

TURNER::

Hello and welcome back to Wisconsin Law In Action, a podcast where we discuss new and forthcoming scholarship with the University of Wisconsin law school professors. I'm your host, Kris Turner. And my guest today is professor Tonya Brito. Thanks for joining the podcast today, Professor Brito.

PROF. BRITO::

Thank you for having me.

TURNER::

Oh, it was my pleasure. Professor Brito is here today to discuss The Child Support Debt Bubble published in the UC Irvine Law Review in 2019. To get started, why don't we just jump right into the article? Can you give us some context for the child support laws in the U.S. that have at least in part led to the development of this debt bubble?

PROF. BRITO::

Sure. I'd be happy to talk about that. The child support system and the regulations have been reformed in a series of legislative enactments in the 70s, 80s and 90s in order to strengthen child support enforcement and collections. And they've been very, very effective, particularly for families where there is a non-custodial parent who has a regular job and regular earnings. Those individuals are really not as able to avoid paying child support. There are systems of wage garnishment, for example, that work quite effectively. But there's this segment of the population who are in the child support system, roughly 25% that are very low income, sometime no income. And for them, it's very difficult to collect support and efforts to collect support can be quite punitive. And as a result they can actually accrue large debts that they can't pay off.

TURNER::

Right. It seems like with the arrears and with... you can discharge the kind of support and even in bankruptcy of [crosstalk 00:01:42].

PROF. BRITO::

Exactly. That's exactly, yeah.

TURNER::

It stays with you until it's paid off.

PROF. BRITO::

It stays with you. That's exactly right.

TURNER::

So for this paper in particular, you're examining the heavy burden that support debt places on low and no income non-custodial fathers in particular. What are some of the real world effects that this debt has had on their lives?

PROF. BRITO::

Well, as part of the study, I did interviews with some of these dads in two different states. 40... I'm sorry, 20 in each states so 40 altogether. And in talking with them, they shared a sense of sometimes disconnection from the children who are the subject of the orders of feeling like, "Well, I owe this debt," and a reluctance sometimes to show up because they feel like they haven't done enough. So they end up kind of it sort of wears on them and they... it's not as if they were unwilling to provide for their children. Economically, it's just very difficult for them to do it at the rates that they were being expected to. So sometimes you would see some withdrawal. But also on the mother's side, sometimes some anger and frustration because they're being told, "This is how much you're entitled to." And they weren't getting that. And so they would sometimes be upset with the fathers and sometimes even making it more difficult for them to spend time with the children. So it can interfere with their home lives in that respect.

PROF. BRITO::

Also, they had a certain amount of fear of child support, fear of the child support office, fear of going to court, fear of being incarcerated. And that could sometimes make it less likely they might show up in court. And that by itself can be a huge disadvantage because things will happen in court even when you're not there.

TURNER::

Right. They... you don't show up, then they're going to go against you in most cases where [crosstalk 00:03:34] absentee, they're like, "Well, okay, this is just that we have to make the ruling when I hear it from that side. So this is all we have in front of us."

PROF. BRITO::

Exactly. Exactly. They're not presenting their side of the story.

TURNER::

You use the word disconnect between the fathers and the children. Sometimes I think that sounds like a really harsh condition that happens to these fathers because you're driving almost a wedge into the family when this arrears shows up.

PROF. BRITO::

I know. It's very unfortunate because one of the purposes of child support is to address the needs of these children and to get them the economic support they need from their fathers, and then pursuing it, particularly in an aggressive way that doesn't really take account of their economic circumstances, it affects the sort of emotional or nurturing aspect of those relationships.

TURNER::

Right. And you're trying to bring up the financial part of the family, but in that way, you're almost hurting or affecting the emotional aspect of the family.

PROF. BRITO::

Yeah. Yeah. And some people have criticized this focus of child support, which is predominantly looking at the contribution that is monetary and not recognizing that fathers have more to provide for their

children than just money. And when you're looking at very low income dads, maybe we should actually be emphasizing more the emotional contributions and support that they can provide.

TURNER::

Right. The being there, the presence in the child's life.

PROF. BRITO::

Exactly. Mm-hmm (affirmative).

TURNER::

Yeah, I had not thought of that aspect before reading the paper. And that's really it's obvious to me in hindsight, but I didn't [crosstalk 00:04:49].

PROF. BRITO::

It was a current underneath everything I looked at. I started the project looking at child support, but every case I dealt with when I talk with the dads, there was this other issue. And some of them had separate litigation trying to get access to their children and that they had to do on their own, as pro se litigants, without a state infrastructure designed to bring those families together.

TURNER::

Yeah. That you also talked about how sometimes in the fear of appearing in court or fear of incarceration, I think that speaks to the larger issue with people just get concerned or worried. And because of that, things pile up against them. And this is a very stark example of that.

PROF. BRITO::

Yes, yes. Definitely, definitely. In our study, we did not see a lot of people actually spending time in jail. We would hear anecdotally, particularly talking to child support attorneys because we did over 140 interviews with lawyers and judges and et cetera, who are involved in child support proceedings. And they would say, "Oh, such and such county, they put a lot of people in jail." But there has been to a degree over time, kind of a pullback from actually incarcerating dads. But there's a lot of threatening of jail and a lot of hearings and then some dads do actually go to jail because of child support nonpayment. But this paper really focuses on whether or not they go to jail, there is this enormous accumulation of debt.

TURNER::

Right. There's still something that is affecting their lives in a very real way.

PROF. BRITO::

Exactly.

TURNER::

So there was one case where the person, the father was in jail, the Henderson V Davis case that you talked about in the paper. That one really, for me, vividly illustrated how incarceration and child support debt affect and interact with each other. What were the most important takeaways that you had from that observation of that case?

PROF. BRITO::

It was very emotional to watch that hearing in court. As part of the project, we were in court taking detailed field notes, observing cases to really get a sense on the ground of how these rules are operating. And that particular case, the dad was incarcerated on unrelated actions. So he wasn't in jail for child support itself, but he had filed his own pro se motion asking the court to suspend his child support obligation while he was incarcerated. And then it would resume when he got out. And the court denied that request.

PROF. BRITO::

What was interesting is a lot of dads don't actually file the motion to request a modification. So he was actually unusual in pulling it together. Now he had had another case because he had older children and in that case, he succeeded in getting a modification. So one of the takeaways is somewhat the inconsistency in the application of the law. It's the same dad, he's in jail again. And he's trying to suspend the child support and he's getting different outcomes. Right?

PROF. BRITO::

Another takeaway is the case really reflects sort of a fundamental, I think, tension in this area of law. On the one hand, the economic reality is someone in jail earning pennies on the dollar, even if they have a job in jail, is not in a position to pay the existing child support order, which is premised on wages you would earn in the labor market out of jail. And so the order was necessarily going to be a lack of compliance with paying the order while in jail, and that's going to accrue and that's going to make it harder when they get out to move on with their lives and reintegrate into society, et cetera.

PROF. BRITO::

So there's that. But on the other hand, there is this just widespread belief, maybe it's a philosophy, a political ideology, about fathers should pay for the children they have. And if you bring a child into this world, you're responsible. And so there's a desire to kind of send a message. You shouldn't benefit from being in jail and mom needs the money. No one's arguing whether or not mom needs. Mom needs the money because the moms are often comparably economically disadvantaged. These poor men aren't having children with wealthy women for the most part. They're having children with women who are in their communities. One of the problems is we simply don't have enough social welfare for poor families. And so these families become almost pit against each other. Mom needs the money. Who's going to be responsible? Dad's going to be responsible. So put a child support order on him and ignore, to some degree, the economic reality that he's in jail and he can't pay this child support order. That doesn't give mom any more money. Mom still has no money. So...

TURNER::

Right. You have a judgment in hand that does not give put the money in wallet.

PROF. BRITO::

Exactly. Yeah. That's exactly right.

TURNER::

You had mentioned inconsistencies between the cases that you had seen. What do you think leads to some of those inconsistencies?

PROF. BRITO::

Sometimes it is we did see mostly dads self representing. And in this hearing, we're just talking about the dad who was in prison was surprisingly capable of putting this motion together, appearing, he appeared by phone from prison. He stated his case. He was unsuccessful, but he laid out the relevant information upon which the commissioner can make a decision. Many dads are at a real disadvantage in doing even that. And that can contribute to different outcomes. There is also some, there's a lot of discretion in these cases. We have a set of legal rules that give the decision makers a lot of wiggle room. And so generally we would say that's a good thing. They can make decisions on a case by case basis, depending on the unique circumstances of any family that appears in court, but that can contribute to very divergent outcomes in these cases.

TURNER::

Right. That kind of sounds like the criminal where they have the recommended-

PROF. BRITO::

Exactly.

TURNER::

And sometimes they'll say they commit this crime, so they're within this realm of the years that they were incarcerated, but sometimes they go off of that or the discretion plays a big part in that. So same idea here. Very interesting.

PROF. BRITO::

Yeah. Yeah. There's a lot of similarities between what we're seeing in child support and criminal justice, even though these are civil cases because of that threat of incarceration. And because a sizable portion of these very low income men have had experience in the criminal justice system. And the ongoing court hearings designed to monitor their efforts to find a job and their payments resemble to some degree kind of a probationary system. So...

TURNER::

Right. And along those lines, my next question as we rolled right into that. So thank you for the nice transition. So what impacts... So they have a judgment, the clock starts ticking on the judgment, the support that they owe. So now they are probably going to fall into arrears in many cases. So what impact do these, the interest in the arrears have on this rapid growth of child support debt?

PROF. BRITO::

A lot of the impacts are damaging. So some dads end up in the cash wage market. They go underground because that's the only way they can earn money to meet their own subsistence level, without it being taken away from them by the state. And then that money may not get to the mom, right? So there's that phenomenon that is not necessarily a good thing for anyone. Another problem in this area is that I mentioned before the relationship with the children can be a difficulty. Also we're just spending a lot of resources in our child support system overseeing these cases. And in court hours and hours, some of the courts we observed in, there would be 50 cases on the calendar for the day. And all the lawyers coming to court representing the state, the judges, the family court commissioners, it's not as if we're seeing over time, better payments. We're not seeing better payments. We're seeing actually an increase in the

overall debt in the United States and at the state level and in the individual family level. So the system is just not working.

PROF. BRITO::

And although there've been just dozens of studies about these cases often pointing out that the amount of debt that's owed is alarming and that it's uncollectable and often recommendations are made for what to do, but they're not necessarily adopted. And so because they might not be politically sellable.

TURNER::

Right. It sounds like it'd be trying to turn an enormous freighter.

PROF. BRITO::

In a way.

TURNER::

It takes a long time to turn it away from a different [inaudible 00:13:25].

PROF. BRITO::

Exactly, exactly. And indeed, at the federal level, during the Obama administration, there were efforts to shift away from setting child support orders at the amount that one might think a dad should pay to an amount that reflects their actual ability to pay. And those two numbers might look very different in an individual case.

TURNER::

That's where it may be politically inflammatory to suggest something like that and say, "Well, this person owes this much be really, but they can't pay. So therefore we can give them a break." And people will say, "What, are you kidding me? They owe this much."

PROF. BRITO::

Exactly, exactly. There's not a lot of sympathy for dads who don't pay child support. It's not as if there's... no one's campaigning for president on, "I want to help poor men who don't pay child support." It's the poor moms with kids that are, and I have a lot of empathy as myself for poor moms who have children and they're not getting the support they need. The difficulty is we've set up a system where we're predominantly looking to the dad to pay. And it's not working the way it's set up right now.

TURNER::

Right. I think that the dads and the moms and everybody involved here wants the mom to get the support and wants the kids to be supported. But the question is, is the current system the correct way to get that support to the moms? And the study is kind of pointing away from that a little.

PROF. BRITO::

It is, it is. And we've moved politically away from an idea of just basic cash assistance to less assistance with lots of conditions attached. So some people are surprised when they learned that Richard Nixon of all people had proposed what was called, I think a child support assurance plan, which is basically a cash payment to families who have children. And at that point in time, our political system has shifted over

time. That was actually proposed by a Republican president. Even today it would be hard for a Democrat to propose that.

TURNER::

Right. It's a fascinating examination of how the politics have shifted about this kind of stuff. But beyond the purview of this podcast. So instead I will ask the next question. After conducting your analysis and gathering the data, were there any surprises that you encountered during the research process? And tell me a little bit more about the research process in general.

PROF. BRITO::

Sure. So in this project, we wanted to look at these child support cases and initially the focus was, and primarily it is on, the ability of unrepresented litigants to navigate the family court system. And we looked in two jurisdictions. One where people who owe support and are facing civil incarceration have a right to counsel. And another one where they don't to get a sense for how having a lawyer might make a difference in these cases. And so part of the project was a court-based ethnography, which means that the researchers are in court observing cases, taking detailed field notes. And another part of the study was doing interviews with all of the relevant actors, lawyers, judges, litigants, and others who were involved like people who run different kinds of legal assistance programs in the jurisdictions. And then another part of the program was just getting all the relevant records, court case records for the cases that we observed.

PROF. BRITO::

And I guess one surprise was, although these are cases and we're looking at public proceedings and as lawyers and people in the legal system, I think in some ways we take sort of pride in the idea that these are public or the legal system is transparent and the public has access to them. And the idea of accountability by the judiciary is sort of embedded in our idea of the legitimacy of the court system. But the reality is on the ground, getting access to the relevant information requires some, I guess, perseverance and negotiation and developing relationships on the ground. These are cases where often there is no stenographer in court, so it's not possible to get, even when you have the research funding, a court transcript of the proceedings. So you need to be in court observing and taking notes.

PROF. BRITO::

These are cases also where the litigants, because they're unrepresented and there's often an oral ruling by the court during, at the end of the hearing and it might be a notation on the civil docket sheet. But you don't get a 10 page written opinion like you do, let's say, in a court of appeals or Supreme Court decision laying out what issue is and what the rationale is and what the relevant law is. So we don't, we're not building up, let's say, a jurisprudence of child support that guides other courts going forward.

PROF. BRITO::

And so there's a way in which there's a parallel system in our court system for people who have resources and attorneys and they get rulings that are written in an explanatory. And then there's this other layer of cases for poor people where they're not represented and they get rulings from the bench. And there is a very scant judicial record of the proceedings. And there's not a lot of accountability because they're not appealing their cases. So you don't have review by a court of appeals, that's evaluating what took place at the trial court level. And so it's really important I think for people who are studying the legal system to focus on these cases that are really under the radar.

TURNER::

Speaking from the librarian point of view, along these same lines. I mean, we get a lot of researchers that are saying, "I'd like to do the trial court research." And I'll say, "Okay, let's take a deep breath because this is going to take some work here." Because people are so used now, you're using Lexis and Westlaw, but you're finding as you mentioned that the appeals, the appeal of courts and higher than that, and you're not finding these trial level ones that have very scant information about them. So I applaud you for doing this kind of work as it's very important, and it's really hard to dig up and perseverance is a nice and correct way of saying this [crosstalk 00:19:16].

PROF. BRITO::

And it's costly, too. It's so costly. I mean, it's a big chunk of the time of the researchers. In the two states we gathered data in, we had to travel to them, to the locations that we were going to. So that takes time away. And it's difficult to carve that out, but also that the cost of getting access to the documents, although we were fortunate that courts we worked with, they let us have access. They didn't charge us per page, which many courts do if you're just a member of the public, but we had to scan the documents and make our own electronic versions. So I had a lot of students working for me to help with that data collection effort. And I got grants from the National Science Foundation and support from the law school in the university over a period of years. And so it is not an easy undertaking. And it's very, it just consumes a lot of research funding. And so...

TURNER::

And you take away that funding and you're someone that just wants to know more about your case. Maybe you're like, "I want to see about my daughter's case that she had against her father or her children or something." And it just becomes much more of a headache and costly and time consuming and access to justice as we've discussed before we started the podcast is something that you see something like this. I'll be like, "This should be open and transparent," but it's not always the case.

PROF. BRITO::

That's true. That's definitely true. And our civil system isn't set up quite the same way as the criminal system. And on the criminal side, getting access to sort of basic data about cases, there are infrastructures available for researchers. And on the civil side, that's just not the case. And so there are groups, including the American Academy of Arts and Sciences has a project looking at civil access to justice issues. And one component of it is the data access part working on identifying what kind of data do researchers need? And also developing what they call a memo of understanding that could be used to negotiate access and how the data would be used to address the illegitimate concerns of the court system in terms of how that data will be used.

TURNER::

Right. That's great. I'm glad to hear that that is going on because that's very important work that's being done. Both sides need to come to an understanding of that. That's wonderful. Let's shift back a little bit back to the article. So policy-wise, what are some of the ways that these enormous debts that people have can be challenged or changed, especially for the unable non-payers that you looked at?

PROF. BRITO::

Sure. That's a really good question. I mean, there have been some changes during the Obama administration from regulations put into effect to address this. They could use more teeth because they

do still allow for a lot of discretion. They don't have a lot of categorical rules like you can't do this under these circumstances. There have been efforts at the local level, and sometimes they're pilot projects to grant amnesty or forgiveness of debts. And often they have a set of conditions that the payer or the debtor has to comply with, like paying a certain portion over a certain period of time. And then larger percentage of the debt will be forgiven. They're not wide scale yet, but there are an acknowledgement that this is problematic and needs to be addressed.

PROF. BRITO::

They come a little bit too late though. It's like a system creates debts that are questionable and then forgives it. It's suggesting that that person was in the wrong or is at fault. And that framing of it, I have some hesitation about, as the best way to address those problems. I think it really needs to be addressed at the front end in terms of setting orders that are realistic, but the problem is bigger than child support. The problem is poverty. The problem is our low wage job market. The problem is not enough social welfare services for poor families. And until those things are addressed, this problem is going to persist.

TURNER::

Okay. Well, when you fix those problems, let me know. I'll have you back on the podcast.

PROF. BRITO::

I will. I'll be... exactly. That's my next job.

TURNER::

Okay. Good, good. Oh, great. That's awesome. What do you hope researchers and readers take away from your article?

PROF. BRITO::

I guess one thing is sort of question the narrative about poor families. There's a very strong deadbeat dad narrative in the United States. And we sometimes even see these help wanted... not help wanted. I'm sorry, in the post office, most wanted felon kind of things, how much this person owes, how much that person owes. But the case I profile in the article sort of illustrates that there are a lot of contributing factors like exorbitant interest rates that quickly make the debt spiral into just fantastical amounts that make it seem like it's a a one percenter who's not paying child support when really it's someone themselves is impoverished.

TURNER::

Mm-hmm (affirmative). Yeah. Again, I kind of subscribed to the deadbeat dad. I know I shouldn't before reading the article and this kind of helped me kind of flesh out the more full picture. So thank you again. I really enjoyed the article.

PROF. BRITO::

Thank you. Thank you for having me on the show.

TURNER::

Sure. Thank you. Where can people find out more about your work?

PROF. BRITO::

Well, the law school has web pages for all the faculty with links to where our scholarly work is available. We have a repository of articles that is maintained by our library-

TURNER::

Great library.

PROF. BRITO::

It is. It's an excellent library. And we also have links on that page to our what's called SSRN pages where our work is also available. So those are two places to look.

TURNER::

Great. Excellent. And of course, we'll be linking to Professor Brito's scholarship on our podcast page as well. Professor Brito, thank you again for sitting down and discussing your paper with me today. It was an eyeopening look at a problem that disproportionately affects low income and minority families. Again, that paper is called The Child Support Debt Bubble published in the UC Irvine Law Review in 2019.

TURNER::

As always thanks to everyone out there for listening and subscribing to the Wisconsin Law In Action Podcast. Professor Brito's scholarship can be found on her SSRN page and in the University of Wisconsin Law School Repository. As I mentioned earlier, links to Professor Brito's scholarship is posted along with this podcast at wilawinaction.law.wisc.edu. You can subscribe to the Wisconsin Law In Action Podcast on the Apple iTunes Store, Stitcher or Google Play, or find our full archive at wilawinaction.law.wisc.edu. Thank you again for listening and join us next time as Professor Richard Monette joins me to talk about his work with tribal governments and obtaining grants and claiming sovereignty and working to strike a balance between the federal, state and tribal governments. See you then. Happy research.