

LITIGATING PRECARIETY: LOW-WAGE WORKERS AND CHILD-SUPPORT ENFORCEMENT*

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The child-support enforcement system has failed to come to grips with the labor market realities of the low-wage fathers it summons to court for nonpayment. This Article uses original empirical data gathered from a court-based ethnography and in-depth interviews with judges, lawyers, and noncustodial parents to illustrate how precarious workers experience the child-support enforcement system. The noncustodial fathers in the study are predominantly Black, low-wage, precarious workers who possess significant barriers to employment, including health problems, histories of incarceration, and limited education. Their real-life work experiences present vivid portraits of their difficulties obtaining and retaining stable jobs that provide a living wage. In an effort to find work, they often seek temp jobs or pursue a wide variety of ventures in the cash economy, everything from cutting hair to collecting cans and bottles for money. In light of their precarious work experiences and volatile earnings, it is no surprise that the noncustodial fathers in the study were not able to reliably pay their child-support order in full each month and, consequently, were summoned to court for nonpayment of support. Rather than confronting the reality of what the low-wage precarious labor market offers these fathers, the judges and government attorneys in enforcement hearings, and the child-support system more generally, stubbornly persist in enforcing child-support orders, premised on a full-time minimum wage job, that bear little relationship to the

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fathers' actual earnings. Instead, inflated child-support orders set fathers up to accrue tremendous child-support debts that burden them and their families. And fathers experience harsh and counterproductive enforcement remedies, including the loss of their drivers' licenses and threats of civil incarceration.

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INTRODUCTION

“I don’t want to like put stuff in boxes for twelve hours for the rest of my life,” Matthew Powell says when considering his immediate job prospects.¹

1. Interview by Tonya L. Brito with Matthew Powell, Obligor, in Cnty. A, State A (Apr. 13, 2016) (on file with author).

“[Y]ou’re only getting paid like \$8 an hour, so you’re really not getting that much. It’s tiring and it’s not really worth it.”² Powell is a twenty-four-year-old Black noncustodial father who had, in the previous year, taken off work to care for a sick relative. When he returned to the workforce, however, he found that “a lot of jobs don’t call me because I have a gap in my work history. And almost every job now wants you to be like concurrent with each job, like back-to-back.”³ At the moment, Powell makes do by working through temporary staffing agencies, which he describes as “something that could help you get going or like if you need a car or need to pay stuff off or something like that and you really like got to work it,” but “not up to par to me.”⁴ He is looking for a permanent job, “that you can call a job, that you don’t have to worry about somebody saying, oh, we don’t need you today, you don’t have to come in, or the bus is full, or stuff like that,”⁵ but, for the moment, such a job appears out of reach.

Powell’s work search woes have been compounded by the suspension of his driver’s license for failure to pay child support during his period of unemployment. He finds it particularly frustrating that child-support enforcement has made it more difficult for him to find a job that would enable him to pay child support:

I just missed three jobs within, between this week and last week because my license was suspended, because they just suspended it again. So, it’s like I, I think that’s something that they shouldn’t do. . . . I could have been working now and been paying my child support off, but now I can’t.⁶

Doninique Sherrell, a twenty-five-year-old Black noncustodial father of three, shares his own temp agency experiences:

[E]very day, they send you a text message about what jobs they have. But they be having some crazy jobs. I got paid, what, \$8, to break down the whole ice of, let’s say they have Disney on Ice . . . you have to take a big old, uh, metal pipe, and you have to break the ice. And, you know, that’s a long floor. That took about eight hours. I didn’t get paid nothing but \$50 that day.⁷

Sherrell is also trying to find a better-paying, more stable, and more sustainable position, but like Powell, he finds his attempts stymied by child support’s suspension of his driver’s license. He explains that the suspension shuts him out

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Interview by Tonya L. Brito with Doninique Sherrell, Obligor, in Cnty. A, State B (Aug. 20, 2015) (on file with author).

of jobs in the transportation industry, which appear to him to provide some of the best paying opportunities for workers without a college degree:

I could pay all my child support, but every good job that I want, I can't keep because I have child support. Everybody was like, well, you know, you owe child support because you're a deadbeat daddy. No, that's not it. I'm willing to pay child support, but I just need my license back.⁸

Powell and Sherrell's challenging experiences are similar to many other child-support payors who exist at the intersection of the low-wage labor market and the child-support enforcement system.

This Article investigates how precarious workers experience the child-support enforcement system. Child-support law and practice does almost nothing to account for the precarious and volatile labor market conditions that low-income noncustodial parents encounter, though they are the parents most likely to be pursued in enforcement proceedings. Labor market conditions have dramatically worsened over the past forty years, especially for low-wage workers who face stagnant wages and flagrantly exploitative employer practices.⁹ Precarious low-wage workers appearing in child-support court are among the most vulnerable employees in the labor market. They face significant and multiple barriers to employment, including educational deficits, prior incarceration, physical and mental health problems, and inadequate transportation. When they find work, it is not likely to be "good jobs" paying family-sustaining wages. Instead, many are perpetually stuck working temporary jobs that do not lead to permanent employment or cobbling together a living in the informal cash economy.

Despite the labor market precarity experienced by these noncustodial fathers, the child-support system subjects them to enforcement actions that presume they have steady and secure employment.¹⁰ Judges and government child-support attorneys inflexibly impute nonexistent earnings when setting orders and give little regard for noncustodial fathers' income uncertainty and variability when enforcing orders.¹¹ This Article explores 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 norms of economic fatherhood that are often impossible for them to meet.

8. *Id.*

9. See ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS, THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S, at 83–88 (2011).

10. Leslie Hodges, Daniel R. Meyer & Maria Cancian, *What Happens when the Amount of Child Support Due Is a Burden? Revisiting the Relationship Between Child Support Orders and Child Support Payments*, 94 SOC. SERV. REV. 238, 239 (2020).

11. *See id.*

This 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 interview and ethnographic data in child-support cases where the state is pursuing past-due child support from low- and no-income noncustodial fathers. This Article uses this data to tell the story of how noncustodial fathers working in the low-wage precarious labor market are treated in child-support proceedings. Part I provides an overview of child-support enforcement in poor families, documenting how several systemic practices lead to unrealistically large orders that many fathers are incapable of paying. Part II describes the study's research methodology, including the data collection plan and approach to data analysis. Part III of this Article first addresses wage stagnation and job precarity in the low-wage labor market and explains its causes. It then shows how the real-life work experiences of the fathers in the study both elucidate labor force precarity and the failure of the legal system to effectively account for it in enforcement proceedings. Part IV explores the conflict between the child-support system's inflexible practice of setting minimum child-support orders based on a presumed full-time minimum-wage job and the precarity and volatility fathers face in the low-wage labor market. It also examines the circumstances when legal actors are responsive to unfavorable labor market conditions, which are generally limited to extremely dire circumstances, such as a recession. However, courts' subsequent retreat from these periods of leniency is not necessarily tied to noncustodial fathers' improved work opportunities and conditions in the low-wage labor market. As such, seek-work orders compel fathers to resort to temp work and cash jobs under threat of civil incarceration for failure to pay support.

I. BACKGROUND ON CHILD-SUPPORT ENFORCEMENT IN POOR FAMILIES

We begin with a very brief overview of the legal background and setting for this study. 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.¹² 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.¹³ The actors involved in public child-support cases include government child-support attorneys, judges (or another judicial officer, such as

12. See Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (1975) (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. *See id.*

13. Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 254, 261 (2000).

family court commissioners), custodial parents, noncustodial parents, and, to a much lesser extent, defense attorneys.¹⁴ The 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.¹⁵ The states' interests in IV-D cases are mixed and often in conflict.¹⁶ 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.¹⁷ 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.¹⁸

Child-support orders are established according to a state's guidelines, which are essentially mathematical formulas that compute the presumptive order amount by primarily considering parents' earnings and the number of children covered by the order.¹⁹ Poor fathers, however, often have child-support orders in place that are unreasonably large in light of their low wages and precarious employment.²⁰ Compared to their nonpoor counterparts, poor noncustodial parents' child-support orders are disproportionately larger percentages of their income.²¹ As documented earlier, several systemic practices

14. Few litigants in IV-D child-support cases are represented by counsel. One study found that 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. 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). Additionally, only 8.8% of the poorest fathers in the sample were represented. See *id.*

15. 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, 1269 (2016); Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts To Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2734 (2014).

16. 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, 1031–34 (2007).

17. 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, 659–60 (2012) [hereinafter Brito, *Fathers Behind Bars*].

18. See Hatcher, *supra* note 16, 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.”).

19. Brito, *Fathers Behind Bars*, *supra* note 17, at 635–36.

20. *Id.* at 639, 646–49.

21. Federal law permits a maximum withholding limit of 50%–65% of earnings for child-support payments. See *Processing an Income Withholding Order or Notice*, OFF. CHILD SUPPORT ENFT (May 17, 2017), <https://www.acf.hhs.gov/css/resource/processing-an-income-withholding-order-or-notice> [http://perma.cc/NJ2H-PGFS]. A 2002 federal report revealed that the child-support orders of low-income obligors were, on average, 69% of their reported earnings, despite the federal limit. Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES' J. 4, 5 (2004). This exceeds the national average of 40%. *Id.*

and failures involving the establishment, modification, and enforcement of child-support orders are contributing factors.

First, a significant number of child-support awards are established as default orders in court proceedings when noncustodial parents do not appear for the hearing.²² Second, child-support orders are frequently calculated on an income level that is imputed—often on the presumption that the parent should and could obtain a stable, full-time, minimum-wage job rather than on the noncustodial parent’s actual earnings.²³ Third, at the time an initial child-support order is established, it is not uncommon for the noncustodial parent to already be deemed in debt for retroactive support dating back several years or made to repay the state for additional costs (such as birth expenses) that were previously incurred by the state.²⁴ Fourth, noncustodial parents often have child-support orders in place that exceed their current ability to pay because the order was not reduced following a reduction in their earnings due to job loss or other similar circumstances.²⁵ Finally, for noncustodial parents with multiple child-support orders, their overall obligation can be staggering and economically unrealistic, especially in light of federal guidelines that permit total monthly child-support obligations to be as high as sixty-five percent of an obligor’s pretax earnings.²⁶ These practices piled one on top of the other—contribute to the child-support-nonpayment problem and the buildup of significant arrears by low-income noncustodial parents.²⁷

There is a broad consensus that the child-support enforcement system is not working properly in these cases.²⁸ Child-support enforcement cases involving poor families involve low collection rates for mothers and high debt accrual for fathers.²⁹ The majority of these fathers are “unable nonpayers,” meaning they lack the financial resources to pay the support they owe.³⁰ Yet, the state aggressively pursues enforcement of support in these cases, which far too often affects families living in deep and persistent poverty, places pro se fathers in court up against government lawyers, and results in unjust outcomes for poor fathers.³¹

22. Brito, *Fathers Behind Bars*, *supra* note 17, at 639–41.

23. *Id.*

24. *Id.* at 642.

25. *Id.* at 643–46.

26. *See supra* note 21 and accompanying text.

27. Tonya L. Brito, *Producing Justice in Poor People’s Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 153–54 (2020) [hereinafter Brito, *Producing Justice in Poor People’s Courts*].

28. *See* Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 957 n.14 (2019) [hereinafter Brito, *Debt Bubble*].

29. *See generally* Brito, *Fathers Behind Bars*, *supra* note 17 (explaining that low collection rates and high debt accrual is in large part due to lack of ability to pay rather than a refusal to pay).

30. *Id.* at 633.

31. *See id.* at 633, 643–46.

Child-support debts entangle poor fathers in repeated court hearings (often relating to the same debt) that become increasingly punitive, typically beginning with court orders to seek work and sometimes culminating in a finding of civil contempt and incarceration.³² Seek-work orders are mandates for an individual to go out and apply for employment.³³ They can be issued either as part of child-support orders or as contempt of court purge orders. Consequently, “child support law treats support obligations as creating a duty to earn enough to pay, not just to pay enough of what one earns.”³⁴ And courts further construe a noncustodial parent’s unemployment as a refusal to pay child support.³⁵ There has been widespread criticism of the practice of jailing these “deadbroke” fathers for unpaid support, with many referring to it as a modern-day debtor’s prison.³⁶

II. RESEARCH METHODOLOGY

This qualitative study examines the experience of low-income litigants in family court, with a particular focus on child-support enforcement actions. The study involves an in-depth exploration of the legal processes in these cases, focusing on court interactions and examining them from the perspectives of all individuals involved, including family members, attorneys, and judicial decision-makers. Study participants’ cases are observed over an extended period of time to understand how pro se litigants understand and navigate the court process, how and to what effect they represent themselves, and whether and how legal representation matters in these cases.

Earlier publications produced from this study include detailed and comprehensive descriptions of the research methodology and, to conserve space,

32. *See id.* at 617–19, 650–55. 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. *See Brito, Debt Bubble, supra* note 28, at 965 n.62. 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 id.*

33. Child-support laws in most states include work requirements. Noah D. Zatz & Michael A. Stoll, *Working To Avoid Incarceration: Jail Threat and Labor Market Outcomes for Noncustodial Fathers Facing Child Support Enforcement*, 6 RSF 55, 57 (2020). For example, § 49.36 of the Wisconsin Statutes governs seek-work orders from the court. WIS. STAT. § 49.36 (2019–2020). The Department of Children & Families (“DCF”) provides further guidance for court orders to seek work. Wisconsin Administrative Code DCF § 150.03(3) (2019–2020) states the following: “As an alternative to imputed income, the court may order the parent who is not a custodial parent to search for a job or participate in a work experience and job training program . . . under s. 49.36, Stats.” *Id.*

34. Zatz & Stoll, *supra* note 33, at 56.

35. Noah D. Zatz, *A New Peonage?: Pay, Work or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 934 (2016).

36. Brito, *Debt Bubble, supra* note 28, at 965–66.

a shortened version of those descriptions is included here.³⁷ Over the course of five years, my study team collected data in six counties across two midwestern states. To maintain the confidentiality of our study participants, individuals' names and place names in the Article are pseudonyms. In this vein, we refer to the two states in the study as State A and State B.³⁸ 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.³⁹ Our interviews with these legal actors reveal their perspective on how civil justice "works" in child-support enforcement cases and how they understand and justify their decision-making processes. To provide a complete picture of the field, we also interviewed individuals from organizations central to the child-support process at both the state and federal levels. They included representatives from JOBS Programs, courthouse librarians who provide assistance to unrepresented litigants, and directors of state child-support agencies.

The research plan also collected data about the experiences of litigants from their own perspectives. We collected longitudinal data from a sample of forty noncustodial fathers, defendants/obligors in child-support cases. Our longitudinal data plan involved an initial in-depth interview, tracking the fathers' cases for a year, and a follow-up interview at the end of the year. We also conducted in-depth, semistructured interviews with eight custodial parent mothers involved in child-support enforcement cases to gain their experiences and subjective interpretations of the child-support process.

Finally, data collection included an extensive ethnographic study of child-support enforcement adjudication. Proceedings involved a judicial officer (judge or family court commissioner), a government attorney representing the child-support enforcement agency, and the parents. In the counties we studied, the custodial parents were overwhelmingly mothers, and the defendants were most often low-income Black fathers. Though defense counsel were rarely present in the observed hearings, they were sometimes appointed or hired to

37. For a more detailed account of the ethnography conducted in this study, see Tonya L. Brito, Daanika Gordon & David J. Pate Jr., *Focused Ethnography: A Methodological Approach for Engaged Legal Research*, in LEGAL SCHOLARSHIP FOR THE URBAN CORE: FROM THE GROUND UP 141, 143–45 (Peter D. Enrich & Rashmi Dyal-Chand eds., 2019) [hereinafter Brito et al., *Focused Ethnography*], and Brito, *Producing Justice in Poor People's Courts*, *supra* note 27, at 162–72.

38. 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.

39. All study participants and place names are pseudonyms.

represent defendants in enforcement actions.⁴⁰ The ethnographic component of the project revealed how parties construct social meaning in the context of a specific legal process. The study investigated the narratives and legal moves that legal professionals and litigants draw upon in coming to conclusions about whether or not a noncustodial parent has the ability to pay a support order.

The study's data analysis is informed by a critical lens that seeks to identify, document, and change systemic inequities. The critical qualitative researcher examines systems of power (whether hidden or obvious) and unjust and oppressive social conditions that marginalize individuals and communities.⁴¹ "In contrast to critical approaches, traditional social science research, through claims of value neutrality, often serves the ideological function of justifying the positions and interests of the always-already powerful."⁴² Critical inquiry focuses on investigating issues of race, gender and socioeconomic status (and their interaction), and how systems of injustice become institutionalized.

We utilize the tools of grounded theory when developing the coding scheme and coding the data. Grounded theory is an inductive approach to data collection and analysis that emphasizes a recurrent process of data collection, open-coding, focused coding, and drafting analytical memos that ultimately leads to theory building.⁴³ We use a multistage method of focused coding that emphasizes collaborative effort and ongoing dialogue. This team approach to data analysis, though labor intensive, heightens reliability by enhancing exposure to multiple interpretations of the data. In analyzing data, the research team engages in an iterative, collaborative, and self-reflective process. Doing so allows us to develop an increasingly detailed and contextualized understanding of the questions under investigation.⁴⁴

40. 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.

41. See *supra* text accompanying note 40.

42. Jeff Rose, *Ethnographic Research for Social Justice: Critical Engagement with Homelessness in a Public Park*, in FOSTERING SOCIAL JUSTICE THROUGH QUALITATIVE INQUIRY 122, 136 (C.W. Johnson & D.C. Parry eds., 2d ed. 2022).

43. KATHY CHARMAZ, CONSTRUCTING GROUNDED THEORY: A PRACTICAL GUIDE THROUGH QUALITATIVE ANALYSIS 9–12, 15–17 (1st ed. 2006); Iddo Tavory & Stefan Timmermans, *A Pragmatist Approach to Causality in Ethnography*, 119 AM. J. SOCIO. 682, 683 (2013).

44. Rose, *supra* note 42, at 136–38.

III. HOW LOW-WAGE LABOR MARKET REALITIES IMPACT CHILD SUPPORT

Poor noncustodial fathers experience a precarious job market that thwarts efforts to meet their child-support obligations consistently and reliably. This part first elaborates on how and why wage stagnation and job precarity is prevalent in the low-wage labor market. Drawing from the project's rich empirical data, it then connects those labor market trends to the work histories of the low-income fathers who appear in child-support court. In their interviews, judges, commissioners, and lawyers shared a litany of employment barriers facing low-income noncustodial fathers. They also explained how the low-wage labor market exacerbates the effect of these barriers. Fathers in the study likewise discussed the barriers that negatively impact their efforts to find work, including educational and skill deficits, incarceration and criminal histories, transportation limitations, racial discrimination, health issues, and family obligations. These conditions—which in some cases are multiplied—make it tough for poor fathers to find any job at all, let alone a job with wages adequate for supporting themselves and paying support. That said, legal actors' awareness of noncustodial fathers' barriers to employment and the harsh conditions they face in the low-wage labor market does not necessarily impact the legal actors' decision-making in court.

A. *Low-Wage Labor Market Precarity*

Low-income noncustodial fathers face a labor market that has in many ways left them behind. Although the challenges they face are varied and complex, two overarching factors—persistently low wages and increasing job precarity⁴⁵—complicate their ability to comply with the child-support system's expectation of consistent financial support in ways that are not sufficiently acknowledged and addressed by that system. This section addresses wage stagnation and job precarity in the low-wage labor market, then briefly reviews the various interconnected causes that researchers have proposed to explain these trends.

Since the late 1970s, wages for most workers have decoupled from economic growth—the U.S. economy grew by 77% between 1980 and 2014, but the average market income for working-age adults in the bottom fiftieth percentile decreased by 6.2% during that time period.⁴⁶ During the same time

45. For the purposes of this Article, precarious employment is defined as “employment that is uncertain, unpredictable, and risky from the point of view of the worker.” Arne Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOCIO. REV. 1, 2 (2009) [hereinafter Kalleberg, *Precarious Work*].

46. David R. Howell & Arne L. Kalleberg, *Declining Job Quality in the United States: Explanations and Evidence*, 5 RSF 1, 5–6 (2019), <https://www.rsfsjournal.org/content/rsfjss/5/4/1.full.pdf> [<https://perma.cc/HYM5-53XN> (staff-uploaded archive)].

period, the share of workers employed in decent-wage jobs (defined as \$17.50 and above) has declined, while the share employed in low-wage jobs (below \$17.50) has increased.⁴⁷

This wage stagnation and decline have made it difficult for many low-income fathers to support themselves, let alone meet child-support obligations. For instance, in 2020, the bottom 20% of households had incomes of \$27,026 or less.⁴⁸ Compared to household budget estimates calculated by the Economic Policy Institute—which considers the cost of housing, food, child care, transportation, health care, other necessities such as clothing, personal care items, and household supplies, as well as taxes⁴⁹—household income at the top of the bottom twentieth percentile is significantly less than the income required for even a single individual to “attain a modest yet adequate standard of living” in many American cities.⁵⁰ Perhaps it is unsurprising that annual budgets in larger cities like Chicago (\$41,159), New York City (\$56,718), and Los Angeles (\$48,891) exceed the twentieth percentile limit.⁵¹ However, even in relatively affordable smaller cities, like Milwaukee (\$33,767), St. Louis (\$35,144), and Cincinnati (\$33,249), a fairly modest budget for an individual adult is out of reach for households in the bottom twentieth percentile of income nationally.⁵²

In addition to contending with subpar wages, low-wage workers often experience precarious employment. For the purposes of this Article, precarious employment is defined as “employment that is uncertain, unpredictable, and risky from the point of view of the worker.”⁵³ For instance, lower wage workers are much less likely to report that they have regular and steady work throughout

47. *See id.* at 11 fig.3, 12 tbl.2.

48. EMILY A. SHRIDER, MELISSA KOLLAR, FRANCES CHEN & JESSICA SEMEGA, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2020, at 9 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf> [<https://perma.cc/C55R-PK26>].

49. *Family Budget Calculator*, ECON. POL’Y INST. (Mar. 2022), <https://www.epi.org/resources/budget/> [<https://perma.cc/BP69-JN23>].

50. EPI calculates housing costs based on the Department of Housing and Urban Development’s fair market rents at the fortieth percentile for modest (but still structurally safe and sanitary) rental housing. ELISE GOULD & ZANE MOKHIBER, ECON. POL’Y INST., THE ECONOMIC POLICY INSTITUTE’S FAMILY BUDGET CALCULATOR: TECHNICAL DOCUMENTATION 3 (2022), <https://www.epi.org/publication/family-budget-calculator-documentation/> [<https://perma.cc/234U-TKZX> (staff-uploaded archive)]. Food costs are calculated based on the USDA’s “low-cost” food plan. Childcare is calculated based on the cost of center-based care for four-year-olds and school-age children (although childcare is not included in the city budgets above since they were calculated for an individual adult). *Id.* at 3–5. Transportation costs are “estimated by adding up three major components of transportation costs: auto ownership, auto use, and transit use,” *id.* at 8, health care costs include both insurance premiums and out-of-pocket costs (taken from Department of Health and Human Services data), *id.* at 8–9, and the cost for “other necessities” comes from the Bureau of Labor Statistics Consumer Expenditure Survey, *id.* at 10.

51. *Family Budget Calculator*, *supra* note 49.

52. *Id.*

53. Kalleberg, *Precarious Work*, *supra* note 45, at 2.

the year, paid sick time, or health and pension benefits.⁵⁴ They are less likely to be a union member, and more likely to be looking for a different job.⁵⁵ Additionally, there is some evidence of a decline in average job tenure (particularly for younger workers)⁵⁶ and a rise in “just-in-time” scheduling models in the low-wage service sector, which leave workers with little advance notice of when and how much they will be working in any given week.⁵⁷ For instance, in 2017 and 2018, 18.7% of workers learned their work schedule less than one week in advance, with some significant variation by industry (12.1% of professional workers versus 23.2% of service workers and 39.6% of construction workers) and educational attainment (31.1% for workers with less than a high school diploma versus 14.4% for workers with a bachelor’s degree and higher).⁵⁸ Furthermore, like the problem of wage stagnation, precarious work appears to have grown since the 1970s, as evidenced by (among other factors) a decline in employee tenure, growth in perceived job insecurity, and the shifting of risk from employers to employees.⁵⁹

Even setting aside the negative impact that job precarity can have on wages,⁶⁰ precarity and unpredictable scheduling may create considerable work-life conflict—particularly for parents or other caregivers—and result in negative mental health outcomes. For instance, one study surveying around twenty-seven thousand retail workers found that various measures of scheduling instability or unpredictability were associated with greater psychological distress and worse sleep quality, even when controlling for the impact on hourly wages.⁶¹

Economists, labor market experts, and other researchers have proposed (and debated) several potential explanations for wage stagnation and increased job precarity in the face of overall economic growth. Some point to the decline

54. Howell & Kalleberg, *supra* note 46, at 16.

55. *Id.*

56. See Kevin F. Hallock, *Job Loss and the Fraying of the Implicit Employment Contract*, 23 J. ECON. PERSPS. 69, 71 (2009).

57. See Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 8–9 (2015).

58. Table 5. *How Far in Advance Workers Knew Their Work Schedules by Selected Characteristics, Averages for the Period 2017–2018*, U.S. BUREAU LAB. STATS., <https://www.bls.gov/news.release/flex2.t05.htm> [<https://perma.cc/5PSL-K4FC>] (last modified Sept. 24, 2019).

59. See Kalleberg, *Precarious Work*, *supra* note 45, at 6–8. A classic example of the risk-shifting between employer and employee is the transition from defined benefit plans (e.g., pensions) to defined contribution plans (e.g., 401ks), in which the employee absorbs more of the risk of investing for retirement. See *id.* at 8.

60. See *id.* at 8–9.

61. Daniel Schneider & Kristen Harknett, *Consequences of Routine Work-Schedule Instability for Worker Health and Well-Being*, 84 AM. SOCIO. REV. 82, 98–102, 105–06 (2009).

in union membership and resulting “collapse in workers’ bargaining power.”⁶² Others point to globalization and outsourcing (as well as inadequate policy responses to the same).⁶³ Still others argue that worker skill has failed to keep pace with employers’ increasing skill requirements.⁶⁴

Employer concentration and the increasing use of noncompete and mandatory arbitration agreements in low-wage employment have also been cited as contributing to the increasing imbalance of power between employees and their employers.⁶⁵ Low-wage workers are increasingly subject to noncompete and mandatory arbitration agreements—in fact, they are more likely to be subject to mandatory arbitration agreements than higher wage workers.⁶⁶ The increased use of mandatory arbitration agreements has been criticized because low-wage workers already tend to be more vulnerable to employment rights violations, particularly wage and hour violations,⁶⁷ and mandatory arbitration agreements may exacerbate the problem by dissuading workers from bringing claims at all.⁶⁸ The impact that noncompete agreements can have on low-income workers was highlighted in 2016 when the state of Illinois sued fast-food franchise Jimmy John’s for its practice of imposing noncompetes on its low-wage food service employees that served “no legitimate

62. JOSH BIVENS & HEIDI SHIERHOLZ, ECON. POL’Y INST., WHAT LABOR MARKET CHANGES HAVE GENERATED INEQUALITY AND WAGE SUPPRESSION? 4, 7–8 (2018), <https://files.epi.org/pdf/148880.pdf> [<https://perma.cc/PTQ7-JDTN> (staff-uploaded archive)]. The share of workers in a union fell from 24% in 1973 to 10.7% in 2017. *Id.* at 7. Brady, Baker, and Finnigan found that a higher level of unionization in a state reduces working poverty for both union and nonunion households. David Brady, Regina S. Baker & Ryan Finnegan, *When Unionization Disappears: State-Level Unionization and Working Poverty in the United States*, 78 AM. SOCIO. REV. 872, 888–91 (2013).

63. See generally, e.g., JOSH BIVENS, ECON. POL’Y INST., ADDING INSULT TO INJURY: HOW BAD POLICY DECISIONS HAVE AMPLIFIED GLOBALIZATION’S COSTS FOR AMERICAN WORKERS (2017), <https://files.epi.org/pdf/130569.pdf> [<https://perma.cc/QZM6-VDKA> (staff-uploaded archive)] (finding specific policy failures have magnified the detrimental effects globalization has on wage growth).

64. See David H. Autor & David Dorn, *The Growth of Low-Skill Service Jobs and the Polarization of the U.S. Labor Market*, 103 AM. ECON. REV. 1553, 1554–58 (2013).

65. See generally Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45 (2019) (arguing that the current antitrust and labor law regimes leave too much gray area and vests too much power in employers).

66. One study found that around 64.5% of workers who make less than \$13.00 per hour are subject to mandatory arbitration agreements. ALEXANDER J.S. COLVIN, ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION 9 tbl.4 (2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/Q55V-VHES> (staff-uploaded archive)]. Another found that 29% of workplaces with an average hourly wage of less than \$13.00 per hour subjected all of their workers to noncompete agreements, and 37.9% subjected some of their workers to noncompetes. ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL’Y INST., NONCOMPETE AGREEMENTS 8 tbl.4 (2019), <https://files.epi.org/pdf/179414.pdf> [<https://perma.cc/Q3LR-B25Q> (staff-uploaded archive)].

67. COLVIN, *supra* note 66, at 14.

68. *Id.* at 10–11.

business interest.”⁶⁹ Such agreements can depress wages by preventing workers from seeking better wages with a new employer, even when such agreements are legally unenforceable.

The stagnant federal minimum wage is perhaps the most well-publicized of the proposed causes of real wage decline in the low-income labor market.⁷⁰ The federal minimum wage has remained at \$7.25 since 2009, and, controlling for inflation, its real value peaked in 1968 and has not reached the same level since.⁷¹ Although there is some debate as to what extent higher minimum wage laws alone will combat poverty,⁷² there is considerable evidence that higher minimum wages increase household incomes at the low end of the income distributions.⁷³ Additionally, there is relatively broad popular support for raising the federal minimum wage. For example, a Pew Research Center poll conducted in April 2021 suggested that sixty-two percent of Americans support a \$15 federal minimum wage.⁷⁴ Over the past several years, states have responded with minimum wage increases—as of 2022, twenty-nine states and the District of Columbia have instituted minimum wages greater than the federal minimum, and eighteen of those states have implemented annual adjustment schedules.⁷⁵ That said, perhaps the most dramatic response to the minimum wage movement (and the Fight for \$15 Movement in particular) has come from municipalities. As of 2021, forty-two cities have implemented minimum wages above the state or federal level, and twenty-two of those cities (including San Francisco, Seattle, and Washington, D.C.) had a minimum wage

69. See Complaint for Declaratory Judgment, Injunctive Relief, and Other Equitable Relief at 2, 17, *People v. Jimmy John’s Enters.*, No. 2016-CH-07746 (Ill. Cir. Ct. June 8, 2016). Jimmy John’s ultimately settled, agreeing not to impose noncompetes in the future and to provide \$100,000 for programs to raise public awareness regarding noncompetes. Daniel Wiessner, *Jimmy John’s Settles Illinois Lawsuit Over Non-compete Agreements*, REUTERS (Dec. 7, 2016), <https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKB N13W2JA> [<https://perma.cc/UW56-NQT7>].

70. See IRENE TUNG, YANNET LATHROP & PAUL SONN, NAT’L EMP. L. PROJECT, *THE GROWING MOVEMENT FOR \$15*, at 1–2 (2015), <https://rmw.nelp.org/wp-content/uploads/sites/2/2016/07/Growing-Movement-for-15-Dollars.pdf> [<https://perma.cc/WTF4-R98E>].

71. Price V. Fishback & Andrew J. Seltzer, *The Rise of America Minimum Wages, 1912–1968*, 35 J. ECON. PERSPS. 73, 74 fig.1 (2021). If the \$7.25 minimum wage had kept pace with inflation since it was last increased in 2009, it would be nearing \$10 as of March 2022. See *CPI Inflation Calculator*, U.S. BUREAU LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/U278-J5YE>] (\$7.25 in January 2009 has the same buying power as \$9.87 in March 2022).

72. See Alan Manning, *The Truth About the Minimum Wage: Neither Job Killer Nor Cure-All*, 97 FOREIGN AFFS. 126, 126–27 (2018).

73. See, e.g., Arindrajit Dube, *Minimum Wages and the Distribution of Family Incomes*, 11 AM. ECON. J. 268, 269 (2019).

74. Amina Dunn, *Most Americans Support a \$15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), <https://www.pewresearch.org/fact-tank/2021/04/22/most-americans-support-a-15-federal-minimum-wage/> [<https://perma.cc/8RVX-DFUN>].

75. *Consolidated Minimum Wage Table*, DEP’T LAB. (Jan. 1, 2022), <https://www.dol.gov/agencies/whd/mw-consolidated> [<https://perma.cc/GTN2-DUQZ>].

of \$15 per hour or more.⁷⁶ Although evidence of the effects of local minimum wage laws is still limited, “the weight of the evidence is consistent with these policies having moderately raised wages at the bottom without a large change in employment probabilities.”⁷⁷ However, despite the generally popular support, a considerable number of state legislatures have pushed back—twenty-eight states have enacted preemption legislation that prohibits cities from raising the minimum wage.⁷⁸

Wage stagnation and job precarity have also been attributed to increases in nonstandard work arrangements.⁷⁹ Nonstandard work is used here as a catch-all term for “work arrangements that depart from the . . . norm of standard employment relations involving permanent, full-time work directed by an employer at the employer’s place of business and with regular pay and benefits.”⁸⁰ This includes independent contracting (itself a considerably broad category whose contours are still hotly contested),⁸¹ part-time work, self-employment, day labor, and cash-economy work (all of which can and do overlap). However, the nonstandard work arrangement most frequently reported by the noncustodial fathers interviewed for this project was temporary staffing agency work. At its most basic level, temp work involves a host employer⁸² contracting work out to a temp agency, which hires the temp employee, pays them, but takes a cut of what the host employer pays for the

76. Arindrajit Dube & Attila Lindner, *City Limits: What Do Local-Area Minimum Wages Do?*, 35 J. ECON. PERSPS. 27, 27 (2021).

77. *Id.* at 47–48.

78. *Id.* at 29.

79. There is mixed evidence as to the extent of growth in nonstandard work arrangements since the early 2000s, but it appears that the “preponderance of evidence . . . indicates that the value in the economy created through fissured mechanisms [like independent contracting and temp work] has grown.” David Weil, *Inequality and the Fissured Workplace*, 21 CANADIAN LAB. & EMP. L.J. 207, 212–15 (2018).

80. Howell & Kalleberg, *supra* note 46, at 17.

81. For example, California Proposition 22 was a saga in which app-based gig companies, like Uber, spent over \$200 million in a successful attempt to convince California voters that ride share drivers should be classified as independent contractors. See Ryan Menezes, Maloy Moore & Phi Do, *Billions Have Been Spent on California’s Ballot Measure Battles. But This Year Is Unlike Any Other*, L.A. TIMES (Nov. 13, 2020), <https://latimes.com/projects/props-california-2020-election-money/> [<https://perma.cc/84DB-AH24> (dark archive)].

82. “Host employers” are also known as “worksites employers” or “lead firm.” NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, NAT’L OCCUPATIONAL RSCH. AGENDA SERVS. SECTOR COUNCIL, AM. SOC’Y FOR SAFETY PROS., AM. STAFFING ASS’N & SAFETY & HEALTH ASSESSMENT & RSCH. FOR PREVENTION, PROTECTING TEMPORARY WORKERS: BEST PRACTICES FOR HOST EMPLOYERS 1 n.1 (2022), <https://www.cdc.gov/niosh/docs/2022-126/pdfs/2022-126.pdf?id=10.26616/NIOSHPUB2022126&id=10.26616/NIOSHPUB2022126> [<https://perma.cc/7P-FN-H292>].

employee's labor.⁸³ The timeframe for a temp arrangement can range from a single day to years for so-called “permatemps,” in spite of restrictions on the amount of time temp workers may be hired without benefits.⁸⁴

While nonstandard work arrangements are not per se exploitative or disadvantageous for workers, they do often disadvantage low-income workers. For example, Professor David Weil notes that nonstandard work arrangements can result in workers having less access to employment benefits, fewer protections under discrimination and wage and hour laws, and fewer opportunities to achieve upward mobility by climbing internal job ladders.⁸⁵ Additionally, workers in nonstandard arrangements generally earn much less than workers in standard arrangements.⁸⁶ Although this disparity may be partially a function of the differences in jobs and demographics between such workers, there is some evidence suggesting that contractors are still paid less compared to employees in similar roles.⁸⁷

Temporary work has expanded since the great recession, with temporary staffing agency work hours growing 3.88 times faster than overall work hours from 2009 to 2018.⁸⁸ Although many (if not most) temp workers seek out temp work with the hopes of obtaining a permanent position,⁸⁹ one study found that only 7% of temp assignments ended in a hire, and only 22% of industrial assignments explicitly advertised as a temporary-to-permanent hire ended in a hire.⁹⁰ As Flanagan notes, this may be by design—in their agreements with worksite employers, staffing agencies often include prohibitions on or disincentives to hiring temp workers directly.⁹¹ As will be discussed in Section

83. See TEMP WORKER JUST., CHI. WORKERS COLLABORATIVE, MISS. WORKERS' CTR. FOR HUM. RTS., NAT'L EMP. L. PROJECT, NEW LAB., N.C. JUST. CTR. & WAREHOUSE WORKERS FOR JUST., TEMP WORKERS DEMAND GOOD JOBS 6 (2022), <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf> [<https://perma.cc/28QU-TD5A>].

84. *Id.* at 12.

85. Weil, *supra* note 79, at 219–20.

86. *Median Usual Weekly Earnings of Full- and Part-Time Contingent and Noncontingent Wage and Salary Workers and Those with Alternative Work Arrangements by Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU LAB. STATS., <https://www.bls.gov/news.release/conemp.t13.htm> [<https://perma.cc/HE5N-T4KW>] (last updated June 7, 2018). Median weekly earnings for contingent workers were around seventy-seven percent of those of noncontingent workers. *Id.*

87. Weil, *supra* note 79, at 228–29. For instance, one study found that contracted janitors earned 15% less than their counterparts working in-house, and contracted security guards earned 17% less than their counterparts. Samuel Berlinski, *Wages and Contracting Out: Does the Law of One Price Hold?*, 46 BRITISH J. INDUS. RELS. 59, 73 (2008).

88. LAURA PADIN & MAYA PINTO, NAT'L EMP. L. PROJECT, LASTING SOLUTIONS FOR AMERICA'S TEMPORARY WORKERS 1 (2019), <https://s27147.pcdn.co/wp-content/uploads/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf> [<https://perma.cc/K8KT-VEWJ>].

89. Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers “Temp,”* 20 J.L. SOC'Y 247, 251 (2020).

90. *Id.* at 252–53.

91. *Id.* at 254.

IV.E, the precarity of temporary work can negatively impact a noncustodial father's ability to support himself and comply with his child-support obligations.

A particularly stark example of how nonstandard work arrangements can stifle upward mobility was highlighted in a 2017 *New York Times* article contrasting Gail Evans, who started as a janitor for Kodak in the early 1980s, and Marta Ramos, who worked in 2017 as a janitor at Apple.⁹² While Evans and Ramos both earned about the same wage (adjusted for inflation), Evans was a full-time Kodak employee who earned four weeks of vacation time per year, partial tuition reimbursement, and a yearly bonus.⁹³ In contrast, Ramos is employed by a contractor that provides janitorial services to Apple, and she receives no such benefits.⁹⁴ Perhaps more importantly, however, Evans had access to internal job opportunities at Kodak; when her facility closed down, she was transferred to another department, and when she finished her degree, she obtained a promotion to a professional-track information technology job.⁹⁵ Less than a decade later, she became Kodak's Chief Technology Officer.⁹⁶ Ramos, on the other hand, does not have any access to internal job ladders at Apple—her only option for advancement is becoming a team leader with her contracting company, which pays fifty cents more per hour.⁹⁷ The point of this example is not to suggest that Evans's accomplishments were usual at the time—instead it shows that the structures in place that made her dramatic upward mobility possible, such as retraining, tuition support, paid time off, and access to internal job ladders, are simply not available to workers in the nonstandard contracting arrangements that have become increasingly common over the past few decades.

Although janitors were not unionized at Kodak when Evans was employed there, the relative power and prevalence of unions at that time compared to 2017 may have also contributed to the stark differences in benefits and opportunity between Evans and Ramos. In addition to raising wages and cementing benefits in unionized workplaces,⁹⁸ union strength in a geographical area can put pressure on nearby employers in nonunion firms to bridge the gap with unionized workplaces (in order to avoid unionization).⁹⁹ Major nonunion

92. Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now*, N.Y. TIMES (Sept. 3, 2017), <https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html> [https://perma.cc/3QQJ-W3VJ] (staff-uploaded, dark archive).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. See JAKE ROSENFELD, PATRICK DENICE & JENNIFER LAIRD, ECON. POL'Y INST., UNION DECLINE LOWERS WAGES OF NONUNION WORKERS 2 (2016), <https://files.epi.org/pdf/112811.pdf> [https://perma.cc/ZD2W-L4ZJ].

99. *See id.*

employers like Kodak reported that they closely monitored nearby union contracts and, in Kodak's case, spent "substantial sums to secure its workers' loyalty" in their efforts to prevent unionization.¹⁰⁰ Higher rates of unionization in a state tend to reduce working poverty in both union and nonunion households,¹⁰¹ and this effect appears to be strongest for workers (particularly male workers) who have a high school degree or less education.¹⁰²

Relatedly, the decline in manufacturing and shift to a service economy also had a hand in creating "a more precarious economy that produced an abundance of low-wage jobs."¹⁰³ Since manufacturing was traditionally heavily unionized (and the service sector less so, even when unions were at their strongest), this shift and the decline of unionization are intertwined.¹⁰⁴ While there has been a small growth in manufacturing in the postrecession economic recovery period, that growth has been disproportionately concentrated in low-wage jobs, possibly reflecting the fact that such jobs are less likely to be unionized or less likely to be out of major firms than in the past.¹⁰⁵ This decline in well-paying manufacturing and blue-collar jobs means that for the obligors interviewed for this project—all male, many young, and most lacking a college degree—these declines have been a key factor in depressing earnings and increasing earnings inequality.¹⁰⁶

Many Black workers experience disproportionately negative outcomes in the labor market—both in terms of wage decline and job precarity—based on their race. Since the late 1970s, overall wage growth was much slower for Black (10.1%) and Latino (11.9%) workers than for White (23.3%) and Asian American/Pacific Islander (36.7%) workers.¹⁰⁷ Additionally, Black and Latino workers are overrepresented in certain nonstandard work arrangements, like temporary work—Black workers are 12.1% of the overall workforce, but 25.9% of temp workers; Latino workers are 16.6% of the overall workforce but 25.4%

100. *Id.* at 5–6 (citing SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* 64 (1997)).

101. Brady et al., *supra* note 62, at 888.

102. ROSENFELD ET AL., *supra* note 98, at 12–13.

103. Rachel E. Dwyer & Erik Olin Wright, *Low-Wage Job Growth, Polarization, and the Limits and Opportunities of the Service Economy*, 5 *RSF* 56, 56–57 (2019).

104. *See id.*

105. *Id.* at 69–70.

106. *See* Andrew Sum, Ishwar Khatiwada, Joseph McLaughlin & Sheila Palma, *No Country for Young Men: Deteriorating Labor Market Prospects for Low-Skilled Men in the United States*, 635 *ANNALS AM. ACAD. POL. & SOC. SCI.* 24, 37 (2011).

107. JOHN SCHMITT, ELISE GOULD & JOSH BIVENS, *ECON. POL'Y INST., AMERICA'S SLOW-MOTION WAGE CRISIS* 6 (2018), <https://files.epi.org/pdf/153535.pdf> [<https://perma.cc/H29N-4RQS>].

of temp workers.¹⁰⁸ The disadvantages of temporary work are compounded for Black workers, who incur larger economic losses than White workers upon job separation and are thus unequally impacted by unstable work arrangements in general.¹⁰⁹ Furthermore, some have noted that the decline of labor unions may have exacerbated wage inequality between Black and White workers—although labor unions have a history of discrimination and overt racism against Black workers,¹¹⁰ from the 1970s onward, Black workers were overrepresented in private sector unions,¹¹¹ and thus “private-sector union decline has exacerbated Black-White wage inequality.”¹¹²

Intertwined with these structural challenges is persistent racial discrimination across various elements of employment. For instance, Black job applicants encounter disparate treatment when trying to obtain a low-wage job in the first place. In one study, researchers conducting a matched testers study found that White job applicants with identical qualifications received a call-back from employers around 31% of the time, while Black applicants received a call-back only around 15.2% of the time.¹¹³ Moreover, White applicants *with* a criminal record still did slightly better than Black applicants *without* a criminal record.¹¹⁴ In a stark, more pared down example of disparate treatment in hiring, one study found that resumes that were randomly assigned White-sounding names received fifty percent more callbacks for interviews than Black-sounding names.¹¹⁵ Furthermore, in addition to hiring, discrimination may depress the wages employers offer Black workers—after controlling for a variety of factors—one study found evidence to suggest that racial discrimination accounts for at least one-third of the Black-White wage gap.¹¹⁶ Racial disparities are particularly pronounced in Miltonville County. In the largest city in

108. *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NAT’L EMP. L. PROJECT (June 7, 2018), <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/> [<https://perma.cc/Z23C-KS24>]; see also *Contingent and Alternative Employment Arrangements News Release*, U.S. BUREAU LAB. STATS., <https://www.bls.gov/news.release/conemp.htm> [<https://perma.cc/JAL8-UEHP>] (last updated June 7, 2018).

109. See Roland G. Fryer, Jr., Devah Pager & Jörg L. Spenkuch, *Racial Disparities in Job Finding and Offered Wages*, 56 J.L. & ECON. 633, 665–66 (2013).

110. For a brief overview, see Jake Rosenfeld & Meredith Kleykamp, *Organized Labor and Racial Wage Inequality in the United States*, 117 AM. J. SOCIO. 1460, 1466–67 (2012).

111. *Id.* at 1461.

112. *Id.* at 1462.

113. Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOCIO. REV. 777, 784 (2009).

114. *Id.* at 785.

115. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

116. See Fryer et al., *supra* note 109, at 670.

Miltonville County, the percentage of Black men who are employed steadily declined from well over 80% in 1970 to around 50% in 2010.¹¹⁷

B. *The Work Life of Low-Wage Fathers: Perspectives from the Field*

Many of the noncustodial fathers interviewed for this project share characteristics that make them particularly vulnerable to the challenging low-income labor market trends discussed above. At the time of their initial interviews, thirty-three percent of the fathers in the study were unemployed. Forty-three percent were receiving government benefits, either food stamps or medical assistance in most cases. Sixty percent had at most a high school diploma or GED, with some fathers reporting that they had no formal educational credential. Fifty-nine percent of the fathers in the study shared that they had serious health issues, physical, mental, or both in some cases. Seventy-five of the fathers self-identified as Black, while ten percent self-identified as White and the rest self-identified as multiracial or Asian American. Additionally, forty-four percent of the fathers in the study had been previously incarcerated. These conditions often make it challenging for obligors to find a job at all, let alone a job with wages adequate for supporting themselves and complying with child-support obligations.

The COVID-19 pandemic and its aftermath have left a great deal of uncertainty about the future of the low-wage labor market. On one hand, several recent changes could be read optimistically to suggest a sea change in the balance of power between low-wage workers and employers. At the time of writing, the unemployment rate had dropped from its early pandemic peak of 14.7% in April 2020 to 3.6% in March 2022.¹¹⁸ Wages have, in turn, generally increased since the pandemic—median weekly earnings were 4.9% higher in the first quarter of 2022 than they were a year prior.¹¹⁹ Unionization efforts have become more public and popular now than they have been in decades.¹²⁰ Record high quit rates in what has been dubbed “The Great Resignation” may signal that low-income workers are less willing to tolerate the stagnant wages and job

117. Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, *“I Do for My Kids”: Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3037 (2015).

118. U.S. DEP’T OF LABOR, BUREAU LAB. STATS., USDL-22-0557, NEWS RELEASE: THE EMPLOYMENT SITUATION—MARCH 2022, at 1 (2022), https://www.bls.gov/news.release/archives/empsit_04012022.pdf [https://perma.cc/Z4ZR-MY3B].

119. BUREAU LAB. STATS., U.S. DEP’T OF LABOR, USDL-22-0624, NEWS RELEASE: USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS 1 (2022), https://www.bls.gov/news.release/archives/wkyeng_04152022.pdf [https://perma.cc/BMY4-FYQ8] [hereinafter U.S. BUREAU LAB. STATS., USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS].

120. See Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), <https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/3N3J-JA2G].

precarity that have become endemic in the past decades, and have spurred optimism that employers will course correct in response.¹²¹

On the other hand, there are also good reasons to temper such optimism. Job precarity still appears to be an enduring problem, despite worker shortages and, theoretically, greater worker power.¹²² Rising inflation threatens to wipe out gains in wages, particularly for low-income Americans.¹²³ And despite their recent hike in popularity, union membership continues to drop.¹²⁴ It remains to be seen what the long-term effects of this shakeup will be. However, it serves as a reminder that low-income noncustodial fathers are subject to a job market that is often unstable, and sometimes volatile in a way that is often incompatible with the relatively inflexible nature of their child-support obligations.

1. Barriers to Employment in a Tough Market

“It’s *tough* to get a job these days. And if you don’t have education, you got a criminal record, it’s *really* tough.” —Judge Eric Garnett¹²⁵

Legal actors and parents in both regions discussed a variety of employment barriers facing low-income noncustodial fathers. Several also acknowledged how the labor market for low-income employees exacerbates the effect of these barriers. The most discussed employment barriers fall into several broad categories: educational and skill deficits, incarceration and criminal histories, transportation limitations, racial discrimination, health issues, and family obligations.

a. Education/Job Skills

Several interviewees (primarily defense attorneys) pointed to deficiencies in education and job skills as a major barrier to employment for fathers. A few

121. David Leonhardt, *The Myth of Labor Shortages*, N.Y. TIMES, <https://www.nytimes.com/2021/05/20/briefing/labor-shortages-covid-wages.html> [https://perma.cc/2TR2-CXRR (staff-uploaded, dark archive)] (last updated Oct. 25, 2021).

122. Noam Scheiber, *Despite Labor Shortages, Workers See Few Gains in Economic Security*, N.Y. TIMES, <https://www.nytimes.com/2022/02/01/business/economy/part-time-work.html> [https://perma.cc/DS54-TQ6C (staff-uploaded, dark archive)] (last updated Feb. 3, 2022).

123. See U.S. BUREAU LAB. STATS., USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS, *supra* note 119, at 1 (noting the eight percent increase in the Consumer Price Index between Q1 2021 and Q1 2022); Rachel Siegel & Andrew Van Dam, ‘Survival Mode’: Inflation Falls Hardest on Low-Income Americans, WASH. POST (Feb. 13, 2022, 3:12 PM), <https://www.washingtonpost.com/business/2022/02/13/low-income-high-inflation-inequality/> [https://perma.cc/XK7D-8C4N (staff-uploaded, dark archive)].

124. Taylor Johnston, *The U.S. Labor Movement Is Popular, Prominent, and Also Shrinking*, N.Y. TIMES (Jan. 25, 2022), <https://www.nytimes.com/interactive/2022/01/25/business/unions-amazon-starbucks.html?action=click&module=RelatedLinks&pgtype=Article> [https://perma.cc/3R55-FMEW (staff-uploaded, dark archive)].

125. Interview by David J. Pate, Jr., with Eric Garnett, Fam. Ct. Judge, in Cnty. A, State A (Sept. 14, 2013) (on file with author).

conceptualized this problem as a mismatch between low-income fathers' skills and the available jobs on the market. Defense attorney Ben Foote noted that "[i]t's just what might be out there for employment is skill levels that these folks, again, given that public defender clientele dynamics, they will never get. . . . You know, they're not gonna be a lab tech at the hospital."¹²⁶ Attorney Foote also observes that "employment is education-driven . . . except sometimes it's weird. Like our technical college is cranking out welders. Well, there's no work for welders."¹²⁷

Others focused on how the recession (and its lingering effects) allowed employers to be choosier in selecting employees with a certain measure of experience and education:

[T]he lower class was affected the most [by the economy] because now the middle-class people, the people that have degrees, they're taking the lower-class jobs. You have people with bachelor's degrees working at McDonalds. So now you have really experienced, skilled people to choose from this pool, and now it's leaving out an entire class of people that only have GEDs, high school diplomas¹²⁸

However, most of the legal actors that discussed education as a barrier conceptualized the problem not as the result of "degree creep" or labor market shifts, but as a deficiency of *basic* skills required to work nearly anywhere. Some legal actors pointed to specific skill areas; for instance, child-support attorney Arthur Rounds points to a lack of literacy as the main reason why some noncustodial fathers cannot find a job: "[S]ometimes I think their reason was they couldn't read, and, you know, they just weren't educated. . . . Now the likelihood of you actually getting a job if you can't read maybe is pretty low."¹²⁹ The Greene County judges interviewed also suggested that literacy is a barrier:

Judge Rose Sites: —And illiteracy is,—

Judge Elizabeth Salmon: —Well, that's another problem.—

Judge Rose Sites: —that level, they're not literate.

Judge Dawn Hintz: It's challenging, you know, to find work for the most challenged individuals in our society—

126. Interview by David J. Pate, Jr., with Ben Foote, Def. Att'y, in Cnty. C, State A (Sept. 14, 2014) (on file with author).

127. *Id.*

128. Interview by David J. Pate, Jr., with Lindsey Ferguson, Def. Att'y, in Cnty. A, State B (Jan. 22, 2015) (on file with author); *see also* Interview by Garrett Grainger with Kathleen Goudeau, Def. Att'y, in Cnty. B, State A (Apr. 13, 2015) (on file with author).

129. Group Interview by Tonya L. Brito with Child-Support Att'ys, in Cnty. B, State A (Apr. 24, 2013) (on file with author).

Judge Rose Sites: —Yeah, like they don't speak English. They don't really read. I mean, it's hard.¹³⁰

Others believed that some low-income fathers lacked basic math and money management skills. Family court commissioner Greg Durand states that “the oddest thing that I've discovered, this must be a failing of our education system, people seem to have a very poor understanding of how to compute an average.”¹³¹

More interviewees, however, simply cited the lack of job skills in the abstract. Defense attorney Peter Elliott connects this to the recession: “I'm finding clients that, you know, are losing their jobs, or lost their jobs in the recession. And they just can't find jobs because they don't have *any skills*.”¹³² Defense attorney Kelly Krueger notes that job and life-skill deficiencies are a national problem: “I think figuring out how to give adults basic education and life skills that are required to, to find a job and keep a job is a challenge for the country, right.”¹³³ JOBS Program Director Pierce Roegner points out that “the young people who need [industrial jobs] basically don't have the education or experience to do that work. They have the physical ability, but they don't have the education.”¹³⁴

Judges' awareness of the existence of this barrier to employment does not necessarily impact their decision-making. Attorney Ralph Neal expresses frustration in how some judges fail to appreciate how serious education and skill limitations (sometimes coupled with incarceration) bar some fathers from nearly any employment:

I feel like leaping up and grabbing the judge by the throat and saying, have you walked outside this courthouse?! Where do you think this man is going to get a job? Who do you think would hire him? You know, would you hire him? I'll send him over to your house and let him paint your garage. Would you do that? No.¹³⁵

At best, some defense attorneys say that a father's lack of job skills can be a defense against the accusation that they are not really trying to find a job.

130. Group Interview by Amanda Ward with Fam. Ct. Judges, in Cnty. B, State B (Apr. 17, 2014) (on file with author).

131. Interview by Chloe Haimson with Greg Durand, Fam. Ct. Comm'r, in Cnty. A, State A (June 2, 2016) (on file with author).

132. Interview by Tonya L. Brito with Peter Elliot, Def. Att'y, in Cnty. A, State B (Mar. 18, 2014) (emphasis added) (on file with author).

133. Interview by Tonya L. Brito with Kelly Krueger, Def. Att'y, in Cnty. C, State B (Dec. 10, 2014) (on file with author).

134. Interview by Daanika Gordon with Pierce Roegner, Dir. of JOBS Program, in Cnty. A, State A (Jan. 6, 2015) (on file with author).

135. Interview by Tonya L. Brito with Ralph Neal, Def. Att'y, in Cnty. A, State A (Jan. 17, 2014) (on file with author).

Defense attorney Harold Hopkins says, “I explain to the court that, you know, this person has limited job skills but is making an effort.”¹³⁶

b. Incarceration

Interviewees also cited past incarceration as a major barrier to employment. Incarceration tends to substantially limit future employment prospects and negatively impact future wages.¹³⁷ Additionally, Black men are incarcerated at higher rates than White men, compounding the racial disparities described above.¹³⁸ According to Todos Empleo Optimal Program Director Hagen, around ninety percent of the noncustodial parents referred to his program for job services had been incarcerated.¹³⁹ Despite how common it is for noncustodial parents owing child support to have served time in jail, defense attorney Lynette Stimpson suggested that judges did not appreciate the impact a criminal record could have on employment:

[T]he court definitely doesn’t understand the difficulties of obtaining employment with a criminal record. . . . I feel like they often say like Home Depot is hiring, and I’m like, well, Home Depot might be the hardest place for someone with a criminal record to get a job [because large corporations are more likely to do background checks].¹⁴⁰

Judge Eric Garnett similarly faults employers who put too much weight on criminal history: “My goodness, we need to do something about the employer’s ability to be able to check someone’s record, and they completed their time. It’s not been a violent offense.”¹⁴¹

Some legal actors allude to the limitations of legal protections against discrimination based on previous convictions. For instance, defense attorney Harold Hopkins explains that

[y]ou know, go on [the court system’s online public case database] and after you got a theft on your record, it’s hard to get a job. They think right away that they’re going to be stealing from them. Or even batteries,

136. Interview by David J. Pate, Jr., with Harold Hopkins, Def. Att’y, in Cnty. A, State A (July 8, 2014) (on file with author).

137. See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 960 (2003); Becky Pettit & Christopher J. Lyons, *Incarceration and the Legitimate Labor Market: Examining Age-Graded Effects on Employment and Wages*, 43 LAW & SOC’Y REV. 725, 740 (2009).

138. Peter Wagner, *Incarceration Is Not an Equal Opportunity Punishment*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/articles/notequal.html> [https://perma.cc/LLA8-VXQT] (last updated Aug. 28, 2012).

139. Interview by Tonya L. Brito with James Hagen, Todos Empleo Optimal Program, in Cnty. A, State A (May 24, 2016) (on file with author).

140. Group Interview by Tonya L. Brito with Lynette Stimpson and Natalie Bednar, Def. Att’y’s, in Cnty. B, State B (Apr. 2, 2015) (on file with author).

141. Interview by David J. Pate, Jr., with Eric Garnett, *supra* note 125.

oh, God, I hired this guy. He's going to beat up some . . . employee. And so, you know, the system is almost stacked against a lot of clients.¹⁴²

Judge Ronald O'Neill believes that employers go one step further to skirt these legal protections:

They will stretch reasons to find why they're not going to hire you, and short of just telling them, I'm not going to hire you because you're a convict and I don't trust you. But there's federal guidelines on when you can and can't apply those things, so employers become creative and say, you know, we had a reduction in our force needs at this point, so you're not hired.¹⁴³

In addition to impairing employment in general, some interviewees observed that criminal records limit access to certain types of employment. For instance, defense attorney Chris Allard notes that a criminal history will often force an individual out of the formal labor market and into the cash economy:

[T]he ones who have had a previous criminal record. Nowadays, employers are largely doing background checks. Now I have a lot of clients who . . . have trouble getting, establishing in the normal marketplace. So, they do a lot of side jobs. They might hang drywall for their uncle or do roofing for their cousin.¹⁴⁴

Defense attorney Carol Kenney cited a particular example of a father who did not appreciate that his record might bar him from a desired career:

He had a felony for drug trafficking, and he did two, three years prison, and he came out, and he decided he wanted to be a physician, some kind of physician's assistant, and he went to Global, you know, he got this degree. Now I can tell you, there's no way in hell they're going to let somebody with drug possession work in the medical arena right away, and he can't find a job.¹⁴⁵

In their discussions of the negative impact of prior incarceration on noncustodial parents' ability to find work, legal actors sometimes situated fathers' employment difficulties within the larger societal problem of mass

142. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136. Under the Wisconsin Fair Employment Law, refusing to hire an individual based on a criminal record is discriminatory, but only if the conviction is *not* substantially related to the job in question. WIS. STAT. §§ 111.321, .322(1), .335(3)(a)(1) (2021–2022). As Hopkins notes, it is not that difficult for an employer to argue that a particular conviction is related to the job in some way. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136.

143. Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. A, State B (July 30, 2014) (on file with author).

144. Interview by Tonya L. Brito with Chris Allard, Def. Att'y, in Cnty. A, State A (Dec. 13, 2013) (on file with author).

145. Interview by David J. Pate, Jr., with Carol Kenney, Def. Att'y, in Cnty. B, State A (July 1, 2014) (on file with author).

incarceration. Judge Elizabeth Salmon faults excessive criminalization: “The felony issue can be huge. And now everything is a felony. Everything is a big deal, and I don’t think people realize how that, the trickle down does work on that side of looking at things because it just affects everything else from there on down.”¹⁴⁶ That said, judges’ understanding of the link between mass incarceration and child-support enforcement does not necessarily translate into more favorable outcomes in family court for fathers who have served time.

c. Transportation

A lack of transportation also serves as a barrier to employment. Defense attorney Anthony Wright explained how a noncustodial father’s reliance on public transportation limits his job options:

If a person . . . had like a driver’s license that was suspended, then I know in my mind that lots of the jobs for which this person would qualify for are probably off the bus line. Like there are lots of factories and things like that that are not on the city bus line, but that’s a barrier.¹⁴⁷

Child-support attorney Scott Pilcher notes that the transportation problem is exacerbated in rural areas:

We have two fairly large urban centers like [Centerville] and [Fairville], with decent transportation systems. But in some of the more rural counties, you know, they understand there aren’t five employers in that part of the county . . . you know, that they live out in the boonies, and, you know, there’s just no way to even look for work. And that might be difficult.¹⁴⁸

Conversely, JOBS Program Director Roegner observes that Miltonville County residents are impacted by employers moving out of the city

because they gave tax breaks to people to move their companies into [Newport] and [Riverside] and, and [Hudson], and, uh, [Auburn] and what have you. These people got tax breaks to move their jobs and their companies out of the inner city away from the mass population. So now you created another barrier, which is transportation. How can I get to work?¹⁴⁹

Twenty-six-year-old Black noncustodial father Mark Whitley says that many residents of his city, Greenville, travel to neighboring cities to find work

146. Group Interview by Amanda Ward with Fam. Ct. Judges, in Cnty. B, State B, *supra* note 130.

147. Interview by Sarah Ishmael with Anthony Wright, Def. Att’y, in Cnty. A, State A (June 2, 2016) (on file with author).

148. Group Interview by Tonya L. Brito with Child-Support Att’y’s, in Cnty. C, State A (Oct. 22, 2012) (on file with author).

149. Interview by Daanika Gordon with Pierce Roegner, Dir. of JOBS Program, in Cnty. A, State A (Jan. 15, 2015) (on file with author).

because of Greenville's high rates of poverty and unemployment.¹⁵⁰ According to Whitley, who was employed in a part-time, minimum-wage position busing tables at IHOP and searching for another part-time position, transportation problems were commonplace, including for him.¹⁵¹ He notes that for some individuals, there are even knowledge barriers to using public transportation in the first place:

A lot of folks, when you don't really got a lot of opportunity around, it's hard for transportation and stuff like that. You got folks who don't know how to take buses, or you got a lot of folks who never had a vehicle, so they really don't know their way around besides what the school bus used to take them around, you know, so it's pretty, it's pretty hard trying to find a job.¹⁵²

Even once a low-wage father has a job and a means to get there, transportation issues can impact his ability to keep his job given the inflexible nature of low-income work and lack of personal support systems. Defense attorney Lynette Stimpson explains that

if you're able to get a car, it's probably a really crappy one, and then it breaks down all the time, and you have to drive ten miles to get to this only job that you could get. And you're late three times, and then miss three times, and you're done.¹⁵³

d. Race

Legal actors questioned about the role of race in the labor market were generally reluctant to describe race as a major barrier. In contrast to the barriers discussed above, few interviewees raised the issue of race on their own. Family court commissioner Greg Durand acknowledged racism in the abstract when pressed, but immediately pivoted to the importance of socioeconomic status as superseding race:

I think a lot more of it is socioeconomic than race. Um, I think it is tough to be poor whether you're White, Black, Hispanic, or Hmong. And I think that if you grow up in a poor neighborhood, again, regardless of which, you are going to be denied opportunities that other people are given.¹⁵⁴

150. Interview by Tonya L. Brito with Mark Whitley, Obligor, in Cnty. A, State B (May 14, 2015) (on file with author).

151. *Id.*

152. *Id.*

153. Group Interview by Tonya L. Brito with Lynette Stimpson and Natalie Bednar, *supra* note 140.

154. Interview by Chloe Haimson with Greg Durand, *supra* note 131.

When pressed about statistics showing that Black men are hired less, Durand demurs: “I think there’s so many factors. Um, I do believe there is still a lot of racism in the world. Um, I, . . . so many factors get, it’s hard to isolate though.”¹⁵⁵ Similarly, when asked whether race comes into play in the job market, James Hagen, Director of Todos Empleo Optimal Program replies,

No, my experience, no, not really, no, not, not since I’ve been what, talk to employers, I’ve worked with employers, no, not really. Uh, I’m sure they have favoritism, you know, but as far as, you know, working with an agency and so forth because of the diversity agency, uh, you know, they’ll take those individuals, you know, and they’ll give them a try and see where they get them at, you know what I mean?¹⁵⁶

Conversely, child-support attorney Ariel Whiting says that although “individuals who are coming into court are not saying that [employers are not hiring them due to their race], “I think it happens.”¹⁵⁷ She recounts her brother-in-law’s experience working for a temp agency, where workers were getting jobs “purely” based on race. She also has observed that

the majority of the individuals who are coming [into court] and saying, well, I’m doing temp agency work are, tend to be Black men. Then something can’t be right. And if many are saying, well, it’s temp-to-perm, but then . . . the update is, I wasn’t hired, then that tells me that something is not right if more than one man is saying the same thing.¹⁵⁸

Defense attorney Mabel Edwards believes that “most judges in [Miltonville] know perfectly well that it’s much harder [to get a job as a Black man]. I mean he can’t get a job because he’s African American, he’s a felon . . .”¹⁵⁹ However, Edwards notes that judges do not acknowledge the problem of racism in individual cases because they feel limited to the facts in front of them: “[T]he reason the court commissioner and the judge isn’t listening is because he can’t. You know, because what he has as, I mean, he feels limited too.”¹⁶⁰

Several noncustodial fathers in the study reported experiencing racism in the job market. Otis Berry, a forty-year-old Black noncustodial father with a child-support order for his six-year-old daughter, notes that the discrimination he encounters rarely takes the form of outright racism; instead, he frequently

155. *Id.*

156. Interview by Tonya L. Brito with James Hagen, *supra* note 139.

157. Interview by Rachel Johnson with Ariel Whiting, Child-Support Att’y, in Cnty. A, State A (May 19, 2016) (on file with author).

158. *Id.*

159. Group Interview by Tonya L. Brito and David J. Pate, Jr., with Def. Att’ys, in Cnty. B, State A (May 8, 2014) (on file with author).

160. *Id.*

experiences “hidden prejudice” when he is applying for jobs.¹⁶¹ Berry worked a seasonal job selling beer at a sports stadium for six years but struggled to find steady work during the offseason.¹⁶² For those six months, he got by with odd jobs and work through temp agencies.¹⁶³ According to Berry, employers “say[] all the little words that they need to say without trying to say it openly . . . they feel they can say a thing, and the person whom they’re being racist to not pick up on it.”¹⁶⁴ As an example, he observes that the individuals receiving his job applications sometimes do not make eye contact with him, or try to “hurry up and get you out of there before you can even say thank you or anything.”¹⁶⁵ Darryl Davis, a forty-three-year-old Black noncustodial father of five children, has also observed the effects of unspoken prejudice within the workplace. In a previous job, he noticed that the employer tended to assign the highest-paid routes to White drivers. He connects the racism he experienced within the workplace to discrimination in hiring—when asked why he had a hard time finding a job, he replied, “most of the time I think because I’m Black.”¹⁶⁶

Charles Caywood and Ronald Emile connected racism in the job market to the regions in which they live. Ronald Emile, a twenty-nine-year-old Black father of three, says, “[W]hen I came back [to Lake County], I’m like, man, I do not want to be around here no more. There’s nothing for a young, Black man in this area, at least the metro east area.”¹⁶⁷ Charles Caywood, a fifty-three-year-old Black father of five, contrasted his negative prior experiences in State A to his mostly positive experiences in Texas:

[O]ppportunity in Texas is everywhere. . . . Yeah, Black or White, Mexican, they don’t care. But right here [Miltonville] it’s untrue. I’ve been turned down many times because I’ve got darker complexion. And it’s not that I didn’t want to work. I just didn’t have the right complexion. . . . Being Black, period, affected me negative in [State A].¹⁶⁸

e. Mental and Physical Health

Defense attorneys noted that disability and health limitations appear to be on the rise among low-income noncustodial fathers, particularly postrecession.

161. Interview by Garrett Grainger with Otis Berry, Obligor, in Cnty. A, State B (July 19, 2015) (on file with author).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Interview by David J. Pate, Jr., with Darryl Davis, Obligor, in Cnty. A, State A (Apr. 21, 2016) (on file with author).

167. Interview by David J. Pate, Jr., with Ronald Emile, Obligor, in Cnty. A, State B (Aug. 17, 2015) (on file with author).

168. Interview by David J. Pate, Jr., with Charles Caywood, Obligor, in Cnty. A, State A (Mar. 21, 2016) (on file with author).

Defense attorney Tracy Koehn explains that “with child support, I ran into fewer and fewer deadbeat dads and deadbeat moms, and more and more on disability, on limitations, on mental health.”¹⁶⁹ Thirteen noncustodial fathers interviewed for this project described experiencing health problems of varying severity. Seven described their experience with mental health issues, primarily depression, anxiety, and bipolar disorder.

Despite the prevalence of health struggles, the fathers rarely talked about how their health impacts their ability to find and keep a job.¹⁷⁰ Charles Caywood discussed his long struggle with bipolar disorder in the context of school and incarceration, but not employment. Caywood dropped out of high school, he says, because “my focus was very poor. And, uh, you know, sometimes . . . something bad would come out of my mouth.”¹⁷¹ Later, he connects his previously untreated mental volatility with his incarceration, when he received medication for his disorder for the first time.¹⁷² While he does not connect his mental health with his difficulties in finding work, it seems to have been a substantial indirect employment barrier since it contributed to two other major employment barriers: incarceration and educational deficits.¹⁷³ Caywood’s situation serves as an example of how mental health can be a root issue that creates additional employment barriers.

That said, defense attorneys have seen limited success in introducing physical disability as a defense in child-support enforcement cases because judges seem to be particularly inquisitorial about health. Attorney Ben Foote says,

[The] judge will look in it, well, have you sought out SSI disability or, you know, other types of disability? Yeah. Well, what’s happened there? And then that could work against you. Well, I tried, and they denied me. Oh, they denied you. Why did they deny you? Well, they said I’m employable. Well, there you go, sir.¹⁷⁴

169. Interview by Stefanie Wong with Tracy Koehn, Def. Att’y, in Cnty. B, State A (June 13, 2014) (on file with author).

170. With few exceptions, including Philip Romero and Dwayne Pawnell, the fathers in the study did not attribute their challenges in the job market to health problems. For his part, Philip Romero explains that he was shut out of the labor market for several years due to his chronic health problems, which included both physical and mental health ailments. Interview by David J. Pate, Jr., with Philip Romero, Obligor, in Cnty. A, State A (Oct. 26, 2017) (on file with author). Dwayne Pawnell similarly describes how he had to settle for lower-paying but less strenuous work because a hernia and back problems halted his generally stable, and comparatively lucrative, career as a welder. Interview by Tonya L. Brito with Dwayne Pawnell, Obligor, in Cnty. A, State B (May 15, 2015) (on file with author).

171. Interview by David J. Pate, Jr., with Charles Caywood, *supra* note 168.

172. *Id.*

173. *Id.*

174. Interview by David J. Pate, Jr., with Ben Foote, *supra* note 126.

According to Attorney Joseph Bourne, judges will look at a noncustodial parent's documentation of their medical issue, but "unless you have got something that you have provided to the corporate counsel, that is like, you know, the Mayo Clinic's chief of staff has sworn off on, it's like, big deal [sarcastically], you know. We don't, doesn't go fly very far with that."¹⁷⁵

Attorney Bourne also reveals how legal actors are sometimes out of touch with the reality of work available to low-income fathers. He dismisses noncustodial fathers who say that they cannot work because they have back problems: "[E]verybody has got a bad back. You know, well, I got a bad back too. The judge has a bad back. We're both here at work."¹⁷⁶ He describes an exchange that a judge in Orange County had with a low-income father who explained that he could not work because of back problems:

You know, stand up. It's like fine now. Why don't you apply to jobs that require sitting down? Here's a new concept for you, you know, with that. You know, with that, it's like, well, yeah, duh, duh, duh, I'm not trained for that. It's like, why not, you know, with that? So, it's like, you know, let's try and fit a job to what you can do with that.¹⁷⁷

The admonition to "just get a desk job" reveals a fundamental disconnect (or, potentially, convenient, temporary ignorance) of the job market for low-income fathers, where the vast majority of jobs available (as will be discussed later) require physical labor.¹⁷⁸ Furthermore, the dismissal of back problems because legal professionals also have bad backs reveals a lack of awareness that the privileges of professional employment do not exactly extend to all.

f. Family Obligations

Finally, noncustodial fathers also occasionally reported that family obligations could serve as a barrier to employment. Dwayne Pawnell and Xavien Yob reported that they turned down available employment in order to stay close to family. Pawnell, a fifty-six-year-old Black father of nine, who was unemployed due to a work-related injury, explains that some of the best paying welding jobs are on container ships, but he chooses to work locally so that he can both make family court dates and be close to his nine-year-old daughter.¹⁷⁹ However, he said,

[I]t kinda put a hardship on me financially because I'm having to work for like, what, \$50 an hour less doing basically the same work. My love

175. Interview by Amanda Ward with Joseph Bourne, Def. Att'y, in Cnty. C, State A (June 3, 2014) (on file with author).

176. *Id.*

177. *Id.*

178. See *infra* Section III.B.1.e.

179. Interview by Tonya L. Brito with Dwayne Pawnell, *supra* note 170.

for my daughter is a lot stronger than the money right now because she's nine. When she get a little older, then maybe, you know, maybe I'll go back out there for a minute.¹⁸⁰

Xavien Yob, a thirty-nine-year-old Black noncustodial father of two, who struggles to find even minimum-wage employment, says that “my son mom, she lives in Tennessee. She's a manager. She's the head manager at Burger King. She said, if you ever need a job, come down here. But I don't want to come down there because I want to be closer to my daughter.”¹⁸¹

Saif Smith discusses another way that family obligations can disincentivize a noncustodial father from making certain employment decisions. Smith, a thirty-seven-year-old father of five, drove a taxi for many years, which gave him the flexibility to spend time with his children on a daily basis, even though he was a noncustodial parent.¹⁸² He would pick up his children from school, bring them food, transport them to activities, and run errands for them.¹⁸³ However, Uber and Lyft began eating into his profits.¹⁸⁴ He tried to find steadier work at a nursing home but quit because it did not afford him the same flexibility to meet his parenting obligations and remain connected to his children that he had as a taxi driver.¹⁸⁵

g. Intersection of Barriers

Finally, several interviewees acknowledged that employment barriers do not operate in isolation, but often intersect and amplify each other. For example, family court commissioner Greg Durand notes how incarceration intersects with other employment barriers: “The socioeconomic factors drive the incarceration factors, and the incarceration factors drive the employment factors, and then everything falls in upon itself.”¹⁸⁶ Another commissioner observes how low-income fathers often experience multiple employment issues, and that some noncustodial fathers are facing so many barriers that they are essentially a “hopeless case”:

Here in [Miltonville County], the issues of nonpayers are so dense. There's transportation issues and criminal histories and lack of education and difficulties with the economy and multiple obligations to multiple women, generally, and trying to get a sense of where they're fitting in

180. *Id.*

181. Interview by Tonya L. Brito with Xavien Yob, Obligor, in Cnty. A, State A (Apr. 25, 2016) (on file with author).

182. Interview by Tonya L. Brito with Saif Smith, Obligor, in Cnty. A, State A (Apr. 13, 2016) (on file with author).

183. *Id.*

184. *Id.*

185. *Id.*

186. Interview by Chloe Haimson with Greg Durand, *supra* note 131.

terms of your boxes for do you send them to jail, do you send them to the Job Search, do you do nothing, do you kick it out the door, because it's a hopeless case, and you're not spending any community resources anymore on this?¹⁸⁷

i. Temporary Work & Precarity

Twelve fathers in this study discussed working through temp agencies in their interviews. A few themes arise from their experiences. First, many describe temporary work as something of a last resort for individuals who, due to criminal history or other factors, cannot find permanent work. Second, fathers (and legal actors) describe the variability and inconsistency of temporary work. Third, fathers uniformly describe temp work as low paying. Finally, both fathers and legal actors explain that while temporary employers often dangle the promise of permanent employment as a motivator, that permanent employment rarely materializes.

Some noncustodial fathers describe temp work as the only employment option for individuals who have a criminal history. Otis Berry says that “it’s like the temp jobs are like the best available jobs because like a permanent job, it’s like they won’t, it’s like they won’t give you a chance, you know. Especially if you’ve like been in trouble with the law some.”¹⁸⁸ Similarly, Xavien Yob feels that “you don’t have no choice but to go through a temp or something here. And now there and there, because you a felon. Um, you know what I mean?”¹⁸⁹

Low-income noncustodial fathers also observe that temp jobs are often the only option for individuals without any postsecondary education. When asked what jobs are available for individuals without a GED, Otis Berry first responds, “temp jobs,” and explains that “I’ll go into some of the temp services like Labor Ready, because they’ll, they’ll put you to work. They’re not so much, oh, you don’t, you don’t have an ID, or you don’t, you, you’re not qualified for, they’re just looking for willing people, you know.”¹⁹⁰ Maurice Shamble, a Black noncustodial father of five, links the connection between lack of higher education and temp work to poverty in his area:

The average person where I’m from is high school diploma, you know what I’m saying. And the average job where I’m from is a temp job with no benefits. That’s why everybody got a [SNAP benefits] card, that’s

187. Group Interview by Tonya L. Brito with Fam. Ct. Comm’rs, in Cnty. A, State A (Jan. 17, 2013) (on file with author).

188. Interview by Garrett Grainger with Otis Berry, *supra* note 161.

189. Interview by Tonya L. Brito with Xavien Yob, *supra* note 181.

190. Interview by Garrett Grainger with Otis Berry, *supra* note 161.

why everybody got to need government assistance because it ain't nothing around here for us, man, you know.¹⁹¹

Both noncustodial fathers and legal actors observe that while temp work may be an available option for low-wage fathers regardless of educational level or criminal history, it is often variable, inconsistent, and unsustainable. As to the actual work performed, most fathers described warehouse and assembly-line work, but as Otis Berry notes, temp assignments can vary wildly day-to-day: “One day you could be cleaning an office building. The next day you could be, uh, working at Six Flags, operating the, the mach-, the rides.”¹⁹² As noted earlier, Doninique Sherrell describes one temp job where he was paid eight dollars per hour to physically break down an ice rink with a metal pipe.¹⁹³ As Matthew Powell notes, temp work may be an available option, but it is not an attractive option: “[G]etting in a temp service is easy, but who wants to work like a full 12 hours in a warehouse all day?”¹⁹⁴ Decrying the monotony and physical demands of the dead-end jobs on offer at temp agencies, Powell dared to want something more for his work life.

In addition to the variable and often unsustainable nature of the work, temp agencies were seen by noncustodial fathers and legal actors as an inconsistent source of employment. Joseph Lathrop, an unemployed fifty-six-year-old father of three, observes that

some days [temp agencies] work you for like two or three days, and then they will tell you they ain't got no work, so that's why it's best to go and order and put yourself in and work at a couple temp places. So that way if this one ain't got no work for you, you call this one, they might have some work for you.¹⁹⁵

Otis Berry explains how this inconsistency wastes time and money:

I've had some opportunities, and, I mean, it's, like I said, some of these opportunities were wanting to, but then when I go it's like, oh, we've got somebody already, or you got to wait in, you got to wait in, you got to wait until they call you on the line. And so, you're just sitting there, and then it's like you never get called so I'm finding myself using a lot of gas to get there, a lot of gas to get back, and it's like a waste of time.¹⁹⁶

191. Interview by David J. Pate, Jr., with Maurice Shamble, in Cnty. A, State B (Aug. 19, 2015) (on file with author).

192. Interview by Garrett Grainger with Otis Berry, *supra* note 161.

193. Interview by Tonya L. Brito with Doninique Sherrell, *supra* note 7.

194. Interview by Tonya L. Brito with Matthew Powell, *supra* note 1.

195. Interview by Tonya L. Brito with Joseph Lathrop, Obligor, in Cnty. A, State A (Jan. 12, 2016) (on file with author).

196. Interview by Garrett Grainger with Otis Berry, *supra* note 161.

Legal actors also see temp work as inconsistent. Child-support attorney Ariel Whiting notes that the phenomenon of temp agencies assigning an individual to a few jobs, then cutting them off, is widespread:

I hear the same, the individuals over and over come in and say, well, I was affiliated with this agency, this agency, and then, yeah, I got a few jobs, but then they didn't call me back. You know, I hear that over and over again. So I just feel like they're just either being used or only certain people are being called back.¹⁹⁷

Child-support attorney Alice Crum says that “I can't understand why some of them get such a regular schedule and some of them, you know, could be called on for a week or two and then not be called back at all.”¹⁹⁸ She does mention a silver lining for noncustodial fathers navigating temp work: “[W]e at least know that they can be employable, you know.”¹⁹⁹

Interviewees also note that temp agencies consistently pay at or close to minimum wage. Doninique Sherrell explains that “you might get some jobs that's only paying \$8. And like anything over in [Arlington], their minimum wage is \$8.25. Over here it's \$8.75. So, it just depends on what you want to do, what you want to work.”²⁰⁰ Thomas Vach, a thirty-year-old Asian American noncustodial father of four, explains that “in [Miltonville], most of the people that goes in there, um, usually get minimum wage to \$8, and they might get \$10 from what I notice,” although he observed that temp jobs do pay a little better in [Washingtonville], a predominantly White suburb of [Miltonville] (starting at twelve dollars per hour).²⁰¹

Child-support attorney Ariel Whiting explains that the growth of temporary work

affect[s] the entire workforce because wages might not be what they otherwise would be if you were working directly for the company. Um, so they're, they might not have as much invested in a worker if like a company would, you know, if you've taken the time to train someone and hire someone. . . . So, um, how do they affect child support? Well, I think there's a whole group of men . . . who otherwise could have, you know, maybe better family-supporting jobs otherwise.²⁰²

197. Interview by Rachel Johnson with Ariel Whiting, *supra* note 157.

198. Interview by Tonya L. Brito with Alice Crum, Child-Support Att'y, in Cnty. A, State B (Aug. 1, 2016) (on file with author).

199. *Id.*

200. Interview by Tonya L. Brito with Doninique Sherrell, *supra* note 7.

201. Interview by Tonya L. Brito with Thomas Vach, Obligor, in Cnty. A, State A (Jan. 13, 2016) (on file with author).

202. Interview by Rachel Johnson with Ariel Whiting, *supra* note 157.

Perhaps the most common criticism of temp work among interviewees is that temporary employment agencies often promise the possibility of permanent employment, but rarely deliver on that promise. Noncustodial father Dearis Calahan, a fifty-three-year-old Black noncustodial father of seven, says that

[s]ome of them do [say that they hire temp workers on permanently], but I haven't ran across any that, uh, that really work. And then they said, well, we might hire you in, but mostly of them, it's work a few days, then they call you back, or some will send you someplace else.²⁰³

Joseph Lathrop puts it in more critical terms: “[T]hey’ll tell you they want to go off, and if you work good in 90 days, they’re going to hire you, but it’s a crock of shit. They’re going to get rid of you because it’s a big turnover and it’s a money profit for them.”²⁰⁴

Troy Wigham, an unemployed forty-one-year-old Black noncustodial father of three, explains how the cycle of broken promises has affected his mental health: “I was doing very good, but they would let all the temp people go at a certain time. They already had the date set, so that was a kind of downfall on me. And it became a depressing, depressive situation.”²⁰⁵ He mentions that this is a common occurrence: “[A] lot of people that do hair, I do, they work through a lot of temps. And every, and every time I talk to them, they, they’re starting a new, different job. There’s never nothing permanent.”²⁰⁶

Legal actors also expressed frustration at this phenomenon. Child-support attorney Ariel Whiting says that “there’s so many times that they come in and say, oh, I’m temp-to-hire or I was temp-to-hire. Um, and then the next time we’re back in court, oh, what happened to that job? I thought you were temp-to-hire. Oh, no, I didn’t get it.”²⁰⁷ Defense attorney Harold Hopkins says that

[t]hey are always hoping that it’s going to turn into a permanent employment or permanent part time or permanent something. But, uh, and it’s, you know, generally, through no fault of their own, that, you know, the temp job, it, that didn’t get, but it’s evidence that they’re out there trying.²⁰⁸

203. Interview by Tonya L. Brito with Dearis Calahan, Obligor, in Cnty. A, State B (July 16, 2015) (on file with author).

204. Interview by Tonya L. Brito with Joseph Lathrop, *supra* note 195.

205. Interview by Tonya L. Brito with Troy Wigham, Obligor, in Cnty. A, State A (Jan. 11, 2016) (on file with author).

206. *Id.*

207. Interview by Rachel Johnson with Ariel Whiting, *supra* note 157.

208. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136.

ii. Cash Jobs and Self-Employment

Nearly half of the fathers interviewed were engaged in some form of under-the-table work at the time of their interview. They reported a wide diversity in the variety of cash jobs they held, including working at a corner store,²⁰⁹ auto service,²¹⁰ auto painting,²¹¹ tattoo artistry,²¹² yard work,²¹³ landscaping,²¹⁴ shoveling snow,²¹⁵ making music,²¹⁶ barbering at a barber shop,²¹⁷ barbering outside a barber shop,²¹⁸ home improvement, such as roofing and siding,²¹⁹ working as a bouncer at a bar,²²⁰ working as a cleaner at a bar,²²¹ working at a Pakistani restaurant,²²² caregiving for a grandparent,²²³ construction,²²⁴ freight liquidation,²²⁵ participation in pharmaceutical research studies,²²⁶ mechanic work,²²⁷ cab driving,²²⁸ working at a church,²²⁹ furniture delivery,²³⁰ truck driving,²³¹ saving cans,²³² and selling beer at a sports stadium.²³³ Many low-income noncustodial fathers combine multiple odd jobs to make ends meet. Otis Berry, for example, explains, “Um, I do a little odd stuff around, around the neighborhood like do a neighbor’s yard. I might even pick up cans, save cans. Um, copper, cut hair. I do hair on the side, cut hair on

209. Daanika Gordon, Researcher Field Notes, at 5 (Dec. 15, 2015) (on file with author).

210. Interview by Tonya L. Brito with Mark Whitley, *supra* note 150.

211. Gordon, *supra* note 209, at 19.

212. Rachel Johnson, Researcher Field Notes at 25 (Apr. 25, 2016) (on file with author).

213. Interview by Tonya L. Brito with Joseph Lathrop, *supra* note 195.

214. Interview by Tonya L. Brito with Troy Wigham, *supra* note 205.

215. *Id.*

216. Interview by David J. Pate, Jr., with Maurice Shamble, *supra* note 191; Interview by David J. Pate, Jr., with Ogechi Rhymes, in Cnty. A, State A (Jan. 20, 2016) (on file with author).

217. Interview by David J. Pate, Jr., with Stephen Dallas, Obligor, in Cnty. A, State B (May 14, 2015) (on file with author).

218. Interview by Garrett Grainger with Otis Berry, *supra* note 161; Interview by Tonya L. Brito with Troy Wigham, *supra* note 205.

219. Gordon, *supra* note 209, at 35.

220. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136.

221. Sarah Ishmael, Researcher Field Notes, at 22 (Dec. 15, 2015) (on file with author).

222. Interview by David J. Pate, Jr., with Ogechi Rhymes, *supra* note 216.

223. Ishmael, *supra* note 221, at 15.

224. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136.

225. Interview by Tonya L. Brito with William Sauer, Obligor, in Cnty. A, State A (Dec. 8, 2015) (on file with author).

226. *Id.*

227. Interview by Tonya L. Brito with Nicholas Rebholz, Obligor, in Cnty. A, State A (Jan. 2, 2016) (on file with author).

228. Interview by Tonya L. Brito with Saif Smith, *supra* note 182.

229. Interview by David J. Pate, Jr., with Ogechi Rhymes, *supra* note 216.

230. Interview by Tonya L. Brito with Xavien Yob, *supra* note 181.

231. Interview by Tonya L. Brito with William Sauer, *supra* note 225; Interview by Tonya L. Brito with Demarlo Anderson, in Cnty. A, State B (July 15, 2015) (on file with author).

232. Interview by Garrett Grainger with Otis Berry, *supra* note 161.

233. *Id.*

the side. You know, just any little odd job that comes about.”²³⁴ Nicholas Rebholz, a White father in his mid-forties, has several jobs, all involving his auto-mechanic skills.²³⁵ “I just float around to different car lots and, you know, just help out,” he says.²³⁶

Self-employment among noncustodial fathers was common. Charles Caywood explains that when there are few opportunities, you have to make your own. “I got some friends that’s got their own businesses. And that’s the only way you going to make it here.”²³⁷ Nicholas Rebholz, for example, would buy, repair, and resell cars at a profit.²³⁸ Maurice Shamble, a singer, set up a studio for “young guys around the neighborhood” to use, and charge them a fee.²³⁹ Others, such as Troy Wigham and Otis Berry, canvassed their neighborhoods for odd jobs, such as yard work.²⁴⁰ “I shovel snow, and I have my own personal landscaping business in my neighborhood, so summertime grass, wintertime snow,” Wigham explains in his interview.²⁴¹

But even those fathers who are not self-employed find income through a wide variety of sources. Many noncustodial fathers find work opportunities through family, friends, or neighborhood connections. At her court hearing, custodial parent Michelle testified that the father of her child does work directly for his sister, such as roofing and painting.²⁴² William Sauer, a thirty-seven-year-old biracial noncustodial father of two, was hired by his girlfriend’s brother to do cash work.²⁴³ Some work directly for friends, as noncustodial father Gerado Herron, who works for a friend’s auto-service business, informed the court in his hearing.²⁴⁴ Thomas Vach finds work through Craigslist, responding to listings for random work assignments,²⁴⁵ while William Sauer participates in pharmaceutical research studies.²⁴⁶

Like temp agency work, cash jobs do not provide noncustodial fathers with full-time, year-round employment, and those engaging in this type of work are earning low wages. Todos Empleo Optimal Program Director James Hagen notes that many noncustodial fathers working under the table are underpaid;

234. *Id.*

235. Interview by Tonya L. Brito with Nicholas Rebholz, *supra* note 227.

236. *Id.*

237. Interview by David J. Pate, Jr., with Charles Caywood, *supra* note 168.

238. Interview by Tonya L. Brito with Nicholas Rebholz, *supra* note 227.

239. Interview by David J. Pate, Jr., with Maurice Shamble, *supra* note 191.

240. Interview by Tonya L. Brito with Troy Wigham, *supra* note 205; Interview by Garrett Grainger with Otis Berry, *supra* note 161.

241. Interview by Tonya L. Brito with Troy Wigham, *supra* note 205.

242. Gordon, *supra* note 209, at 35.

243. Interview by Tonya L. Brito with William Sauer, *supra* note 225.

244. Gordon, *supra* note 209, at 4.

245. Interview by Tonya L. Brito with Thomas Vach, *supra* note 201.

246. Interview by Tonya L. Brito with William Sauer, *supra* note 225.

they may be making around \$9 per hour when they should be making \$15.²⁴⁷ One noncustodial father, Ray Jones, laments in his enforcement hearing that he needs to get a “real job” to make ends meet and pay his child-support order, the implication being that his cash jobs are not a “real job,” and only fathers with steady jobs in the formal labor market can meet support orders.²⁴⁸

As with temp jobs, many noncustodial fathers are engaged in under-the-table work because of the obstacles they have faced finding permanent jobs in the formal economy. Some noncustodial fathers mentioned the detrimental effect their criminal record has had on their ability to find work. Otis Berry mentions criminal “stuff on my record from like 20 years ago,”²⁴⁹ and Xavien Yob claims that his felony charge has made it tougher to get a job in Miltonville in particular.²⁵⁰ “I’m a felon. Therefore, I can’t go find the good jobs, you know,” says Charles Caywood.²⁵¹

Legal actors acknowledged that the existence of a criminal record pushes noncustodial fathers into the cash economy. Child-support attorney Sally Richardson notes that many obligors in Lake County have criminal records, while child-support attorney Jackie Becker adds,

[Y]ou’re just going to have to work on, you’re going to have to go with your uncle and he’s going to have the job and he’s going to have to cut you in because you’re never going to pass, you know. You’re going to have to get those kind of side jobs, cash jobs.²⁵²

Richardson and Becker’s observations reflect the prevalence of low-income noncustodial fathers working cash jobs as well as where they often get them: through personal connections. With a criminal record, those are often the only options available.

Finally, some noncustodial fathers encountered employers who refused to put them on the payroll, preferring to pay them cash under the table instead of providing better wages, health insurance, and other work-related benefits their regular employees received. “I’ve been having issues with this guy [not putting me] on the books . . . he’s not doing what he’s supposed to do,” noncustodial father David Wright complained in his enforcement hearing.²⁵³ Facing a similar situation, Shawn Davis was forced to quit his under-the-table job because they refused to put him on the payroll and prevented him from attending child-

247. Interview by Tonya L. Brito with James Hagen, *supra* note 139.

248. Gordon, *supra* note 209, at 5.

249. Interview by Garrett Grainger with Otis Berry, *supra* note 161.

250. Interview by Tonya L. Brito with Xavien Yob, *supra* note 181.

251. Interview by David J. Pate, Jr., with Charles Caywood, *supra* note 168.

252. Group interview by Tonya L. Brito with Child-Support Att’ys, in Cnty. A, State B (Feb. 25, 2014) (on file with author).

253. Gordon, *supra* note 209, at 28.

support mediation.²⁵⁴ During his enforcement hearing, the family court commissioner asked, “[Y]ou’re not working?”²⁵⁵ Davis said, “I was working at [Carlux] but I’m not now.”²⁵⁶ The commissioner asked what happened and Davis said, “[T]hey didn’t want to put me on the payroll, they were just paying under the table cash. I had to come to mediation and couldn’t go to work and the boss said that I couldn’t go because I wasn’t on the payroll.”²⁵⁷

Noncustodial fathers often rely on cash jobs to supplement their income because, as described above, working in the formal economy does not necessarily provide sufficient earnings. Stephen Dallas is one such father; he has been struggling to get enough hours in his factory job. “The job been slow, I mean working less hours. They trying to not so much downsize us but streamline it, so you know when they streamline some people going to lose their job because they making stuff more automated.”²⁵⁸ Consequently, Dallas, who has not worked full time in months, barbers on the side and is considering doing it more. “I think that’s something I might have to start back gravitating to, like cutting hair and, doing little stuff like that because I know that, honestly, I’m not going to be able to survive on this,” he says.²⁵⁹ The insufficiency of Dallas’s on-the-books jobs highlights the shortcomings of the low-skill labor market. Says Charles Hopkins, expressing frustration at such a system:

I shouldn’t go and have thirty damned jobs just to make ends meet. It’s bad enough I got two of them, and one is under the table, and I don’t even, that, I wouldn’t even consider that a full-time, part-time job. I would consider that a fill-in job because they only call me if they’re, if they’re, you know, don’t have a fill, you know, fill up people.²⁶⁰

Overall, for the noncustodial fathers in the study, many jobs in both the formal and informal economy do not provide them with enough income to cover both child support and their own basic needs.

IV. (RE)CONSIDERING LABOR MARKET PRECARITY IN CHILD-SUPPORT COURT

The labor market precarity experienced by fathers in the study is generally met by inflexibility in the child-support system and enforcement proceedings. Their varied and erratic job histories—often cycling between employment, underemployment, and unemployment as they move between stints in temp

254. *Id.* at 19.

255. *Id.*

256. *Id.*

257. *Id.*

258. Interview by David J. Pate, Jr., with Stephen Dallas, *supra* note 217.

259. *Id.*

260. Interview by David J. Pate, Jr., with Charles Hopkins, Def. Att’y, in Cnty. A, State A (July 8, 2014) (on file with author).

jobs, in the formal labor market, and in the cash economy, or some combination thereof—are directly at odds with child support’s rigid adherence to setting orders based on the presumption that they should at least have a steady, full-time minimum wage position. While child-support courts are responsive to major and widespread disruptions in the labor market, caused by, for example, the Great Recession in 2008, and more recently, the global pandemic, any leniency they afford low-income noncustodial fathers can be short-lived and not necessarily reflective of whether or not their labor market experiences have significantly improved. Faced with court orders to seek work under threat of imprisonment, noncustodial fathers are even more likely to resort to temp work and cash jobs in an effort to avoid jail.

A. *The “Magic Number”: Full-Time Minimum Wage*

When discussing earning potential, interviewees were strikingly consistent on one point: in the absence of any severe physical disability, noncustodial fathers are deemed capable of, at minimum, earning the minimum wage in a full-time position.²⁶¹ Based on this assumption, this hypothetical thirty-five-hours-per-week minimum-wage job serves as the floor for child-support calculations, regardless of whether the noncustodial father currently has such a job or not. Judge Terrance Hawkes describes this amount as “the magic number.”²⁶² Defense attorney Goudeau describes it as “the bottom line.”²⁶³

Child-support attorneys in several counties described how they imputed full-time minimum wage in their child-support calculations for noncustodial parents who were not working. They pointed out that “the law” or “federal guidelines” authorized them to impute minimum wage.²⁶⁴ Child-support attorney Alice Crum explained that they imputed income regardless of job history based on the assumption that “even if you’ve never had a job, you could be making minimum wage.”²⁶⁵ Several child-support attorneys, including Ariel Whiting and Martha Jensen, suggested that the main criteria for imputation was the lack of an obvious physical disability.²⁶⁶ Child-support attorney Jensen elaborates:

261. For example, Judge Derrick Bengé described his reasoning, stating, “Hey, you know, you’re an able-bodied person, and you present no medical evidence saying you can’t work or not able to or whatever. So, I’m going to impute a minimum wage paying job, 40-hour week, full-time job.” Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. C, State B (Mar. 13, 2014) (on file with author).

262. Interview by David J. Pate, Jr., with Terrance Hawkes, Fam. Ct. Judge, in Cnty. A, State A (Aug. 14, 2013) (on file with author).

263. Interview by Garrett Grainger with Kathleen Goudeau, *supra* note 128.

264. Group Interview by Tonya L. Brito with Child-Support Att’ys, in Cnty. A, State B, *supra* note 252.

265. Interview by Tonya L. Brito with Alice Crum, *supra* note 198.

266. Interview by Rachel Johnson with Ariel Whiting, *supra* note 157; Group Interview by David J. Pate, Jr., with Child-Support Att’ys, in Cnty. A, State A (Dec. 18, 2012) (on file with author).

The court says, you know, you're an able-bodied adult. You have the ability to pay some, to earn some kind of a living. I find that you have the ability to earn minimum wage working 35 hours.²⁶⁷

Other child-support attorneys connected minimum wage imputation to father effort, or lack thereof. Child-support attorney Scott Pilcher said that “our family courts routinely impute minimum wage jobs to payors if they can't find work, and we feel like they're not, you know, exercising their best efforts.”²⁶⁸ Putting it a little more bluntly, child-support attorney Connie Berg distinguished noncustodial fathers who have worked in odd jobs all of their adult life (and who may still be able to pay adequate child support) and “the people who are just lazy, they don't want to get a job, you know, we can, the law says that we can impute incomes so we can say, look, a person making minimum wage would be making this much and paying this much.”²⁶⁹

Several judges²⁷⁰ also explained that they imputed minimum wage when setting child-support orders and expressed similar sentiments to the child-support attorneys on the perceived lack of physical disability and the underlying reasoning behind imputation. Judge Derrick Bengé explains to noncustodial parents that “you know, you're an able-bodied person, and you present no medical evidence saying you can't work or not able to or whatever. So, I'm going to impute a minimum wage paying job, forty-hour week, full-time job.”²⁷¹ Judge Richard Dodson illustrates how judicial perceptions of effort and physical ability are intertwined when he explains:

[I]f you impute minimum wage, and if they come in and say, but I'm blind in one eye, or the other one I have cataracts, and I don't have a left arm and a left leg, okay, well, then maybe we're, you know, okay. But if it's a perfectly healthy young man, he just, or young woman, it could be either one, and they just are irresponsible and live off Mom and Dad still, I can impute income to them. And we usually do it at minimum wage, \$7.25 an hour, forty hours a week.²⁷²

Minimum wage imputation is not only the natural consequence of an underlying assumption that anyone without a major physical disability can maintain a full-time minimum wage job but also seems to serve as a convenient

267. Group Interview by David J. Pate, Jr., with Child-Support Att'ys, in Cnty. A, State A, *supra* note 266.

268. Group Interview by Tonya L. Brito with Child-Support Att'ys, in Cnty. C, State A, *supra* note 148.

269. Group Interview by Tonya L. Brito with Child-Support Att'ys, in Cnty. A, State B, *supra* note 252.

270. Judge Bengé, Judge Binford, Judge Dodson, Judge Garnett, and Judge Hawkes.

271. Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. C, State B, *supra* note 261.

272. Interview by David J. Pate, Jr., with Judge Richard Dodson, in Cnty. C, State A (July 22, 2013) (on file with author).

shortcut for judges and child-support attorneys confronted with a busy case load. Judge Derrick Bengé, child-support attorney Scott Pilcher, and child-support attorney Martha Jensen indicated that they had memorized the monthly earnings and accompanying child-support calculations for a full-time minimum wage job because they impute income so often.²⁷³ Child-support attorney Scott Pilcher explained that imputation often results in “an order that is probably more than he can pay, but it’s a lot less than what mom needs. So, but, you know, we have to keep these cases moving, and we have to get something coming in. It’s better than nothing.”²⁷⁴

Defense attorneys appeared more or less resigned to the fact that full-time minimum wage was the “bottom line” in the earning potential determination. Defense attorney Kathleen Goudeau described the rule as “pretty cut and dried.”²⁷⁵ Attorney Ben Foote described it as a rule of thumb.²⁷⁶ Defense attorney Lindsey Ferguson confirmed the rule while disputing its underlying assumptions, explaining that “they will impute minimum wage. Because the rule is that anybody should be able to make minimum wage even though that’s not true.”²⁷⁷ She explained that defense attorneys could ask for deviations from minimum wage, but that success was mixed depending on the judge.²⁷⁸

B. *The Great Recession & an Inequitable Recovery*

At the time of these interviews, it had been about seven to nine years since the peak of the 2008–2009 recession. However, its lingering impact on low-income fathers was still readily apparent to interviewees.²⁷⁹ Some, like defense attorney Peter Elliott, generally discussed how noncustodial fathers who had

273. Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. C, State B, *supra* note 261; Group Interview by Tonya L. Brito with Child-Support Att’ys, in Cnty. C, State A, *supra* note 148; Group Interview by David J. Pate, Jr., with Child-Support Att’ys, in Cnty. A, State A, *supra* note 266.

274. Group Interview by Tonya L. Brito with Child-Support Att’ys in Cnty. C, State A, *supra* note 148.

275. Interview by Garrett Grainger with Kathleen Goudeau, *supra* note 128.

276. Interview by David J. Pate, Jr., with Ben Foote, *supra* note 126.

277. Interview by David J. Pate, Jr., with Lindsey Ferguson, *supra* note 128.

278. *Id.*

279. Twelve interviewees discussed the recession and its effects: six defense attorneys (namely, Peter Elliott, Ben Foote, Tracy Koehn, Lindsey Ferguson, Harold Hopkins, and Carol Kenney), two child-support attorneys (Arthur Rounds and Ariel Whiting), one judge (Judge Ronald O’Neill), two fathers (obligors Dearis Calahan and Demarlo Anderson), and the director of the Jobs Program (Pierce Roegner). *See* Interview by David J. Pate, Jr., with Ben Foote, *supra* note 126; Interview by Stefanie Wong with Tracy Koehn, *supra* note 169; Interview by David J. Pate, Jr., with Lindsey Ferguson, *supra* note 128; Interview by David J. Pate, Jr., with Charles Hopkins, *supra* note 260; Interview by David J. Pate, Jr., with Carol Kenney, *supra* note 145; Group Interview by Tonya L. Brito with Child-Support Att’ys, Cnty. B, State A, *supra* note 129; Interview by Rachel Johnson with Ariel Whiting, *supra* note 157; Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. A, State B, *supra* note 143; Interview by Tonya L. Brito with Dearis Calahan, *supra* note 203; Interview by Tonya L. Brito with Demarlo Anderson, *supra* note 231; Interview by Daanika Gordon with Pierce Roegner, *supra* note 149.

steady work prior to 2008 lost their jobs in the recession and are still unable to find employment because “they don’t have any skills” and “there just isn’t enough to go around.”²⁸⁰ Others discussed the impact of mass layoffs in specific industries (for example, the auto plant). Still others focused on how certain populations both disproportionately bore the burden of the recession and did not share in the benefits of the nation’s slow recovery.

Some interviewees acknowledged that the job market for noncustodial fathers had improved at least somewhat since 2008–2009. Child-support attorney Ariel Whiting observes:

When the recession hit in, there’s been a change because when, from 2008 to now, because there was a time when we had a lot of people coming in around ’08, around that time, some years ago, same story over and over. There just weren’t any, market horrible, no jobs. . . . I see a bit of a change in the past two or three years, maybe. We’re, it’s still there, but it’s not, it just seemed like every case for a while, like case after case after case.²⁸¹

However, several interviewees have observed that the following groups have not shared equally in the recovery: men, individuals with disabilities or mental health issues, and individuals without bachelor’s degrees. Child-support attorney Arthur Rounds describes the recession as a “man recession” because “if you look at the numbers, guys got killed in this recession.”²⁸² Rounds believes that the recession’s disproportionate impact on men has led to a “big societal shift,” that affects child support: “[W]e see more cases where it’s 50/50, but mom’s paying support, because she makes more money than dad. It’s much more common . . . it used to be mom only paid if they had real big problems in their life.”²⁸³

Defense attorney Tracy Koehn noticed that after the recession, “with child support, I ran into fewer and fewer deadbeat dads and deadbeat moms, and more and more on disability, on limitations, on mental health. A lot of those cases where they didn’t not want to work. They weren’t able or there were limitations.”²⁸⁴ She attributes this problem to employers, who could afford to be selective in the labor market postrecession and were less willing to accommodate workers with disabilities and other limitations: “Well, once the economy tanked, especially starting in ’08, and the economy tanked, and there

280. Interview by Tonya L. Brito with Peter Elliot, *supra* note 132.

281. Interview by Rachel Johnson with Ariel Whiting, *supra* note 157.

282. Group Interview by Tonya L. Brito with Child-Support Att’y, Cnty. B, State A, *supra* note 129.

283. *Id.*

284. Interview by Stefanie Wong with Tracy Koehn, Def. Att’y, in Cnty. B, State A (June 13, 2014) (on file with author).

were 500 people applying for one job, they don't have to take them. And oftentimes, they don't."²⁸⁵

Defense attorney Lindsey Ferguson also discussed how the recession increased employer selectivity, but focused on how that selectivity disproportionately impacted individuals without a college degree:

The lower class was affected the most because now the middle-class people, the people that have degrees, they're taking the lower-class jobs. You have people with bachelor's degrees working at McDonald's. So now you have really experienced, skilled people to choose from this pool, and now it's leaving out an entire class of people that only have GEDs, high school diplomas, and some type of certificate from a local vocational school.²⁸⁶

While some interviewees observed that the recession did shape how some judges handle a noncustodial father's ability to pay, these inequities may lead to blind spots—the job market as a whole may have stabilized by 2015, but not necessarily for men without college degrees, especially those with physical or mental health limitations.

Legal actors in Jackson County pointed to the closure of the local auto plant in 2008 as a major driver of unemployment in the region. Child-support attorney Shannon Grey describes how the plant closure created ripple effects across satellite industries:

[W]hen we first had the layoffs at [the auto plant], when the [auto] plant closed in '08, yeah, that was legitimate. And then what happened was not only did [it] close, but all the support industries that went along with [the plant] . . . [Automobile seat manufacturers] and a number of other companies also went under because they were, I guess [the auto manufacturer] only uses those companies locally to supply car seats or whatever. Then when they closed the plant, those side industries went down as well because they don't then continue to work for, you know, do the same project they did for [the manufacturer].²⁸⁷

Judge Lowell Binford also cites the loss of satellite industries as a major reason for unemployment:

[W]ith the closing of [the plant], it hurt the unemployment rate, but many of those people at [the plant] transferred out of county to other [company] plants, retired, or chose to do something else. And so, it's not

285. *Id.*

286. Interview by Garrett Grainger with Kathleen Goudeau, *supra* note 128.

287. Interview by Tonya L. Brito with Shannon Grey, Child-Support Att'y, in Cnty. C, State A (Oct. 22, 2012) (on file with author).

like we have 5,000 ex-[auto plant] employees hanging around here. We have some. But with [the plant] closing, the satellite jobs all closed.²⁸⁸

Interviewees observed that Jackson County has not presented the same economic opportunities in the wake of the plant closure. Judge Binford notes that

those jobs all paid \$20, \$30, \$40 an hour. Now everybody is looking to find jobs that pay \$10, \$12, \$15 an hour, and there aren't that many of those around. And for the guys who used to make good money and didn't leave the county, they've got child support orders that say pay \$200 a week, and they don't make \$200 a week, for example. So that's the problem in trying to find jobs.²⁸⁹

Defense attorney Ben Foote observes that there is little demand in the area for previously high-demand work:

[T]here's no work for welders, you know, I mean, [the plant] is gone. You know, those spot welding and all the ones that make the seats and the frame, they're gone. They don't need the welders here. So the employment is elsewhere, and these people will literally, if they were savvy enough, they went elsewhere. They went to Texas, and they went to, you know, Indiana. You know, but you're dealing with the people that are here.²⁹⁰

Although the layoffs from the auto plant and related industries were initially seen as a "legitimate" excuse for nonpayment, judicial goodwill toward out-of-work noncustodial parents did not last: "[T]here are still a number of people who were working for [the plant] who aren't working. And the judges at this point are like, it's been three or four years, so they don't buy the excuse anymore."²⁹¹

C. *Judicial Notice of the Job Market*

As discussed above, legal actors have noted that judges and commissioners will sometimes take notice of the general state of the job market in child-support cases when considering a father's ability to pay. However, interviewees also note that this acknowledgement of the job market can get quite specific, and not always necessarily work in the child-support payor's favor. Child-support attorney Shannon Grey of Jackson County notes that

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

289. *Id.*

290. Interview by David J. Pate, Jr., with Ben Foote, *supra* note 126.

291. Interview by Tonya L. Brito with Shannon Grey, *supra* note 287.

[t]he judges here know the different industries, like the different companies that they have, like IKEA. Who are the other ones I'm thinking of? There's [Hendersonville]. There's . . . factories down there in [Hendersonville], [Candyverse], because now it's like, it's fall. Christmas is around the corner, so [Candyverse] down in [Hendersonville] is going to be hiring. So, they know all that kind of stuff. And the [Machines Titan] plant when it goes up, so these judges here seem to pretty much know all the employers and what their requirements are.²⁹²

Notably, Fairville is about a forty-minute drive away from Hendersonville with no public transit options connecting the two. The closest IKEA to Fairville is about an hour and fifteen minutes away.

Defense attorney Natalie Bednar also notes that judges discuss specific employers but are not aware when noncustodial fathers are unlikely to be hired by those employers: "I feel like they often say like Home Depot is hiring, and I'm like, well, Home Depot might be the hardest place for someone with a criminal record to get a job."²⁹³ Defense attorney William Plumlee explains that judges will instruct clients to find minimum wage work, and counsels his clients not to say that they would not take certain jobs because a judge "may say, well, I've heard the case, but let me tell you, you know, McDonald's is a job, and any job is better than no job, and you should go to McDonald's and apply for that job if there is a job."²⁹⁴

Commissioner Lesley Paxton explained that she also questioned noncustodial fathers about whether they had pursued specific cash economy work:

[T]hat's one of the prime questions I ask. Are you doing odd jobs? Are you self-employed doing anything for cash? Are you mowing lawns for old ladies, recycling cans, giving plasma? I had a guy tell me all about giving plasma the other day and where you can go to get certain amounts²⁹⁵

Commissioner Lesley Paxton and Judge Marvin Blanchard saw judicial referrals to certain jobs as a positive direction for child-support court. Commissioner Paxton says that

I would love to see a situation where the court system could be tied in with employers in a way, where if the court found people who truly were

292. *Id.*

293. Group Interview by Tonya L. Brito with Lynette Stimpson and Natalie Bednar, *supra* note 140.

294. Interview by Amanda Ward with William Plumlee, Def. Att'y, in Cnty. B, State A (July 7, 2014) (on file with author).

295. Group Interview by Tonya L. Brito with Fam. Ct. Comm'rs, *supra* note 187.

interested in employment, and there probably are a great number of people like that, that the court could somehow direct that involvement and then reassess the case based on the outcomes of that employment situation. I suppose in a better economy, that might work out.²⁹⁶

Judge Blanchard described similar aspirations:

[I]f I knew how to do it, I would have a list of employer providers and could make recommendations. I think there is out there, I think the state does it too. They have resources where they can direct people that are truly interested in finding a job.²⁹⁷

It is worth noting that both of these remarks evince an inherent skepticism that most economically struggling low-wage noncustodial fathers actually want to work. Paxton qualifies his statement with the phrase, “if the court found people who *truly were interested* in employment.”²⁹⁸ Blanchard uses nearly the exact same phrasing, referring to noncustodial fathers who are “*truly interested* in finding a job.”²⁹⁹ While judicial notice of job openings and subsequent referrals may be intended to help struggling payors, this skepticism suggests that discussion of specific employers may often just serve as a “gotcha” to cast doubt on a noncustodial father’s job search efforts.³⁰⁰

D. *Judicial Reactions to the Recession*

Defense attorneys and child-support attorneys mentioned how the recession shaped judicial reactions to noncustodial fathers claiming that they were unable to pay. Initially, at least, courts tended to be more lenient toward them. Defense attorney Kenney notes that “you have a case where they just lost the job because the, the economy went caphooey and we all know it happened. And the court will almost take judicial notice.”³⁰¹ Defense attorney Kim McDaniel observes that the bad economy has led to fewer contempt proceedings: “[T]he people that they have, everybody’s lost their job. So, they’re not going to hold people in contempt who don’t have jobs because we’re not going to get anywhere.”³⁰² Similarly, defense attorney Ben Foote has noticed that “[j]udges aren’t just putting them in, in jail just to put them in jail

296. *Id.*

297. Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. A, State B, *supra* note 143.

298. Group Interview by Tonya L. Brito with Fam. Ct. Comm’rs, *supra* note 187.

299. Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. A, State B, *supra* note 143.

300. See Brito, *Producing Justice in Poor People’s Courts*, *supra* note 27, at 184–86.

301. Interview by David J. Pate, Jr., with Carol Kenney, *supra* note 145.

302. Group Interview by Tonya L. Brito with Ester Campos and Kim McDaniel, Def. Att’ys, in Cnty. B, State B (Mar. 22, 2014) (on file with author).

when there is absolutely no realistic, you know, prospects. So actually, fewer are going to jail now I believe.”³⁰³

Conversely, however, defense attorney Harold Hopkins notes that judges are still sending noncustodial fathers to jail for contempt despite the poor job market: “Every week. Every day. Every day they have child support, you have people going to jail. . . . It probably decreased a little bit because of the one judge is gone. And [the] job market has picked up a little bit.”³⁰⁴

While some legal actors’ reluctance to impose contempt in a poor job market may be linked to their moral judgment of a noncustodial parent (a generally poor job market can bolster an assertion that he wants to work, but cannot), Judge Ronald O’Neill frames it as a practical decision: “[W]ith the economy as bad as it is, when I was in family court five, six, seven years ago, the economy was better, more frequent result the contempt worked. Here, it’s not as much a remedy.”³⁰⁵ According to Judge O’Neill, contempt “worked” to motivate noncustodial fathers precession, but it does not work as a remedy when there are few jobs available.³⁰⁶

E. *Temp Work: Effect on Child Support and Legal Reactions*

Legal actors, particularly defense attorneys, explained how variable earnings are incompatible with child support’s demand for consistent payment. Defense attorney Harold Hopkins says that noncustodial parents sometimes need to be pressed to fully detail their temp work history and share it with the court.³⁰⁷ He offers the following hypothetical dialogue:

And I worked at a temp job over there. And when did you have that one?
Well, let’s see, we’re July, no, I had one in March, I had one in April,
and I had one in end of June. Did you ever notify child support? No.
Why not? Because it was only for a couple, three weeks, or whatever.
Did you pay anything?³⁰⁸

However, as a practical matter, temporary work can be used in court to show a noncustodial father is trying. Hopkins says, “I always argue, hey, the guy, person is out there trying. You know, they have a temp job.”³⁰⁹

Family court commissioner Greg Durand corroborates the idea that evidence of temporary work “goes to effort” in the courtroom, particularly if the low-wage father has tried multiple temp agencies: “[I]f you come in, and

303. Interview by David J. Pate, Jr., with Ben Foote, *supra* note 126.

304. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136.

305. Group Interview by David J. Pate, Jr., with Fam. Ct. Judges, in Cnty. A, State B, *supra* note 143.

306. *Id.*

307. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136.

308. *Id.*

309. *Id.*

you can show that you've got your name in at four temp agencies, that's an effort."³¹⁰ However, he does not see them as an effective long-term solution for improving a noncustodial father's ability to pay child support:

I think they serve a very important need. I think that, that, uh, the amount of, the percentage of men that they get into full-time, life-sustaining, family-sustaining jobs is probably pretty small. I mean, I think they're necessary because if you want to find work, you can find a day here, a day there. But I don't get the sense they are a long-term solution for much.³¹¹

Despite the recognition that temp jobs do not present an effective long-term solution for improving low-income fathers' ability to pay, several legal actors discussed how they still referred noncustodial fathers to temp agencies as part of their routine practice. Child-support attorney Florence Smith says that "[temp agencies] are part of our jobs order too, we'll have them go."³¹² Defense attorney Laura Hardaway noted how temp jobs were replacing transitional jobs as go-to placements for fathers in job programs: "[T]his last year, I think in the last six months it seemed like the guys were not being placed in transitional jobs anymore. They were being placed in temporary jobs, you know, like staffing jobs."³¹³ She did note, however, that temp job placements did seem to be a "better strategy" than transitional placements.³¹⁴ Defense attorneys Harold Hopkins and Ralph Neal both said that they refer clients to temp agencies, with Hopkins even going in person to a nearby agency to ask which jobs were available.³¹⁵

Although temp agency referrals seem to have become an important tool for legal actors faced with a noncustodial father's inability to pay, the rest of the child-support system does not seem to have adapted to account for the rise of temporary work all that much. Child-support attorney Florence Smith does say that because "we found that more and more people are unable to get more than 30 or 32 hours per week" (since temp agencies do not want to provide insurance) "we kind of set it, the bar at 30 hours a week for our default orders."³¹⁶ Otherwise, there was little evidence that child-support obligations or enforcement mechanisms were adjusted to account for the unstable nature of temporary work.

310. Interview by Chloe Haimson with Greg Durand, *supra* note 131.

311. *Id.*

312. Group Interview by David J. Pate, Jr., with Child-Support Att'ys, in Cnty. C, State B (Mar. 10, 2014) (on file with author).

313. Interview by David J. Pate, Jr., with Laura Hardaway, Def. Att'y, in Cnty. A, State A (Jan. 19, 2015) (on file with author).

314. *Id.*

315. Interview by David J. Pate, Jr., with Harold Hopkins, *supra* note 136.

316. Group Interview by David J. Pate, Jr., with Child-Support Att'ys, in Cnty. C, State B, *supra* note 312.

F. *Incompatibility of Unreliable Under-the-Table Work with Child-Support Enforcement*

Under-the-table work is often, by nature, sporadic and unreliable. Work may mean various odd jobs; for example, if a noncustodial father is mowing neighbors' lawns or buying and selling cars, income can vary greatly from day to day or week to week. Work may be seasonal, such as shoveling snow, or increase during tax season when customers have more disposable income. "I can't wait until it snows some more," says noncustodial father Troy Wigham, explaining that when there is no snow, he will not get paid to shovel snow.³¹⁷ "Right now, it's tax season, so, you know, people have money and, you know, hey, could you come by and do my brakes or do a tune-up, you know," says Nicholas Rebholz, a car mechanic.³¹⁸ Legal actors recognize the unreliable nature of under-the-table work as well. Family court commissioner Lesley Paxton notes that noncustodial fathers doing seasonal work tend to pay more child support during certain times of the year, while construction workers often file for unemployment during the winter.³¹⁹

Because of their sporadic income, it can be difficult for noncustodial fathers with cash jobs to say how much they are making, meaning that subjectivity might come into play when they report their income. For example, Miles Rogers struggled to put a number to his income when asked to do so in his August 2015 child-support enforcement hearing.³²⁰ Child-support attorney James Carter questions him about his source of income and he responds that his last time with a regular employer was in 2006.³²¹ Miles Rogers adds that he does "odd jobs."³²² When asked how much he makes, he said it depends.³²³ Family Court Commissioner Doreen Maynard asked Rogers how much he "averages."³²⁴ He answers, "I don't get that much."³²⁵ He is asked again how much he averages.³²⁶ He asks if they mean per month, and says, "Probably 200–300 a month."³²⁷ When Commissioner Maynard asked how he is managing to live, Rogers says that he receives food stamps.³²⁸

During his enforcement hearing, Miles Rogers had a very difficult time providing concrete information about his income. Because he works odd jobs

317. Interview by Tonya L. Brito with Troy Wigham, *supra* note 205.

318. Interview by Tonya L. Brito with Nicholas Rebholz, *supra* note 227.

319. Ishmael, *supra* note 221, at 11.

320. Chloe Haimson, Researcher Field Notes, at 8 (Aug. 18, 2015) (on file with author).

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

and his income fluctuates on a day-to-day basis, it appears that he does not know precisely how much he makes—just that he does not make much.³²⁹ Other noncustodial fathers, such as Jeremy Cervantes, who informs the family court commissioner that he works “side jobs, for cash,” must estimate their income as well, revealing the unreliable nature of income in the informal economy.³³⁰

The overall uncertainty and variability of under-the-table work makes it challenging to reliably set and collect on child-support orders in the current system. Orders are established using mathematical formulas applied to earnings and other criteria, such as the number of children.³³¹ For example, in Wisconsin the presumptive child-support order is 17% of gross wages for one child, 25% for two children, and so on.³³² Establishing a child-support order involves legal actors computing amounts using precise earnings figures, even when income varies greatly.³³³ The rigidity required to “do the math” and set a fixed support order does not account for the labor market realities of low-wage noncustodial fathers who experience varied and sporadic income in the cash economy.³³⁴

While fixed orders make sense for workers with steady jobs and stable wages, they are entirely ill-suited for workers who must resort to the informal economy to make a living.³³⁵ Imposing a fixed order on fluctuating and unreliable income will predictably lead to disastrous results where noncustodial fathers’ payments are, like their income, uncertain and variable. Indeed, for many of the noncustodial fathers in the study, their payment history consisted of an irregular sequence of full, partial, and no payments. And when they inevitably fell behind in their child-support payments, these low-income fathers were pursued for nonpayment in enforcement hearings and accrued substantial arrears on the debt.

CONCLUSION

The original empirical data gathered from this study’s court-based ethnography and in-depth interviews with judges, lawyers, and noncustodial parents illustrate how precarious workers experience the child-support enforcement system. The noncustodial fathers in the study are predominantly Black, low-wage, precarious workers who possess significant barriers to employment, including health problems, histories of incarceration, and limited education. Their real-life work experiences present vivid portraits of their difficulties obtaining and retaining stable jobs that provide a living wage. In an

329. *Id.*

330. Gordon, *supra* note 209, at 21.

331. See Brito, *Fathers Behind Bars*, *supra* note 17, at 636–37.

332. *Id.* at 636.

333. See *id.* at 636–39.

334. See *id.* at 638–39.

335. *Cf. id.*

effort to find work, they often seek temp jobs or pursue a wide variety of ventures in the cash economy, everything from cutting hair to collecting cans and bottles for money. In light of their precarious work experiences and volatile earnings, it is no surprise that the noncustodial fathers in the study were not able to reliably pay their child-support order in full each month and, consequently, were summoned to court for nonpayment of support. Rather than confronting the reality of what the low-wage precarious labor market offers these fathers, the judges and government attorneys in enforcement hearings, and the child-support system more generally, stubbornly persist in enforcing child-support orders, premised on a full-time minimum-wage job that bears little relationship to the fathers' actual earnings. Put simply, the child-support enforcement system has failed to come to grips with the labor market realities of the low-wage fathers it summons to court for nonpayment. Instead, inflated child-support orders set fathers up to accrue tremendous child-support debts that burden them and their families. And fathers experience harsh and counterproductive enforcement remedies, including the loss of their drivers' licenses and threats of civil incarceration.