

NONMARITAL FATHERS IN FAMILY COURT: JUDGES' AND LAWYERS' PERSPECTIVES

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ABSTRACT

This Article presents findings revealing judges and government attorneys' perspectives regarding nonmarital fathers as parents. The findings are drawn from original empirical data generated in a rigorous and extensive five-year qualitative study investigating the experiences of low-income litigants in family court. Specifically, this Article examines the perspectives of the judges and family court commissions who preside over IV-D child support cases as well the government attorneys who bring actions to enforce child support orders. These legal actors place a primacy on fathers' role as economic providers and characterize the fathers as disengaged dads because they do not reliably pay child support. When fathers counter in court that they are engaged dads who provide nurturing and caretaking to their children, judges and government attorneys admonish them stating that parental involvement is not relevant in support enforcement cases. Yet, when fathers attempt to affirmatively assert legal claims to gain access to and parenting time with their children, those same legal actors silence them and tell them that the court cannot hear their parenting claims and they must pursue them in a separate proceeding elsewhere.

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INTRODUCTION

The child support system's exclusive focus on nonresident fathers' responsibility to provide financially for their children has the effect of diminishing and undermining nonmarital fathers' efforts to be engaged and nurturing fathers. I explore this phenomenon in public child support cases, commonly referred to as IV-D cases, where the state summons fathers, often poor Black nonmarital fathers, to court to answer for their failure to pay court-ordered child support. Fathers experience IV-D child support enforcement hearings as a contested space where they are held to gendered and racialized middle-class norms of economic fatherhood that are often impossible for them to meet. At the same time, both the legal rules and courts minimize or ignore fathers' attempts to raise a claim for access to their children.

The IV-D program, which is authorized under Title IV-D of the Social Security Act, provides child support services to families in the United States through a partnership between the federal government and state, local, and tribal governments.¹ State child support enforcement agencies are responsible for locating absent parents, establishing paternity in cases involving nonmarital births, establishing court orders for child support, and enforcing child support orders.² The actors involved in public child support cases include government child support attorneys, judges (or another judicial officer, such as family court commissioners), custodial parents, noncustodial parents, and, to a much lesser extent, defense attorneys.³ The

1. Social Services Amendment of 1975, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (codified as amended at 42 U.S.C. §§ 651-60 (2006)). As part of this partnership, the federal government provides funding to state and tribal child support agencies, and the federal Office of Child Support Enforcement (OCSE) provides oversight and guidance. *Id.*

2. Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 254 (2000).

3. Few litigants in IV-D child support cases are represented by counsel. One study found that

government attorneys in IV-D cases represent the interests of the State's child support enforcement agency, not the interests of either of the parents in the case.⁴ The states' interests in IV-D cases are mixed and often in conflict.⁵ The State enforces child support orders against poor fathers to deliver money to custodial mothers *and* to recoup for itself the costs of public welfare provided to the custodial mother.⁶ In many IV-D cases, most or all of the child support collected is payback to the State, not money provided to the custodial mother and her children.⁷

This Article examines the perspectives of the judges and family court commissions who preside over IV-D child support cases as well the government attorneys who bring actions to enforce child support orders. Specifically, it presents findings revealing legal actors' perspectives regarding nonmarital fathers as parents. Judges and lawyers characterize the fathers in these cases as disengaged dads due to their failure to reliably pay child support. They place a primacy on fathers' role as economic providers, reifying outdated social norms in the process. Legal actors inconsistently treat nonmarital fathers as nurturing, a position often confusing to fathers. When fathers defend child support actions brought on the ground that they are engaged dads who provide nurturing and caretaking to their children, legal actors silence them because parental involvement is not relevant in child support enforcement cases. And when fathers affirmatively assert legal claims to gain access to and parenting time with their children, those same legal actors again silence them and tell them that the child support court cannot hear those claims. Instead, fathers must initiate an entirely

only 15.4% of sample fathers and 12.1% of sample mothers had attorney representation, and both parents were represented in only 6.5% of cases. Additionally, only 8.8% of the poorest fathers in the sample were represented. See Margaret F. Brinig & Marsha Garrison, *Getting Blood from Stones: Results and Policy Implications of an Empirical Investigation of Child Support Practice in St. Joseph County, Indiana Paternity Actions*, 56 FAM. CT. REV. 521, 536 (2018).

4. See Stacy Brustin & Lisa Martin, *Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents*, 67 HASTINGS L.J. 1265 (2016); Jessica Dixon Weaver, *Overstepping Ethical Boundaries: Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705 (2014).

5. See Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007).

6. Federal law requires custodial parents who receive public aid to assign to the state their right to collect child support as a condition for receiving such assistance, and the state then brings child support actions against noncustodial parents to reimburse itself for the welfare payments made to the custodial parent. See 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).

7. See Hatcher, *supra* note 5, at 1045 ("Successful collections of the assigned child support are generally kept by the state and federal governments to reimburse the cost of providing welfare assistance.").

separate case in a different court to pursue their parenting claims.⁸ And, yet, despite legal actors' insistence that the law requires them to treat support enforcement and parental involvement as separate and unrelated matters, they frequently conflate the two in court proceedings.

The Article's findings are drawn from original empirical data generated in a rigorous and extensive five-year qualitative study investigating the experiences of low-income litigants in family court. With the assistance of my research team, I gathered data across six counties in two midwestern states, focusing on IV-D child support cases where the State is pursuing past-due child support from low- and no-income noncustodial fathers. There is a broad consensus that the child support enforcement system is not working properly in these cases.⁹ Child support enforcement cases involving poor families involve low collection rates for mothers and high debt accrual for fathers.¹⁰ The majority of these fathers are "unable nonpayers," meaning they lack the financial resources to pay the support they owe.¹¹ Yet, the State aggressively pursues enforcement of support in these cases, which far too often affect families living in deep and persistent poverty, pro se fathers in court up against government lawyers, and unjust outcomes for poor fathers.¹² Child support debts entangle poor fathers in repeated court hearings (often relating to the same debt) that become increasingly punitive, sometimes culminating in a finding of civil contempt and incarceration.¹³ There has been widespread criticism of the practice of jailing "deadbroke" fathers for unpaid support, with many referring to it as a modern day debtor's prison.¹⁴

I. NONMARITAL FAMILIES

Family composition in the United States has undergone tremendous changes over the past fifty years, particularly the rate of nonmarital births. Today, 40% of infants are born to nonmarital couples, more than ten times

8. Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 805–06 (2015).

9. See Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 957 (2019).

10. See Brito, *supra* note 6.

11. *Id.* at 633.

12. *Id.* at 633, 643–46.

13. *Id.* at 617–19, 650–54. State child support agencies initiating civil contempt actions against obligors contend that their nonpayment of support is a willful violation of a child support order, meaning that the obligor could pay the order but chooses not to. In these actions, incarceration is civil, not criminal, and is a remedy intended to coerce the obligor/contemnor to comply with the child support order rather than to punish him for the violation. See Brito, *supra* note 9, at 965 n.62.

14. Brito, *supra* note 9, at 966.

the number in 1960.¹⁵ These figures vary according to race and ethnicity—70% for Black mothers and 52% for Hispanics.¹⁶ Nonmarital births are increasingly likely to occur within cohabiting unions.¹⁷ Research shows that, compared to marital fathers, nonmarital fathers are more vulnerable; they are younger¹⁸ and less educated, may engage in more unhealthy behaviors, have high levels of poverty,¹⁹ and have weaker attachments to the labor force.²⁰ Nonmarital fathers are also more likely to have complex families, meaning here they have multiple children with different mothers.²¹ Finally, they are more likely to have adverse experiences, such as substance abuse problems and earlier incarceration.²²

Nonmarital families are also less stable than married couples. Regardless of how committed the unmarried couple may be, it is more likely that their relationship will end within a few years of the birth of their child.²³ Research shows that almost two-thirds of children born to nonmarital parents will not be residing with the father by age five.²⁴ These relationships end in part because the couple experiences difficulties due to insufficient money and

15. See SALLY C. CURTIN, STEPHANIE J. VENTURA & GLADYS M. MARTINEZ, U.S. DEP'T HEALTH & HUM. SERVS., RECENT DECLINES IN NONMARITAL CHILDBEARING IN THE UNITED STATES 1 (2014) (Over about a fifty-year period, the nonmarital birth rate increased from 5% in 1960 to 23% in 1986 to 32% in 1996 and to 41% in 2009); see also Eunice Kennedy Shriver Nat'l Inst. of Child Health & Hum. Dev., *Understanding Fragile Families: More Than 10 Years of Research Reveals Much About Fragile Families*, NIHCD SPOTLIGHTS (Dec. 2, 2010), <https://www.nichd.nih.gov/newsroom/resources/spotlight/120310-understanding-fragile-families> [<https://perma.cc/C66E-FU3F>].

16. Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman & Anne K. Driscoll, *Births: Final Data for 2019*, NAT'L VITAL STATS. REPS., Mar. 23, 2021, at 1, 6.

17. CURTIN ET AL., *supra* note 15, at 1, 4 (The rate rose rapidly from 41% of recent nonmarital births in 2002 to 58% in 2006–10).

18. Sara McLanahan, *Family Instability and Complexity after a Nonmarital Birth: Outcomes for Children in Fragile Families*, in SOCIAL CLASS AND CHANGING FAMILIES IN AN UNEQUAL AMERICA 108, 116 (Marcia J. Carlson & Paula England eds., 2011) (The age of nonmarital parents is correlated positively with socio-economic status and differs by race and ethnicity).

19. SARA McLANAHAN ET AL., BENDHEIM-THOMAN CTR. FOR RSCH. ON CHILD WELLBEING, THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY: BASELINE NATIONAL REPORT 11–12, 17 (2003), <http://www.fragilefamilies.princeton.edu/documents/nationalreport.pdf> [<https://perma.cc/P9MH-SWEG>] (Twenty-one percent of mothers and 6% of fathers report a household income of less than \$5,000 and 43% of mothers and 61% of fathers report household income of \$20,000 or higher).

20. Lawrence M. Berger & Callie E. Langton, *Young Disadvantaged Men as Fathers*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 56, 62 (2011).

21. See Tonya L. Brito, COMPLEX KINSHIP NETWORKS IN FRAGILE FAMILIES, 85 FORDHAM L. REV. 2567, 2573–74 (2017).

22. Marcia J. Carlson & Sara S. McLanahan, *Fathers in Fragile Families*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 241, 245–46 (Michael E. Lamb ed., 5th ed. 2010); Lisa Bunting & Colette McAuley, *Teenage Pregnancy and Parenthood: The Role of Fathers*, 9 CHILD & FAM. SOC. WORK 295, 302 (2004).

23. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE OF CHILDREN 17, 21 (2010), <http://www.jstor.org/stable/20773693>.

24. *Id.* (“Despite their high hopes, unmarried parents’ bonds are fragile, with over 60 percent of nonmarital unions dissolving within five years of their child’s birth.”).

additional childrearing responsibilities from a prior relationship.²⁵ While Black nonmarital couples are less likely than other racial and ethnic groups to maintain stable cohabiting relationships,²⁶ research demonstrates that after a breakup Black noncustodial fathers are more likely than other noncustodial fathers to maintain a relationship with their children.²⁷

II. RESEARCH METHODOLOGY

A detailed and comprehensive description of the research methodology is included in my earlier scholarship produced from this study.²⁸ Borrowing largely from those earlier writings, I provide here a brief overview of the research plan. My study team collected data in six counties across two Midwestern states, which we refer to as State A and State B.²⁹ Data collection in all six counties included exploratory fieldwork, ethnographic observations of child support enforcement hearings, and over 145 in-depth group and individual interviews with lawyers, litigants, and judges who are all involved in child support proceedings.³⁰ We also interviewed several institutional actors from various organizations central to the child support process at both the state and federal levels. These individuals included representatives from Jobs Programs, courthouse librarians who provide assistance to unrepresented litigants, and directors of state child support agencies.

In the ethnography we conducted, the cases typically involved a judicial officer, a child support attorney, and the parents. Judges presided over legal proceedings and rendered decisions in child support cases; however, in State

25. *Id.* at 24–25, 27.

26. *Id.* at 21 (“Racial and ethnic differences in union dissolution are substantial. Black couples are more likely to end their relationships than white and Hispanic couples.”). Cynthia Osborne, Wendy D. Manning & Pamela J. Smock, *Married and Cohabiting Parents’ Relationship Stability: A Focus on Race and Ethnicity*, 69 J. MARRIAGE & FAM. 1345, 1355 (2007) (“Black children born to cohabiting parents are more likely to experience their parents’ separation (57%) than their Mexican American counterparts (29%), but they are (statistically) equally likely as White children born to cohabiting parents (45%) to experience their parents’ separation.”).

27. Kathryn Edin, Laura Tach & Ronald Mincy, *Claiming Fatherhood: Race and the Dynamics of Paternal Involvement Among Unmarried Men*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 159–63 (2009).

28. For a more detailed account of the ethnography conducted in this study, see Tonya L. Brito, Daanika Cordon & David J. Pate Jr., *Focused Ethnography: A Methodological Approach for Engaged Legal Research*, in FROM THE GROUND UP: LEGAL SCHOLARSHIP FOR THE URBAN CORE 141, 143–44 (Peter D. Enrich & Rashmi Dyal-Chand eds., 2019), and Tonya L. Brito, *Producing Justice in Poor People’s Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 162–72 (2020).

29. Within each state, we concentrated our data collection in three counties, chosen because their family courts vary in size and urbanicity while serving communities with varying levels of racial, ethnic, and economic diversity.

30. All study participant and place names are pseudonyms.

A enforcement actions were initially heard by family court commissioners. As noted previously, government child support attorneys represent the interests of state child support enforcement agencies. The custodial parents owed support are the petitioners and the noncustodial parents owing support are the obligors (i.e., defendants) in these cases. In the counties we studied, the custodial parents were overwhelming mothers, and the defendants were most often low-income Black fathers. Both parents typically lacked attorney representation. Though defense counsel were rarely present in the observed hearings, they were sometimes appointed or hired to represent defendants in enforcement actions.³¹

The research plan also collected data about the experiences of litigants from their own perspectives. We collected longitudinal data from a sample of forty child support obligors/defendants, twenty from each of the two field sites where we conducted the focused ethnography. The longitudinal data included: (1) an initial in-depth interview of each obligor; (2) case progress tracked over a period of at least one year, including observations of any enforcement hearings that took place during that timeframe; and (3) a follow-up interview at the end of the year. Though we were primarily interested in examining how low-income litigants navigate court processes and utilize available legal assistance measures in cases where they are pursued for nonpayment of support, we wanted to understand the role and experiences of custodial parents as well. Consequently, we also conducted in-depth, semi-structured interviews with eight custodial parent mothers involved in child support enforcement cases. Interviews with custodial parents could better describe women's experiences and subjective interpretations of the child support process.

Broadly, the study involves an in-depth exploration of the legal processes in these cases, focusing on court interactions and examining them from multiple perspectives and over an extended period of time. It explores the meaning people draw from legal interactions as well as the complexity of the relationship between process and outcomes. We also sought to understand how pro se litigants navigate the court process, what steps they

31. The infrequent presence of defense counsel in these cases is unsurprising in light of the overall low rates of representation in family law cases. See Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389, 1391–92 (2016). Also, many obligors in the cases observed were low or no-income and unlikely to have the resources to hire an attorney, and there is no constitutional right to representation in child support cases, even for poor individuals. See Tonya L. Brito, David J. Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 225–28 (2016). In State A, however, the law allows for appointment of counsel for obligors only in contempt actions where there is a risk of civil incarceration. Even though counsel was purportedly available to eligible obligors, the research team rarely observed defense counsel in contempt actions.

take to represent themselves, and whether and how legal representations matters in these cases.

IV. PERSPECTIVES ON NONMARITAL FATHERS AS PARENTS

1. *Nonmarital Fathers as Disengaged Dads*

Our research finds that judges, family court commissioners, and child support attorneys overwhelmingly held to traditional gender norms within the family when discussing the parents who they encounter in child support court. These legal actors tended to assume that child support cases involve a custodial mother and a noncustodial father. This assumption was reflected in their use of gender pronouns or other taken-for-granted language that positions mothers as custodial parents and fathers as obligors. They suggested that this language was a generalization based on their experience. For instance, Defense Attorney Ralph Neal explained, “since they’re almost all male, I speak of my clients as he, and the custodial parent is mom or she.”³²

This assumption reflects broader gendered understandings of the family, which hold that mothers are primarily responsible for caregiving and fathers are primarily responsible for financial support. Mr. Neal elaborated on the societal pressures that link women to child rearing and indicated that legal actors reify these pressures. He commented:

I think that’s because that’s how our society is structured. I mean, it’s the expectation that the children will be with their mother, and only in recent years have we come around to thinking that why shouldn’t they be with both parents, or why shouldn’t the dad be considered equal? Um, but that doesn’t change how the mothers feel. And even the sickest of mothers still feels tremendous guilt that not being able to, uh, not being able to have her children. . . . The authority figures, the judges, the court commissioners, even the child support attorneys, I think all recognize that the mother doesn’t have her children because something is really wrong with mom.³³

32. Interview with Ralph Neal, Defense Attorney, in County A, State A (Jan. 17, 2014) (on file with author).

33. *Id.*

Indeed, even Defense Attorney Joseph Bourne actively stigmatized noncustodial mothers in relation to gendered ideas of parenting. In relation to his female clients, he commented:

I've had a few women with that, and I'm like probably sexist, because I'm like, how did you lose custody of your kids? You know, what's going, what, I mean, you got to be a really rotten parent for this to happen, you know, with that.³⁴

Contrasting the assumption of a nurturing custodial mother was legal actors' construct of the nonmarital father as a disengaged father. While legal actors did not directly use the term "deadbeat dads," they alluded to fathers who feel no sense of responsibility toward their children. One female family court commissioner described:

Some of them, they don't really care. They're like, why should I pay support? She's getting money from the state. She's being taken care of. She's not working, or, oh, she's working, so she doesn't need my support, because she's working, and I don't have an income. It's like there's a total disconnect on what their obligations and responsibilities are in some of the more severe contempt cases.³⁵

Judges and government attorneys indicated that the idea of an uninvolved father was also supported by social patterns and cultural mores. Child Support Attorney Alma Pederson suggested, "I know when kids are raised when they're in single parent families sometimes a father is considered a non-necessary party. When *dad* is cut out, historically, that's not such an unusual circumstance."³⁶ Other respondents described how commonplace single-parent families are. Pierce Roegner is the director of a Jobs Program that provides services to unemployed and underemployed noncustodial parents in child support court. Roegner similarly expressed disdain for fatherlessness in families in the broader community. Referencing a high school girls' basketball team that he coached, Roegner stated that, "out of those fifteen girls, thirteen of them had no man living in their home."³⁷ Some legal actors characterized nonmarital fathers as not only failing to support their children but making things even harder financially

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

35. Group Interview with Family Court Commissioners, in County A, State A (Jan. 17, 2013) (on file with author).

36. Group Interview by David Pate Jr. with Child Support Attorneys, in County A, State A (Dec. 18, 2012) (on file with author).

37. Interview by Daanika Gordon with Pierce Roegner, Director of Jobs Program, in County A, State A (Jan. 6, 2015) (on file with author).

for mothers by relying on them for support. Judge Binford explained this succinctly, saying, “A huge percentage of these guys, . . . really, all they’re doing is living off women in their life.”³⁸

Judges and lawyers also claimed that disengaged fathers are a consequence of the form that many relationships initially take. Child Support Attorney Alma Pederson explained:

[A] lot of the times though they’re cases where the parties did not have a longstanding, romantic relationship. And, so, when the child is born, by that time, oftentimes Dad is not in contact with Mom, at least not regularly. So, Mom is more likely to just sort of take the responsibility by default.³⁹

This presumption of casual relationships suggests that the problem is not just disengaged fathers, but fundamentally irresponsible relations between parties. This perpetuates an ideology, as legal scholar Khiara Bridges describes, that situates the reproduction of low-income women of color as a social problem.⁴⁰ Examining the disproportionately high maternal mortality rate among Black women in the United States as compared to non-Black women, Bridges argues that narratives about the contributing factors, such as Black women’s higher rates of diabetes, obesity and hypertension, “can function to blame [B]lack women for dying or nearly dying when they attempt motherhood.”⁴¹ Similarly, in the child support context, social welfare policy targets poor fathers “as both poverty’s cause and cure.”⁴² Policy narratives about deadbeat dads who are intentionally shirking their parental responsibility serve to situate poor nonmarital fathers as a social problem to be fixed, rather than addressing the intractable social and economic problems in the United States that make it difficult for these fathers to support themselves, provide financially for their children, and advance in the labor market. These problems include, among other things, extreme income inequality, racial discrimination in the labor market, decades of stagnant wages for lower skilled workers, earnings for full-time

38. Interview by David Pate Jr. with Lowell Binford, Judge, in County C, State A (June 28, 2013) (on file with author).

39. Group Interview by David Pate Jr. with Child Support Attorneys, in County A, State A (Dec. 18, 2012) (on file with author).

40. See Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229 (2020).

41. *Id.* at 1279.

42. See Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 905 (2013).

minimum wage falling far below a living wage, and exploitative labor market practices.⁴³

Judges and child support attorneys acknowledged that not all nonmarital fathers are disengaged fathers. They also recognized that some fathers provided support and acted as parents outside of the formal structure of the enforcement process. Defense Attorney Ben Foote indicated that some fathers care for additional children gained through a new relationship. Though this does not diminish their obligation to support their prior born children, he stated, it does reflect that men are involved in “a lot of these blended families, a lot of helping out each other.” Serial family relations, which are relatively common in the United States and not limited to poor nonmarital fathers, often lead to blended families.⁴⁴ And when fathers form new cohabiting relationships, many function as fathers to the nonbiological children now living in their household in addition to their existing nonresidential biological children.⁴⁵

Judge Eric Garnett also explained that fathers often provide in-kind for their children outside of the enforcement system. According to Judge Garnett:

[A]nd so I look at these young men who come in here, or older men, and see them think, what’s the big deal, Judge? Why you all hassling me? You know, I take care of my child. I do for my child. I buy all kinds of stuff you don’t know about.⁴⁶

Legal actors consistently admonish fathers to work within the formal child support system instead of making in-kind contributions. Somewhat inconsistently, they also sometimes show leniency towards engaged fathers who are not paying their full support order. As Judge Garnett put it, “if there’s a meaningful relationship with the parent, that’s not a bad deal.”⁴⁷

43. See Lawrence M. Berger, Maria Cancian & Katherine Magnuson, *Anti-poverty Policy Innovations: New Proposals for Addressing Poverty in the United States*, 4 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 1 (2018), <https://doi.org/10.7758/RSF.2018.4.3.01>; Roland G. Fryer, Jr. et al., *Racial Disparities in Job Finding and Offered Wages*, 56 J. L. & ECON. 633 (2013).

44. See Brito, *supra* note 21, at 2570 (“Americans today are more likely to experience periods of couplehood with different partners interspersed with periods of singlehood. Their serial relationships develop through marriage, remarriage, or cohabitation. Additionally, regardless of marital status, many of these recouplings produce additional children or create blended families.”).

45. See Pamela J. Smock & Fiona Rose Greenland, *Diversity in Pathways to Parenthood: Patterns, Implications, and Emerging Research Directions*, 72 J. MARRIAGE & FAM. 576, 586 (2010); see also Marcia J. Carlson & Lawrence M. Berger, *What Kids Get from Parents: Packages of Parental Involvement Across Complex Family Forms*, 87 SOC. SERV. REV. 213 (2013).

46. Interview by David Pate Jr. with Eric Garnett, Family Court Judge, in County A, State A (Sept. 14, 2014) (on file with author).

47. *Id.*

Legal actors suggested that, while fathers initially present as disengaged, they can be moved along a trajectory toward responsible fatherhood. This doesn't just entail encouraging men to financially support their children, but teaching them the moral value of parenting.⁴⁸ Judge John Green suggested that child support enforcement could benefit from a problem-solving model that brings fathers in for regular review hearings. He elaborated:

I think we can encourage or get these young men to want to be better fathers, want to work. And look, I've been around long enough to know that sometimes there's just no jobs. So, I'm not going to lock somebody up because it's just really hard times, but I need to hear what they're doing and not that it just should fall on somebody else.⁴⁹

As Pierce Roegner described, the orientation into the Jobs Program entails “trying to get a feeling for how they feel about really wanting to help their children. Because, basically, our focus is on responsible fatherhood and family reunification.”⁵⁰ Legal actors suggest that, while men in child support hearings—generally low-income men of color—do not have the requisite skills or experience or values to act as fathers, they can be taught to understand the meaning of being a good parent.

Legal actor study participants reified gender differences in describing the child support enforcement process, and they linked expectations of parents to gendered constructions around caregiving, responsibility, and financial support. Many of their discussions around gendered parenting roles relied on intersectional constructs that additionally implicated race and class. Narratives that suggested the deficiencies of parents involved in child support enforcement proceedings are rooted in assumptions of the problematic nature of the reproduction of individuals who cannot materially support their children. Whereas social norms associated with middle-class parenting are lauded, low-income or poor individuals are thought to be

48. Judge Terrance Hawkes, for example, homed in on fathers he viewed as irresponsible, stating: “I also get frustrated with the guys that are out there trying to populate the earth, you know, and they just, they don't care, you know. That really bothers me.” Interview by David Pate Jr. with Terrance Hawkes, Family Court Judge, in County A, State A (August 14, 2013) (on file with author). Pierce Roegner suggested that men get by through taking advantage of women. He described,

they go from one woman to another. The women have the jobs. The women have the homes. The women have the children, and [they're] jumping from one bed to another. [T]hen the child support problems exacerbate, because the women are still having children by these men, who have no jobs, who have no homes, who have no promise of a future.

Interview by Daanika Gordon with Pierce Roegner, Director of Jobs Program, in County A, State A (Jan. 6, 2015) (on file with author).

49. Interview with John Green, Family Court Judge, in County A, State A (June 2, 2013) (on file with author).

50. Interview by Daanika Gordon with Pierce Roegner, Director of Jobs Program, in County A, State A (Jan. 6, 2015) (on file with author).

irresponsible. These meanings particularly attached to low-income people of color, as legal actors drew upon racialized stereotypes of cultural pathologies, particularly those attached to Black parents. Defense Attorney Joseph Bourne most obviously drew upon an explicit discourse of racial difference:

When I started out here, I was getting African-American males between the ages of about 33 to 37. And I ended up almost quitting the PD's office over that. Because I was catching a lot of attitude with that. And it's like, you know, guys like, you're supposed to be defending me. It's like, sir, you owe \$35,000. How do I make that go away? And it's like, you have three different, four kids by three women, with that. I said, as soon as we get done with this one, they're lining up round two for the next wife. And it's like, you just been to prison before for this same issue.⁵¹

His characterization taps into numerous racialized ideas: that Black men have casual relationships with multiple women, that childbearing is careless or casual, and that Black fathers are irresponsible and attempting to shift blame onto the system. Race and class intersect with gender in constructs of deserving and worthy parents, positioning low-income minoritized nonmarital parents as outside of a normative ideal that privileges white, middle-class family structures.

2. *The Primacy of Economic Fatherhood*

Legal professionals working with the state, child support attorneys, judges, and family court commissioners spoke about men and fathers as economic providers first and foremost. In child support court, fathers' primary responsibility was linked to financially providing for the children, and there was considerably less value placed on fathers' contributions to caretaking or emotional bonding. The fathers in this study powerfully felt the singular emphasis on financial child support receipt. They found the disregard of their parenting claims to be counterproductive, demoralizing, and demeaning. As an example, Thomas Vach, a nonmarital father, emphasized how the court discounted other forms of support he contributed to his nine-year-old son Shundel's wellbeing.⁵² According to Mr. Vach, he gave Shundel "a bunch of winter clothes, sweaters, socks, underwears, um,

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

52. Interview with Thomas Vach, Obligor, in County A, State A (Jan. 13, 2016) (on file with author).

all his hygiene [products]” as well as birthday and holiday gifts.⁵³ When asked how the court responded to his assertions that he provided for the child in other ways, he said, “[T]hey say that stuff don’t matter. They said that anything but the money that they ask for doesn’t matter. It doesn’t count.”⁵⁴

Family Court Commissioner Greg Durand was asked about the role of fathers as parents and how caretaking or involvement are taken into consideration by the court. His reply provides insight into how economic primacy of fatherhood is understood by legal actors:

[W]e are not saying you’re a deadbeat. We’re not here saying you’re not providing something to your child. We’re here on a very simple issue. You have a court order that says you pay X. Are you paying X? Um, and if you think there’s reasons that you shouldn’t pay X, you’ve got to bring those in a motion in a separate court. Because that really is the only question that we’re discussing that day. So, we try not to ignore that but also to really explain that’s what we’re here for. And we’re not trying to diminish it or diminish spending time with the kid.⁵⁵

The primacy of economic fatherhood rests on an ideological understanding of family that is intersectionally gendered. It fits into an archetype of the white, middle-class, heteronormative American family of the 1950s, which relied on a gendered division of labor between a married couple with only biological children in common.⁵⁶ Under prevailing social norms, men were expected to financially support their families as wage earners, and women were caretakers of their children and shared household, which includes acquiring the household material provisions (i.e., food, clothing, diapers, etc.) using men’s income. Consequently, the ideological family is embedded in both the law and its interpretation, which discount other forms of family and shame those families who cannot/do not/will not conform to this standard.

Dorothy Smith referred to this normative form of family as the Standard North American Family.⁵⁷ Though this idealized family form remains ever-present in the American imagination and has had continuing influence on

53. *Id.*

54. *Id.*

55. Interview by Chloe Haimson with Greg Durand, Family Court Commissioner, in County A, State A (June 2, 2016) (on file with author).

56. See Dorothy E. Smith, *The Standard North American Family: SNAF as an Ideological Code*, 14 J. FAM. ISSUES 50, 52 (1993).

57. See *id.* at 50.

public policy, historian Stephanie Coontz documents that its dominance within society was fairly short-lived, lasting from the postwar era through the 1970s–80s.⁵⁸ Patricia Hill-Collins in her book about family, nationalism, and hip-hop argues that the ideological “American family” is upheld by politicians and through various policies to structure a racialized and classed hierarchy.⁵⁹ Similarly, legal scholar Claire Huntington argues that family law’s efforts to reinforce traditional gender norms causes harm to families because it sets up nonconforming fathers as failures and may undermine family relationships.⁶⁰

The child support rules are meant to reestablish this two-parent household ideal. Child support attorney Sally Richardson stated this clearly: “Well, that’s what the law says. The, you know, the child should enjoy the lifestyle as if the family had stayed together and what it means.”⁶¹ The law assumes that all families have, at least initially, lived together under one roof even though many of the cases in child support court involve nonmarital parents. Still, judges and lawyers also presume that the gendered, nuclear family model is the only healthy form. There is an implicit assumption that single-parent families are problematic, contributing to a culture of poverty. Child Support Attorney Alice Crum said, for instance:

You know, but it’s just, it’s just so sad to see how many families aren’t intact families and all these kids that are going to grow up like that and just become part, you know, a lot of them will become part of the cycle. And you don’t like to think that way, and hopefully you want all the best for all of them, but the statistics show that that’s what happens, so it’s just hard.⁶²

Other legal actors similarly pathologize single parent families, particularly nonmarital fathers, when they assume fathers are not committed to their parenting responsibilities. Child Support Attorney Shannon Grey captured this sentiment in her comment: “I think more of a key area to me than anything—we really need the dads more engaged. I think if we could find a way to do that, so that maybe if we had more engaged fathers, maybe we’d have better funding for child support. And the dads would be more

58. See STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE* (2005).

59. See PATRICIA HILL COLLINS, *FROM BLACK POWER TO HIP HOP: RACISM, NATIONALISM, AND FEMINISM* (2006).

60. See Clare Huntington, *Family Law and Nonmarital Families*, 53 *FAM. COURT REV.* 233, 237 (2015).

61. Group interview with Child Support Attorneys, in County A, State B (Feb. 25, 2014) (on file with author).

62. Interview with Alice Crum, Child Support Attorney, in County A, State B (Aug. 1, 2016) (on file with author).

willing to pay the child support.”⁶³ The idea that the legal system must transform nonmarital fathers’ attitudes toward parenting manifests most clearly in court referrals to responsible fatherhood programs. Responsible fatherhood programs locate the problem of nonpayment in fathers’ lack of attachment to the parenting role. Judge Matthew Covarrubias’ statement embodied this viewpoint, saying, “for a lot of these guys, the relationship with the mom wasn’t a particularly meaningful one or a long-lasting one. The kids are kind of like, it’s almost like neighbor kids. Yeah, that’s a cute kid, you know, I might do something. But it’s such a weak bond to begin with, not only to the child, but so often to the mother.”⁶⁴

These remarks reflect a long-standing view advanced by some politicians and policymakers that nonmarital families and single-parent households are necessarily harmful for children’s well-being.⁶⁵ Indeed, child support attorneys, particularly Shannon Grey and Alice Crum, discussed the family as the fabric of society. Families that cannot live up to the expectations of the idealized married, two-parent model are pathologized and policed carefully. In particular, legal actors’ value-laden sentiments about low-income families of color in the child support system are reminiscent of the Moynihan Report, which diagnosed the economic disadvantage and male joblessness within Black communities as a function of female-headed single-parent homes.⁶⁶ In problematizing and policing these families, the child support court strips them of family autonomy. Because custodial mothers receiving government aid must assign their right to collect child support and are required to cooperate in those proceedings, they do not have the right to choose other options, such as accepting in-kind support in lieu of formal child support payments. Additionally, unlike more affluent families, parents in the IV-D system cannot decide for themselves how to divide between themselves their joint responsibility to support and care for their children.

63. Interview with Shannon Grey, Child Support Attorney, in County C, State A (Oct. 22, 2012) (on file with author).

64. Interview with Matthew Covarrubias, Judge, in County A, State B (July 15, 2015) (on file with author).

65. Politicians promoting pro-marriage welfare reform policies parroted “culture of poverty” arguments premised on the claim that marriage and economic dependence on husbands would end the “pathological behavior of mothers who passed down dependency on public resources to their children.” See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1673–77 (2005); see also Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Discourse of American Welfare Policy*, 19 WIS. WOMEN’S L.J. 1, 10–15 (2004) (describing the pro-marriage welfare policies in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the landmark federal welfare reform legislation, and measures later adopted by states to encourage welfare recipients to marry).

66. See DANIEL P. MOYNIHAN, U.S. DEPT. LABOR, OFF. OF POL’Y PLANNING AND RES., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

Further, the consequence of privileging economic fatherhood over a more holistic understanding of parenting is that it undermines the families' autonomy to allocate parenting responsibilities as the family sees fit. The State, by contrast, imposes a "one size fits all" solution that advances the State's interests rather than the interests of individual families.⁶⁷ The State historically has afforded less respect, autonomy, and privacy to nonmarital, separated or divorced, nonwhite, and poor families. For example, the State typically conditions poor families' receipt of government benefits on family members' submission to privacy-invading rules and restrictions. For families in the IV-D child support system, this means that they are often deprived of the opportunity to deviate from the traditional economic fatherhood model.

As Commissioner Greg Durand's statement demonstrated,⁶⁸ issues surrounding parenting or visitation must be kept separate and actually are diminished by virtue of the legal separation of support from custody issues. They are also diminished by how the legal system neglects to recognize and protect their right to nurturing fatherhood. With respect to economic fatherhood, there is a massive and costly legal institutional structure in place to advance the State's interest in establishing paternity, establishing a court order for support, and enforcing the support order.⁶⁹ This system includes federal and state-level child support agencies, a statutory framework (also at the federal and state level), and a judicial system to adjudicate these cases.⁷⁰ No such legal institutional structure exists to establish and enforce child placement orders. Because the State has considerably less interest in nurturing fatherhood, nonmarital fathers must initiate and pursue such claims for parenting time entirely on their own.

67. See Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL'Y & L. 775, 781–84 (2012).

68. Interview by Chloe Haimson with Greg Durand, Family Court Commissioner, in County A, State A (June 2, 2016) (on file with author).

69. Child support enforcement in the United States is a federal/state/tribal partnership that operates in fifty-four states and territories and sixty tribes. According to the Federal Office of Child Support Enforcement, the total administrative expenditure for operating the child support enforcement program at both the federal and state levels was \$5.88 billion in FY2018, with the federal share amounting to approximately \$3.55 billion and the states' share amounting to \$3.26 billion. In FY2018, nationally the program served 14.72 million children, collected \$32 billion dollars in support, established 1.41 million paternities, established 872,181 child support orders, and collected support in 8.74 million cases. See OFF. OF CHILD SUPPORT ENF'T, U.S. DEPT. OF HEALTH AND HUMAN SERVS., ANNUAL REPORT TO CONGRESS FY2018, at 2, A-2-A-3, D-5, D-7 (Mar. 24, 2021), <https://www.acf.hhs.gov/css/report/fy-2018-annual-report-congress> [https://perma.cc/L7UL-C9WR].

70. See *id.* at 2; see generally Jane C. Murphy & Naomi R. Cahn, *Collecting Child Support: A History of Federal and State Initiatives*, 34 CLEARINGHOUSE REV. 165 (2000) (providing an historical overview of federal and state laws and regulations governing child support enforcement in the United States).

However, the primacy of economic fatherhood is not simply a matter of legal separation. Many legal actors do not see the value of fathers' involvement in their children's lives unless it is accompanied by financial support. During a group interview, child support attorneys responded to questions about how fathers define taking care for their children, and a simultaneous discussion ensued:

Child Support Attorney Sally Richardson: “. . . in their mind, if you just see your child, sometimes that's taking care of your child.”

Child Support Attorney Connie Berg: “Well, what Sally said, that I told a guy a couple days ago, kids can't live off hugs and kisses [laughter]— And, you know what, and that's kind of, it's all, at the end of the day, you know, we under-, I understand that you love your child. There's no question of that in my mind. But, you know, we're here for the money that it takes to raise this child.”

Child Support Attorney Sally Richardson: . . . “there's very little to do with responsibility and sacrifice when they're talking about it.”⁷¹

Moreover, the primacy of economic fatherhood is far more nuanced than simply financial provision. Much of the data indicate that fathers' economic provisions are only classified as bona fide financial contributions when they are regular, monetary sums of support that can be quantified through formal channels, whether these occur through direct transfers between parents' bank accounts or the child support system. In-kind support, such as buying clothing, diapers, formula, or informal in-the-moment cash exchanges are legally considered gifts, but ideologically, this form of support is discredited by many legal actors themselves.

Substantial research shows that the provision of in-kind support in lieu of or in addition to formal support is common and preferred by some families in the child support system. In their study involving interviews of 400 low-income noncustodial fathers, sociologists Jennifer B. Kane, Timothy J. Nelson, and Kathryn Edin found that in-kind support accounted for a quarter of all support provided and amounted to sixty dollars per month on average.⁷² Notably, a larger proportion of support was provided in-kind by both low-income and Black fathers.⁷³ As compared to formal support,

71. Group interview with Child Support Attorneys, in County A, State B (Feb. 25, 2014) (on file with author).

72. See Jennifer B. Kane, Timothy J. Nelson & Kathryn Edin, *How Much In-Kind Support Do Low-Income Nonresident Fathers Provide? A Mixed-Method Analysis*, 77 J. MARRIAGE & FAM. 591, 607 (2015).

73. *Id.* at 608.

informal and in-kind support is “more predictive of closeness in the father-child relationship.”⁷⁴

Legal actors consistently discouraged fathers from providing such support and expressed frustration that so many fathers did not heed their advice. Judge Matthew Covarrubias went even further, equating fathers’ in-kind payments to children and mothers to occasionally giving pocket change to homeless people. He stated:

There’s some guys that will say, well, you know, I uh, I’m there for my kids. I buy the shoes. She hits me up for money. And they think that’s sufficient. And they think that, well, I don’t get, I’m not getting credit for that. . . . When you say all right, well, I’ll tell you what you do. You sit down and you make a list of all the money you’ve given them. And, uh, if it’s more than this, then maybe I can do something about it. None of them ever take me up on it because they just do it when they feel like it, and, uh, you know, it’s like occasionally, uh, give a \$10 bill or \$20 bill to some homeless person or somebody that’s struggling. You know, don’t spend it on booze. They think that’s their good deed for the day.⁷⁵

Judge Covarrubias’s statements arguably put in-kind payments in a poorer light than not providing compensation at all. The seemingly sporadic, undocumented forms of material support assumes that fathers have money, but only provide it when they are feeling generous enough to do so. Further it assumes that the fathers are providing such in-kind support for the benefit of their own self-esteem and not as an authentic act of care.

Indeed, when parents decide between themselves that noncustodial fathers will have more responsibility for childcare in exchange for less financial burden, some legal actors were skeptical that nonmarital fathers are acting in good faith. For example, Ms. Crum used a series of air quotes to explain her skepticism about such family arrangements:

They always have an, quote, out-of-court agreement, end quote, that they’re, you know, so they’re not, no longer looking for child support. And I always have to explain, well [*skeptical tone of voice*] okay, that’s fine, but if your, quote, out-of-court agreement, end quote, does not work out of court like you expect it to, like I can’t reference and say you’re, you know, [*taps table*] the child support is going down

74. Maureen R. Waller, Allison Dwyer Emory & Elise Paul, *Money, Time or Something Else? Measuring Nonresident Fathers Informal and In-Kind Contributions*, 39 J. FAM. ISSUES 3612, 3634 (2018).

75. Interview with Matthew Covarrubias, Judge, in County A, State B (July 15, 2015) (on file with author).

[taps table] to zero because the parties have an out-of-court agreement.⁷⁶

Ms. Crum explained that she constantly warns families that these out-of-court agreements which waive the State's involvement in the collection of support cannot be readily changed once made.⁷⁷ She explained that when people come in saying that they "changed their minds," it may mean that the State can no longer help, which leaves the custodial parent in a financial bind without the court's help.⁷⁸ When probed further about the number of families that have returned to court stating that they changed their minds about these agreements, Ms. Crum admitted that it is only "a couple" rather than a frequent occurrence.⁷⁹

By treating fathers' financial contributions to their children as the only thing that counts, child support courts are out of step with the norms of contemporary parenthood. Families in the United States no longer define a father's role as solely a breadwinner. Both mothers and fathers expect and support fathers taking on a greater share of the families' caretaking responsibilities.⁸⁰ This modern view cuts across class lines, with both middle-class and low-income fathers including nurturing in how they define their roles.⁸¹ The new social norms around parenting roles extend to mothers and fathers who live apart. In a study involving in-depth interviews with separated families, Elizabeth Cozzolino and Christine Williams reported that families held two expectations about gender roles that reflect new cultural ideals.⁸² Specifically, the researchers found that "custodial mothers are evaluated in terms of their ability to financially support their children, while noncustodial fathers are assessed in terms of the care they demonstrate toward their children."⁸³

76. Interview with Alice Crum, Child Support Attorney, in County A, State B (Aug. 1, 2016) (on file with author).

77. *Id.*

78. *Id.*

79. *Id.*

80. See also Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005) (arguing that "[t]he constitutional norm of fatherhood should be nurture").

81. MARCIA J. CARLSON & PAULA ENGLAND, SOCIAL CLASS AND CHANGING FAMILIES IN AN UNEQUAL AMERICA 6–7 (Marcia J. Carlson & Paula England eds., 2011) (citations omitted) ("[E]thnographic studies report that many unwed and low-income fathers describe their roles in terms of similar to those used by married and middle-class fathers, even though they face much greater economic constraints.")

82. See Elizabeth Cozzolino & Christine L. Williams, *Child Support Queens and Disappointing Dads: Gender and Child Support Compliance*, 4 SOC. CURRENTS 228 (2017) (contending that these new parenting ideals will reinforce gender inequality because they heighten expectations about mothers' financial contributions while downplaying fathers').

83. *Id.* at 234.

Although many of the judges and lawyers expressed skepticism about fathers taking on more parenting responsibility, a small number of legal actors took a contrary position. For example, Ms. Grey said that she saw the detriment to prioritizing economic fatherhood over all else.⁸⁴ She spoke at length about how the system needs to be more holistic in its approach to what families need, by providing more opportunity for fathers' involvement in their children's lives.⁸⁵ When discussing why it is so important for pro se nonmarital fathers to have access to legal representation, she said:

But also, sometimes I'm concerned that fathers are getting short shrift because they're not realizing that they have the possibility of being more than an occasional parent. They might be able to actually co-parent . . . with the child's mother. And I'm not sure how many of them would opt for that option, but I don't know because they don't have counsel. And these are serious decisions for these young children's future. . . . And that's I think more of a key area to me than anything, so that the dads are more engaged[.]⁸⁶

Ms. Grey was very emotional about this topic, and her views stood out from those of other respondents.

3. *Nonmarital Fathers' Parenting Claims Undervalued and Unsupported*

Efforts of nonmarital fathers to raise a claim for access to their children and a court-ordered and enforceable parenting time schedule are stymied by the very structure of IV-D child support courts. There is a bifurcated legal structure in place that separates child support and parenting claims such that fathers' parenting claims are not heard alongside the child support claims and must be filed elsewhere.⁸⁷ Nonmarital fathers must file their parenting claims in an entirely separate lawsuit that will be heard by a different family court judge.⁸⁸ Judges and child support attorneys and our ethnographic

84. Interview with Shannon Grey, Child Support Attorney, in County C, State A (Oct. 22, 2012) (on file with author).

85. *Id.*

86. *Id.*

87. See Huntington, *supra* note 60, at 234–38.

88. *Id.*; see also *Child Support and Parenting Time Orders*, NAT'L CONF. STATE LEGISLATURES (2019) <https://www.ncsl.org/research/human-services/child-support-and-parenting-time-orders.aspx> [<https://perma.cc/RNZ2-MHMB>] (reporting that there is no resource similar to the child support enforcement system that is available to “assist unmarried parents with establishing parenting time arrangements. [U]nmarried parents generally must navigate an entirely different court process than the one through which they received a child support order. This can be costly, confusing and time consuming.”).

observations in court confirmed that legal actors consistently rejected fathers' requests that the court take up their child access and parenting time claims along with the pending child support issues in a unified proceeding, i.e., the court proceedings that fathers are already repeatedly summoned to court for. Ms. Crum explained how she responds when such requests are made. She says "I explain to the custodial parents that, hey, we don't do visitation and custody down here. We can't. You need to go, you know upstairs. We can't."⁸⁹

Child support IV-D cases focus on establishing paternity and setting and enforcing child support orders.⁹⁰ Orders of paternity address custody and placement in a minimal and superficial manner. These form orders typically include the following boilerplate language: "The Court orders that custody be awarded to the parties jointly, primary placement with the mother and placement with the father will be at reasonable times, on a reasonable notice." The flimsy nature of these parenting orders—which purport to provide fathers with access to their children at reasonable times and on reasonable notice—in practice leaves child access completely in the discretion of the custodial nonmarital mother. Researchers have found that mothers frequently engage in gatekeeping,⁹¹ and many of the nonmarital fathers we interviewed similarly reported that the mothers of their children restricted access for unjustifiable reasons, including being behind in their child support payments, or no reason at all.⁹² In a hearing the research team

89. Interview with Alice Crum, Child Support Attorney, in County A, State B (Aug. 1, 2016) (on file with author).

90. Brito, *supra* note 2, at 254.

91. See Huntington, *supra* note 60, at 233, 237.

92. For example, Matthew Powell expressed a desire to spend more time with his four-year-old daughter, Evashta, but during the prior three months her mother, Myra, only allowed him to see Evashta two or three times. Interview with Matthew Powell, Obligor, in County A, State A (April 13, 2016) (on file with author). According to Powell, Myra does not allow him to see his daughter "just because I can't afford child support right now." *Id.* Philip Romero, a father of four children, also reported difficulties gaining access to his children. Interview by David Pate Jr. with Philip Romero, Obligor, in County A, State A (Dec. 15, 2015) (on file with author). He said that he had a good relationship with his two oldest children, Diane and Phillip Jr., but at the time of the interview was not in contact with his two youngest children, Orlando and Gabriella. According to Romero, Orlando and Gabriella's mothers refused to allow access to them. *Id.* During his interview, Dwayne Pawnell said that when his daughter, Jennifer, was born, he and Jennifer's mother, Joanna, lived together. Interview with Dwayne Pawnell, Obligor, in County A, State B (May 15, 2015) (on file with author). After they separated, they had a cooperative co-parenting arrangement, with Pawnell initially having primary custody of Jennifer for three years and later having custody on weekends. *Id.* Joanna began to restrict Pawnell's access to Jennifer after he raised concerns about Jennifer's safety around Joanna's then-boyfriend, a man who had been accused of raping Joanna's fifteen-year-old niece. *Id.* After a successful custody suit initiated by Pawnell, a family court judge ordered Joanna to allow Pawnell to resume contact with their daughter. *Id.*

observed, Commissioner Andrew Hendren acknowledged the uselessness of this type of order. He stated:

Reasonable times [and on] reasonable notice. Can't enforce that. Can't enforce that type of order. If you're looking for something that can be enforced, you can get the paperwork in court and file that order. There's nothing stopping you from doing the right thing. This is in your hands. You can get a motion packet to get a set schedule for placement.⁹³

Child support courts routinely rebuffed fathers who tried to defend their failure to pay child support on grounds that they either were very involved in their child's life or because they had been denied access to their child. Judges typically told fathers that placement and access are separate matters and have no bearing on non-payment of child support, even if the lack of involvement was involuntary. Judge Eric Garnett described how he handles these situations:

First thing, a guy will [come] in here and say, [*mimics whiny voice*], "But Judge, she won't let me see my child. You know she won't let me see my child. So, I don't want to pay child support." Then I'm like, "Let me disabuse you of that. There's [*sic*] two tracks. One is your child support, your responsibility to pay, and the other is your right to have a relationship with your child. They're separate."⁹⁴

Fathers nonetheless saw parenting and support as interconnected. In his interview, nonmarital father Dwayne Pawnell explicitly connected his willingness to pay support to his level of access to his daughter, saying "I don't mind paying the 20% [of earnings] as long as I could see [my daughter] and spend time with her, that was the problem, the only problem."⁹⁵ Legal actors' retellings of fathers' in-court statements confirmed that fathers saw financial responsibilities and caretaking as related. Poor fathers who have difficulty paying child support were understandably concerned that this failure casts them in a negative light, even though they were providing in-kind contributions and/or had significant levels of parent involvement. Fathers sought credit for the nurturing and informal ad hoc support they provided to their children, which the State challenged vis-à-vis enforcement

93. Field Notes, in County A, State A (Apr. 25, 2016) (on file with author).

94. Interview by David Pate Jr. with Eric Garnett, Family Court Judge, in County A, State A (Sept. 14, 2014) (on file with author).

95. Interview with Dwayne Pawnell, Obligor, in County C, State B (May 15, 2015) (on file with author).

of formal support orders. Fathers became defensive about being implicitly cast as a deadbeat, when in fact they saw themselves as engaged fathers.

On the other hand, some nonmarital fathers in the study internalized the mandate that they provide financially for their children, even in circumstances where they experienced deep and chronic poverty. Viewing child support and parenting time as linked, they refrained from pressing for access to their children when they were behind in their child support payments. Other fathers, such as Mathew Powell, complained that the custodial mother of their children conditioned access to children on payment of support. According to Powell, the custodial mother, Myra, blocked him from seeing or communicating with his four-year-old daughter, Evashta, “just because I can’t afford child support right now.”⁹⁶

Paying child support is not a legal prerequisite for seeing one’s nonresident children. However, as these fathers have experienced (and researchers have found), in practice it often effectively functions as such. In *Indebted Relationships: Child Support Arrears and Nonresident Fathers’ Involvement with Children*, Turner and Waller found a correlation between greater child support arrears and lower nonresident paternal involvement with children.⁹⁷ They suggested two possible reasons this correlation exists.⁹⁸ First, large child support arrears may create conflict between the parents, which could lead to less paternal involvement.⁹⁹ Second, large arrears may lead to fathers experiencing depression and other mental health problems that negatively impact their ability to spend time with their children.¹⁰⁰ Their research and the experiences of the fathers in this study support a persistent criticism of the child support system: it harms children’s well-being by increasing acrimony between parents and diminishing paternal involvement.¹⁰¹

All the players in child support enforcement—judges, child support attorneys, and litigants—understood that fathers see support and parental involvement as inextricably linked. Legal actors similarly appeared to see the two as connected, given that during hearings judges would question the parties about the father’s relationship with his children. Further, even though the law does not allow for it, judicial actors sometimes treated nonpaying fathers with leniency in cases of significant parental involvement.

96. Interview with Matthew Powell, Obligor, in County A, State A (Apr. 13, 2016) (on file with author).

97. See Kimberly J. Turner & Maureen R. Waller, *Indebted Relationships: Child Support Arrears and Nonresident Fathers’ Involvement with Children*, 79 J. MARRIAGE & FAM. 24 (2017).

98. *Id.* at 37–38.

99. *Id.*

100. *Id.* at 38.

101. Huntington, *supra* note 60.

This can happen in all stages of the legal process. For example, a family court commissioner revealed that when he is entering a child support order, it matters to him whether the father is actively involved in parenting:

I try to get a sense of who's doing what for the child and how much actual involvement and how much actual financial commitment there is and the level of conflict between the parties, because frankly, money is an issue of conflict as well, and sometimes it's got to be viewed in context. So those are all important aspects of the negotiation process.¹⁰²

The ethnographic data demonstrates that courts take account of the noncustodial parent's time with their children in situations where it is supposedly not a legally permissible consideration. Child support attorney Ariel Whiting confirmed that this practice takes place: “[O]ftentimes I’m considering what Mom has to say about the payments made. And the courts themselves will actually take the father’s involvement with the child even though that’s not really relevant, but they will consider that.”¹⁰³ Ms. Whiting acknowledged that judges also take parental involvement into consideration when setting orders, particularly if the fathers have low educational attainment or employability. Judge Eric Garnett similarly acknowledged that he takes parental engagement into account in cases where both parents report that the father handles childcare for the parties’ preschool age child, reasoning: “if . . . you’re taking care of the child while she’s working, I’m kind of okay with that because childcare is very expensive. And if there’s a meaningful relationship with the parent, that’s not a bad deal.”¹⁰⁴

The contradiction between the law “on the books” and what actually happens “on the ground” frustrated and confused nonmarital fathers. Although this practice frequently takes place in court, fathers were consistently told exactly the opposite—that support and parental involvement and child access are separate and distinct, that being a good father doesn’t excuse their failure to pay support, and that they have to file a separate action to pursue rights of access to their children. Recognizing that noncustodial parents understand parenting and support as being interconnected, legal actors used this knowledge in multiple and contradictory ways. In some circumstances they tried to persuade fathers

102. Group Interview with Family Court Commissioners, in County A, State A (Jan. 17, 2013) (on file with author).

103. Group Interview with Family Court Commissioners, in County A, State A (Dec. 18, 2012) (on file with author).

104. Interview by David Pate Jr. with Eric Garnett, Family Court Judge, in County A, State A (Sept. 14, 2014) (on file with author).

that parental involvement and child support payments were distinct and unrelated. For example, having grown accustomed to fathers being defensive in child support enforcement cases, Ms. Crum shared that she tries to dispel these feelings with a preemptive “spiel” to fathers:

[D]ads that are brought to child support court equate that with not being good dads 'cause I hear that all the time. And it's one of those, like, parts of my spiel that says, you know, you're not here because we're saying you're a good dad or you're a bad dad.¹⁰⁵

By contrast, the data also shows that child support attorneys sometimes used this knowledge to manipulate fathers' emotions to convince them to agree to a proposed child support amount. This happened most often during their pre-hearing meetings with unrepresented parties. Child support attorneys reported that they invoked the connection between parenting and support to persuade fathers to agree to stipulated orders, without regard to their actual ability to pay the order amount. Child support attorneys leveraged financial responsibility and used the connection among parenting and support to guilt and shame fathers into agreements. For example, child support attorney Courtney Booth recounts how she persuaded fathers to agree:

Don't you love your child? . . . [T]he way I get the, the fathers, more often, is to say do you really want a judge who has never met your child to make a decision as to what's best for your child, or do you and the mom, who love this child, [want] to come to an agreement as to what you think is best for the child, and that usually brings them back like, yeah, I do love my child. I'm like so the statute says 20%. You know, that's what's in the best interest of your child. What do you say? And a lot of [times] they're like, oh, yeah, because I don't (unclear word) this judge.¹⁰⁶

When the fathers agreed to orders that they cannot afford, the legal system was setting them up for inevitable nonpayment, child support debt accrual, and possible contempt proceedings.

The contradiction between what legal actors told fathers about the law and what fathers experienced in court (and themselves believed to be true) was confounding. It also points to institutional and interpersonal power dynamics. Although judges and child support attorneys judged fathers on

105. Interview with Alice Crum, Child Support Attorney, in County A, State B (Aug. 1, 2016) (on file with author).

106. Group interview with Child Support Attorneys, in County B, State B (Jan. 30, 2015) (on file with author).

their parenting (even in circumstances where the law does not grant them this discretion), they rejected fathers' efforts to use their parental involvement to defend against claims of nonpayment. Even if fathers recognized this dynamic, they had little power over how the legal actors exercised discretion, especially when they were pro se litigants.

CONCLUSION

The child support system's exclusive focus on nonresident fathers' financial responsibility for their children has the effect of diminishing and undermining nonmarital fathers' role as engaged fathers. As demonstrated in this Article, judges, family court commissioners, and government child support attorneys in child support court overwhelmingly adhere to and reinforce outdated gender norms within the family. Through extensive qualitative interviews, legal actors reveal that whether or not nonresident fathers' have paid their court-ordered child support is the only thing that matters in their courts.

This approach is contrary to the norms of contemporary parenthood, which no longer limits fathers' responsibilities to the role of family breadwinner and instead expects both mothers and fathers to provide their children with nurturing and to assume caretaking responsibilities. It is also contrary the values and lived experience of many of the nonmarital fathers who are summoned to child support enforcement proceedings. These court proceedings are a contested space for poor nonmarital fathers who are often unable to consistently pay their support order. They are shamed and penalized for their failure to live up to the classed and raced traditional ideals of economic fatherhood. And they are silenced when they challenge the primacy of economic fatherhood and argue in defense that they are nurturing and engaged fathers.

Further, there is no support for the nonmarital fathers who report in court that they want to be more engaged with their children but have difficulty gaining access to them. When those fathers express an interest in securing legal protection of their right to gain access to and maintain a relationship with their nonresident children, they are rebuffed and told to pursue those legal claims on their own elsewhere.