

2015

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Recommended Citation

Tonya L. Brito, David J. Pate Jr., and Jia-Hui Stefanie Wong, *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 Fordham L. Rev. 3027 (2015).
Available at: <https://ir.lawnet.fordham.edu/flr/vol83/iss6/7>

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“I DO FOR MY KIDS”: NEGOTIATING RACE AND RACIAL INEQUALITY IN FAMILY COURT

Tonya L. Brito,* David J. Pate, Jr.** & Jia-Hui Stefanie Wong***

INTRODUCTION

Socio-legal scholarship examining issues of access to justice is currently experiencing a renaissance.¹ Renewed inquiry into this field is urgently needed.² Studies confirm that only 20 percent of the legal needs of low-income communities are met and that the vast majority of unrepresented litigants are low income,³ creating what some call a “justice gap” that has

* Jefferson Burrus-Bascom Professor of Law and Associate Dean for Research and Faculty Development, University of Wisconsin Law School. The authors thank Daanika Gordon, Garrett Grainger, and Amanda Ward for their many insights and contributions during our collaboration on the study described in this Article and Rachel Johnson and Danielle Topp for their valuable assistance with case files. We are grateful to Mario Barnes, Khiara M. Bridges, Osagie K. Obasogie, and Catherine Powell for their generous comments on earlier drafts of this Article. We also thank the participants in the Center on Law, Equality and Race 2014–15 Lecture Series at UC Irvine School of Law, 2014 ClassCrits VII Workshop at UC Davis School of Law, 2014 Critical Race Theory/Empirical Methods Conference at Fordham University School of Law, and the 2014 Critical Race Theory and Empirical Methods Public Symposium and Fifth Working Group Meeting at the University of Denver Sturm College of Law for helpful discussion of the ideas expressed in this Article. This material is based upon work supported by the National Science Foundation (NSF) under Grant No. SES-1323064. This study would not have been possible without the support of NSF and our other funders, including the University of Wisconsin Law School, the Institute for Research on Poverty, the University of Wisconsin-Madison Graduate School, the University of Wisconsin-Milwaukee Spaights Endowment, and the University of Wisconsin-Milwaukee Fromkin Award. Finally, we are especially grateful to the many participants in this study who have been willing to share their experiences and perspectives on access to justice for low-income litigants in child support enforcement proceedings. For an overview of the Fordham symposium, see Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 *FORDHAM L. REV.* 2953 (2015).

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1. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 *WIS. L. REV.* 101, 101.

2. See Laura K. Abel, *Evidence-Based Access to Justice*, 13 *U. PA. J.L. & SOC. CHANGE* 295, 295–96 (2009); Albiston & Sandefur, *supra* note 1, at 101–02; Jeanne Charn, *Service and Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School*, 10 *CLINICAL L. REV.* 75, 112 (2003); Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 *J. LEGAL EDUC.* 531, 532 (2012).

3. See *LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 16, 27 (2009), available

become even more urgent in recent years.⁴ State tribunals that deal with high-stakes issues particularly relevant to low-income residents, such as family courts and housing courts, are seeing an increasing number of litigants, the majority of whom are unrepresented.⁵

Although the population of low-income Americans most affected by the civil justice gap is disproportionately minority, race and racial inequality are understudied areas of inquiry in the access to justice literature.⁶ In a review of the few existing empirical studies concerning civil justice and racial inequality that have been completed, Professor Rebecca Sandefur reported that they suggest “some race differences in experiences with justiciable problems and disputes.”⁷ One such study, for example, found a race-based disparity in civil justice outcomes before a Hawaiian public housing board.⁸ In this study, examining evictions for nonpayment of rent, Richard Lempert and Karl Monsma concluded that non-Samoans had better outcomes in housing court than Samoans.⁹ Because their data indicated weak evidence of disparities in case outcomes between Samoans and non-Samoans in nonfinancial cases,¹⁰ but strong evidence in financial cases,¹¹ the researchers rejected the idea that non-Samoans did better in court primarily because of explicit racial prejudice toward Samoans. Instead, they attributed the observed race-based disparity to what they called “cultural discrimination.”¹² This cultural discrimination resulted from housing board members rejecting the reasons offered by Samoans for nonpayment of rent, reasons which were persuasive in the context of Samoan culture but not Western culture.¹³ Lempert and Monsma argue that the effect of the cultural discrimination was the same as if the board had acted out of ethnic discrimination and thus complicates understandings of how racial or ethnic discrimination operates.¹⁴ However, the article is one of few in the scholarly literature that sought to make sense of the complex nature of how race and racial inequality play out in the legal system.

This Article contributes to the access to justice scholarship by examining how legal actors and low-income litigants negotiate race and racial inequality in family court. Specifically, we examine cases where the state is pursuing child support from low- and no-income noncustodial fathers,

at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

4. See Rhode, *supra* note 2, at 531–32.

5. See LEGAL SERVS. CORP., *supra* note 3, at 1–19.

6. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 349 (2008).

7. *Id.* at 350.

8. See generally Richard Lempert & Karl Monsma, *Cultural Differences and Discrimination: Samoans Before a Public Housing Eviction Board*, 59 AM. SOC. REV. 890 (1994).

9. *Id.* at 906.

10. *Id.* at 900.

11. *Id.* at 906.

12. *Id.* at 907–08.

13. *Id.* at 901.

14. *Id.*

many of whom lack the financial resources to pay the support they owe and are unrepresented in the proceedings. We are conducting an empirical study of access to justice in child support actions in two states, which we refer to as State A and State B, though the data for this Article is drawn only from State A's three field sites. Each research site comprises a busy child support docket in an area where communities of color are overwhelmingly poor. Many of the parents owing child support in these cases are indigent noncustodial fathers. They are predominantly Black¹⁵ and typically lack counsel.

The findings in this Article are drawn from a larger qualitative study that investigates how attorney representation and other more limited forms of legal assistance affect civil court proceedings for low-income litigants. The study examines child support enforcement hearings in States A and B—two states that offer different and distinct legal assistance models—to understand how the civil right to counsel and more limited forms of legal assistance impact civil contempt proceedings for low-income litigants. In light of the growing “justice gap,” the questions of whether and how to provide assistance to individuals who cannot afford civil counsel is a pressing nationwide issue. Though we did not initially set out to explicitly examine questions of race within the context of studying access to civil justice, the importance of race and racial inequality to our research questions became apparent early in our data collection efforts.¹⁶ Applying social science methodology to enhance our understanding of the race dynamics that shape child support enforcement proceedings situates this Article in the exciting new scholarly field of critical race empiricism.¹⁷

In this Article, we conclude that the adjudication of child support cases shows a judicial colorblindness that ignores contemporary realities concerning racial inequality in the labor market. Judicial myopia to racial context “presume[s] a level present-day social and economic playing field.”¹⁸ The colorblind ideology is favored by those who think that race is

15. Following the tradition in critical race theory whose founders have noted that “Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun,” we capitalize “Black” as a racial descriptor in the United States. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

16. This project is supported by research funding from the National Science Foundation. Anonymous reviewers of our grant proposal critiqued our failure to include race as an element of our data analysis and encouraged us to consider doing so.

17. See, e.g., Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1636–38 (2010); Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2013); Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through Colorblind Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQ. (forthcoming 2015).

18. Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 241 (2005).

meaningless and “race should not matter.”¹⁹ A race-neutral approach, however well intentioned, can cause real harm to racially subordinated groups.²⁰ In child support enforcement cases brought against poor Black men, viewing race in this way serves to legitimize proceedings that emphasize perceived deficiencies in personal behavior and self-rehabilitation and obscures a profoundly racially stratified labor market. Discourse among legal actors and the responsabilization strategies employed in court frame poor Black fathers as economic failures, impose behavioral compliance with mandated demonstrations of “effort,” and reproduce systems of subordination.

Part I of this Article describes the study’s design. It begins with a brief overview of the larger study, explaining its purpose, research questions, and research settings. It then focuses on the methodology and data sources pertaining to State A from which this Article is drawn.

Part II addresses the experiences of low-income fathers in the child support system. It examines the economic status of “unable nonpayers,” noncustodial parents who are not able to obtain and maintain the secure employment needed to stay current with their child support obligations. This part also analyzes the available data on child support payments and debt accrual for this subset of noncustodial parents. It chronicles the enforcement measures used by child support agencies to collect support and explains why low-income fathers often face civil contempt proceedings, and potential imprisonment, when they fall behind in their payments.

Part III reports our study findings concerning how parties and legal actors navigate race and racial inequality in child support enforcement proceedings, where low-income noncustodial fathers of color are present in large numbers. Drawing from the empirical data generated by this study, this part demonstrates how race is and is not present in State A’s court hearings. It also critiques the colorblind approach to legal decision making, highlighting how assumptions about job availability for low-income fathers are premised on a White, middle-class norm and fail to account for the realities of race-based employment discrimination that impact poor Black fathers’ ability to find work. The fallacy of this approach is illustrated through a focused analysis of an order to show cause hearing in the *Mitchell v. Robinson* case.²¹

I. STUDY DESIGN

A. Purpose and Overview of the Study

This Article draws on data from a qualitative study designed to examine the role and impact of counsel in child support enforcement proceedings.

19. Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQ. 77, 85 (2010).

20. *Id.* at 87; see also Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL’Y 473, 490 (2011).

21. All participant and location names are pseudonyms.

We asked the following research question: Under what circumstances, and in what ways, does legal representation matter in child support proceedings?

The larger research study includes data collection in two states, State A and State B. State A is one of several states that provides appointed counsel to low-income child support obligors facing incarceration through civil contempt. State B does not provide counsel but has implemented other legal assistance measures to facilitate self-representation by obligors. Within each state, we concentrated our data collection in three counties. These counties were chosen because their family courts vary in size and urbanicity while serving communities with different levels of racial, ethnic, and economic diversity. Within each county, data collection includes ethnographic observations of child support enforcement hearings, group and individual interviews with both legal professionals and noncustodial parents who owe support, and a review of court records.

B. Methodology and Data Sources

This Article focuses on data collected only in State A and this section will describe only the methodology and data sources for that state. In State A, data collection has taken place in three counties: Counties A, B, and C. Data collection in County A furnished information about the provision of full representation in a large, urban court that operates in a racially and ethnically diverse and economically depressed city. Collecting data in County B allowed us to gather similar information in a suburban court that operates in a less ethnically diverse and fairly economically advantaged environment, though one that also has large racial disparities. By contrast, data from County C provided information about how full representation works in a smaller urban court that operates in a less ethnically diverse and relatively more economically advantaged city than County A.

Data collection in all three counties has included exploratory fieldwork, observations of child support enforcement hearings, and group and individual interviews with legal professionals who handle child support cases. The exploratory fieldwork and observations helped us understand the formal and informal policies and practices of each county, as well as laid the groundwork for future stages of the study. Courtroom observations of child support enforcement hearings enabled us to see what these proceedings actually looked like in practice. Finally, we conducted semi-structured group and individual interviews with legal actors involved in child support enforcement proceedings (family court commissioners, judges, child support attorneys, and defense attorneys) to provide us with inside knowledge on the child support enforcement process. During interviews, we asked participants to share their perspectives on topics such as the “typical” child support enforcement case, the goals of the process, characteristics of the obligors, and how unrepresented obligors negotiate legal processes.

Additionally, we conducted a focused ethnography in County A. Focused ethnography examines specific and well-defined interactions, acts,

or social situations and is characterized by relatively short-term field visits and intensive data collection to observe specific structured events or activities, such as courtroom proceedings.²² It is an approach that has been used to study specific contexts in a world that is increasingly socially and culturally differentiated.²³ In contrast to “conventional” ethnography, focused ethnography emphasizes targeted, intensive data collection in highly specific social settings.²⁴ Because our interest was in a specific type of court proceeding, this approach was well suited to explore our research question. Furthermore, focused ethnography generates research questions from existing theory and experiential knowledge. As such, it requires familiarity with the social setting of interest;²⁵ we had gained such familiarity in County A during the first stage of our research.

Our focused ethnography has included multiple site visits during which the researchers conduct the observations as a team. We are conducting a multifaceted investigation of a single social phenomenon utilizing the collection and analysis of several data sources. The ability to increase the “trustworthiness” of this study is enhanced by the use of two researchers simultaneously conducting observations.²⁶ Conducting research on the same phenomenon, at the same time, during the same historical period, allows for the research team to use their many sources of information to cross-check observations during the period of analysis. Furthermore, the differing social positions and identities of the six members of the research team shape their experiences of observation, including what they see, how they interpret the observations, and how they are treated by others in the courtroom. As such, the presence of multiple observers provides a broader portrait of how the courtroom operates.

Data collection has spanned thirty-four months (including exploratory fieldwork), during which we conducted about sixty-four hours of

22. Hubert Knoblauch, *Focused Ethnography*, F. QUALITATIVE SOC. RES. SOZIALFORSCHUNG, Sept. 2005, ¶ 2, available at <http://www.qualitative-research.net/index.php/fqs/article/view/20>.

23. *See id.*

24. *See id.*; *see also* Gina M.A. Higginbottom, Jennifer J. Pillay & Nana Y. Boadu, *Guidance on Performing Focused Ethnographies with an Emphasis on Healthcare Research*, 18 QUALITATIVE REP. 1 (2013). In her study of the Chicago-Cook County criminal courts, Professor Nicole Gonzalez Van Cleve utilized a multi-method approach toward data collection. *See* NICOLE GONZALEZ VAN CLEVE, *CODE OF THE COURTS: RACIALIZED JUSTICE IN A COLORBLIND ERA* (forthcoming). She initially conducted a traditional ethnography. Her nine months as an “insider” at the field site included law clerk positions with the state’s attorney’s office and the public defender’s office, which provided access to settings throughout the courthouse, including offices, courtrooms, lock-ups, and judges’ chambers. *Id.* Participant observations were later supplemented with a large scale, qualitative “court watching” data collection effort, whose features resemble those of a focused ethnography. *Id.* Specifically, Van Cleve relied on 130 research assistants to conduct 1000 hours of observations in the twenty-five courtrooms at the courthouse. *Id.*

25. *See generally* Frederick Erickson, *Some Approaches to Inquiry in School-Community Ethnography*, 8 ANTHROPOLOGY & EDUC. Q. 58 (1977).

26. *See generally* DOING NATURALISTIC INQUIRY: A GUIDE TO METHODS (David A. Erlandson et al. eds., 1993); JEROME KIRK & MARK L. MILLER, *RELIABILITY AND VALIDITY IN QUALITATIVE RESEARCH* (1986).

observations in State A's county courthouses, including fifty-six hours of observation as part of our focused ethnography in County A. While we do not have self-identified demographic data on parties in these cases, our data from researcher observations indicates that child support obligors were predominately men of color. In the sixty-nine child support enforcement cases we observed where parties were present in court and researchers made note of their perceived race, we noted that 65 percent of obligors appeared to be Black, 20 percent appeared to be White, 12 percent appeared to be Latino, and 1 percent appeared to be Asian.²⁷ In these same cases, the obligor appeared to be male 97 percent of the time and female 3 percent of the time.

We have conducted twenty-eight total interviews, including eight group interviews and twenty individual interviews. Interview participants have included ten judges, eighteen family court commissioners, nineteen child support attorneys, thirteen defense attorneys, and three other individuals with professional experience in child support enforcement proceedings. The majority (78 percent) of these participants have been White, 56 percent have been male, and 44 percent have been female.

To supplement the focused ethnography in County A, we are also obtaining and reviewing publicly available case file data and, where available, court hearing transcripts that correspond to the cases we are observing. The archival records provide information about the cases' litigation processes, putting the hearings in a historical context that enhances our understanding of the observations. Hearing transcripts offer a verbatim account of court proceedings that have been observed.²⁸

II. LOW-INCOME FATHERS, CHILD SUPPORT ENFORCEMENT, AND CIVIL CONTEMPT PROCEEDINGS

As a threshold matter, this Article begins with a basic overview of the experience of low-income fathers and their families in the child support enforcement system. Because this subject is covered extensively in the prior work of one of the authors,²⁹ this section offers a more succinct and updated explication.³⁰

Although child support is meant to secure financial support for children residing in single-parent households, many fathers who are under a legal obligation to pay support are poor and have difficulty finding and maintaining jobs that would enable them to reliably pay support. They are

27. In total, over 100 cases have been observed. However, for various reasons, we do not have notes on the researchers' perceptions of the obligor's race in all cases. In some cases, the obligor did not appear in court or appeared by phone. Additionally, in our earliest observations, we did not consistently record the obligor's perceived race.

28. This study is part of a larger research project that has future trajectories that explore different questions.

29. See, e.g., Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012).

30. In this Article, "we" refers to the three coauthors and "I" refers to the primary author, Tonya L. Brito.

referred to in the scholarly and policy literature as “unable payers” to distinguish them from the vilified “deadbeat dads”³¹ who willfully fail to support their children. Noncustodial fathers who are poor struggle to meet their child support obligations, and about 88 percent of them do not pay any child support at all.³² According to one study, their incomes average just \$5,627 annually, which is below the \$6,800 poverty level for a single adult.³³

Furthermore, these noncustodial fathers face multiple challenges in the job market. Studies have found that 75 percent do not work full-time, 60 percent are racial and ethnic minorities, 29 percent are incarcerated, 43 percent have not completed high school, 39 percent have health problems, and 32 percent have been unemployed for at least three years.³⁴ It is thus unsurprising that these men struggle to find and maintain employment that enables them to pay their child support orders.

It is also unsurprising that child support enforcement offices do not collect payments from these noncustodial fathers.³⁵ Additionally, the poorest children generally do not receive the full amount of child support they are owed.³⁶ Among custodial parents with formal child support orders in place, only about 35 percent of parents who were never married, 42 percent who were Black, and 39.6 percent who were living in poverty, received the full amount of child support that courts awarded.³⁷

Fathers who are unable to pay support often accumulate significant child support debt. No- and low-income parents are responsible for the greatest portion of unpaid child support, according to the Office of Child Support Enforcement (OCSE).³⁸ A 2008 OCSE memorandum reported that, of the more than \$70 billion in child support debt nationally, noncustodial parents who have no quarterly earnings or earn less than \$10,000 annually owed 70 percent of all arrears owed.³⁹ A significant portion of child support arrears is owed not to the custodial parent, but to the government as reimbursement for welfare expenditures.⁴⁰ Furthermore, the poorest obligors have the

31. See Brito, *supra* note 29, at 619.

32. *Id.* at 646.

33. *Id.*

34. *Id.* at 646–47.

35. *Id.* at 647.

36. *Id.*

37. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2011, at tbl. 2, *available at* <http://www.census.gov/prod/2013pubs/p60-246.pdf>.

38. See Brito, *supra* note 29, at 649.

39. *Id.*

40. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., MAJOR CHANGE IN WHO IS OWED CHILD SUPPORT ARREARS 1–2 (2014), *available at* https://www.acf.hhs.gov/sites/default/files/programs/css/changes_in_who_is_owed_arrears.pdf. With the decline in the number of TANF welfare cases, there has been a corresponding decline in the percentage of child support arrears that is owed to the government. The Office of Child Support Enforcement reports that 51 percent of arrears was owed to the government in 2002 and 26 percent was owed in 2013. *Id.* at 1.

greatest amount of debt; 63 percent of child support debtors earn \$10,000 or less.⁴¹

In order to collect these debts, the child support system has developed a number of enforcement methods.⁴² Most common is the withholding of income from employer payroll accounts, but child support obligors can also be subject to other measures, such as having tax refunds intercepted, drivers' or other licenses revoked, or bank account balances seized.⁴³ Significantly, many of these collection measures are automated, which means that employed parents who owe child support are essentially unable to avoid paying their orders.⁴⁴ However, even these automated mechanisms are not successful at collecting money from obligors who are very poor.⁴⁵ For a noncustodial parent without a job or assets, measures like wage assignments, tax intercepts, or property liens are completely ineffective.⁴⁶

Without the usual tools at its disposal, the child support enforcement system must rely on other tactics to address the debts owed by very poor obligors.⁴⁷ Civil incarceration pursuant to an order of contempt is commonly used as a remedy to enforce child support orders against indigent noncustodial parents,⁴⁸ many of whom lack attorney representation. Contempt is commonly understood as conduct that intentionally disobeys a court order.⁴⁹ In situations of nonpayment of child support, civil and criminal contempt are both available as enforcement measures. Civil contempt is a remedial sanction intended to compel compliance with a court order.⁵⁰

The legal process for pursuing civil contempt in State A involves two stages. Civil contempt proceedings in child support cases are initially brought before a family court commissioner. Child support attorneys file an order to show cause why the obligor should not be held in civil contempt for failure to comply with the child support order. Following a hearing (or

41. See Brito, *supra* note 29, at 649.

42. *Id.* at 650.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 650–51.

48. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 116–18 (2008).

49. See *id.* at 104–05 (explaining that contempt involves a showing that an “individual disobeyed a court order” and that “his noncompliance was willful”).

50. See Brito, *supra* note 29, at 656. Civil contempt is distinguishable from criminal contempt in several respects. While civil contempt is intended to coerce compliance, criminal contempt is a punitive sanction and intended to uphold the court's authority by punishing a party for defying a court order. See Patterson, *supra* note 48, at 101–03. Also, while both civil and criminal contempt can result in incarceration, another key difference between the two is that a civilly jailed individual can secure his or her release at any time by complying with the court order. *Id.* at 103. In addition, attorney representation is not uniformly available in both civil and criminal contempt actions; defendants in civil contempt cases do not enjoy a constitutional right to counsel or a variety of other protections guaranteed by the Sixth and Fourteenth Amendments. See *id.* While some states (including State A) afford publicly funded attorneys to indigent child support debtors facing incarceration through civil contempt proceedings, many do not.

multiple hearings), the family court commissioner determines whether grounds exist to find the obligor in contempt. Family court commissioners, however, lack authority to enter a finding of contempt. Instead, they must certify the matter to a circuit court judge with a recommendation that the judge find the obligor in contempt. Following a hearing (or multiple hearings) before a circuit court judge, the judge will determine whether a contempt finding is warranted. Child support enforcement proceedings are often cyclical; obligors experience multiple enforcement hearings for the same child support debt.

Civil contempt requires a finding that the underlying court order was willfully violated. In a case involving child support, a finding of civil contempt generally requires that an obligor was under an order of support, was able to comply with the order, and failed to do so.⁵¹ If the obligor is unable to comply with the order, civil contempt is not an appropriate response. Thus, ability to pay the underlying child support order is an essential finding in a child support contempt action.

Incarceration for civil contempt is conditional, and thus any sentence must include purge conditions (which are the steps to be taken in order to get rid of the contempt finding) under which the contemnor would be released upon compliance. Typically, the remedial sanction is stayed (or delayed) in order to provide the delinquent parent with an opportunity to meet the purge conditions. Civil incarceration can occur if the purge conditions are not met, and the remedial sanction ordered by the court is commitment to the county jail. In this case, the stay on the remedial sanction may be lifted and a bench warrant issued for the commitment of the noncompliant parent. In State A, additional administrative steps are required prior to incarceration, including notification of the noncompliant parent in order to provide him or her with the opportunity to appear before the court prior to the establishment of a commitment order.

III. NAVIGATING RACE AND RACIAL INEQUALITY IN CHILD SUPPORT ENFORCEMENT

A. *Colorblind Decision Making in Child Support Enforcement*

Race is highly visible yet notably absent in child support enforcement actions. During our observations of court hearings, the fathers brought before the court for nonpayment were overwhelmingly men of color, predominately Black fathers. The judges, family court commissioners, and lawyers were, by contrast, nearly all White. Race was only rarely explicitly mentioned, whether in the court hearings we observed or in our interviews

51. As noted in *Turner v. Rogers*, under established U.S. Supreme Court principles, “[a] court may not impose punishment ‘in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.’” *Turner*, 131 S. Ct. 2507, 2516 (2011) (quoting *Hicks v. Feiock*, 485 U.S. 624, 638 n.9 (1988)). Because once the civil contempt is purged the contemnor is free to go, it is often said that the contemnor “carr[ies] ‘the keys of [his] prison in [his] own pockets.’” *Hicks*, 485 U.S. at 647 (quoting *Shillitani v. United States*, 384 U.S. 364, 368 (1966)).

with legal actors. Yet, though we initially did not directly ask study participants to talk about the relevance of race to the fathers' ability to pay their past due child support orders, questions of race and racial inequality surfaced in the fathers' narratives of their lived experience as workers and fathers.

During court proceedings, it was not uncommon for fathers to reveal that they had long spells of unemployment or underemployment. Fathers would list the specific employers they had applied to or with whom they had interviewed and explain to the court that they had yet to hear back. One father indicated that he had applied to more than thirty jobs in the last month; when asked by the judge what he thought would be a fair outcome, he replied, "I don't know, anything I could do to try to get a job. But . . . me being incarcerated, I mean, that ain't going to do no justice."⁵²

Some fathers also pointed to barriers to obtaining jobs, including having a criminal record or liens. As one man told a family court commissioner, "Unfortunately because of the criminal background checks that you guys, well, the court, nothing I've committed, prevented me getting a professional job."⁵³ When they had employment, fathers often said that the work was temporary and that the income earned was not sufficient. As one man stated, "I am taking temporary employment now just to make ends meet and to try to pay something on my child supports."⁵⁴ Another father, explaining why he did not earn enough to pay his child support order, muttered, "I just didn't."⁵⁵

The trouble these men experience when seeking and maintaining work is not surprising in light of both the unemployment rate and documented discriminatory hiring practices in the largest city in County A. The unemployment rate for Black men in this city, at over 50 percent, is among the highest in the United States. The percentage of Black men who are employed has steadily declined over the past four decades, from well over 80 percent in 1970 to approximately 50 percent in 2010. This pattern of labor market disparities between Whites and Blacks, while particularly evident in County A, is one that exists nationwide.

Research conducted across the United States has found that Black applicants are treated less favorably than White applicants and less frequently called back or offered jobs.⁵⁶ Also, Black employees are offered lower starting wages than White employees.⁵⁷ Moreover, Blacks with criminal records are more heavily penalized in the job application process

52. Transcript of Record at 12, *Carter v. Rice* (County A July 23, 2014).

53. Amanda Ward, Researcher Field Notes 9 (Apr. 1, 2014) (on file with author).

54. Transcript of Record at 4, *Simon v. Hudson* (County A Feb. 26, 2014).

55. Ward, *supra* note 53, at 2.

56. Marc Bendick, Jr., Charles W. Jackson & Victor A. Reinoso, *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25, 31–32 (1994).

57. Roland G. Fryer, Jr., Devah Pager & Jörg L. Spenkuch, *Racial Disparities in Job Finding and Offered Wages*, 56 J.L. & ECON. 633, 635 (2013).

than Whites with criminal records.⁵⁸ In fact, Whites with criminal records are treated more favorably by employers than Blacks without criminal records.⁵⁹ Consequently, it is very unlikely that a Black convicted felon has any appreciable prospects in the labor market, which is particularly salient given that Black men are incarcerated at much higher rates than White men.⁶⁰

Family court commissioners and judges often direct unemployed fathers to participate in the JOBS Program, rather than immediately certifying their cases for civil contempt. The JOBS Program is a state-funded program.⁶¹ Local nonprofit organizations receive government contracts to provide clients with assistance in gaining job skills, applying to jobs, securing employment, and ultimately, paying their child support order.⁶² Typically, the organizations providing job assistance services also make additional services available to their court-mandated clients, such as participation in their fatherhood programs.⁶³

The director of one organization that operates within the JOBS Program, Peirce Roegner, confirmed that the fathers that his program serves cycle through low-wage jobs on an intermittent basis and, in some situations, are completely shut out of the labor market.⁶⁴ Roegner's clients are predominately Black, and he described the multiple, intersecting practices that undermine their efforts to secure long-term, stable employment. Outright racial exclusion impedes job access for some Black fathers in the JOBS Program. Roegner related several examples of employers who refused to hire any of the clients he referred. Describing one case, he said, "We sent African American young men up there to apply for jobs when [the employers] were hiring, and they turned them all away. They didn't fit the mold."⁶⁵ Instead, there the employer hired migrant farm workers, economically vulnerable workers to whom the employer paid low wages and offered no benefits. Speaking of another instance of race-based

58. Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 641.

59. *Id.* at 645.

60. Peter Wagner, *Incarceration Is Not an Equal Opportunity Punishment*, PRISON POLY INITIATIVE (Aug. 28, 2012), <http://www.prisonpolicy.org/articles/notequal.html>. Peirce Roegner, the director of a nonprofit jobs program in County A, confirms that criminal records are a large barrier to employment for Black men in County A, whether or not job applicants have a record. "[I]t is almost expected that a minority person who's over eighteen years of age has a criminal record. It's almost like, you know, uh, if you come in, and you fill out an application, and there's nothing there, if it's blank, they think you're lying." Interview by Daanika Gordon with Peirce Roegner, Director of JOBS Program, County A, State A (Jan. 15, 2015) (on file with author).

61. For more information on these state programs, see *Work-Oriented Child Support Programs*, NAT'L CONF. STATE LEGISLATURES (June 20, 2014), <http://www.ncsl.org/research/human-services/work-oriented-child-support-programs.aspx>.

62. *See id.*

63. *See id.*

64. Interview by Daanika Gordon with Peirce Roegner, *supra* note 60; Interview by Daanika Gordon with Peirce Roegner, Director of JOBS Program, County A, State A (Jan. 6, 2015) (on file with author).

65. Interview by Daanika Gordon with Peirce Roegner, *supra* note 60.

employment discrimination at a new business development outside the city, Roegner explained:

[T]hey did not recruit people from the city to come out there and work. They imported people from overseas because of the color of their skin. Even though they couldn't speak English, they were bringing in a workforce from other parts of the world who would fit into their community, racially, but, hey, they didn't care about the fact that they didn't talk English or what have you. They cared about [the fact that] they were White.⁶⁶

Of the several examples of discriminatory hiring practices that were shared, perhaps the most troubling is employers who prefer to recruit low-wage workers from overseas rather than hire local Blacks.

Alternatively, some practices, though race-neutral on their face, nonetheless produce race disparities in employment. For example, according to Roegner, local government entities have steered companies and their "family-supporting jobs" away from the city to the suburbs through tax breaks.⁶⁷ Residentially, County A is highly segregated, with Blacks primarily residing in the central city and Whites primarily residing in the outer suburbs. Employer relocation from the city to the suburbs contributes to the economic disenfranchisement of fathers in the JOBS Program (and others like them) simply because transportation is a significant barrier to employment for low-income Black city residents. Poor fathers often lack cars or a driver's license, and adequate bus transportation between the city and suburbs is not available.

Temp agencies are the most reliable employers of JOBS Program clients. Unlike many other employers in County A, they are willing to hire low-skilled Black men from the central city; however, according to Roegner, the agencies repeatedly undermine the stable employment of the very workers they hire. Roegner explained that some temp agencies may work with men periodically, allowing them to work for a period of time before a temporary layoff and a rehire. This practice is economically advantageous for the agency, as the employer will pay the temp agency up to \$20 an hour and the agency will pay the temp worker only \$7 per hour. The temp agency will tell employees that the jobs are "temp to perm," meaning that the temporary position will convert to a permanent, full-time position after ninety days of employment. But, to disrupt that switch from happening, the temp agency will lay workers off on the eighty-ninth day and then call them back to work a few days later, forcing workers to start all over from day one. Exploitative employment practices such as these undoubtedly contribute to the precarious financial situation in which these fathers live.

In their study examining the labor market experiences of women exiting welfare following the "welfare to work" reforms of the mid-1990s, sociologists Jane L. Collins and Victoria Mayer characterize temp work as

66. *See id.*

67. *See id.*

“enclaves of disempowered workers.”⁶⁸ Their study corroborates Roegner’s JOBS Program clients’ experiences with temp agencies. Collins and Mayer note that “temp service agencies operate across the spectrum of skill and wage levels” placing minority workers in a variety of low-wage, insecure jobs.⁶⁹ Like the Black fathers in the JOBS Program, some of the women in their study were negatively impacted by the “informal ‘ninety-day rule’ that characterizes many temporary positions, in which employers cut off contracts before workers become eligible for permanent positions.”⁷⁰ Such practices contribute to discontinuities in employment, deprive workers of rights and protections, and exacerbate inequalities.⁷¹

Despite the high levels of unemployment among minority men in State A and the documented incidence of race-based exclusion from the labor market, there was no mention during our focus groups that race-based employment discrimination is a factor relevant to obtaining work or that courts or lawyers ought to consider it when determining minority fathers’ ability to pay child support. We asked the judges, family court commissioners, and lawyers to identify the impediments that keep these fathers from finding jobs. In response, they pointed to other contributing factors and consistently recite a series of well-known and documented barriers to employment experienced by low-income men without acknowledging their links to race. They reported that the men lack adequate and marketable job skills, have limited education and/or lack a high school degree, possess limited work histories, and have been previously incarcerated.

However, they do not discuss how these are not race-neutral barriers, but rather are connected to systems that disadvantage Blacks. For example, Michelle Alexander has argued that the criminal justice system is designed in a way that ensures that men of color are incarcerated at much higher rates.⁷² As Judge Garnett in County A described, “Particularly with [the] climate that we have, it’s *tough* to get a job these days. And if you don’t have education, you[’ve] got a criminal record, it’s *really* tough.”⁷³ Similarly, a family court commissioner noted, “The issues of nonpayors are so dense. There’s transportation issues and criminal histories and lack of education and difficulties with the economy and multiple obligations to multiple women.”⁷⁴ Judge Rhinehart in County C described a case where the father did not have a high school diploma or driver’s license, had not

68. JANE L. COLLINS & VICTORIA MAYER, *BOTH HANDS TIED: WELFARE REFORM AND THE RACE TO THE BOTTOM OF THE LOW-WAGE LABOR MARKET* 157 (2010).

69. *Id.* at 156. Indeed, temp service agencies “are the primary institution organizing day labor for domestics, gardeners, and construction workers in many parts of the country.” *Id.*

70. *Id.* at 50, 92.

71. *Id.* at 156–57.

72. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 17 (2012).

73. Interview by David Pate with Eric Garnett, Family Court Judge, County A, State A (Sept. 14, 2013) (on file with author).

74. Group interview by Tonya Brito with Family Court Commissioners, County A, State A (Jan. 17, 2013) (on file with author).

worked since he was sixteen years old, and had a felony conviction; the judge said, “He’s sort of hit the trifecta of people [for whom] it’s going to be hard . . . to find employment.”⁷⁵ The lawyers and judges operating in child support court reveal a keen awareness of the challenges the fathers in their courts face when competing for jobs—with one glaring and significant exception. What they do not mention as a barrier to successful employment is the fathers’ racial identity or the pervasive and longstanding race discrimination in employment that they encounter in the labor market.

It was rare even for defense counsel to identify race as a factor that is relevant to success in the labor market and ability to pay child support. Defense Attorney Joseph Bourne, for example, talking about a Black client, said,

That was the guy [who had] one job interview in X number of years. And it’s like, you’re not helping yourself And it’s like, I can’t change the facts, you know. That’s basically what we’re going on. This is about the most fact-specific area of the law. You either did or you didn’t.⁷⁶

From Bourne’s perspective, his client’s failure to obtain employment was related only to his individual effort and abilities, and not to his race.

Another defense attorney, Harold Hopkins, said, “It’s been a rough economy for the last seven years . . . I don’t need to tell you this, but for poor Black people and poor people of any race.”⁷⁷ While Hopkins initially indicated some recognition that Blacks struggled in the job market, he was also quick to add that their challenges were not unique and that individuals of all races faced barriers in a weak economy. In this way, the specific challenges of Black men in the labor market become invisible.

There are potential explanations for why legal actors operating in the child support field ignore salient issues of race when considering an impoverished Black father’s ability to pay child support. One explanation is that the ideology of post-racialism, which posits that the United States has moved beyond race, undermines any impulse to take race and racial inequality into account. Post-racialism “reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decisionmaking or adopt race-based remedies.”⁷⁸ At best, this perspective is an aspirational—yet premature—ideal that resonates with many individuals and legal actors who believe (and often hope) that racial discrimination is rare.⁷⁹ A post-racial ideology is dangerous, however, because it masks the racism that continues to exist in society and “serves to

75. Interview by Tonya Brito with Melanie Rhinehart, Family Court Judge, County C, State A (June 19, 2013) (on file with author).

76. Interview by Amanda Ward with Joseph Bourne, Defense Attorney, County C, State A (June 3, 2014) (on file with author).

77. Interview by David Pate with Harold Hopkins, Defense Attorney, County C, State A (July 8, 2014) (on file with author).

78. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2008); see also Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection*, 98 GEO. L.J. 967 (2009); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

79. See Barnes, Chemerinsky & Jones, *supra* note 78, at 968–72.

reinstate an unchallenged White normativity.”⁸⁰ In the child support enforcement context, latent racism is manifest in the taken-for-granted quality of judges’ and family court commissioners’ statements about known job openings and the presumed ease with which they assume that the poor, Black fathers who appear in their courts can secure those jobs.

Additionally, some may be deterred from making race-based claims of unfairness because they anticipate backlash. In a post-racial world, there is a “colorblind proscription on race-talk,”⁸¹ and empirical studies show that, rather than provoke empathy, sensitivity, or moral outrage, “emphasizing racial unfairness may *increase* White support for discriminatory policies.”⁸² In an examination of how post-racial racism operates in the criminal justice system, Professor Ian Haney Lopez analyzed numerous studies that reach this counterintuitive finding.⁸³ In one study, for example, White participants were more likely to favor the death penalty when they learned that it discriminates against Blacks.⁸⁴ To avoid perverse outcomes such as this, individuals may avoid race-talk and instead employ “stealth strategies” to address racial unfairness.⁸⁵

In our study, we see evidence of this stealth strategy at work. Even the defense counsel that recognize the effect of race on their clients’ employment searches are careful not to attribute Black male joblessness to discrimination when advocating on behalf of their clients in court. Defense attorney Laura Hardaway, for example, shared in her interview that race-based labor market exclusion contributes to her clients’ challenges finding work.⁸⁶ Yet, she assiduously avoids mentioning discrimination when representing her clients in contempt actions. Instead, she gets the idea across by showing, for example, that her client “applied for one hundred jobs. He’s only gotten two callbacks. You know, you don’t have to point out [that] it’s discrimination.”⁸⁷ Through a more indirect presentation of evidence, she demonstrates to the court that discrimination is an inescapable conclusion.

Hardaway employs a strategy of challenging race-neutral expectations of job availability and earning capacity. This approach, though it indirectly and obliquely raises race as a relevant factor in her cases, is prudent and understandable. Other defense counsel related prior negative experiences when raising questions about race disparities in their cases.⁸⁸ For example, defense attorney Mabel Edwards was handling a juvenile court matter

80. Cho, *supra* note 78, at 1593; *see also* Barnes, Chemerinsky & Jones, *supra* note 78, at 972.

81. López, *supra* note 78, at 1064.

82. *Id.* at 1065.

83. *Id.* at 1064–66.

84. *Id.* at 1066.

85. *Id.* at 1067. López argues, however, that more, not less, “race talk” is needed to dismantle racial inequality. *Id.*

86. Interview by David Pate with Laura Hardaway, Defense Attorney, County A, State A (Jan. 13, 2014) (on file with author).

87. *Id.*

88. Group interview by Tonya Brito & David Pate with Defense Attorneys, County B, State A (May 8, 2014) (on file with author).

involving a Black male minor defendant with a White male judge presiding. The student intern working with Edwards argued to the court that the juvenile should not be waived into adult court and noted the county's race statistics regarding how many and which children got waived into adult court.⁸⁹ According to Edwards, the judge's response was angry and defensive:

I thought the judge was going to blow a gasket. I thought, I mean, just say it out loud in court and, I mean, it was appalling what the numbers were. But not him. I don't do that. I, you know, I, the judge, I am not a racist, and don't you call me a racist.⁹⁰

Unsuccessful efforts such as these reveal the challenges attorneys face in navigating issues of race and racial inequality in the cases they handle. According to Edwards, talking about race in court leads to "defensiveness" and "finger pointing." Although judges profess sensitivity to race issues—and she believes that they are sincere—"they don't think it's what they do. It's what happens before them and after them."⁹¹ Judges and other legal professionals, while perhaps aware that racial inequities exist, do not see child support enforcement hearings as a space where such disparities are of any relevance.

Adjudication of child support cases shows a judicial myopia with respect to racial context that presumes a level present-day social and economic playing field.⁹² Even advocates for poor fathers are reluctant to raise race as a relevant factor and instead employ a strategy of challenging race-neutral expectations about job availability and earning capacity.⁹³ The cases are litigated through a process of colorblindness and sanitizing racially discriminatory employment conditions. Race-neutral approaches such as these, which are undoubtedly desirable to some,⁹⁴ fail to challenge widely held assumptions about the relevance of race to one's employment prospects. In effect, jobless Black fathers are evaluated in child support proceedings according to a normative White standard.⁹⁵ Put differently, expectations about job availability reflect the experiences of Whites in the labor market and do not take account of the very different experiences of Blacks.

Avoiding race and racial inequality serves to legitimate court proceedings that emphasize perceived deficiencies in personal behavior and self-

89. *Id.*

90. *Id.*

91. *Id.*

92. See Yamamoto, Minner & Winter, *supra* note 18, at 241.

93. See *supra* notes 86–88 and accompanying text.

94. See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 2002–04 (2000).

95. Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 288–89 (2015) (critiquing the Supreme Court's affirmative action jurisprudence on the ground that it "define[s] the experiences of Whites in the United States as the normative standard by which all college and university applicants, and thus all affirmative action programs, should be evaluated").

rehabilitation and obscures the subordination of impoverished Black fathers in a racially stratified job market. Legal actors' discourses and the responsabilization strategies employed in court frame poor Black fathers as economic failures, impose behavioral compliance with mandated demonstrations of "effort," and reproduce systems of subordination.⁹⁶ The fallacy of the colorblind approach is illustrated in the following first-person narrative account and focused study of an order to show cause hearing in the *Mitchell v. Robinson* case.

B. *Mitchell v. Robinson, Order to Show Cause Hearing, April 29, 2014*

My research collaborator David Pate and I are observing hearings one day in State A, County A. Before the *Mitchell v. Robinson* hearing gets underway, Family Court Commissioner Andrew Hendren informs us (the researchers) that there are five separate cases on the calendar for 2:15 p.m., all of which involve the same father, Robinson.⁹⁷ As we wait for the hearing to begin, Commissioner Hendren mentions that the order to show cause petition was filed by only one of the mothers in these five cases. He says that when there are multiple cases involving the same obligor and an order to show cause is filed in one case, then the child support office will bring in all the cases for a joint hearing.⁹⁸ Economically disadvantaged men like Robinson tend to have multiple children across multiple partnerships. This phenomenon, referred to by social scientists as "multiple partner fertility," is especially common among unmarried couples.⁹⁹

96. Dawn Moore & Hideyuki Hirai, *Outcasts, Performers and True Believers: Responsibilized Subjects of Criminal Justice*, 18 THEORETICAL CRIMINOLOGY 5, 11 (2014) ("[R]esponsibilization [i]s a governing strategy that works to[] 'reconstruct self-reliance in those who are excluded.'" (quoting Nikolas Rose, *Government and Control*, 40 BRIT. J. CRIMINOLOGY 321, 334 (2000))).

97. His comments lead to a discussion in which he and state child support attorney Lynette Ballard each offer different perspectives on this practice. Apparently, the state has a push to bring in all cases involving an obligor when an order to show cause is filed, but not when other motions are filed, such as a modification motion. According to Ballard, the state is motivated to bring all the cases in simultaneously because they are trying to get arrears addressed and reduced. Commissioner Hendren makes clear that he is against this practice. He says: "Every wheel gets greased from one squeaky wheel." Tonya Brito, Researcher Field Notes 3 (Apr. 29, 2014) (on file with author).

98. *Id.* at 5.

99. "Nearly 40 [percent] of all unmarried mothers experience at least one new partnership, and about 14 [percent] have a child with a new partner, adding to the instability and complexity of these families." *Fragile Families and Child Wellbeing Study Fact Sheet*, FRAGILE FAMILIES, <http://www.fragilefamilies.princeton.edu/documents/FragileFamiliesandChildWellbeingStudyFactSheet.pdf> (last visited Apr. 23, 2015). About 13 percent of men aged forty to forty-four and 19 percent of women aged forty-one to forty-nine have children with more than one partner, with a higher prevalence among the disadvantaged. Karen Benjamin Guzzo, *New Partners, More Kids: Multiple-Partner Fertility in the United States*, 654 ANN. AM. ACAD. POL. & SOC. SCI. 66, 74 (2014). Compared to parents with two or more children by only one partner, people with multiple-partner fertility become parents at younger ages, largely with unintended first births, and often do so outside of marriage. *See generally id.* "While only 15 percent of married mothers have children with different fathers, 43 percent of unmarried women have children with at least two men." *Fragile Families Research Brief*, FRAGILE FAMILIES, <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief8.pdf> (last visited Apr. 23, 2015).

At 2:41 p.m., state child support attorney Lynette Ballard calls in the case of *Mitchell v. Robinson*. Both parties in the case appear, but the other four mothers do not show up for the consolidated hearings. Marie Mitchell is a Black woman in her late thirties or early forties. She wears her hair in braids that are pulled back in a ponytail. She is dressed in a dark jacket and slacks. Dante Robinson is a Black man in his early forties with a shaved, bald head. “Respectabl[y] poor,”¹⁰⁰ Marie and Dante are neatly dressed and well-groomed. Both are unrepresented.¹⁰¹

The hearing lasts for a total of fourteen minutes. It starts in a familiar fashion, with the government lawyer, Ballard, reviewing the history of child support payments that have been made (or not made), followed by Commissioner Hendren questioning Robinson about his work history and current efforts to find a job. Dante has five court orders to pay child support and eleven children altogether. Eight of his children are under eighteen years old and they are the subjects of the five pending child support orders. For each case, he has a monthly amount due for current support, a monthly amount due for arrears, a total amount due to the mother, and a total amount due to the state. The monthly amounts vary, from a low of \$5.00 per month to over \$100 per month. The financial details spill out so rapidly that I can barely record them in my notes. Dante’s total child support debt, though, is in the tens of thousands.¹⁰²

The subject of this child support hearing is Janae, his thirteen-year-old daughter with Marie Mitchell. The child support order is \$152 per month and Marie wants the order enforced. According to Attorney Ballard, Dante made his last child support payment in April 2013, thirteen months prior to the hearing date.¹⁰³ Upon receiving Dante’s child support payment, the child support agency spread it out proportionately across all five of his open cases, which are all in arrears. Marie Mitchell received only \$4 in child support from that payment.¹⁰⁴

After reporting on the status of the case and Robinson’s payment history, Attorney Ballard requests that the court refer Dante to the JOBS Program, saying that he needs help finding a job.¹⁰⁵ Commissioner Hendren begins to question Dante:

Q: Who is paying your bills?

A: I live with my mom.

Q: When did you last work?

100. See Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 *YALE J.L. & HUMAN.* 343, 372 (1990).

101. Brito, *supra* note 97, at 5.

102. *Id.*

103. Dante disputes the date of his last payment, arguing that it was October 2013. Attorney Ballard double-checked her file and confirmed that Dante was correct about the date of his last payment. *Id.*

104. *Id.*

105. *Id.* at 6.

A: My last job was a year ago.

Q: What have you been doing to find work?

A: I fill out applications all the time. I have seven felonies and I shot someone. When I put the truth about that on applications then no one will hire me.¹⁰⁶

Commissioner Hendren suggests that the JOBS Program can help with finding a job. His tone is encouraging. Dante responds that he has been looking for a job. Commissioner Hendren tells him that it cannot hurt to give it a try. Dante responds in a calm and deliberate manner: “I try. I try. I try.” Again, as if he has not heard Dante’s repeated comments about his efforts to find work, Commissioner Hendren talks about how important it is to keep looking for a job. Dante asserts: “I can bring in video showing how hard I’m trying.”¹⁰⁷ The court commissioner’s failure to even acknowledge Dante’s claim that he cannot try any harder to find a job illustrates how the struggles faced by poor Black men are rendered invisible in multiple ways. Not only do most legal professionals fail to take the racial reality of the labor market into account in their approach to child support enforcement cases, but they also ignore accounts of these experiences in the courtroom. Rather, they expect Dante and other obligors like him to follow a particular narrative—one where they admit that they could be doing more in their employment search—and refuse to truly hear statements and experiences that challenge that narrative.

Commissioner Hendren then shifts to Marie Mitchell. There is a visible look of frustration on Mitchell’s face. She reveals that she is on disability and needs the child support payments to raise her daughter Janae. “The four dollars that I get every six months or a year isn’t enough.” Commissioner Hendren tells her that she will get about 60 percent of whatever Dante pays because her child support order is the largest of the group.¹⁰⁸

Dante speaks out of turn.¹⁰⁹ He interjects and says firmly: “I do for my kids.” He then tells the court that he panhandled \$200 to give Janae a gift for her thirteenth birthday. “I go out two or three times a week to look for a job. I don’t want to be poor. I don’t want to panhandle.”¹¹⁰

106. *Id.*

107. *Id.*

108. *Id.*

109. See Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 635 (1991) (explaining that “speak[ing] out of turn” creates “an opportunity for the client to assert autonomous identity”); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV 1, 27–31, 48–51 (1990) (explaining that although Mrs. G had rehearsed with her legal aid attorney an explanation that she purchased life necessities when she used a welfare overpayment to replace her daughters’ torn up, old shoes, during the fair hearing Mrs. G surprised her attorney and silenced the room when she claimed power by departing from this “victim” script and instead stating “quite emphatically” and in a “stronger, more composed” voice that she’d bought Sunday shoes and that her “girls already had everyday shoes to wear to school, but she had wanted them to have nice shoes for church too”).

110. Brito, *supra* note 97, at 6.

In their recent book, *Doing the Best I Can: Fathering in the Inner City*, Kathryn Edin and Timothy Nelson report on their ethnographic study of 110 Black and White low-income, unmarried fathers in Philadelphia, Pennsylvania, and Camden, New Jersey.¹¹¹ According to Edin and Nelson, men like Dante Robinson believe they should provide for their children but reject the idea that they play a traditional breadwinner role.¹¹² These men have “radically redefined fatherhood to sharply elevate the softer side of fathering: offering love, preserving an open line of communication, and spending quality time.”¹¹³ As for providing economic support for their nonresident children, “doing the best I can . . . with what is left over” is what drives their sense of obligation and financial behavior.¹¹⁴ All too often, however, they contribute very little financial support to children with whom they do not reside because not much is “left over.”¹¹⁵ Although the men place great weight on their responsibility to be self-supporting, even that modest goal is often out of reach due to their meager earning capacity.¹¹⁶

At the hearing, Marie Mitchell confirms that Dante Robinson gave their daughter Janae the money for a birthday present as he claimed. There is no record of the payment in the financial accounting maintained by the child support agency, however. Because the funds did not go through the formal channels of the child support system—which track payments—the money does not count against Dante’s accrued child support debt. Commissioner Hendren recommends that Dante make payments on a monthly basis, even partial payments, and that he make all future payments through the system.¹¹⁷

Given his experience in the child support system, Dante has no doubt received that advice before, yet he still opted to give the money directly as a gift to his daughter. The \$200 may not “count” to the child support system, but for Dante, it counts in his identification as a father and gives meaning to his relationship with Janae. For him, to give that money to the child support agency and show up empty-handed on Janae’s birthday is no choice at all. While he is an impoverished man in his forties who lives with his mother, he does not succumb to the dictates of the state bureaucracy regarding the manner in which he should provide for his child. Instead, he exercises agency to realize his own definition of what it means to be a good father to his child.

Many fathers in Dante’s position prefer to support their children through informal cash and in-kind exchanges instead of complying with the

111. KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013).

112. *See id.* at 206–07.

113. *Id.* at 207.

114. *Id.* at 206.

115. *Id.*

116. *Id.* at 113, 206.

117. Brito, *supra* note 97, at 7.

mandate that they pay support through the formal state process.¹¹⁸ Some fathers directly give their children items such as a new coat or school supplies on an “as needed” basis.¹¹⁹ Others make “in-kind” contributions to their children’s household, sometimes in lieu of cash transfers.¹²⁰ Still others give money directly to the mothers of their children, particularly when the parents remain on good terms. Fathers enact the fatherhood role in this manner to remain connected to their children. Edin and Nelson found in their study that having no money deters some fathers from staying involved in their children’s lives.¹²¹ They write, “A father who doesn’t even have the wherewithal to treat his child to ice cream or purchase a pair of sneakers will often feel that he has no business coming around.”¹²²

As Dante’s hearing draws to a close, Attorney Ballard asks the court to certify the case to a judge, so a contempt finding can be entered at the next hearing if Dante has not fulfilled his work search requirements.¹²³ Commissioner Hendren denies the request and instead states that he will set the next hearing date before him so that Dante receives the same message the next time he is in court. Turning to Dante, his tone softens and he tells Dante that he is getting credit for trying to find a job and encourages him to continue those efforts. Yet the commissioner still requires Dante to attend the JOBS Program, which implies that he has not tried hard enough. Commissioner Hendren then dismisses the orders to show cause in the other four cases because the mothers did not appear at the hearing.¹²⁴

C. Job Search Efforts, Compliance, and Social Control

The end result of Dante Robinson’s enforcement hearing is that he is directed to work with a nonprofit jobs program. At the next court hearing, he will be questioned about his efforts to find work and, if he does not demonstrate sufficient compliance, he will face potential civil incarceration. Dante’s job prospects are undeniably weak. Nonetheless, his case presses forward. Like Dante’s case, enforcement proceedings for similarly situated, impoverished, and homeless men follow a common unwritten script. The family court commissioner plays his role. *How much is the order? When was the last payment? What are the arrears? When was your last job? How are you supporting yourself? Are you looking for work? We’ll refer you to the JOBS Program so that they can help you find a job.* Dante deviates from the ritual performance when he insists that he *is* looking for a job and implies that the JOBS Program could not possibly increase his

118. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV 991, 995 (2006).

119. See EDIN & NELSON, *supra* note 111, at 111.

120. Maldonado, *supra* note 118, at 1004–05.

121. EDIN & NELSON, *supra* note 111, at 168. Mothers, too, act as “gatekeepers” to their children, sometimes denying access to fathers who have meager financial contributions to make. *Id.* at 169.

122. *Id.* at 168.

123. Brito, *supra* note 97, at 7.

124. *Id.*

already substantial efforts.¹²⁵ Every time Commissioner Hendren urges him to give the program a try or to try harder, Dante meets him with: “I try, I try.” When Dante shares that he panhandled to buy a gift for his daughter, he veers so far from the usual narrative that the commissioner cannot even acknowledge these facts and instead continues to extol the benefits of the JOBS Program.

In court, Dante is heard but not understood. His experience is “one of speaking into a void, of speech without response.”¹²⁶ The legal system fails to comprehend or take seriously his story. There is no substantive response to his continued pleas that he is trying everything to find a job. There is no response to his confession that he begged on the street to provide for his daughter. The social reality of Dante’s life, an impoverished Black man who lives with his mother, cannot be acknowledged or addressed in the courtroom.

Like those of Millie Simpson,¹²⁷ Mrs. G,¹²⁸ and Leila Spencer,¹²⁹ Dante’s story reveals how the poor and marginalized experience multiple positionalities within the law. They each stand before the law,¹³⁰ submitting to the legal process that has been engaged to judge them and hold them accountable through mechanisms of social control and punishment. They each stand with the law,¹³¹ using strategy and tactics to maneuver and locate fissures within the legal system. And they each stand against the law,¹³² voicing resistance to the unspoken courtroom script and “revers[ing] for a moment the trajectory of power.”¹³³

Each of these poor, Black citizens is present in court but, neither seen nor heard by the legal actors present, is rendered invisible in that space. Though Dante repeats over and over that he is looking for a job, neither the child support attorney nor the commissioner acknowledges or responds to his statements. Conversely, Dante is simultaneously hypervisible in the legal space he occupies, reconstituted in court through the use of negative, racial stereotypes. For his part, Dante is presented as both hypersexual and criminal, two pervasive and longstanding negative stereotypes of Black masculinity. Rather than allow the *Mitchell v. Robinson* case to proceed singularly before the court, the child support agency has placed all five of his open cases on the court’s calendar. Instead of addressing his failure to pay child support on behalf of just one child, Janae, the courtroom drama highlights the fact that he is not supporting any of the eleven children he

125. See *supra* notes 107, 110 and accompanying text.

126. Sarat, *supra* note 100, at 361.

127. Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731, 731 (1991).

128. White, *supra* note 109, at 5.

129. Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 944 (2005).

130. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

131. See *id.* at 108, 164.

132. See *id.* at 165, 219–20.

133. Ewick & Silbey, *supra* note 127, at 745.

has had with five different women. Additionally, his extensive criminal record—seven felonies and a shooting—is referenced as another element of his personhood and the primary reason he cannot provide economically for his children.

Standing against the law,¹³⁴ Dante disrupts the specter of both invisibility and hypervisibility. He is quietly resistant in the face of the bureaucratic response of the court. He does not acquiesce to the standard courtroom script (i.e., referral to the JOBS Program) that is offered by the court because it does not fit his social reality. He challenges the normative expectation—that there is a job out there for him if only he would try harder to find it—through his repeated statements that he is trying. He breaks the spell simply by speaking his truth and laying bare his abject poverty and vulnerability. “I don’t want to be poor. I don’t want to panhandle.”¹³⁵ Dante also contests the hypervisible negative image of him as a hypersexual Black man who has multiple children with multiple women and does not see fit to take care of any of them. He presents a counter-identity and thus reclaims his personhood as a father who loves and cares for his children, despite his poverty. In telling his story of begging on the street to provide Janae with a birthday gift, Dante reveals what fatherhood means for him and what he must do in order to “do” for his kids. Presenting his story serves to individualize and humanize him and illuminates the lived experience of other impoverished child support debtor fathers who appear every day in family court.

The child support system is blind to the race-based injustice that Dante Robinson and other Black men experience in the labor market. Formal colorblindness assumes “[r]acial group members all have equal prospects of achieving the American dream—only individual talent and initiative matter.”¹³⁶ As appealing as the colorblind ideal may be to some, ignoring race when it matters has insidious effects—it can perpetuate discrimination¹³⁷ and even result in increased racial bias.¹³⁸

Such harm is manifest in child support cases where the colorblind mindset constructs indigent Black fathers as objects of social control, men who need to be encouraged, prodded, and even threatened with imprisonment to get them to seek work. Fathers are ordered to engage in work search efforts and the court monitors their compliance with that directive at each subsequent hearing. Rather than immediately resorting to civil incarceration as a remedy, the legal actors maintain that they are willing to give the obligors multiple opportunities to find a job and comply with their child support order. Family court commissioners and judges confirm that these cases “spin in place,” with some cases having multiple hearings scheduled over a period of time. As one commissioner stated: “[I] think we all bend over backwards to give them every opportunity to do

134. *See supra* note 132.

135. *See supra* note 110 and accompanying text.

136. Yamamoto, Minner & Winter, *supra* note 18, at 263.

137. *See* Peery, *supra* note 20, at 490.

138. *See* Plaut, *supra* note 19, at 87.

something.”¹³⁹ By envisioning themselves as offering obligors multiple chances to fulfill their legal obligations, legal actors reveal their beliefs that with enough time and opportunity, any father should be able to secure employment.

Legal actors’ perceived leniency belies the underlying tension between a race-neutral expectation that work is available to all fathers who seek it and the racialized hierarchy of the labor market these fathers encounter. Defense attorney Laura Hardaway reports that sometimes she references the high unemployment rate for minorities when making arguments in court that her clients cannot find work, but the argument “goes nowhere.”¹⁴⁰ Family court commissioners frequently respond that they just saw in the newspaper that a firm or business is advertising jobs and that her client should go down there and get that job.¹⁴¹ From the perspective of the court, White and Black job applicants have an equal chance at getting those jobs, and the fact that Hardaway’s clients are Black is an arbitrary distinction that should make no difference in society or in the law.¹⁴² Thus, when Black fathers do not get jobs, they are cast as failures who are simply not trying hard enough to gain employment and pay their child support orders, even after being offered multiple chances by the court.

Legal actors’ race-neutral approach masks the racial subordination that exists¹⁴³ and can reproduce racial disadvantage through enforcement of unrealistically high orders that go unpaid, accruing burdensome and uncollectible arrearages sometimes in the tens of thousands of dollars. In these cases, child support orders are initially set at a monthly figure based not on a father’s actual income (or his lack thereof), but rather on the imputed income of a full-time, minimum wage job.¹⁴⁴ In so doing, the legal system embodies a “sameness” framework¹⁴⁵ in which all men must “meet a single standard marked by formally ‘neutral’ requirements of behavior.”¹⁴⁶ This simple and appealing conceptual scheme elides the racial context of family court, where the prospect of incarceration looms over Black fathers as they are called to court—again and again—to account for their continued failure to find work.

CONCLUSION

Studying questions of access to justice for low-income civil litigants reveals the challenges of navigating race and racial inequality in the context of child support enforcement proceedings. The judges, family court commissioners, child support attorneys, and many defense counsel struggle to understand or even see the challenges faced by the low-income Black

139. Group interview by Tonya Brito with Family Court Commissioners, *supra* note 74.

140. Interview by David Pate with Laura Hardaway, *supra* note 86.

141. *Id.*

142. Harris, *supra* note 94, at 1929.

143. See Carbado, *supra* note 17, at 1617.

144. See Brito, *supra* note 29, at 639.

145. See Carbado, *supra* note 17, at 1611.

146. Harris, *supra* note 94, at 2014.

fathers who they encounter in court. They do not acknowledge the explicit and implicit racial discrimination that exists in the labor market and, instead, take a race-neutral approach in their work. In failing to acknowledge how racial inequality shapes the job opportunities of Black men, the child support professionals hold the fathers to unrealistic standards for finding and maintaining consistent full-time employment. Furthermore, as a result of their judicial myopia and inattention to the racialized social and economic realities of people of color, they cast these men as “deadbeats” who would not seek work absent judicial supervision and the prospect of civil incarceration.

As this Article illustrates, a race-neutral approach masks the unequal racial structures that persist throughout U.S. society. Contrary to the beliefs of the legal professionals in our study, these structures play an important role in child support enforcement proceedings. The failure of institutional actors to recognize the very real consequences of racial inequality in the lives of the Black fathers in their courtrooms serves to legitimate and perpetuate these very systems of subordination.