal-child-support/child-support-debt/managing-your-child-support-payments/i-am-currently-incarcerated-do-my-child-support-pa/> (last visited Oct. 29, 2024) [<https://perma.cc/KXG9-A9PS>] (providing guidance to child support obligators depending on individual circumstance, including generally making child support payments, what happens to child support upon losing a job or becoming incarcerated, etc.).

²⁴ See *id.*

²⁵ See Drew A. Swank, *Enforcing the Unenforceable: Child Support Obligations of the Incarcerated*, 7 U.C. DAVIS J. JUV. L. & POL'Y 61, 65 (2003).

²⁶ See *id.* at 61 ("In the United States, there are two growing, interrelated epidemics: the number of individuals incarcerated and the non-payment of child support.").

“Child support” refers to the “financial contribution of an absent or noncustodial parent to the rearing of his or her children.”²⁷ Under California’s Family Code, court-ordered child support is suspended while a parent is incarcerated if the incarceration period exceeds ninety days, subject to exceptions.²⁸ This system accounts for the incarcerated parent’s lack of or reduced access to earnings while being institutionalized.²⁹ While there has been extensive action aimed toward altering child support payments to account for the parent’s period of incarceration,³⁰ there is little legislation or case law geared towards making up for lost child support from parents who are serving life-long or long-term sentences.³¹ Indeed, scholars note that “[r]ather than foster parental responsibility, the current California child support enforcement system tolerates parental *irresponsibility*.”³² In conjunction with a system that generally defaults to non-prioritization of child

²⁷ BATZ ET AL., *supra* note 22, at ii.

²⁸ CAL. FAM. CODE § 4007.5; *see also* LEGAL SERVS. FOR PRISONERS WITH CHILD., INCARCERATED PARENTS MANUAL: LEGAL RIGHTS AND RESPONSIBILITIES 24 (Carol Strickman ed., 2015), https://www.courts.ca.gov/documents/BTB_23_4K_4.pdf [<https://perma.cc/R33M-J72Y>].

²⁹ *See In re Marriage of Regnery*, 214 Cal. App. 3d 1367, 1372-73 (1989).

³⁰ *See, e.g.,* Cory Holifield Bennett, *Executive Order 13563 Creates Access to Affordable Child Support Orders for Incarcerated Parents*, 5 TEX. A&M J. PROP. L. 201, 202-03 (2019) (“On December 20, 2016, President Barack Obama issued an executive order modifying the guidelines for setting child support orders under the Child Support Enforcement Program. In this final rule, states are prohibited from treating incarceration as ‘voluntary unemployment’ when establishing or modifying [child] support orders.” (alteration in original)).

³¹ *See* CHARLENE WEAR SIMMONS, CAL. RSCH. BUREAU, CHILDREN OF INCARCERATED PARENTS 1 (2000) (“Although considerable information has been generated in a number of small-scale studies, the Child Welfare League of America concludes ‘... the true scope of the problem is uncertain because few reliable statistics exist.’”); *see also* Karen Rothschild Cavanaugh & Daniel Pollack, *Child Support Obligations of Incarcerated Parents*, 7 CORNELL J. L. & PUB. POL’Y 531, 533-48 (1998) (discussing indigent incarcerated parents, but all instances and cases involve some form of release date in sight). For the purposes of this Note, “long-term” may refer to any objectively elongated period of time beyond the ninety-day minimum, but primarily to those sentences that terminate after the child has surpassed the limit of legal dependency constraints. *See Child Support*, CAL. CTS., <https://selfhelp.courts.ca.gov/child-support> (last visited Oct. 30, 2024) [<https://perma.cc/H6DS-G2RW>] (reporting that “[t]he duty to pay support typically ends when a child turns 18 and graduates high school”).

³² BATZ ET AL., *supra* note 22, at 34 (emphasis added).

support enforcement, these “career prisoner” parents have no option but to permanently abrogate their financial responsibilities to their children.³³

This Note is the first to analyze the various statutory and social avenues that lead to this niche and largely overlooked epidemic of confining the children of long-term inmates to lower financial levels. In tandem with the mental and emotional difficulties already associated with having an incarcerated parent,³⁴ this nearly inescapable financial burden creates a high barrier for inmates’ children to simply survive, let alone live comfortably.³⁵ As a result, the struggle to meet these children’s basic needs contributes to a self-sustaining generational cycle of poverty and, statistically, incarceration.³⁶

Part I.A of this Note provides the background and history of California as a prevalent carceral state, with a critical focus on the use of prisons for (criminally) cheap labor and the agencies through which inmate wages are administered.³⁷ Part I.B delineates the sparsely available data regarding children with incarcerated parents in the state of California and the demographic’s accompanying predispositions.³⁸ Part I.C explains the function and applicability of California Family Code § 4007.5 as the relevant child support governance.³⁹

Part II connects the effects of meager prison wages with the determinative standard for child support payments, highlighting how California law fails to consider the interests of dependents when

³³ See *id.* at ii (“Available statistics reveal that in a majority of cases, child support obligations are not upheld and delinquency often goes unrectified.”).

³⁴ See SIMMONS, *supra* note 31, at 1 (“Children whose parents have been arrested and incarcerated face unique difficulties. Many have experienced the trauma of sudden separation from their sole caregiver, and most are vulnerable to feelings of fear, anxiety, anger, sadness, depression and guilt.”).

³⁵ See Swank, *supra* note 25, at 64 (“Non-payment of child support is a leading cause of child poverty and has been cited as the nation’s greatest source of financial insecurity. . . . The possibility of a child escaping poverty often depends on whether the child receives child support.”).

³⁶ See SIMMONS, *supra* note 31, at 1 (“The behavioral consequences can be severe, absent positive intervention — emotional withdrawal, failure in school, delinquency and risk of intergenerational incarceration.”).

³⁷ See *infra* Part I.A.

³⁸ See *infra* Part I.B.

³⁹ See *infra* Part I.C.

accommodating for their incarcerated parents' inability to pay child support.⁴⁰ Part II.A discusses case law in which courts set forth bright-line rules for imputing income to an incarcerated parent, along with other lawmaking avenues through which incarcerated parents are disproportionately prioritized in relation to their children's needs.⁴¹ Part II.B argues that the "nested exemption" contained in California Family Code § 4007.5(a) has no impact on long-term incarcerated parents in its current form, rendering the relevant code section futile and vastly underutilized for indigent parents.⁴² Part II.C explores policy arguments behind expanding child support regulations, including minimizing inequitable third-party effects and the utilitarian and economic motivations for inducing progress.⁴³

Finally, Part III proposes a solution composed of a framework that rebalances the interests of children with those of their incarcerated parents.⁴⁴ California law carves out an exemption to child support obligations in order to prevent an insurmountable post-release accumulation of debt for the parent (or to dismiss the order completely based on the permanently altered financial circumstances of a lengthy or indefinite sentence),⁴⁵ but lawmakers failed to bridge the gap by replacing or supplementing the dependent child's loss of that support.⁴⁶ Accordingly, inmate wages should be increased, and those earnings should either (1) be remitted to their own children as support payments or (2) pooled into an aggregate fund of incarcerated parents' wages and distributed equally among the children of those contributing parents.⁴⁷ These proposed solutions would not only be equitable for the children and custodial parents, but they also begin to deconstruct the leviathan of institutionalized slavery in furtherance of prison labor rights.⁴⁸

⁴⁰ See *infra* Part II.

⁴¹ See *infra* Part II.A.

⁴² See *infra* Part II.B.

⁴³ See *infra* Part II.C.

⁴⁴ See *infra* Part III.

⁴⁵ CAL. FAM. CODE § 4007.5.

⁴⁶ See *infra* Part III.

⁴⁷ See *infra* Part III.

⁴⁸ See, e.g., ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 19 (2022) ("Incarcerated people in 17 states

I. BACKGROUND

A. *The History of California as a Carceral Labor State*

As one of the most densely populated regions in the United States, California's prison population hovers around 95,000 inmates.⁴⁹ This massive population leads to an issue of overcrowded facilities, which the state purports to remedy by outsourcing inmates to privately and municipally operated or owned "contract facilities."⁵⁰ These contract facilities are constitutionally permissible under the Thirteenth Amendment that "outlawed slavery and involuntary servitude, 'except as a punishment for crime whereof the party shall have been duly convicted.'"⁵¹ There are four main categories of prison labor: (1) internal facility maintenance, (2) state prison industries, (3) public works assignments, and (4) private industry work through the Prison Industry Enhancement Certification Program ("PIECP").⁵² Present a never-ending supply of manpower and absent an obligation to provide incarcerated workers with labor rights, private institutions and public agencies alike are able to exploit this population for cheap labor.⁵³

This ostensibly symbiotic business relationship between prisoners and institutions began in 1990 when voters passed Proposition 139, the Prison Incarcerated Individual Labor Initiative.⁵⁴ Implemented through the Joint Venture Program,⁵⁵ Proposition 139 allowed the California Department of Corrections and Rehabilitations ("CDCR") to work with

went on strike in August 2018 to call attention to various issues, including low wages, and called for work stoppages and an end to what the organizers called 'prison slavery.'") [hereinafter ACLU]; *id.* at 25 ("Given this gaping loophole [allowing slavery and involuntary servitude as punishments for crimes], states turned to incarcerated labor as a means of partially replacing chattel slavery and the free labor force slavery provided.").

⁴⁹ Heather Harris & Sean Cremin, *California's Prison Population*, PUB. POL'Y INST. OF CAL. (Sept. 2024), <https://www.ppic.org/publication/californias-prison-population/> [https://perma.cc/89TT-JDS6].

⁵⁰ *See id.*

⁵¹ ACLU, *supra* note 48, at 25 (quoting U.S. CONST. amend. XIII).

⁵² *Id.* at 8-9.

⁵³ *See id.* at 5-6; *infra* Part II.B.

⁵⁴ *About*, CAL. PRISON INDUS. AUTH., <https://jointventureprogram.calpia.ca.gov/about/> (last updated July 25, 2022) [https://perma.cc/5A5H-VFW9] [hereinafter CALPIA].

⁵⁵ *Id.*

“public entities, businesses and others” and create these contract facilities within the state.⁵⁶ The Joint Venture Program is facilitated by the California Prison Industry Authority (“CalPIA”) and is intended to be “a cooperative effort of private industry and the state of California benefiting businesses, victims, and the state while preparing incarcerated individuals for successful reintegration into the community.”⁵⁷

The intended “cooperative effort,” however, effectively excludes the interests of the individuals actually performing the labor.⁵⁸ California requires all “able-bodied prisoners” to work, participate in rehabilitative programming, or do both.⁵⁹ Prison labor and its tangible contributions are major factors in the American economy,⁶⁰ with California as the frontrunner in terms of production and financial output.⁶¹ Recent numbers project that there are 64,788 incarcerated workers in California alone.⁶² In 2019, California’s correctional industries program ranked number one in net sales for the fiscal year: the Golden State netted \$249,961,931, a whopping \$136.7 million ahead of the next state.⁶³ The California Prison Industry produces an all-encompassing range of goods, including “office furniture, clothing and food products, [and]

⁵⁶ CAL. PENAL CODE § 2717.1.

⁵⁷ CALPIA, *supra* note 54.

⁵⁸ See ACLU, *supra* note 48, at 5 (“Incarcerated workers are under the complete control of their employers, and they have been stripped of even the most minimal protections against labor exploitation and abuse. From the moment they enter the prison gates, they lose the right to refuse to work.”).

⁵⁹ Byrhonda Lyons, *California Lawmakers Reject Ballot Proposal that Aimed to End Forced Prison Labor*, CALMATTERS (June 30, 2022), <https://calmatters.org/justice/2022/06/california-prisoners-work-involuntary-servitude/> [<https://perma.cc/M7GP-V2AZ>].

⁶⁰ See ACLU, *supra* note 48, at 37 (“In the early 20th century, the value of commodities produced by incarcerated workers was estimated to be around \$650 million. In 2021, the value of goods, services, and commodities produced by the 51,569 incarcerated workers employed in prison industries programs — who represent only about 6.5 percent of all incarcerated workers — totaled over \$2 billion.”).

⁶¹ See *id.* at 39-40.

⁶² *Id.* at 94.

⁶³ *Id.* at 40.

license plates,” benefitting nearly every aspect of our community⁶⁴ while receiving a scant fraction of the proceeds in compensation.⁶⁵

B. Facts and Figures: Children of Incarcerated Parents

Sixteen-year-old Terrence watched as police officers kicked down his front door, handcuffed his mother and hauled her away, and told him, “Call somebody to come watch you.”⁶⁶ No one cared to actually follow up with Terrence, and he spent the majority of his mother’s six-month incarceration surviving on his own.⁶⁷ When the teenager used all fifty-six dollars in his piggy bank to feed himself, he did odd jobs around the neighborhood to generate cash for living expenses.⁶⁸ However, running a newspaper route proved inadequate for paying the house bills, and his utilities were soon disconnected.⁶⁹ He resorted to staying at a friend’s house, where his friend’s parent finally noticed Terrence’s situation and put him on emergency foster care.⁷⁰

Unfortunately, Terrence’s story is demonstrative of the unique challenges faced by most children of incarcerated parents.⁷¹ Though not always this extreme, adversity persists across ranges of lived experiences.⁷² In California, “[n]early 200,000 kids . . . have a parent

⁶⁴ Ryan Fonseca, *A New Push to Ban Involuntary Servitude in California Prisons*, L.A. TIMES (Feb. 28, 2023, 5:55 AM), <https://www.latimes.com/california/newsletter/2023-02-28/essential-california-involuntary-servitude-ban-essential-california> [https://perma.cc/W2LP-4XET]. For a portion of his sentence, my father worked in textiles and sewed uniforms for government workers.

⁶⁵ See *infra* Part II.B.

⁶⁶ S.F. P’SHP FOR INCARCERATED PARENTS, CHILDREN OF INCARCERATED PARENTS: A BILL OF RIGHTS 9 (2003) (hereinafter S.F. P’SHP).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.* at 19-20.

⁷² My personal experience was quite different from Terrence’s, showing that the hardships we face can take various forms. See, e.g., Leah Wang, *Both Sides of the Bars: How Mass Incarceration Punishes Families*, PRISON POL’Y INITIATIVE (Aug. 11, 2022), https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration/ [https://perma.cc/78U7-HFEG]; *supra* INTRODUCTION.

who is behind bars.”⁷³ If a child’s primary parental caretaker goes to prison, they go on to live with other family members, friends, state institutions, or even on their own as vulnerable, unhoused individuals.⁷⁴ For the other group of children whose noncustodial parent goes to prison, the most tangible effect is the financial impact: “More than one-fourth (27%) of parents in state prisons with minor children owe ongoing child support, and most of those (80%), unsurprisingly, owe back pay.”⁷⁵ On a national scale, 29% of children in a single-parent household live below the poverty level, and this number “grows even higher to 36% if the children receive no child support.”⁷⁶

Aside from the socioeconomic effects, children growing up in low-income, turbulent households are likely to suffer “severe social consequences, such as delinquency and intergenerational incarceration.”⁷⁷ These negative effects are the result of Adverse Child Experiences (“ACEs”) and almost always carry over into adulthood with lasting impacts.⁷⁸ The social consequences result in struggles with depression, anger, and shame, oftentimes manifesting themselves in the eventual release of pent-up frustration in unproductive or illegal ways.⁷⁹ Growing up in poverty also “disproportionately increase[s] the risk of, among other things, inadequate nutrition, substance abuse, decreased educational achievement, increased juvenile criminal behavior, physical abuse, and teen and non-marital childbearing — which further perpetuates the cycle.”⁸⁰ The ensuing plethora of hardships attacks this

⁷³ Daniela Pardo, *New Law Helps Incarcerated Parents be Closer to Home*, SPECTRUM NEWS 1 (Aug. 3, 2023, 3:16 PM PST), <https://spectrumnews1.com/ca/la-west/inside-the-issues/2023/08/03/new-law-helps-incarcerated-parents-be-closer-to-home#> [https://perma.cc/R7XP-UAC3].

⁷⁴ Wang, *supra* note 72.

⁷⁵ *Id.*

⁷⁶ Swank, *supra* note 25, at 64.

⁷⁷ SIMMONS, *supra* note 31, at 5.

⁷⁸ See Vincent J. Felitti, Robert F. Anda, Dale Nordenberg, David F. Williamson, Alison M. Spitz, Valerie Edwards, Mary P. Koss & James S. Marks, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREV. MED. 245, 245 (1998).

⁷⁹ See S.F. P’SHP, *supra* note 66, at 36-38.

⁸⁰ Swank, *supra* note 25, at 65 (alteration added).

young, vulnerable population from all angles and makes it nearly impossible to break out of their harmful intergenerational patterns.⁸¹

The other notable, and perhaps most dangerous, adverse effect on this population of children is the fact that they are “ignored by the criminal justice and social services systems.”⁸² At the time of arrest or sentencing, it is not common practice for the legal system to inquire if the detainee has children.⁸³ This oversight results in very little demographic information about these children, and they remain unrecognized as a group by “any state agency or department in California.”⁸⁴ Although there are some non-profit organizations that seek to support these children,⁸⁵ this demographic’s “lack of visibility in the criminal justice and child welfare systems can inhibit positive intervention and may lead to neglect.”⁸⁶ As a practical matter, these at-

⁸¹ *Id.*

⁸² SIMMONS, *supra* note 31, at 3.

⁸³ *Id.*; S.F. P’SHIP, *supra* note 66, at 2 (“There is no requirement that the various institutions charged with dealing with those accused of breaking the law — police, courts, jails and prisons, probation departments — inquire about children’s existence, much less concern themselves with children’s care. Conversely, there is no requirement that systems serving children — schools, child welfare, juvenile justice — address parental incarceration.”). However, in my personal experience, my mother recalls receiving outreach from California Child Support Services in the months following my father’s first long-term prison sentence. It is unclear how the agency obtained her information, but she believes my father must have reported to authorities that he had children.

⁸⁴ SIMMONS, *supra* note 31, at 3.

⁸⁵ A non-exhaustive list of these nation-wide organizations include the following: America on Track, Project Aviary, Assisting Families of Inmates, Friends Outside, Foreverfamily, KidsMates, Save Kids of Incarcerated Parents, The National Resource Center on Children and Families of the Incarcerated.

⁸⁶ SIMMONS, *supra* note 31, at 6. This is compared with the many benefits available to foster youth, another disadvantaged group, yet one that is institutionally recognized and supported by financial assistance programs accordingly. *See, e.g.*, JOHN BURTON ADVOCS. FOR YOUTH, FOSTER YOUTH BENEFITS ELIGIBILITY 1, 1-2 (2024), https://jbay.org/wp-content/uploads/2024/04/Foster-Youth-Benefits-Eligibility-Chart_March-2024.pdf [<https://perma.cc/7MHS-X6D6>]. This is by no means to say that the foster system is perfect, however. *See The Failures and Future of the U.S. Foster Care System*, THE POL’Y CIRCLE, <https://www.thepolicycircle.org/brief/the-failures-and-future-of-the-u-s-foster-care-system/> (last visited Nov. 18, 2024) [<https://perma.cc/2D77-ZW8B>].

risk youth who need the most support are ironically the ones who receive it the least.⁸⁷

C. *California's Child Support Structure and Family Code § 4007.5*

In California, child support payments are calculated based on guidelines set forth by local agencies.⁸⁸ The two main factors used in this determination are (1) each parent's income and (2) the amount of time the child spends with each parent.⁸⁹ In special instances, a "change in circumstances" is subject to an automatic review by the obligor's local child support agency to adjust the payment order.⁹⁰ These circumstantial changes cover incarceration:

- (1) The obligor or obligee is incarcerated in a county jail, state or federal prison, or court-ordered rehabilitation facility and there is no evidence of support potential. If the obligor is incarcerated, the local child support agency shall seek to adjust the current order to *zero*, and refer to the case closure regulations . . . to determine if case closure is appropriate.⁹¹

This state regulation falls in line with California's Family Code §4007.5(a) that suspends child support for persons incarcerated or involuntarily institutionalized for more than ninety days "unless the person owing support *has the means to pay* support while incarcerated or involuntarily institutionalized."⁹² Beginning in September 2022, a parent automatically "does not owe support for the time they were confined," subject to a singular exception.⁹³ Although the state's policies

⁸⁷ SIMMONS, *supra* note 31, at 3 ("One prominent researcher contends that ' . . . these children have tended to be ignored by the criminal justice and social services systems. . . .").

⁸⁸ *Estimate My Child Support*, ORANGE CNTY., <https://www.css.ocgov.com/legal/estimate#:~:text=Child%20support%20is%20calculated%20under,child%20spends%20with%20each%20parent> (last visited Oct. 30, 2024) [<https://perma.cc/U86Z-9MNX>].

⁸⁹ *Id.*

⁹⁰ CAL. CODE REGS. tit. 22, §115530 (2023).

⁹¹ *Id.* (emphasis added).

⁹² CAL. FAM. CODE § 4007.5(a) (emphasis added).

⁹³ *Guide to Child Support for Incarcerated Parents*, CAL. CTS., <https://selfhelp.courts.ca.gov/child-support/incarcerated-parent> (last visited Oct. 30,

and regulations account for incarceration as a key factor in child support calculations, the Family Code features the caveat that if an incarcerated parent does have the financial means to pay their child support, the payment order does not automatically toll.⁹⁴ From its application in case law, this nested exception has largely concerned noncustodial incarcerated parents who are *non*-indigent and either have some form of assets to comply with the order⁹⁵ or are expected to soon be released and re-introduced into the workforce to earn money.⁹⁶

II. THE SHORTCOMINGS OF CALIFORNIA'S FAMILY LAW

A. *Unbalanced Interests: California Law Favors the Incarcerated Parent Over the Child*

Like a lopsided seesaw, this zero-sum situation allows one party to dismount at the expense of the other: the law relieves an indigent incarcerated parent of their financial duty without subsidizing the extra burden imposed on the child and custodial parent.⁹⁷ Though courts have

2024) [<https://perma.cc/UU2C-UDNA>] (“Generally, a parent doesn’t owe child support for the time they’re confined if it’s longer than 90 days. Starting September 27, 2022, under California law, child support automatically stops if the parent who has to pay is confined against their will for more than 90 days in a row in jail, prison, juvenile detention, a mental health facility, or other institution.”).

⁹⁴ See *id.* This Note aims to stretch this exception to cover indigent, noncustodial incarcerated parents as well. See *infra* Part II.

⁹⁵ See Cavanaugh & Pollack, *supra* note 31, at 542 (“The Supreme Court of Delaware similarly held that a father should be required to liquidate his assets in order to discharge his child support obligation . . . [and that] ‘[i]t would be inequitable to have the support obligation discharged by one parent, or society, while the incarcerated parent retains available assets.’” (quoting *Harper v. Barrows*, 570 A.2d 1180, 1184 (Del. 1990))).

⁹⁶ See *Mascola v. Lusskin*, 727 So. 2d 328, 332 (Fla. 1999) (“Most assuredly it would be in the children’s best interest to have the unpaid support payments grow in the expectation that one day the father will have the ability to make actual payment.”).

⁹⁷ Cavanaugh & Pollack, *supra* note 31, at 552 (“[I]t is unjust to seemingly reward criminal behavior with a cessation of financial obligations.”); see *In re Marriage of Smith*, 90 Cal. App. 4th 74, 78 (2001) (In a case of a noncustodial parent seeking modification to his child support orders after becoming incarcerated, the petitioner claimed he had no job in prison and could not pay any amount.).

been divided on the matter,⁹⁸ modern case law has largely leaned in favor of exempting incarcerated parents from paying child support upon consideration of various factors.⁹⁹ These factors include the incarcerated parent's assets, ability and opportunity to work, and other similar variables employed at the judge's discretion.¹⁰⁰ The glaringly overlooked problem with these cases is that the issue simply ends with the verdict; there is no follow-up with the further disadvantaged child.¹⁰¹ In the case of *In re Marriage of Smith*, a noncustodial father was dismissed from his job upon pleading guilty to a federal crime and serving a sentence, thereby losing his income.¹⁰² Here, the county "argued [that the noncustodial incarcerated parent's] obligation should continue nevertheless because he, rather than his family, should bear the burden of his criminal act."¹⁰³ This argument was unsuccessful due to the court's reasoning that if either of the earning capacity standard elements (ability and opportunity) were amiss, then there was no actual income nor earning capacity to keep the support obligation afloat.¹⁰⁴

The excusal of indigent incarcerated parents from paying child support sheds light on the impossible nature of the § 4007.5(a)

⁹⁸ *Arizona ex rel. Dep't of Econ. Sec. v. Ayala*, 916 P.2d 504, 506 (Ariz. Ct. App. 1996) ("Other jurisdictions that have addressed the issue of whether incarceration should relieve a parent of his child support obligation are divided."); Cavanaugh & Pollack, *supra* note 31, at 533 ("The absence of a cohesive policy creates inequitable inconsistencies, rendering the law vague, unwieldy, and impracticable.").

⁹⁹ *See, e.g., Ayala*, 185 Ariz. at 318 ("We hold that incarceration alone does not justify suspending a support obligation. . . . Accordingly, we reverse and remand to allow the trial court to inquire into Ayala's assets and to consider . . . all factors relevant to that determination . . ."); *El Dorado Cnty. Dep't of Child Support Servs. v. Nutt*, 167 Cal. App. 4th 990, 993 (Cal. Ct. App. 2008) (ruling that "a court may not impute income to an incarcerated parent in the process of calculating amounts owed in child support, absent evidence that he has the ability and opportunity to work in prison").

¹⁰⁰ *See* cases cited *supra* note 99.

¹⁰¹ Cavanaugh & Pollack, *supra* note 31, at 551 ("When the imprisoned obligor is unable to pay while in prison, the state and welfare system often come to the aid of the obligor's children.").

¹⁰² *In re Marriage of Smith*, 90 Cal. App. 4th 74, 77-78 (Cal. Ct. App. 2001).

¹⁰³ *Id.* at 78 (alteration added).

¹⁰⁴ *Id.* at 85.

exception.¹⁰⁵ California courts have ruled that incarcerated parents with child support who are “going to be [in prison] until long after the child is emancipated” will not be ordered to pay any money unless they “start receiving income of some sort.”¹⁰⁶ Case law provides us with a three-prong test for gauging a parent’s earning capacity to determine how much child support they will be ordered to pay: “(1) the *ability* to work including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the *willingness* to work exemplified through good faith efforts . . . ; and (3) an *opportunity* to work which means an employer who is willing to hire.”¹⁰⁷ For incarcerated parents, willingness is a non-issue due to the prison system’s compulsory work requirements,¹⁰⁸ so they are entirely at the system’s mercy for the *ability* and *opportunity* prongs.¹⁰⁹ When both the ability and opportunity to generate meaningful income are lacking, there is no need to apply the earning capacity standard because it is functionally zero.¹¹⁰ Put simply, where there is no money, there can be no payments, and the courts consequently tilt in favor of excusing the parental obligor.

In addition to the judiciary, executive action has shown deference to the incarcerated parent.¹¹¹ During his final term, former President Barack Obama issued an executive order “prohibiting States from treating incarceration as voluntary when considering a parent’s request

¹⁰⁵ CAL. FAM. CODE § 4007.5(a) (“Every money judgment or order for support of a child shall be suspended, by operation of law, for any period exceeding 90 consecutive days in which the person ordered to pay support is incarcerated or involuntarily institutionalized, unless the person owing support has the means to pay support while incarcerated or involuntarily institutionalized.”).

¹⁰⁶ *El Dorado Cnty. Dep’t of Child Support Servs. v. Nutt*, 167 Cal. App. 4th 990, 992 (Cal. Ct. App. 2008) (alteration in original).

¹⁰⁷ *In re Marriage of Regnery*, 214 Cal. App. 3d 1367, 1372 (Cal. Ct. App. 1989) (emphasis added).

¹⁰⁸ See ACLU, *supra* note 48, at 5 (“From the moment they enter the prison gates, they lose the right to refuse to work.”).

¹⁰⁹ *In re Marriage of Regnery*, 214 Cal. App. 3d at 1373.

¹¹⁰ *Id.*

¹¹¹ Bennett, *supra* note 30, at 202.

for a modification of his or her child support order.”¹¹² This order decreased the number of denied reduction or dismissal requests by eliminating judges’ discretionary powers in determining that incarceration is the result of voluntary criminal activity.¹¹³ Even in states that do still hold incarceration as voluntary acts and thus deny recusal from payments,¹¹⁴ an indigent incarcerated parent’s unpaid debt simply accrues and the child must look elsewhere for funds.¹¹⁵

B. Domino Effect: Low Prison Wages Lead to The Futility of \$ 4007.5

Despite its extensive contributions to our society,¹¹⁶ the prison labor force collects pennies on the hour in return,¹¹⁷ reducing the practical

¹¹² *Id.* at 203. President Obama’s Executive Order 13563 intended to broadly improve “regulation and regulatory review,” per its namesake. Exec. Order. No. 13563 (Jan. 18, 2011), 45 C.F.R. 301-305, 307-309 (Dec. 20, 2016). The Executive Order was then codified to implement “Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs.” *Id.* (“This rule is intended to carry out the President’s directives in Executive Order 13563: Improving Regulation and Regulatory Review. The final rule will make Child Support Enforcement program operations and enforcement procedures more flexible, more effective, and more efficient by recognizing the strength of existing State enforcement programs [...] . . . It will improve child support collection rates because support orders will reflect the noncustodial parent’s ability to pay support, and more noncustodial parents will support their children.”).

¹¹³ See, e.g., *Ohler v. Ohler*, 369 N.W.2d 615, 618 (Neb. 1985) (Prior to Executive Order 13563, a court ruled that there was “no sound reason to relieve one of a child support obligation by virtue of the fact that he or she engaged in criminal conduct[,]” reasoning that “incarceration is certainly a foreseeable result of criminal activity”). For a discussion on cases granting reduction or dismissal of child support obligations, see notes 98–100 and 102.

¹¹⁴ See, e.g., *Wilkerson v. Wilkerson*, 220 So. 3d 480, 483 (Fla. Dist. Ct. App. 2017) (“We believe that an individual’s actions that lead to incarceration are voluntary for purposes of this statute.”); *Mascola v. Lusskin*, 727 So. 2d 328, 332 (Fla. Dist. Ct. App. 1999) (holding that the father’s conduct leading to incarceration was voluntary).

¹¹⁵ See Cavanaugh & Pollack, *supra* note 31, at 551 (“When the imprisoned obligor is unable to pay while in prison, the state and welfare system often come to the aid of the obligor’s children.”).

¹¹⁶ See Fonseca, *supra* note 64 and accompanying text.

¹¹⁷ See ACLU, *supra* note 48, at 55 (“Our research found that the average minimum hourly wage paid to workers for non-industry jobs is 13 cents, and the average maximum hourly wage is 52 cents. The about 6.5 percent of workers with jobs in higher-paying state prison industries are paid 30 cents to \$1.30 per hour on average.”); *supra* Part I.A.

effect of § 4007.5(a)'s exception to a nominal one.¹¹⁸ In addition to implementing a forced labor system to sustain an infinite supply of workers,¹¹⁹ the loosely-termed "wages" that prison workers receive are on par with involuntary servitude.¹²⁰ The Prison Industries Revolving Fund sets a minimum threshold of \$730,000 to be set aside for the expenses of the prison industries program, including inmate compensation.¹²¹ On top of this, California caps inmate wages as not to "exceed one-half the minimum wage [as provided in the state's Labor Code]."¹²² But in effect, this statutory ceiling for prison wages is nothing more than words arbitrarily strung together; the inmate pay scale in California ranges from eight cents to thirty-seven cents per hour for non-industry jobs and thirty-five cents to one dollar per hour for jobs in state-owned correctional facilities.¹²³ Prison workers are also subject to further wage deductions in the form of fines, taxes, and other fees that leave them with less than half of their gross pay.¹²⁴ The systemic garnishing of already extremely low wages is a historical trend that has seen little progress.¹²⁵ In 1999, the Office of Justice Programs outlined earned prison wages in relation to where they are actually allocated, reporting:

Between January 1979 and September 1998, PIECP projects generated approximately \$113.7 million in gross inmate wages. Nearly half of this amount was diverted to non-inmate recipients: \$8.9 million was deducted for victims of crime, \$25.7 million was deducted for room and board payments, \$5.8 million was deducted for family support and about \$13.7 million was withheld in local, State and Federal taxes.¹²⁶

¹¹⁸ See *infra* notes 119–120.

¹¹⁹ See *supra* Part I.A.

¹²⁰ See ACLU, *supra* note 48, at 5–6; Lyons, *supra* note 59.

¹²¹ CAL. PEN. CODE §§ 2806, 2811.

¹²² CAL. PEN. CODE § 2811.

¹²³ ACLU, *supra* note 48, at 57.

¹²⁴ *Id.* at 59.

¹²⁵ See PIECP Final Guideline, 64 Fed. Reg. 17000, 17002 (Apr. 7, 1999) (to be codified at 63 C.F.R. pts. 36710, 36719); ACLU, *supra* note 48, at 59.

¹²⁶ PIECP Final Guideline, 64 Fed. Reg. at 17,000, 17,002.

Proven through historical action and intent, it is not uncommon for prison reform proposals to face pushback in the legislative branch.¹²⁷

Increasing prison wages as part of ending involuntary servitude has been a major reform proposal on the docket across the nation.¹²⁸ In 2020, California Assemblymember Sydney Kamlager proposed the “End Slavery in California Act,” or ACA 3, to abolish involuntary servitude as a form of criminal punishment by raising prison wages to the state’s minimum wage.¹²⁹ The bill was passed in both houses of Congress, but was vetoed by the governor and returned to the Senate floor in August 2022.¹³⁰ Executive and administrative actors remain wary about raising prison wages because of the “[estimated] \$1.5 billion [it would cost] to pay prisoners minimum wage”¹³¹ The bill faces additional challenges in the form of potentially increased labor claims and litigation that would flood the court system and have a far-reaching administrative effect on judicial efficiency.¹³² However, immediacy is not particularly a requisite for taking steps towards fixing this problem; an increase in prison wages need not be so steep. In the Senate Committee’s analysis of the End Slavery in California Act, the staff notes the following:

[I]f California is required to pay minimum wage for inmate labor (\$15.00 per hour for employers with more than 26

¹²⁷ See, e.g., Lyons, *supra* note 59 (Proposed by prison laborer Samuel Brown and state legislators, the End Slavery in California Act “failed to muster enough votes before the deadline to put the proposed constitutional amendment, ACA 3, in front of voters in November”).

¹²⁸ *Id.* (“The effort to remove involuntary servitude as a punishment from California’s Constitution is part of a nationwide trend. . . . In 2020, Nebraska and Utah voters overwhelmingly decided to remove slavery as a punishment for crime from their state constitutions. Colorado led the way in 2018 when voters abolished slavery and servitude from their constitution.”).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² COMM. ON APPROPRIATIONS, CAL. STATE SENATE, ACA 3 – INVOLUNTARY SERVITUDE FISCAL SUMMARY 3-4, (2020) (“[T]he Correctional Law Section (CLS), within the Civil Law Division, anticipates an increase in litigation as a result of this constitutional amendment. They posit that prison inmate jobs would become more coveted due to the higher pay, and since there are not enough paying jobs for the eligible prison population, more job-related lawsuits, such as claims of discrimination, ADA violations, and retaliation, may arise.”).

employees), then the costs of this bill could exceed \$1 billion annually. If some lesser amount per hour suffices to either escape the definition of involuntary servitude altogether, or to entice enough inmates to voluntarily work, then the costs of this measure could be significantly less.¹³³

On balance, implementing gradual increases is likely an effective and achievable option to unravel the injustices in prison labor rights while not overburdening the financial systems currently in place.

Most recently, pro-abolitionists in California faced an eye-opening setback when the famously blue state voted against Proposition 6, which would have eliminated its “constitutional provision allowing involuntary servitude for incarcerated persons.”¹³⁴ Proposition 6 aimed to replace the current compulsory work assignment system with a volunteer work assignment program and delegate to localities the power to implement their own pay scales for inmates.¹³⁵ Because of its previous failure to garner sufficient support in 2022 due to the high estimated cost,¹³⁶ the language of Proposition 6 attempted a work-around by packaging the proposed amendment as a “voluntary work program.”¹³⁷ However, this attempt to circumvent the issue failed when Californians rejected the ballot measure by a 53.4% majority.¹³⁸ While it remains unclear why the historically liberal state voted this way,¹³⁹ some analysts

¹³³ *Id.* at 3.

¹³⁴ CAL. SEC’Y OF STATE, GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 34-37 (2024), <https://vig.cdn.sos.ca.gov/2024/general/pdf/complete-vig.pdf> [<https://perma.cc/G6UW-GXTY>]; see *Prop 6: Limit Forced Labor in State Prisons*, CALMATTERS, <https://calmatters.org/california-voter-guide-2024/propositions/prop-6-involuntary-servitude/> (last visited Nov. 18, 2024) [<https://perma.cc/ZW63-NNPE>].

¹³⁵ *Prop 6: Limit Forced Labor in State Prisons*, *supra* note 134.

¹³⁶ See *id.* (“Legislators considered a similar measure in 2022, but support tanked after the California Department of Finance estimated that it would cost about \$1.5 billion annually to pay minimum wage to prisoners. This year’s amendment has the voluntary work program as a way to get around that issue.”).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Mackenzie Mays, *With Progressive Ballot Measures on Track to Fail, California’s Political Identity Is Questioned*, L.A. TIMES (Nov. 7, 2024, 3:00 AM PST), <https://www.latimes.com/california/story/2024-11-07/with-progressive-ballot-measures-set-to-fail-californias-political-identity-is-questioned> [<https://perma.cc/VF4D-DQR8>].

have suggested that the ballot's linguistics confused voters who were unfamiliar with Proposition 6's background and voted against it by default.¹⁴⁰ Meanwhile, other voters decided that the economic impact of banning prison labor would be too disruptive to the current system of state costs.¹⁴¹ Regardless of the electorate's reasoning, it appears that California was not ready to ban prison labor outright, but the fight for the cause persists¹⁴² and will be worth tracking in California's next election cycle.

In conjunction with § 4007.5(a), the currently insignificant prison wages function as a catch-22¹⁴³ and are not utilized for the vast majority of incarcerated parents.¹⁴⁴ The crux of the issue lies at the disjointed intersection between the meager wages of incarcerated laborers and the inability to satisfy the exception.¹⁴⁵ The law is able to favor indigent

¹⁴⁰ Cayla Mihalovich, *Anti-Slavery Measure Prop. 6 Fails, Allowing Forced Labor to Continue in California Prisons*, CALMATTERS (Nov. 10, 2024), <https://calmatters.org/politics/elections/2024/11/california-election-result-proposition-6-fails/> [<https://perma.cc/35MM-GVY5>] ("Prop. 6 supporters and independent political experts said the language might have confused voters. The California Attorney General's Office writes ballot language and summaries, and the word 'slavery' did not appear on the California ballot. Instead, the language read, 'Eliminates Constitutional Provision Allowing Involuntary Servitude for Incarcerated Persons. Legislative Constitutional Amendment.' 'When I saw the words 'involuntary servitude,' I thought, 'This might take some explaining for the voters,'" said Mark Baldassare, survey director at the Public Policy Institute of California. 'We know that when people are unsure or uncertain, the default is to vote "no."'). See also Sophie Austin, *California Voters Reject Measure That Would Have Banned Forced Prison Labor*, AP NEWS (Nov. 11, 2024, 6:35 PM GMT), <https://apnews.com/article/california-labor-prison-slavery-prop-6-election-e295b561651940e2b527d7f5128b1b53> [<https://perma.cc/2N8R-ZVEE>] (George Eyles, a Californian who voted against Prop. 6, explained, "I really couldn't get any in-depth information about . . . the thinking behind putting that whole Prop. 6 forward, so that made me leery of it . . . If I really can't understand something, then I'm usually going to shake my head, 'No.'").

¹⁴¹ See, e.g., Austin, *supra* note 140 (One voter "decided [Prop. 6] likely would not be economically feasible since prison labor helps cut costs for upkeep").

¹⁴² See Mihalovich, *supra* note 140.

¹⁴³ "[A] problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, MERRIAM-WEBSTER'S DICTIONARY (2023).

¹⁴⁴ See *supra* Part I.C.

¹⁴⁵ CAL. FAM. CODE § 4007.5(a) ("Every money judgment or order for support of a child shall be suspended, by operation of law, for any period exceeding 90 consecutive days in which the person ordered to pay support is incarcerated or involuntarily

incarcerated parents because this cyclical issue sustains itself: with extremely insufficient earnings, the parent is not obligated to their child support debt, and § 4007.5(a) is rendered futile.

C. Shifting Responsibility as a Matter of Policy

One of the persevering fundamentals of the American Dream is the collective desire to enforce parents' social obligation to care for the children they bear, which begins with providing for them.¹⁴⁶ Despite the drastic evolution in family types,¹⁴⁷ the expectation that individuals are responsible for the lives they bring into this world has remained constant.¹⁴⁸ Because the area of law governing child support enforcement currently fails to adequately serve this significant portion of our community, enacting meaningful change is necessary to address dignitary concerns for both parties: parents would be able to provide for their own children in accordance with the social norm, and children would have access to basic needs and avoid indirect punishment for crimes they did not commit.¹⁴⁹ However, we have set up a system that punishes the child for their parent's crimes, and the problem has bloomed into one of massive scale.¹⁵⁰ Taking action against the flaws in

institutionalized, unless the person owing support has the means to pay support while incarcerated or involuntarily institutionalized.”).

¹⁴⁶ Swank, *supra* note 25, at 66 (asserting that “[b]ecause of its effect on the taxpayer and society as a whole, the duty of parents to support their children is a social obligation owed not only to their children but to the state as well”).

¹⁴⁷ See *supra* THE EVOLUTION OF FAMILY DYNAMICS WITHIN THE AMERICAN DREAM.

¹⁴⁸ See *supra* text accompanying note 146.

¹⁴⁹ See Wang, *supra* note 72 (“Millions of families and minor children throughout the country are punished emotionally, economically, and otherwise by a loved one’s incarceration.”).

¹⁵⁰ See Cavanaugh & Pollack, *supra* note 31, at 532 (“Using currently available statistics, we calculate that approximately 37,820 custodial parents are owed approximately \$122 million in child support by people in prison [nationwide].”).

the system may not undo past negative impacts,¹⁵¹ but it may prevent future ones from accumulating.¹⁵²

In addition to the appeal to the pathos,¹⁵³ there are compelling utilitarian and economic motivations for reconstructing the current child support payment scheme. Most notably, the financial cost of government agencies providing assistance programs to low-income families would be subsidized.¹⁵⁴ By providing a means for incarcerated parents to satisfy their obligations, the government would shoulder less of the financial burden of making up for the lost child support payments.¹⁵⁵ This would also result in a new self-sustaining cycle, as money would flow back into the economy via the custodial parent and child as they purchase necessities.¹⁵⁶

One concern with reworking the child support system is the potential to over-burden administrative agencies with increased oversight responsibility.¹⁵⁷ However, shifting duties from one party to another differs from simply assigning more work to our agencies; rather, this mechanism seeks out improvements rather than complete overhauls.¹⁵⁸ In practice, imputing the financial responsibility back to the parent

¹⁵¹ See *id.* at 551 (“By requiring that prisoners be held responsible for child support orders, . . . attention will properly be re-focused on the best interests of our children.”).

¹⁵² See *id.* at 549 (discussing an Idaho appellate court’s ruling that “barring an incarcerated and indigent parent from seeking a modification . . . provides no present benefit to the child”).

¹⁵³ See *supra* notes 146–152 and accompanying text.

¹⁵⁴ See Cavanaugh & Pollack, *supra* note 31, at 551 (“By requiring that prisoners be held responsible for child support orders, millions of dollars from state welfare programs will be saved . . .”).

¹⁵⁵ See *id.* at 552 (“[W]hen support is not paid by a noncustodial incarcerated parent, it must come from other sources. Often government agencies pick up the burden, which means that it is in the states’ best interest to implement laws that do not encourage the payment of governmental benefits when other sources of money are available. . . . [T]here is no reason the government should be spending its tax dollars.”).

¹⁵⁶ See, e.g., *id.* at 550 (stating that child support is spent on “basic needs such as food, clothing, shelter, childcare, and education”).

¹⁵⁷ See Bates, *supra* note 22.

¹⁵⁸ See *id.* (“Members of the Assembly Human Services Committee and the Joint Select Task Force on the Changing Family share the concern that California develop the most efficient and equitable methods possible for awarding and enforcing child support payments.”).

would actually benefit the third parties that are no longer charged with that burden: “States with stronger child support enforcement programs have lower non-marital birth rates; lower divorce rates; and reduced welfare, Medicaid, and food stamp outlays. Increased child support enforcement has reduced welfare payments by 12% to 16% from 1980 to 1996.”¹⁵⁹ If every custodial parent collected child support, the theoretical figures project sharp decreases in welfare program usage: “[P]ublic assistance recipients would decrease by 26%, food stamps by 19%, and Medicaid by 5%.”¹⁶⁰ At present, taxpayers pay an estimated \$22 billion a year towards defaulting child support payments through these channels.¹⁶¹ With a more linear child support payment system, the benefits would be uniform for state agencies and taxpayers alike¹⁶² in addition to the increased workability of the noncustodial parent-child fiscal relationship.¹⁶³

III. PROPOSALS FOR ADDRESSING THE GAPS IN THE LAW

A. *The Power of Recognition: Destigmatize to Increase Visibility*

The first significant step in any problem-solving process is an intentional identification of the problem.¹⁶⁴ The information that currently exists regarding children of incarcerated parents is limited¹⁶⁵ due to a plethora of reasons, but the major factor that lends credence to this resource and data desert is the stigma surrounding parental incarceration.¹⁶⁶ Researchers have discovered that children with

¹⁵⁹ Swank, *supra* note 25, at 66.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (“As the statistics show, the non-payment of child support by the noncustodial parent, whether incarcerated or not, is important to every taxpayer in the United States.”).

¹⁶² *Id.* (stating that defaulted child support payments have an “effect on the taxpayer and society as a whole”).

¹⁶³ See *supra* notes 148–156 and accompanying text.

¹⁶⁴ Eryk Branch, *The First Step in Critical Thinking and Problem Solving*, IENSTITU (Oct. 24, 2022) <https://www.ienstitu.com/en/blog/the-first-step-in-critical-thinking-problem-solving> [<https://perma.cc/93A9-7DV4>].

¹⁶⁵ See *supra* Part I.B.

¹⁶⁶ See S.F. P'SHIP, *supra* note 66, at 1–2.

imprisoned parents are “vulnerable to depression, anger, and shame,” and receive little support “as they ‘do time’ along with their parents.”¹⁶⁷ Through no fault of their own, this demographic is overlooked and stigmatized for the less-than-idyllic circumstances they were born into.¹⁶⁸ Thus, more research on children of incarcerated parents is needed to push them into the line of visibility and gain widespread formal recognition as an under-funded, under-supported group.¹⁶⁹

B. A Symbiotic Framework

A second important way to correct this problem is to implement a framework that re-balances the interests of children with those of their incarcerated parents.¹⁷⁰ For both utilitarian and policy reasons, one proposal is to increase inmate wages, and those earnings should either (1) be remitted to their own children or (2) pooled into an aggregate fund and distributed equally among children of incarcerated parents. This system would promote equity within nontraditional families, maximize use of California’s Family Code, and drive progress on unraveling both institutionalized slavery¹⁷¹ and the criminalization of poverty.¹⁷²

Guaranteeing a genuine source of income for incarcerated parents would realize their earning potential as able-bodied workers and end the dubious nature of the § 4007.5(a) exemption. This would benefit imprisoned parents who wish they could provide for their children to finally do so from inside prison walls, effectively releasing these children from their own financial prisons. Furthermore, expanding the

¹⁶⁷ *Id.* at 14.

¹⁶⁸ *Id.* at 2 (“Children of prisoners have a daunting array of needs. . . . And — rather than being stigmatized for their parents’ actions or status — they need to be treated with respect, offered opportunity, and recognized as having potential. These needs, too often, go not just unmet but unacknowledged.”).

¹⁶⁹ SIMMONS, *supra* note 31, at 1 (“[T]he Child Welfare League of America concludes ‘. . . the true scope of the problem is uncertain because few reliable statistics exist.’” (alteration added)).

¹⁷⁰ Cavanaugh & Pollack, *supra* note 31, at 551 (“By requiring that prisoners be held responsible for child support orders, . . . attention will properly be re-focused on the best interests of our children.”).

¹⁷¹ ACLU, *supra* note 48, at 19.

¹⁷² *See infra* notes 175–178 and accompanying text.

obligation of child support payments to incarcerated parents would reduce the use of incarceration as a parental cop-out and mitigate the financial burden of the custodial parent and government welfare agencies.¹⁷³ A solution that bridges the § 4007.5(a) gap will also benefit society in the long run: “Children who receive their child support perform better academically, and are more likely to both finish high school and attend college. Noncustodial parents who pay their child support are more likely to be involved in the lives of their children and provide emotional as well as financial support.”¹⁷⁴

Another disturbing feature that enables our current system is the majority’s aversion to indigent folks based on preconceived notions about them.¹⁷⁵ These assumptions become harmful when they turn into a willingness to punish individuals for being poor, especially in the context of paying child support.¹⁷⁶ Indeed, the most fallacious aspect of the two-way pipeline of child support and incarceration is the criminalization of poverty: “[T]he government still requires fathers to contribute to the welfare of their children or face the consequences of contempt of court, which may include imprisonment.”¹⁷⁷ Though enforcement may be more conveniently executed as a crime, inter-family issues should be kept within the civil system. Currently, legislative policies and criminal justice overlap in two primary ways:

- (1) A noncustodial parent is not in compliance with a child support obligation and that noncompliance leads to incarceration (short-term, primarily in local jails) as a result of either a civil contempt or criminal non-support action taken by the state.

¹⁷³ See *supra* Part II.C.

¹⁷⁴ Swank, *supra* note 25, at 65.

¹⁷⁵ See David Ray Papke, *State v. Oakley, Deadbeat Dads, and American Poverty*, 26 W. NEW ENG. L. REV. 9, 9 (2004) (“Poverty is an embarrassing and, for some, irritating problem in America. . . . Two scholars have even argued that genetically determined low intelligence is the root cause of poverty.”).

¹⁷⁶ See *id.* at 20 (“Since at least the mid-1980s, [the attitudes towards ‘deadbeat dads’] have been demonized. . . . Courts, legislatures, and average taxpayers have increasingly come to see these delinquent child support obligors as primary causes of poverty and also a drain on the public purse.”).

¹⁷⁷ Bennett, *supra* note 30, at 205.

(2) A noncustodial parent is incarcerated for a criminal offense and has a current or delinquent child support obligation. In this case, the parent's incarceration is not due to failure to pay child support orders, and incarceration is often for longer periods of time and in a state or federal prison.¹⁷⁸

In these situations, it makes little sense to inflict a solely retributive punishment for an offense that can be remedied financially. Additionally, incarceration is inequitable in this instance as the punishment does not fit the crime. For low-income noncustodial parents, imprisonment has little deterrent effect if they cannot change their circumstances and are not provided with any means to do so. Imprisonment for being too poor to fulfill one's financial obligations does not address the true underlying issue — that a child is not receiving their due financial support from their parent.

On the other hand, based on the theories of punishment, should society reward offenders by allowing inmates to earn a meaningful income? For those who subscribe to the retributive theory of punishment, they would note the principle's three basic tenets: (1) punishment is proper where a voluntary wrong was committed, (2) the punishment must match the "wickedness of the offense," and (3) the "justification for punishing persons is that the return of suffering for moral evil voluntarily done is itself just or morally good."¹⁷⁹ As applied here, proponents of retribution might argue that paying inmates livable wages when they have damaged society in some capacity may undermine the notion that the punishment must fit the crime. In this Note's proposed framework of raising wages for prison laborers to fulfill their child support orders, there is a potential for inmates to make more money while incarcerated than they might make outside of prison walls. In the same vein, deterrence enthusiasts who "threaten[] and impose[] harms as punishment in order to provide a disincentive to prohibited

¹⁷⁸ *Child Support and Incarceration*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/human-services/child-support-and-incarceration> (last updated Feb. 1, 2022) [<https://perma.cc/4BZS-SD5H>].

¹⁷⁹ Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 602-03 (1978).

conduct”¹⁸⁰ may note that allowing offenders to jeopardize their children’s well-being is an opportune method to discourage crime.

However, despite these valid theories of concern, we should prioritize meeting our children’s needs over arguably futile retroactive punishment of indigent parental obligors.¹⁸¹ Additionally, using incarcerated persons’ children as an extra layer of punishment is facially immoral. Allowing this third-party spillover effect to negatively impact children of incarcerated parents is inconsistent with our fundamental ideal of parents caring for their progeny, and, therefore, inapposite to the American Dream as posited by this Note.

CONCLUSION

As a vulnerable subset of the population, the legal rights of children with incarcerated parents are often bypassed or actively withheld from them.¹⁸² Already majorly disadvantaged by default, the government owes this demographic a more stable form of support: “The courts and legislatures should be compelled to recognize that the needs of children are not in any way lessened when an obligor is imprisoned. Children still require money to cover their basic needs.”¹⁸³ The exception in California Family Code § 4007.5(a) is massively under-utilized due to the currently unworkable nature of the prison labor system. By reshaping our priorities to include the children of incarcerated parents’ needs, we can balance the scales to benefit all stakeholders involved.

Raising prison wages to create a flow of money to children who are owed financial support is one of many viable solutions to this large-scale problem. It is not a legally sustainable nor morally compassionate practice to leave these children to fend for themselves and rely on non-profit organizations or welfare programs that are already too impacted in their current state. The issue is deeply embedded within multiple layers of our correctional and economic systems, and it will take

¹⁸⁰ *Id.* at 606 (alterations added).

¹⁸¹ See Cavanaugh & Pollack, *supra* note 31, at 533 (“[W]hen balancing the rights of convicted criminals against children who require support regardless of parental circumstances, the welfare of children must take precedence.”).

¹⁸² S.F. P’SHP, *supra* note 66, at 2.

¹⁸³ Cavanaugh & Pollack, *supra* note 31, at 550.

consistent, intentional work to rectify the ways in which our institutions fail these children. My personal narrative is a testament to the palpable effects of our societal negligence, and it is imperative that the solution to this problem is swift, efficient, and uniform to unfetter our children from the crimes of their parents.