

Negotiating race and racial inequality in family court

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TAKEAWAYS

Low-income Black fathers face explicit and implicit racial discrimination in the labor market, making it challenging for them to earn enough to provide for their children.

Child support professionals hold fathers to unrealistic standards for finding and maintaining consistent full-time employment by failing to acknowledge how racial inequality shapes the job opportunities of Black men.

Ignoring race when it matters serves to perpetuate discrimination and can even increase racial bias.



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In 2019, millions of noncustodial parents across the United States owed over \$115 billion in child support debt.¹ The majority of child support debt is owed by low-income fathers, many of whom are Black.² While the rules around what happens to these fathers vary from state to state, their fate is adjudicated in family court where they could face incarceration for their unpaid child support.

Most low-income fathers of color navigate the civil court system without legal representation. In fact, 80 percent of the civil legal needs of low-income communities go unmet and the vast majority of unrepresented litigants are low income.³ Even more troubling is that these trends are going in the wrong direction. State courts 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.⁴ This phenomenon is referred to by some as a “justice gap,” meaning that low-income litigants do not have access to the same level of representation as Americans with more financial means.⁵ The population of low-income Americans most affected by the civil justice gap is disproportionately composed of people of color.⁶ Still, race and racial inequality are understudied areas in the literature examining access to justice.

In this article, we examine 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, many of whom lack the financial resources to pay the support they owe and are unrepresented in the proceedings.⁷ We address the following research question:

- How does race and racial inequality affect child support judicial proceedings for low-income litigants?

Many fathers who are legally obligated to pay support are poor and have difficulty finding and maintaining jobs that would allow them to reliably pay support.

Low-income fathers, child support enforcement, and civil contempt proceedings

Child support is intended to provide financial resources for children residing in single-parent households. However, many fathers who are legally obligated to pay support are poor and have difficulty finding and maintaining jobs that would allow them to reliably pay support. According to a 1997 Urban Institute study, about 88 percent of poor noncustodial fathers—including fathers who were institutionalized and those without a child

support order—pay no child support.⁸ Fathers without the means to pay can incur significant debt in the form of child support arrears. Low- and no- income noncustodial parents account for the majority of child support arrears; of noncustodial parents with more than \$100,000 in arrears in 2017, 60 percent had no reported income, and an additional 25 percent had reported income of less than \$20,000, meaning their debt was at least five times their annual income.⁹

Child support collection and enforcement services are governed by each state’s child support program (see text box). In order to collect child support debts, these agencies use a number of enforcement methods including wage garnishments, tax intercepts, and property liens. While these measures work well to enforce orders for employed noncustodial parents, they tend to be unsuccessful in collecting money from obligors who are very poor. As a result, the child support enforcement system relies on other strategies, including pursuing an order of civil contempt for noncompliance with the child support order.

For a noncustodial parent to be found in civil contempt, a judge must determine that the obligor had the ability to pay the child support order but failed to do so. In the state in which we conducted our study, the process for pursuing an order of civil contempt generally has two parts. First, the case is brought before a family court commissioner. Following one or more hearings, the family court commissioner determines whether grounds exist to find the noncustodial parent in contempt. If so, the case then goes to a circuit court judge for an additional one or more hearings. In order for a judge to arrive at a finding of civil contempt, they must generally determine that an obligor was under an order of support, was able to comply with the order, and failed to do so. If the obligor is unable to comply with the order, the judge should not apply an order of civil contempt. Thus, the judge’s assessment of the noncustodial parent’s ability to pay the underlying child support order is an essential finding in a child support contempt action.

Most noncustodial fathers who do not pay their child support are poor and face substantial obstacles to finding jobs that would give them the means to pay.¹⁰ One study found that 75 of noncustodial fathers with incomes below 130 percent of the federal poverty line did not work full-time.¹¹ Other studies have found that 60 percent of poor fathers who do not pay child support belong to 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.¹² Given these challenges, it is not surprising that so many of these men struggle to find employment.

Child support enforcement

All U.S. states operate a child support program to provide child support collection and enforcement services. The state agencies are overseen by the federal Office of Child Support Enforcement (OCSE).

At a minimum, all child support enforcement programs offer the following services:

- Locating noncustodial parents;
- Establishing paternity;
- Establishing and modifying child support orders;
- Collecting payments and enforcing child support orders; and
- Referring noncustodial parents to employment services.

Not all child support payments are managed by state child support programs; some are handled through courts or private attorneys. Individuals who receive public assistance from the state are required to participate in the state child support program. In addition, any parent who needs help to establish a child support order or to collect support payments can apply for those services.

Virtually all noncustodial parents who are employed in the formal labor market have child support payments automatically deducted from their wages. The child support system has a number of other methods intended to enforce order payment. If an order is still not paid in full, the child support enforcement agency or the custodial parent can request a hearing in family court for an order of civil contempt, or non-compliance with the child support order.

In the state in which we conducted our study, an initial hearing is conducted under a family court commissioner (who is appointed by the circuit court judge). The commissioner can: (1) determine that there are no grounds to find the noncustodial parent in contempt; (2) order the noncustodial parent to appear before the commissioner again at a later date; or (3) conclude that there are grounds to find the noncustodial parent in contempt, and thus refer to case to the circuit court judge. The circuit court judge (an elected position) will then hold an additional one or more hearings, and then make a decision on the civil contempt order. If the court determines that the noncustodial parent is able to comply with the order but has failed to do so, the noncustodial parent can be ordered to pay a lump sum, scheduled payments, or face civil incarceration.

Methods

The findings discussed here 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.¹³ 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 became apparent early in our data collection efforts.

The state in which we conducted the research for this article is one of several states that provides appointed counsel to low-income child support obligors facing incarceration as a result of a finding of civil contempt. We concentrated our data collection in courts in three counties: (1) a large, urban court that operates in a racially and ethnically diverse and economically depressed city; (2) a suburban court that operates in a less ethnically diverse and fairly economically advantaged environment, though one that also has large racial disparities; and (3) a smaller urban court that operates in a less ethnically diverse and relatively more economically advantaged city than does the large urban court.

Data collection included exploratory fieldwork, observation of child support enforcement hearings, and group and individual interviews with legal professionals who handle child support cases; we did not interview the custodial or noncustodial parents who we observed in hearings. We also conducted multiple site visits during which a team of researchers observed court proceedings.

Data collection spanned thirty-four months during which we conducted about sixty-four hours of observations in county courthouses. 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 of Asian descent. In these same cases, 97 percent of the obligors appeared to be male and 3 percent appeared to be female.

We conducted twenty-eight total interviews—eight group interviews and twenty individual interviews. Interview participants 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 were White, 56 percent were male, and 44 percent were female.

Questions of race and racial inequality repeatedly surfaced as the fathers spoke during their court hearings.

Colorblind decision making in child support enforcement

During our court observations, race was highly visible, but rarely acknowledged in child support enforcement actions. As noted above, 80 percent of the fathers in court for nonpayment of child support were men of color, predominantly Black men. In contrast, the judges, family court commissioners, and lawyers in those court rooms were nearly all White. During the court hearings we observed and in our interviews with legal actors, race

was rarely mentioned explicitly. Still, questions of race and racial inequality repeatedly surfaced as the fathers spoke during their court hearings.

Many fathers spoke of long periods of unemployment and underemployment. Some spoke of barriers to obtaining a job, such as having a criminal record or liens. The trouble that these men experience in finding and maintaining unemployment is not surprising given the characteristics of the largest city in the county in which our study was located. The unemployment rate for Black men in this city exceeded 50 percent during our observation period, higher than most other cities in the United States.

This pattern of labor market racial disparities, while particularly apparent in the geographical area of our study, is evident nationwide, and is reflected in other research. Black job applicants are less frequently called back or offered employment compared to White applicants.¹⁴ When Black Americans do obtain employment, their starting wages are lower compared to similarly-qualified White employees.¹⁵ The penalty for having a criminal record in the job application process is so much larger for people who are Black than for people who are White, that Black people without criminal records are actually treated less favorably by employers than White people with criminal records.¹⁶ As shown in Figure 1, Black men in the United States are incarcerated at a much higher rate than White men. Given how difficult it is for a convicted felon who is Black to find steady employment, this high rate of incarceration means that large numbers of Black fathers face an extreme challenge in earning enough to support their children.

Figure 1. In the United States, men who are Black are incarcerated at a much higher rate than men who are White.



Note: Each figure represents rate of 1,000 in 100,000 residents incarcerated, includes male prisoners of all ages.

Source: Bureau of Justice Statistics, Federal Justice Statistics Program, 2019 (preliminary), National Corrections Reporting Program, 2018, National Prisoner Statistics, 2019, and Survey of Prison Inmates, 2016; U.S. Census Bureau, “Postcensal Resident Population Estimates for January 1, 2020,” December 31, 2019, Table 10.

Rather than immediately certifying child support cases for civil contempt, family court commissioners often direct unemployed fathers to participate in the JOBS Program. Through this state-funded program, local nonprofit organizations receive government contracts to help clients gain job skills, apply for jobs, find employment, and ultimately, pay their child support order. The organizations providing job assistance services often also have additional services—such as fatherhood programs—that are available to their court-mandated clients. One person we interviewed, the director of an organization offering services through the JOBS Program, noted that his predominantly Black clients tend to

cycle through temporary low-wage jobs, and at times are completely shut out of the labor market. Some Black fathers face explicit racial discrimination—such as a company that preferred to hire White non-English speakers from other countries rather than Black men from the community. Others faced implicit discrimination—practices that appeared to be race-neutral but in fact resulted in racial employment disparities, such as local economic policies that place jobs in areas that are geographically distant for Black individuals living in a highly segregated area. The organization director explained that most JOBS Program clients who locate employment find it through temp agencies that are willing to hire low-skilled Black men from the central city. However, these agencies reportedly often undermine job stability for their workers, by claiming that a temporary position will become permanent after ninety days, but then laying them off after eighty-nine days. They then rehire them again a few days later, with the permanent employment clock again set to zero. Other research has confirmed that temp agencies often place minority workers in low-wage, insecure jobs, using practices like the “ninety-day rule” that contribute to intermittent employment, deprive workers of rights and protections, and exacerbate inequalities.¹⁷

Even though minority men in the area of our study faced high levels of unemployment and race-based exclusion from the labor market is documented, the court officials in our focus groups did not suggest race-based employment discrimination as a factor relevant to obtaining work, nor did they propose that courts or lawyers should consider it when determining minority fathers’ ability to pay child support. Instead, judges, family court commissioners, and lawyers, reflecting a “colorblind” attitude, stated that these fathers could not find jobs because they lacked adequate and marketable job skills, had limited education and work histories, and had been previously incarcerated. They did not acknowledge that these barriers to employment are not race-neutral barriers, but rather are linked to systems—such as the criminal justice system—that inherently disadvantage people who are Black.¹⁸

A colorblind approach to assessing civil contempt cases ignores racially discriminatory employment conditions. While undoubtedly desirable to some, race-neutral approaches such as these fail to challenge inaccurate assumptions about how race is related to employment prospects. Jobless Black fathers are evaluated in child support proceedings according to a normative White standard. Effectively, expectations on the part of court officials about job availability reflect the experiences of White people in the labor market, and do not take account of the very different experiences of people who are Black. The shortcomings of the colorblind approach can be seen in one of the hearings we observed. This was an “order to show cause” hearing, the first part of the two-stage civil contempt process, where a family court commissioner determines whether there is reason to find the noncustodial parent in contempt.

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

Dante Robinson was called to an order to show cause hearing by Marie Mitchell, the mother of Janae, her thirteen-year-old daughter with Robinson.¹⁹ Robinson is named in four additional cases on the calendar for the same time period, representing his other open child support orders. He has a total of eleven children, eight of whom are minors. He has child support orders for these eight children with five different women. While multiple partner fertility—having biological children with more than one partner—is more common among unmarried couples than married couples, Robinson is an unusual case.²⁰ Although only Mitchell has filed an order to show cause petition for nonpayment of child support, the policy of the child support office when there are multiple cases with the same obligor is to file a similar petition for all outstanding orders.

At 2:41 p.m., the case of *Mitchell v. Robinson* is called in. 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; Dante Robinson is a Black man in his early forties with a shaved, bald head. Both are neatly dressed and well-groomed, and both are unrepresented by legal counsel.

The hearing lasts for a total of fourteen minutes. It starts with the lawyer representing the child support enforcement office, 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. For each of Robinson's five child support orders, 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. Robinson's total child support debt is in the tens of thousands.

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 Mitchell wants the order enforced. According to Attorney Ballard, Robinson made his last child support payment in April 2013, thirteen months prior to the hearing date. Upon receiving Robinson'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.

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

Q: Who is paying your bills?

A: I live with my mom.

Q: When did you last work?

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.

Commissioner Hendren suggests that the JOBS Program can help with finding a job. His tone is encouraging. Robinson responds that he has been looking for a job. Commissioner Hendren tells him that it cannot hurt to give it a try. Robinson responds in a calm and deliberate manner: "I try. I try. I try." Again, as if he has not heard Robinson's repeated comments about his efforts to find work, Commissioner Hendren talks about how important it is to keep looking for a job. Robinson asserts: "I can bring in video showing how hard I'm trying."

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 \$4 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 Robinson pays because her child support order is the largest of the group.

Robinson speaks out of turn. 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."

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 Robinson’s accrued child support debt. Commissioner Hendren recommends that Robinson make payments on a monthly basis, even partial payments, and that he make all future payments through the system.

As Robinson’s hearing draws to a close, Attorney Ballard asks the commissioner to find that cause for contempt exists, so that in the second part of the contempt process, a judge can enter a contempt finding if Robinson has not fulfilled his work search requirements. Commissioner Hendren denies Ballard’s request and instead states that he will have Robinson return to his court for a second hearing so that Robinson receives the same message again. Turning to Robinson, his tone softens and he tells Robinson that he is getting credit for trying to find a job and encourages him to continue those efforts. Yet the commissioner still requires Robinson 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.

Poor men may strive to do their best to provide for their nonresident children, but often have very little financial support to give. Kathryn Edin and Timothy Nelson, in their ethnographic study of 110 Black and White low-income, unmarried fathers in Philadelphia, Pennsylvania, and Camden, New Jersey, suggest that men like Dante Robinson believe that they should provide for their children but reject the view that they should play the role of a traditional breadwinner. 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.”²¹

While the \$200 that Robinson gave to his daughter as a birthday gift does not “count” towards his formal child support obligation, it does show him trying to be a good father to Janae. Many fathers in Robinson’s position prefer to support their children through informal cash and in-kind exchanges rather than complying with their child support order and paying through the formal state process.

As appealing as the colorblind ideal may appear to some, ignoring race when it matters can have disastrous consequences, perpetuating discrimination and even increasing racial bias.

Job search efforts, compliance, and social control

The end result of Dante Robinson’s first contempt hearing is that he is directed to work with the JOBS Program. At the next hearing before Commissioner Hendren, he will be asked about his efforts to find work and, if he does not demonstrate sufficient compliance, will go before a judge and face potential civil incarceration. At his hearing, the legal system fails to comprehend or take seriously Robinson’s story. Although the order to show cause petition was filed by only one of the mothers with whom Robinson has children, the child support agency has placed all five of his open cases on the court’s calendar. Rather than focusing on his failure to pay child support on behalf of his daughter Janae, the hearing underlines the fact that he is not supporting any of his children. Robinson notes that his criminal history—seven felonies and a shooting—makes it very difficult to find a job.

Hendren refers Robinson to the JOBS Program, reflecting the expectation that with this assistance, he should be able to find a job. Robinson, however, 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 “I try. I try. I try.”

The court commissioner applies a colorblind approach, assuming that success is based only on individual skill and effort, regardless of one’s race. However, this approach makes the child support system simply blind to the race-based injustice that Dante Robinson and other Black men experience in the labor market. As appealing as the colorblind ideal may appear to some, ignoring race when it matters can have disastrous consequences, perpetuating discrimination and even increasing racial bias.²²

The colorblind approach can result in unrealistically high orders that go unpaid, burdening poor men with uncollectible arrearages that may reach tens of thousands of dollars. When a father has no or very low income, their child support order may be set based not on actual earnings, but on the expectation of a full-time minimum wage job. In many cases, however, the racial context makes this expectation entirely unrealistic for poor Black men, who are called to court again and again to account for their persistent failure to find work, always facing the possibility of imminent incarceration.

There is a tension between a race-neutral expectation that work is available to all fathers who seek it, and the reality of the racialized hierarchy that these fathers encounter in the labor market. A colorblind mindset positions poor Black fathers as men who need to be encouraged, prodded, and even threatened with imprisonment in order to get them to find a job. Fathers are ordered to search for work and may return to court multiple times so that their compliance can be assessed. Court officials view themselves as giving noncustodial parents multiple opportunities to fulfill their legal obligations, thus revealing their belief that with enough time and opportunity, any father should be able to be employed. When Black fathers fail to find employment, they are viewed by the court system as failures who are simply not trying hard enough.

Conclusion

Our examination of access to justice for low-income civil litigants highlights the challenges of navigating race and racial inequality within the context of child support enforcement proceedings. Court officials struggle to understand or even perceive the challenges encountered by the low-income Black fathers who appear in court. They fail to acknowledge both explicit and implicit racial discrimination in the labor market and instead take a race-neutral approach. Black fathers are thus held to impractical standards for finding and maintaining consistent full-time employment, and cast as “deadbeats” who would not seek work without judicial supervision and the threat of incarceration. A race-neutral approach disguises the unequal racial structures

Type of analysis: Qualitative

Data source: Observations of child support enforcement hearings, and group and individual interviews with legal professionals who handle child support cases.

Type of data: Ethnographic

Sample definition: (1) a large, urban court that operates in a racially and ethnically diverse and economically depressed city; (2) a suburban court that operates in a less ethnically diverse and fairly economically advantaged environment, though one that also has large racial disparities; and (3) a smaller urban court that operates in a less ethnically diverse and relatively more economically advantaged city than does the large urban court.

Time frame: A 34-month period during 2013 to 2015.

Limitations: Qualitative methodology produces in-depth and illustrative information in order to understand the various dimensions of the problem under analysis. It is not focused on quantification or numerical representativeness.

that exist throughout U.S. society. Although the legal professionals we spoke to do not recognize it, these racial structures play a significant role in child support enforcement proceedings. The failure of these officials to recognize the consequences of racial inequality in the lives of the Black fathers in their courtrooms serves to perpetuate these discriminatory systems. ■

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