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# Forgotten Fathers

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## FORGOTTEN FATHERS

DANIEL L. HATCHER\*

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*John*<sup>1</sup>

*I met with John recently, a client I have known for several years. I have tried to help him with several legal issues by providing pro bono assistance. John grew up in foster care after both his parents died and moved from place to place – group homes, foster families, relatives, facilities for troubled youth, and sometimes on runaway. He was never in the same home for more than six months.*

*His mother died first. Then he met his father for the first time, and John hoped to go live with him. Unfortunately for John, his father was killed shortly after their meeting. He also learned he had an older brother, and steps were taken for John to possibly move in with him. But then his brother died of an overdose. In foster care, John was labeled as having borderline personality disorder. And he was medicated. A lot.*

*So I met with John at a diner to catch up and answer some of his questions. John has a tough exterior – tattoos up and down his bulky arms – but then he*

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\* Associate Professor of Law, University of Baltimore; J.D. 1996, University of Virginia School of Law. I am grateful for the opportunity to present this Essay at the Boston University School of Law Conference, "Evaluating Claims About the 'End of Men': Legal and Other Perspectives," which took place in October 2012.

<sup>1</sup> The identity of this client has been changed and facts altered to protect confidentiality.

*calls me "Mr. Dan," almost timidly. He is unemployed, having struggled with finding and keeping part-time jobs doing labor or other tasks. He talks at times of being a mechanic. He loves cars, yet he has no driver's license. He has a criminal history, and though it is minor, it haunts his record. He is often homeless, or couch surfing. He dropped out of high school. He has no health insurance.*

*And he is a father.*

*John has a two-year-old son. He was living with the boy's mother but recently moved out. She has a child-support order against him, which she was forced to initiate because she receives public assistance. The child support is therefore owed to the state, not to her. While John was living with the mother and his son, the child support continued to accrue and it caused arguments. John wanted to stop the child support, but the mother needed the public assistance and John's employment was sporadic at best. She could not risk letting them know he was living with her because she was afraid to lose the public assistance.*

*So now they are apart. He sees her and his son, but he talks of frustrations. He would like to see his son more. He still really likes the mother, but they argue about the child support. He is a few thousand dollars behind on the child support now. He could potentially catch up, but it is not easy for him to find work with all the barriers he faces.*

*As he sat across from me we talked a bit about parenting and kids. I discussed my own children, and how hard it is – but also how amazing. We talked about how he now has the chance to be the parent he never had. He liked this idea. Briefly, there was a spark in his eyes.*

*It faded faster than it arrived.*

*John thinks the whole world is against him. He is frustrated often, and jaded always. As we left the diner, he crossed the street and we started off in different directions. I watched him walk away, and I had a sinking feeling.*

*I do not know if I can help him.*

## INTRODUCTION

Poor fathers like John are largely forgotten, written off as a subset of the unworthy poor. These fathers struggle with poverty – often with near hopelessness – within multiple systems in which they are either entangled or overlooked, such as child-support and welfare programs, family courts, the criminal justice system, housing programs, and the healthcare, education, and foster-care systems. For these impoverished fathers, the “end of men” is often not simply a question for purposes of discussion but a fact that is all too real.<sup>2</sup>

In the instances in which poor fathers are not forgotten, they are targeted as causes of poverty rather than as possible victims themselves – or more accurately they fall somewhere along the false dichotomy between pure blame

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<sup>2</sup> See Hanna Rosin, *The End of Men*, ATLANTIC, July/Aug. 2010, at 56, 62-63.

and pure sympathy.<sup>3</sup> The poor fathers are lumped together in monolithic descriptions that become constants in equations attempting to understand and solve societal ills.<sup>4</sup>

If a continuously evolving factor is treated as a known constant rather than an undetermined variable, the math will inevitably be wrong. Thus, the essentialist policy equations created from the uniform view and treatment of low-income fathers will inevitably result in incorrect policy solutions to system concerns. Moreover, each system's equation – already incorrectly constructed – is further impacted and skewed by the unplanned interactions with incorrect equations of other systems.

As we toil to see the world through the lens of our specific scholarship and advocacy, seeking to bring complexities into focus, we risk leaving countless interconnected issues in the blurred periphery. For poor fathers – and all individuals and families impacted by poverty – this blurred periphery is where systems are haphazardly interacting, failing, and causing harm.

This Essay seeks to step back, to de-simplify the incorrect math and begin drawing the interconnections between the legal and policy systems impacting low-income fathers, including the linkages to impoverished women and families. The contexts of race, gender, and class are engaged within the numerous systems and legal structures that impoverished fathers encounter. These systems and their impact must each be considered individually while simultaneously understanding the broader view of the system interactions.

For example, linkages between the struggles of low-income fathers and the child-welfare system should be addressed. Young minority men face daunting statistics. Up to sixty percent of young minority men in some urban centers, who are not otherwise in school, are not in the aboveground workforce.<sup>5</sup> Of young minority men who are able to successfully finish high school, nearly half will end up unemployed, incarcerated, or dead by the time they turn

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<sup>3</sup> 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, 633 (2012); Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 130 (2011); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1007-08 (2006).

<sup>4</sup> Cf. Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 204 (2008).

<sup>5</sup> See PAUL OFFNER & HARRY HOLZER, BROOKINGS INST., CTR. ON URBAN & METRO. POLICY, *LEFT BEHIND IN THE LABOR MARKET: RECENT EMPLOYMENT TRENDS AMONG YOUNG BLACK MEN* 7 tbl.5 (2002), available at <http://www.brookings.edu/es/urban/publications/offnerholzer.pdf>.

twenty-four.<sup>6</sup> And, by the age of thirty-four, half of African American men will be noncustodial fathers.<sup>7</sup>

Of these low-income men, many were once boys struggling in our nation's broken foster-care systems,<sup>8</sup> forgotten boys, who often face even more daunting statistics than the young men they will become, and most of whom will become forgotten fathers.<sup>9</sup> A recent study tracking former foster-care youth uncovered disturbing connections between the foster-care system and the criminal justice system. It found that by age twenty-four, nearly 60% of the young men had been convicted of a crime,<sup>10</sup> and by age twenty-six, almost 75% of the men had been incarcerated and approximately 82% had been arrested.<sup>11</sup> Considering the impact of criminal histories on the ability to find sustainable employment,<sup>12</sup> the numbers are stunning.

The appropriate discussion point for fathers like John is not found in the narrative of the "end of men" and the purported competition between men and

<sup>6</sup> JOHN MICHAEL LEE JR. & TAFAYA RANSOM, COLL. BD. ADVOCACY & POLICY CTR., THE EDUCATIONAL EXPERIENCE OF YOUNG MEN OF COLOR: A REVIEW OF RESEARCH, PATHWAYS AND PROGRESS 49 fig.31 (2011), available at <http://youngmenofcolor.collegeboard.org/sites/default/files/downloads/EEYMC-ResearchReport.pdf>.

<sup>7</sup> PETER EDELMAN ET AL., RECONNECTING DISADVANTAGED YOUNG MEN 129 (2006).

<sup>8</sup> See MARK E. COURTNEY ET AL., CHAPIN HALL, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 36 (2011), available at [http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation\\_Report\\_4\\_10\\_12.pdf](http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf) (explaining that adults who have aged out of the foster-care system are more likely to be low-income than their peers); Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135, 166 (2003) (explaining how "juvenile courts have become increasingly discredited and bureaucratic under the weight of burgeoning dockets"); Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J.L. REFORM 199, 207 (2007) ("The periodic family court case reviews included in the federal statutory scheme as a safeguard for children have been emasculated by a lack of adequate representation for children and, in many states, by an inadequately staffed juvenile court system."); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1716 (2000) (book review) ("Virtually everyone familiar with current child welfare practice in the United States agrees that it is in crisis.").

<sup>9</sup> According to one study, fifty-three percent of male former foster youth have become fathers by age twenty-six, and two-thirds of those fathers are already noncustodial fathers. COURTNEY ET AL., *supra* note 8, at 80.

<sup>10</sup> See JENNIFER L. HOOK & MARK COURTNEY, CHAPIN HALL, EMPLOYMENT OF FORMER FOSTER YOUTH AS YOUNG ADULTS: EVIDENCE FROM THE MIDWEST STUDY 9 (2010) available at [www.chapinhall.org/sites/default/files/publications/Midwest\\_IB3\\_Employment.pdf](http://www.chapinhall.org/sites/default/files/publications/Midwest_IB3_Employment.pdf).

<sup>11</sup> COURTNEY ET AL., *supra* note 8, at 92.

<sup>12</sup> Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 2-4 (2012); Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 641.

women as struggling for the mantel of the dominant sex.<sup>13</sup> Nor is the issue best illustrated by a Super Bowl commercial for a Dodge Charger muscle car “vrooming toward the camera punctuated by bold all caps: MAN’S LAST STAND,” with the lingering question of who should be “steering the beast.”<sup>14</sup> John does not even have a driver’s license.

Rather, the discussion for impoverished fathers should be directed toward whether there is an opportunity to turn back from their gradual acquiescence to failure, and whether at-risk boys can veer away from a seemingly pre-determined path. Until the monolithic treatment of poor fathers is corrected in the many systems that the fathers encounter, the fathers’ jaded view that the whole world is against them will continue to be disturbingly correct. This Essay seeks to begin correcting the math – or at least bring attention to the errors – in how poor fathers are currently plugged into system equations. It draws connections between the various systems, and includes a plea to break down the siloed approaches and discussions that can constrain and misinform our policies and advocacy regarding poor fathers, poor mothers, and poor children.

#### I. POOR FATHERS AS CONSTANTS: UNWORTHY OF ASSISTANCE, WORTHY OF BLAME

The uniform view and treatment of poor fathers is not new. Decades – or even centuries – of social policies have viewed low-income fathers with a simplistic combination of contempt and blame. The fathers have been lumped into a category of the “unworthy poor” and thus not deserving of public assistance, while simultaneously being labeled as deadbeats and the root cause of poverty among women and children. Thus begins the mathematical error, as the fathers are treated as uniform constants rather than continuously evolving variables. This Part sets out the historical development of the uniform categorization of poor fathers. Part II then explains how the resulting essentialist view of poor fathers is plugged into the numerous system equations that the fathers encounter, compounding the error and harm.

##### A. *Fathers as Unworthy Poor*

The notion of the unworthy poor dates back to the English poor laws, in which only the poor who were unable to work were given public assistance.<sup>15</sup> “The law divided the poor into two categories: (1) the aged and the impotent poor who were worthy of help, and (2) the able-bodied poor, the vagabonds and beggars, who were unworthy of help and who were punished if they

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<sup>13</sup> See Rosin, *supra* note 2, at 58-60.

<sup>14</sup> *Id.* at 72.

<sup>15</sup> E.g., William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL’Y REV. 101, 103-04 (1998).

refused to work.”<sup>16</sup> The early versions of these Elizabethan poor laws considered mothers with young children as part of the “impotent” poor who were deemed worthy of receiving assistance.<sup>17</sup> Men, however, were treated as unworthy of assistance and the towns that provided assistance to mothers would sue the fathers to reimburse the costs.<sup>18</sup> Rather than receiving aid, able-bodied unemployed men would be punished by incarceration, public whippings, or worse.<sup>19</sup> For example, one of the poor laws enacted in 1535 required the following punishment for the able-bodied poor:

A valiant beggar, or sturdy vagabond, shall at the first time be whipped, and sent to the place where he was born or last dwelled by the space of three years, there to get his living; and if he continues his roguish life, he shall have the upper part of the gristle of his right ear cut off; and if after that he be taken wandering in idleness, or doth not apply to his labour, or is not in service with any master, he shall be adjudged and executed as a felon.<sup>20</sup>

The distinctions between the worthy and unworthy poor, and placing fathers into the category of those underserving of public assistance, continued in

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<sup>16</sup> *Id.* at 103 (footnote omitted).

<sup>17</sup> Heidi Meinerz, *Idaho's Throwback to Elizabethan England: Criminalizing a Civil Proceeding*, 34 *FAM. L.Q.* 165, 169 (2000) (internal quotation marks omitted) (quoting LYNN HOLLEN LEES, *THE SOLIDARITIES OF STRANGERS: THE ENGLISH POOR LAWS AND THE PEOPLE, 1700-1948*, at 56 (1998)).

<sup>18</sup> *E.g.*, Michael J. Higdon, *Fatherhood by Conscriptio: Nonconsensual Insemination and the Duty of Child Support*, 46 *GA. L. REV.* 407, 413 (2012).

<sup>19</sup> This is not to contend, however, that women were treated well under the poor laws. For a description of the poor treatment of single mothers during Elizabethan times, see Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 *J. GENDER SOC. POL'Y & L.* 775, 778 (2012).

<sup>20</sup> Quigley, *supra* note 15, at 109 n.36 (internal quotation marks omitted) (quoting 27 *Hen. 8, c. 25* (1535) (Eng.), *reprinted in* 4 *STATUTES AT LARGE* 387-88 (Danby Pickering ed., 1762)); *see also* Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 *HOUS. L. REV.* 211, 218 (2003) (stating that under the English poor laws, able-bodied poor persons could also be shipped to America as indentured servants); David M. Tortell, *Looking for Change: Economic Rights, The Charter and The Politics of Panhandling*, 22 *NAT'L J. CONST. L.* 245, 248 (2008) (explaining that under the Elizabethan poor laws, such as “the 1572 *Act for the Punishment of Vagabonds*, . . . persons prosecuted for this offence ran the risk of literally being branded as criminals (with a burning poker through the ear) for their transgression” (footnote omitted)); Brendan Maturen, Note, *The U.S. and Them: Cutting Federal Benefits to Legal Immigrants*, 48 *WASH. U. J. URB. & CONTEMP. L.* 319, 322 n.18 (1995) (“[There were some] ‘harsh’ aspects of the Poor Law of 1601: parents and children could be held liable or responsible for each others’ care, and ‘vagrants refusing work could be committed to a house of correction; whipped, branded, or put in pillories and stoned; or even put to death.” (quoting WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 11 (5th ed. 1994))).

America and became part of the expansion of government assistance under the New Deal programs:

Since its beginning with the Elizabethan Poor Laws, welfare policy has distinguished between people presumed able to work, and those presumed unable. The federal Social Security Act of 1935 incorporated this distinction and limited federally supported welfare to the “unemployable”: the aged, blind, disabled, and women and children without men to support them. The aged, blind, and disabled were presumed unemployable because of personal infirmity or disability. Women with children, however, were presumed unemployable because tradition holds women to be physically and morally unsuited for wage labor, and because both law and social custom assign them the responsibility of caring for children.<sup>21</sup>

The welfare assistance program established by the Social Security Act was titled “Aid to Families with Dependent Children” (AFDC), and initial AFDC rules virtually banned fathers from residing in the households receiving benefits.<sup>22</sup> Many states even established “man in the house” rules that disqualified families from receiving benefits if a man was found residing in the household, complete with midnight raids:

In the 1950s, many state legislatures implemented restrictive man-in-the-house rules. Under these rules, when welfare recipients were found to have a relationship with an able-bodied man, it was presumed that the man was a “substitute parent” who would provide financial assistance to the family. These rules – which were frequently invoked to cover even casual relationships with men or relationships with men who had no legal obligation to take care of the children – were disproportionately used to cut benefits to African-American families.<sup>23</sup>

The AFDC practices were highly racialized, based on stereotypes held against welfare mothers who were often labeled as “welfare queens,”<sup>24</sup> encompassing the societal belief and politically created image that an “AFDC mother is African American, urban, lazy, and a ‘bad mother’ who gets pregnant to obtain more AFDC benefits.”<sup>25</sup> And along with the “welfare-queen” stereotype, the

<sup>21</sup> Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1252-53 (1983) (footnotes omitted).

<sup>22</sup> See David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1292 n.71 (2004).

<sup>23</sup> Lee A. Harris, *From Vermont to Mississippi: Race and Cash Welfare*, 38 COLUM. HUM. RTS. L. REV. 1, 40-41 (2006) (footnotes omitted).

<sup>24</sup> See ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 35-40 (2004); Richard Hardack, *Bad Faith: Race, Religion and the Reformation of Welfare Law*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 539, 616-17 (2006) (discussing the “racialized” stereotypes held against women receiving welfare assistance).

<sup>25</sup> Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 737 (1992).



negative view of poor fathers whose children needed public assistance grew from its Elizabethan beginnings, with the label that all poor fathers are "deadbeat dads."<sup>26</sup>

The evolving AFDC requirements did provide states with the option to give welfare assistance to two-parent families in which the father was unemployed.<sup>27</sup> Several states refused, however, to provide this optional benefit, or if the two-parent benefit was provided at all, it was limited to as little as six months.<sup>28</sup> Even under the 1996 Temporary Aid To Needy Families program (TANF), which was described as providing expanded welfare assistance access to two-parent families, the requirements are much stricter for states providing two-parent benefits and thus fathers are still discouraged from being present in the household.<sup>29</sup>

Poor fathers have been labeled and treated as the unworthy poor since Elizabethan times. The mindset that impoverished men are unworthy of public assistance continued through the evolution of welfare programs in America, and continues today. Further, as the next Section explains, poor fathers were not only categorized as undeserving of assistance but also were targeted as the cause of poverty among women and children. Poor fathers have been banned from poor households needing public aid, and then blamed for being absent.

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<sup>26</sup> See Roger J.R. Levesque, *Targeting "Deadbeat" Dads: The Problem with the Direction of Welfare Reform*, 15 *HAMLIN J. PUB. L. & POL'Y* 1, 7-23 (1994); Greg Geisman, Comment, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 *S.D. L. REV.* 568, 570 (1993) ("In order to protect the public welfare from 'deadbeat dads' who were responsible for bringing children into the world but irresponsible in financially supporting them, the English Parliament enacted the so-called 'poor laws' which provided that failure to uphold child-support obligations would result in either imposition of a fine, imprisonment, or loss of personal property to provide support." (footnote omitted)).

<sup>27</sup> Edward M. Wayland, *Welfare Reform in Virginia: A Work in Progress*, 3 *VA. J. SOC. POL'Y & L.* 249, 299 (1996).

<sup>28</sup> *Id.* ("[In 1961] Congress created the AFDC-Unemployed Parent Program (AFDC-UP), under which states were permitted to provide AFDC benefits to two-parent families if the father was unemployed. As of 1988, Virginia was one of twenty-five states which had still not implemented AFDC-UP. In the Family Security Act of 1988, Congress required the remaining states to create an AFDC-UP Program by October 1, 1990. States were permitted, but not required, to impose a maximum time limit on the receipt of AFDC-UP benefits, which could be as little as six months. Virginia opted to limit AFDC-UP benefits to six months." (footnotes omitted)).

<sup>29</sup> See Yoanna X. Moisesides, *I Just Need Help . . . TANF, the Deficit Reduction Act, and the New "Work-Eligible Individual,"* 11 *J. GENDER RACE & JUST.* 17, 22 (2007) (explaining how under TANF states must meet fifty percent work participation rate for single-parent families and ninety percent for two-parent families).

B. *Fathers as Poverty's Cause*

For as long as poor fathers have been deemed unworthy of public aid, they have also been targeted as poverty's cause. The drafters of the poor laws in England "identified the unemployed male 'able-bodied' worker as the central problem of poverty at that time."<sup>30</sup> As Pat Thane explains,

They assumed that much unemployment was voluntary and could be substantially reduced in an expanding economy, by encouraging men to find work. They took for granted the universality of the stable two-parent family, primarily dependent upon the father's wage, and the primacy of the family as a source of welfare. Hence the poverty of women and children was thought to be remediable by the increased earnings of husbands and fathers.<sup>31</sup>

Fathers that did not adequately support their children were punished severely by local villages for burdening the public with supporting indigent children and mothers.<sup>32</sup> The targeting of fathers continued in the early American states, with state laws allowing towns to sue fathers for the support of their families.<sup>33</sup>

Still today, a primary goal of modern social policy in America is to target fathers as both poverty's cause and cure. Joseph Lieberman expressed this simplistic view when he was Attorney General of Connecticut, stating that "the failure of delinquent fathers to pay child support is the major reason why more than half the American families that are headed by a woman live below the poverty level."<sup>34</sup> And in their book titled *Deadbeat Dads*, Marcia Boumil and Joel Friedman stated the view even more strongly:

[W]e hope that the information contained herein will lead to a reappraisal of the behavior that ultimately impacts most on the innocent victims of deadbeats – the children. It is they who carry the biological heritage of the offending parent and who suffer the effects of poverty, abandonment, and a discontinuity with their personal history.<sup>35</sup>

<sup>30</sup> Pat Thane, *Women and the Poor Law in Victorian and Edwardian England*, HIST. WORKSHOP, Autumn 1978, at 30, 30.

<sup>31</sup> *Id.*

<sup>32</sup> See *supra* note 20 and accompanying text.

<sup>33</sup> Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1145; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 283-84 (1964).

<sup>34</sup> JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA: PRACTICAL ADVICE FOR NEGOTIATING – AND COLLECTING – A FAIR SETTLEMENT, at x (1986); David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583, 597-99 (2009) (quoting LIEBERMAN, *supra*, and explaining the view of "deadbeat dads" as the cause of poverty).

<sup>35</sup> MARCIA MOBILIA BOUMIL & JOEL FRIEDMAN, DEADBEAT DADS: A NATIONAL CHILD SUPPORT SCANDAL, at xii (1996).

### C. *The Harm of Essentialism*

The uniform treatment of poor fathers is an example of essentialism, a view that ignores the obvious truth that all people and their circumstances are different. The inherent flaw of essentialism has now been recognized in feminist scholarship and critical race theory,<sup>36</sup> and anti-essentialist theories have now also been encouraged in discussions of masculinities.<sup>37</sup> But the essentialist and gendered social policies regarding poverty are entrenched, and remain largely unchanged since the poor laws of England.

The essentialist response to poverty became even more entrenched in America during the conservative anti-welfare push of the 1980s and 1990s. During this time, poverty took on an increasingly gendered perspective. Diana M. Pearce coined the phrase “feminization of poverty” in 1978, a construct that became a focal point for advocacy.<sup>38</sup> Unfortunately, the much-needed recognition of poverty among women occurred during the anti-welfare movement when society harbored negative views against “welfare queens” and “deadbeat dads.”<sup>39</sup> Thus, rather than spurring creative and varied approaches to solving the complex interwoven causes of poverty, the mobilization against the feminization of poverty grew hand in hand with an even further targeting of fathers as poverty’s cause.<sup>40</sup> As recognized by Johanna Brenner, “[t]wo central

<sup>36</sup> LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 136-37 (2012); Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1259-62 (2011); Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism,”* in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 71, 74-76 (Francisco Valdes et al. eds., 2002); Nancy E. Dowd, *The “F” Factor: Fineman as Method and Substance*, 59 EMORY L.J. 1191, 1199 (2010) (book review) (explaining how Angela Harris’s and Kimberle Crenshaw’s scholarship and “critiques of the unexamined racial assumptions of feminists made anti-essentialism a core method of feminist theory”).

<sup>37</sup> Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 201, 204 (2008) (“In much feminist analysis, men as a group largely have been undifferentiated, even universal. What has been critiqued as essentialist when considering women as a group has been accepted with respect to men. It is time, I would suggest, to ‘ask the man question’ in feminist theory. It is a logical consequence of anti-essentialist principles and it serves feminist theory for several reasons.”); see also Jon Guss, *The Man Question: Male Subordination and Privilege*, 26 BERKELEY J. GENDER L. & JUST. 384 (2011) (reviewing NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* (2010)) (discussing the construction and enforcement of “masculinity”).

<sup>38</sup> Laura T. Kessler, *PPI, Patriarchy, and the Schizophrenic View of Women: A Feminist Analysis of Welfare Reform in Maryland*, 6 MD. J. CONTEMP. LEGAL ISSUES 317, 370 n.284 (1995) (noting that “[t]he ‘feminization of poverty’ was first coined by Diana Pearce in 1978”); see also Diane Pearce, *The Feminization of Poverty: Women, Work, and Welfare*, 11 URB & SOC. CHANGE REV. 28, 28 (1978).

<sup>39</sup> See BOUMIL & FRIEDMAN, *supra* note 35, at ix; Hatcher, *supra* note 19, at 788-89; Papke, *supra* note 34, at 599-601.

<sup>40</sup> See Barbara Ehrenreich & Frances Fox Piven, *The Left’s Best Hope*, MOTHER JONES,

assertions of the feminization of poverty campaign – ‘Divorce produces a single man and single mother,’ ‘40 percent of ex-husbands contribute nothing to their children’s support’ – link women’s poverty primarily to men’s failure to support their families.’<sup>41</sup> The result was a bipartisan effort to place the burden and responsibility of poverty squarely on the backs of fathers.<sup>42</sup> As explained by Anna Marie Smith, the “dominant bi-partisan approach to welfare policy treats child-support payments not as one small element within a comprehensive ensemble of anti-poverty policies . . . but as a ‘silver bullet.’”<sup>43</sup>

The societal views and political bolstering against the poor were highly racialized,<sup>44</sup> continuing from the Reagan era through Clinton’s welfare-reform efforts, which included an even greater backlash against welfare mothers and increased targeting of poor fathers.<sup>45</sup> The two societal mobilization efforts of the time – the conservative backlash against families on welfare and the increased recognition of the feminization of poverty – should have been at loggerheads. But a common enemy existed, and the feminization of poverty construct was unfortunately partly co-opted by the anti-welfare movement. The result was a focus on the same essentialist view and targeting of deadbeat dads that has continued since the poor laws of England.<sup>46</sup> Such monolithic treatment

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Sept./Oct. 1983, at 26, 27-28 (“From the left wing of feminism all the way to such staid groups as the League of Women Voters and the American Association of University Women, women are organizing conferences and public hearings, issuing reports, and lobbying with a high level of energy and unity. But when it comes to developing solutions, there is, it seems to us, a curious hesitancy. Most of the agitation around women’s poverty has been more reactive than visionary and all too narrowly focused on Reagan’s budget cuts – as if the solution lay in a restoration of the Carter era plus, perhaps, the apprehension of child-support defaulters.”).

<sup>41</sup> Johanna Brenner, *Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth*, 1 GENDER & SOC’Y 447, 451-52 (1987).

<sup>42</sup> Papke, *supra* note 34, at 599-601 (discussing how the targeting of deadbeat dads was bipartisan).

<sup>43</sup> Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 140 (2002).

<sup>44</sup> Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 416 (1999) (“[T]he public became hostile to welfare once welfare became identified with black single mothers.”).

<sup>45</sup> *Work and Responsibility Act of 1994: Hearing on H.R. 4605 Before the H. Comm. on Educ. and Labor*, 103d Cong. 46-47 (1994) (statement of Donna Shalala, Secretary, United States Department of Health & Human Services) (“We are proposing the toughest child support system ever to make sure fathers pay their child support. . . . [M]others who apply for AFDC benefits must cooperate fully with paternity establishment procedures prior to receiving benefits. . . . We are proposing to systematically apply a new, stricter definition of cooperation in every AFDC case.”).

<sup>46</sup> For a more detailed history and discussion of the feminization-of-poverty construct and how the term was unfortunately partly co-opted by the conservative anti-welfare movement, see Hatcher, *supra* note 19, at 786-94.

and targeting of poor fathers did not work under the English poor laws,<sup>47</sup> and does not work now.

## II. INCORRECT SYSTEM EQUATIONS

This Part describes how the essentialist view of poor fathers is plugged into numerous systems, spreading the resulting harm. Because of the essentialist view, the math of each system equation is incorrect, and each system equation then further compounds the errors of the others as they interact. For poor fathers, the effect of the incorrect math is almost insurmountable.

### A. *Child Support and Public Assistance*

The starting point of the essentialist treatment and harm often begins with the interaction of child support and public assistance, soon after the birth of a child. Here, the same mistaken gendered treatment of the poor from the early American bastardy acts and the poor laws of England continues in force today. When a mother applies for public assistance, she is forced to name the father and sue the father for child support,<sup>48</sup> and then any resulting payments must be assigned to the government to pay back the cost of government aid received.<sup>49</sup> These child-support requirements are included in the TANF program, which provides welfare cash assistance, and also in numerous other public assistance programs such as Medicaid, food stamps, and childcare assistance.<sup>50</sup>

The policies are uniformly applied, with poor mothers and fathers forced into the child-support system. Once in the system, rather than applying flexibility to consider the best interests of the children and parents, the government's interest in pursuing the fathers to repay the public assistance takes over.<sup>51</sup> Impoverished fathers, regardless of their circumstances, are

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<sup>47</sup> Thane explains how the New Poor Law of 1834 in England included incorrect assumptions that simply targeting fathers was the solution to poverty, when many fathers themselves were also struggling economically and with poor health. "These were assumptions quite incompatible with the realities of the 1830s, of industrial low pay and recurrent unemployment, and early or sudden death." Thane, *supra* note 30, at 30.

<sup>48</sup> For simplicity, custodial parents are referred to as mothers throughout this Essay, and noncustodial parents as fathers, although the reverse is often true.

<sup>49</sup> Social Services Amendments of 1974 § 101(a), 42 U.S.C. § 608(a)(2)-(3) (2006).

<sup>50</sup> See generally PAULA ROBERTS, CTR. FOR LAW AND SOC. POLICY, CHILD SUPPORT COOPERATION REQUIREMENTS AND PUBLIC BENEFITS PROGRAMS: AN OVERVIEW OF ISSUES AND RECOMMENDATIONS FOR CHANGE (2005), available at <http://www.clasp.org/admin/site/publications/files/0252.pdf>.

<sup>51</sup> States actually have discretion in developing "good cause" exceptions to the child-support cooperation requirements. 42 U.S.C. § 654(29). Most states, however, use very narrow exceptions, the exceptions are rarely granted, and the mothers often are not aware the exceptions exist. Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L.J. 47, 56-57 (2003); Jacqueline M. Fontana, Note, *Cooperation and*

treated virtually the same as an automated process kicks into gear.<sup>52</sup> Unrealistically high orders are set, often beginning with several thousand dollars already in arrearages that leave these fathers little chance to catch up.<sup>53</sup> Driver's licenses are immediately suspended.<sup>54</sup> Any meager wages are garnished at sixty-five percent net, leaving insufficient funds for the fathers to pay their own bills.<sup>55</sup> The few dollars in a bank account are attached.<sup>56</sup> If unemployed, income is imputed, making child-support payments even more unrealistic and causing arrearages to accrue faster.<sup>57</sup> Credit is destroyed.<sup>58</sup> Contempt proceedings are filed repeatedly.<sup>59</sup> In many cases, no lawyers are provided.<sup>60</sup> No sympathy exists. And the parents, already in fragile relationships, are driven apart.

Strong promise exists for healthy relationships to grow within these low-income "fragile families." Data from a national study conducted in 2000 found that virtually all fathers reported hopes of taking an active and positive role in their children's lives, and ninety-three percent of the mothers similarly said they hoped for such involvement from the fathers.<sup>61</sup> The forced child-support policies are destroying the hopes of fragile families, however, as the poor fathers often have no choice but to retreat into oblivion.<sup>62</sup>

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*Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 375 (2000); see also OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., OEI-06-98-00043, CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: USE OF GOOD CAUSE EXCEPTIONS 2 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00043.pdf> ("States report receiving very few requests for exceptions and granting even fewer.").

<sup>52</sup> E.g., 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 (2007).

<sup>53</sup> E.g., Brito, *supra* note 3, at 642.

<sup>54</sup> Cammett, *supra* note 3, at 145.

<sup>55</sup> Brito, *supra* note 3, at 658.

<sup>56</sup> *Id.* at 650.

<sup>57</sup> *Id.* at 639-41.

<sup>58</sup> Cammett, *supra* note 3, at 144.

<sup>59</sup> Brito, *supra* note 3, at 651-55.

<sup>60</sup> *Id.* at 619-20.

<sup>61</sup> Kirk E. Harris, *Fathers from Family to the Fringe*, in PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 203, 213 (Margery Austin Turner et al. eds., 2009) (citing SARA MCLANAHAN ET AL., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY: NEWARK, NEW JERSEY 14 (2000), available at [www.fragilefamilies.princeton.edu/newark/newark\\_august23.pdf](http://www.fragilefamilies.princeton.edu/newark/newark_august23.pdf)); see also SARAH MCLANAHAN ET AL., BROOKINGS INST., FRAGILE FAMILIES, WELFARE REFORM, AND MARRIAGE 2 (2001), available at <http://www.brookings.edu/~media/research/files/papers/2001/12/childrenfamilies%20mclanahan/pb10.pdf>.

<sup>62</sup> Hatcher, *supra* note 52, at 1086; see also Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's Story of the Duty to Establish Paternity*, 6 YALE J.L. & FEMINISM 297, 302-03 (1994) (retelling the personal story of a mother who is forced to take a poor father to court

The world of child support quickly suffocates poor fathers in a combination of deep frustration and apathy. Having neither a driver's license nor a bank account, suffering from poor credit history, and facing tens of thousands of dollars in growing arrearages and garnishment of sixty-five percent of any wages, many fathers give up or try escaping into the underground economy.<sup>63</sup> And the additional harm caused by the interaction with the other systems has only just begun.

### B. *Family Courts and Paternity Dockets*

Family law matters in which the parties have money – and lawyers – are scheduled before experienced judges to resolve the issues involving divorce, custody, alimony and support, payment for private school and summer camps, extended visitation when the parents travel, division of marital property, and treatment of retirement accounts and stock options. The judges may arrange for multiple scheduling conferences, settlement conferences, mediation attempts, and hearings to resolve pre-trial disputes. After the lawyers have conducted extensive discovery, deposed witnesses, filed multiple motions, and hired private investigators and expert witnesses, the court hearings may take multiple days, with an entire courtroom sometimes devoted to just one case. These are not the tribunals for the poor.

Courts that address child-support issues impacting poor fathers can often barely be characterized as courts. The impoverished parents and their issues of paternity, establishing child-support amounts, contempt, and license suspensions are often cordoned off into separate tribunals. Jaded fact finders are often not real judges.<sup>64</sup> The rooms are overflowing and chaotic. Lawyers are usually not present except for overburdened attorneys representing the interests of the state. Some fathers are in chains, brought in from prison. Babies are crying. Cases are heard in a matter of a few minutes, or sometimes seconds, rather than days.<sup>65</sup>

In such circumstances, essentialism reigns. The individualized circumstances blur together as if the poor fathers are undesirable products

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in order to receive a state welfare check and healthcare coverage).

<sup>63</sup> E.g., EDELMAN ET AL., *supra* note 7, at 129-30 (explaining how child-support policies disproportionately impact young African American men, including causing a reduction in their participation in the workforce).

<sup>64</sup> Rebecca May, *Notes from Child Support Courts: Process and Issues*, in REBECCA MAY & MARGUERITE ROULET, CTR. FOR FAMILY POLICY & PRACTICE, A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT 42 (2005), available at <http://www.cffpp.org/publications/LookAtArrests.pdf> (explaining that Family Court Commissioners hear and decide some family law cases).

<sup>65</sup> The descriptions are aided in part by the author's experiences in representing low-income parents in child-support matters. See Daniel L. Hatcher & Hannah Lieberman, *Breaking the Cycle of Defeat for "Deadbroke" Noncustodial Parents Through Advocacy on Child Support Issues*, 37 CLEARINGHOUSE REV. 5, 7-8; Kelly, *supra* note 62, at 301-05.

forced quickly through a dilapidated factory assembly line, with the tired judges or hearing examiners uniformly doling out judgments with disdain and apathy. Researchers with the Center for Family Policy and Practice visited several of these tribunals that only handle child support and paternity matters involving impoverished parents, and concluded:

Another unfortunate aspect of the system for noncustodial parents is the high caseloads carried by child support staff, attorneys and judges. High caseloads lead to an increased likelihood that noncustodial parents will be viewed as “all the same,” as making excuses, and not credible in their reasons for being unable to pay child support.<sup>66</sup>

In New Haven, Connecticut, a court magistrate once decided upwards of sixty such cases in only three hours.<sup>67</sup> A court master in Harris County, Texas, outdid him by wide margin, however, having decided over 500 paternity and child-support matters in one day.<sup>68</sup> The essentialist mindset against poor fathers is evident from the description of the first day of a new child-support docket in Dayton Ohio:

On the first day of the court, one defendant with a bandaged arm and under a doctor’s care was ordered to three days in jail and sheriff’s work detail. When the defendant claimed that he was under a doctor’s care and unable to work, [the judge] stated, “I don’t see anything wrong with your other hand.”<sup>69</sup>

Similarly, a “Friend of the Court” in Ingham County, Michigan, quoted Al Capone to indicate his praise of harsh enforcement and felony charges against fathers unable to pay child support: “[Y]ou can get so much more with a smile and a gun than with just a smile.”<sup>70</sup>

Thus, the uniformly harmful and outdated child-support and welfare-assistance polices are compounded by the child-support/paternity-court systems in which poor fathers are entangled. Then, with the fathers already almost incurably wounded, the criminal justice system layers on even further harm.

### C. *The Criminal Justice System*

As the poor fathers face insurmountable child-support policies and Dickensian child-support tribunals, the criminal justice system further beats them down and attacks them from multiple directions. The inability of

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<sup>66</sup> May, *supra* note 64, at 46.

<sup>67</sup> Laurel Leff, *56 Who’s-the-Daddy Cases Heard in 3 Hours*, NEW HAVEN INDEP. (Aug. 2, 2011, 12:09 PM), [http://www.newhavenindependent.org/index.php/archives/entry/paternity\\_docket/](http://www.newhavenindependent.org/index.php/archives/entry/paternity_docket/).

<sup>68</sup> Carlos Byars, *County Court Hears 500 Paternity Cases in 1 Day/Docket Reportedly Largest Ever in Texas*, HOUSTON CHRON., Mar. 26, 1995, at A1.

<sup>69</sup> May, *supra* note 64, at 32.

<sup>70</sup> *Id.* at 24.



impoverished fathers to pay unrealistic child-support obligations is increasingly criminalized; many fathers are jailed because they are poor and have failed to pay.<sup>71</sup> Fathers also frequently have been prosecuted for other reasons, crimes that are again inextricably linked with poverty.<sup>72</sup>

First, directly caused by the child-support system, an increasing number of poor fathers are dragged into the criminal justice system as a result of states and the federal government prosecuting nonpayment of child support as either criminal nonsupport or civil contempt.<sup>73</sup> Once incarcerated, the fathers may lose their jobs. For example, in Hartford County, Connecticut, a state marshal was followed as he was arresting fathers for nonsupport:

One father works full-time and describes his love for his four kids but is wanted on two warrants for failure to appear in court and will have to pay at least \$9,000 cash in bond or stay in jail. The father is sure he will be held for two weeks and lose his job. Another father arrested on this day believes we [sic] will lose his job and spend weeks in the "can." The state marshall [sic] says that his quarry are more often down on their luck and disorganized, rather than heartless jerks who care nothing for their children. "In other words, they're poor."<sup>74</sup>

Child-support debt continues to accrue while the fathers are incarcerated, and the resulting criminal record will make finding employment even more difficult. Tonya Brito describes the circumstances of a poor father who became the subject of a Supreme Court decision concluding fathers do not have the right to counsel in contempt proceedings:

Since September 2005, Michael Turner has been incarcerated on six different occasions for nonpayment of child support. His prison terms total over three years in jail. He currently owes over \$20,000 in unpaid child support, and while he remains in prison on his current sentence, he will accumulate even more debt that he is unable to pay. After his release, South Carolina's automated case processing machinery will issue another order to show cause. At the hearing the court will ask Turner why he should not again be held in contempt because of his failure to pay the outstanding arrearage. Absent an unforeseen circumstance that bestows \$20,000 on Turner making it possible for him to pay off the arrears, it is

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<sup>71</sup> See *id.* at 12-38.

<sup>72</sup> See Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison,"* 3 CALIF. L. REV. CIRCUIT 184, 188 (2012), [http://www.californialawreview.org/assets/circuit/Spade\\_3\\_184.pdf](http://www.californialawreview.org/assets/circuit/Spade_3_184.pdf) ("US prisons are full of low-income people and people of color who were prosecuted for crimes of poverty and minor drug use.").

<sup>73</sup> See Brito, *supra* note 3, at 651-55; May, *supra* note 64, at 12-38.

<sup>74</sup> May, *supra* note 64, at 18.

virtually certain that he will be civilly incarcerated for the seventh time and that this cycle will continue.<sup>75</sup>

Further, the criminal justice system also entangles poor fathers because of other crimes. According to 2011 data from the Department of Justice's Bureau of Justice Statistics, ninety-three percent of those imprisoned in federal or state institutions are men.<sup>76</sup> Further, the criminal justice system has a disproportionate impact based on race and poverty.<sup>77</sup> The circular interactions with the other systems are intensely negative. The child-support system increases the likelihood of poor fathers entering the underground economy and engaging in criminal activity. Involvement with the criminal justice system leads to an ongoing accrual of child-support debts during periods of incarceration. A resulting criminal record decreases the chances of finding stable employment, and the criminal record may also serve to ban the fathers from eligibility for other public assistance and student loans. The lack of a job and large child-support arrearages further reduce the ability of the fathers to keep up with their payments. The failure to make child-support payments increases the chances of the fathers being hauled back into the child-support and paternity tribunals and prosecuted and re-incarcerated for nonsupport. The cycle continues.

#### D. Housing

Yet another system is compounding the harm to poor fathers, but rather than pulling them in, subsidized housing programs subject fathers to systematic exclusion. Poor fathers often seek to be involved in their children's lives, but they are often unable to be present in their children's homes: "While fathers are often present in and around public housing developments, most of them are not officially on the household's lease and are often disconnected from services that could lead to economic stability for themselves and their children."<sup>78</sup>

First, the fathers are often not considered as part of an eligible population for subsidized housing. The notion of the able-bodied unworthy poor rears its head again:

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<sup>75</sup> Brito, *supra* note 3, at 617-18 (footnotes omitted) (discussing *Turner v. Rogers*, 131 S. Ct. 2507 (2011)).

<sup>76</sup> E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011, at 2 tbl.1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

<sup>77</sup> Cammett, *supra* note 3, at 129; see also Bruce Western & Sarah McLanahan, *Fragile Families: Young Fathers with Incarceration Experiences*, in 2 CONTEMPORARY PERSPECTIVES IN FAMILY RESEARCH 310 (Greer Litton Fox & Michael L. Benson eds., 2000).

<sup>78</sup> *Father's Day 2012 Reconnecting Families and Dads Saturday, June 16<sup>th</sup>, 2012*, FIND YOUTH INFO, <http://www.findyouthinfo.gov/feature-article/fathers-day-2012> (last visited Apr. 23, 2013); see also Harris, *supra* note 61, at 209 ("Ninety percent of the households living in HOPE VI public housing are African American and female headed.").

Making matters worse, low-income fathers living apart from their children are unable to seek help from major federal programs – they typically do not qualify for public housing or housing choice vouchers (Section 8). This is because federal programs largely target custodial parents, the disabled, and the elderly. Thus an able-bodied noncustodial parent is often unable to access most forms of housing assistance.<sup>79</sup>

Second, even if the fathers were otherwise potentially eligible for housing assistance, prior involvement with the criminal justice system frequently operates as a ban. “By the 1990s, at the height of the war on drugs, the federal government implemented the one-strike policy to bar admission to anyone with a criminal record who lives in, or wants to live in, federally funded housing.”<sup>80</sup> Moreover, not only are the poor fathers rendered ineligible for living in the housing with their children, but they also can be banned from even visiting. Across the country, public housing facilities compile publicly posted lists of individuals who are banned from stepping foot in the housing facilities, even for only minor infractions such as loitering or disturbing the peace.<sup>81</sup>

The combination of policies both severely reduces the chances of poor fathers finding affordable housing, and also further divides the fathers from their families. The fathers often have good relationships with the mothers and want to be a part of their children’s lives, but the policies do not allow the parents to live together and can ban the fathers from even visiting:

Delray Fowlkes is a loving and dedicated father, but is banned from living with his three year old son, Delray Jr., in Annapolis public housing. Delray wants to be fully involved in his son’s life and help his mother to raise him, but he can’t even take him to and from pre-school or attend parent-teacher conferences because the program Delray Jr. attends is on housing authority property. Delray was placed on the banned list five years ago following a drug arrest for which the charges were later dropped. The only other times Delray has been arrested were for

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<sup>79</sup> JOY MOSES, CTR. FOR AM. PROGRESS, *LOW-INCOME FATHERS NEED TO GET CONNECTED: HELPING CHILDREN AND FAMILIES BY ADDRESSING LOW-INCOME FATHERS’ DISCONNECTIONS FROM EMPLOYMENT, SOCIETY, AND HOUSING* 13 (2010), available at <http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/fatherhood.pdf>.

<sup>80</sup> Harris, *supra* note 61, at 210.

<sup>81</sup> E.g., Gregory A. Beck, Note, *Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?*, 2004 U. ILL. L. REV. 1223, 1234-39; Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES, Oct. 1, 2007, at A1; see also *KHRA Criminal Trespass List*, KINGSPOUR HOUSING REDEVELOPMENT AUTHORITY 5 (last updated Feb. 28, 2013, 5:46 PM), [http://www.kingsporthousing.org/downloads/ct\\_list.pdf](http://www.kingsporthousing.org/downloads/ct_list.pdf); *No Trespass List*, HOUSING AUTHORITY COVINGTON (last visited Mar. 23, 2013) <http://www.hacov.org/LinkClick.aspx?fileticket=EsqNPuadScQ%3d&tabid=2133>; *Trespass Notice Program Combats Drug Related Crime*, N.Y.C. HOUSING AUTHORITY, [http://www.nyc.gov/html/nycha/html/residents/trespass\\_new.shtml](http://www.nyc.gov/html/nycha/html/residents/trespass_new.shtml) (last visited Feb. 14, 2013).

trespassing on housing authority property when he was trying to visit his family, most of whom live in public housing.<sup>82</sup>

The policies force the fathers into the shadows, making them only surreptitiously able to see their families, and forcing them to risk their families' evictions when they do so: "Many fathers operate covertly in their connection to their families so their presence does not jeopardize the arrangements the mother of their children has secured with public assistance – arrangements largely based on an assumption of father absence."<sup>83</sup>

#### E. Health Care

In addition to lacking access to affordable housing, impoverished fathers also lack access to health care. Again categorized as the unworthy poor, men struggling with poverty have generally not been eligible for publicly funded health insurance, including Medicaid, unless the men are able to prove they are sufficiently disabled.<sup>84</sup> Further, poor fathers suffer not only from a lack of access to health insurance, but they are also conditioned to be less likely to seek needed health care and are more likely to receive inadequate health care even when they seek it out:

Poor men and men of color live with a tremendous amount of pain, are demeaned and devalued in a system that rewards wealth and values some people over others, and die early. When social determinants of health – such as poverty, poor education and educational opportunities, underemployment and unemployment, confrontations with law enforcement, the sequelae of incarceration, and social and racial discrimination – are factored into the health status of men, the scope and depth of the health crisis is even more evident and poignant. Poor men are less likely to have health insurance, less likely to seek needed health services, and less likely to receive adequate care when they do.<sup>85</sup>

Ironically, the only time poor men are currently guaranteed access to health care is in prison. But even then, the circumstances of incarceration inflict further harm to their health.<sup>86</sup>

Hope for improvement exists, as a greater number of poor fathers will be eligible for Medicaid in 2014 under the Patient Protection and Affordable Care

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<sup>82</sup> *Stories of Annapolis Residents Challenging Housing Policy That Tears Families Apart*, ACLU (Aug. 12, 2009), <http://www.aclu.org/womens-rights/stories-annapolis-residents-challenging-housing-policy-tears-families-apart>.

<sup>83</sup> Harris, *supra* note 61, at 210.

<sup>84</sup> Amy L. Katzen, Commentary, *African American Men's Health and Incarceration: Access to Care upon Reentry and Eliminating Invisible Punishments*, 26 BERKELEY J. GENDER L. & JUST. 221, 232 (2011).

<sup>85</sup> Henrie M. Treadwell & Marguerite Ro, Editorial, *Poverty, Race, and the Invisible Men*, 93 AM. J. PUB. HEALTH 705, 705 (2003).

<sup>86</sup> Katzen, *supra* note 84, at 228-31.

Act.<sup>87</sup> Many states, however, are indicating their refusal to expand access to Medicaid as intended under the Act,<sup>88</sup> now that the Supreme Court has ruled that the states cannot be forced to do so.<sup>89</sup> Even in states that do expand access, the historical lack of care and other factors that weigh against poor men's health will not be overcome quickly.

#### F. Education

Poor fathers were usually not educated well as boys and lack access to additional education as men. These educational failings set the foundation for the struggles of low-income fathers, ingraining in their psyche from an early age the apathetic embracement of failure as their inevitable path. And this is before the other systems have combined to take their toll:

These social welfare policy trends put tremendous pressure on low-income men who already find themselves caught in the structural disjuncture of unemployment, have been failed by educational systems that do not effectively support the completion of a high school education, are targeted disproportionately by the criminal justice system, and finally, are subjected to subtle but broad-scale discrimination and social isolation.<sup>90</sup>

Poor boys, especially poor minority boys, often come to school already broken as a result of living in poverty and suffering from abuse and neglect. Then, rather than providing a place to mend and grow, the educational system often exacerbates the wounds rather than healing them. Nancy Dowd explains that the school system further undermines poor minority males, with black boys more likely than any other group to be punished with suspension or expulsion, labeled as troublemakers, identified as having mental disabilities, categorized for special education even when not disabled, and more likely to fail.<sup>91</sup> "Black males are 'physically marginalized' in basements, detention, special classes where no learning takes place, as well as 'psychologically and socially isolated.' Separation reinforces failure; it does not cure behavior problems or other problems."<sup>92</sup>

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<sup>87</sup> *Id.* at 232.

<sup>88</sup> As of February 2013, fourteen states have indicated they will refuse to participate in the Medicaid expansion under the Affordable Care Act, three states are leaning toward not participating, and six states remain undecided. *Where Each State Stands on ACA's Medicaid Expansion*, ADVISORY BOARD COMPANY, [www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap](http://www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap) (last updated Mar. 4, 2013).

<sup>89</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) ("What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.").

<sup>90</sup> Harris, *supra* note 61, at 205.

<sup>91</sup> Nancy E. Dowd, *What Men? The Essentialist Error of The End of Men*, 93 B.U. L. REV. 1205, 1216-19 (2013).

<sup>92</sup> *Id.* at 1217 (footnote omitted) (quoting PEDRO A. NOGUERA, THE TROUBLE WITH

Further, the “criminalization of schools” and the increasing use of arrest and other harsh school disciplinary actions is thrust upon troubled boys who have the greatest needs for supportive help – not exclusionary punishment.<sup>93</sup> The policies also increase the likelihood of the impoverished boys ending up in juvenile delinquency systems, and from there the boys are more likely to transition into the criminal justice system as adults.<sup>94</sup>

As poor fathers, the past failings of the education system continue to inflict their harm, and the fathers also lack access to continue their education as adults. For the fathers who hope to rectify their past lack of educational opportunities, federal student loans are often unavailable to the fathers who have been intertwined in the criminal justice system, especially those with drug convictions.<sup>95</sup> Moreover, even an impoverished father who is able to find financial support to attend school may likely be stripped of his hopes when the child-support tribunals conclude he is voluntarily impoverished by attending school rather than working more hours.<sup>96</sup>

### G. Foster Care System

Still another system that works against poor fathers – both from when they were boys, and also as adults – is foster care. The child-welfare system is inextricably linked with poverty, as children in foster care rarely come from well-off families. The majority of children enter foster care due to neglect rather than abuse, and the neglect is virtually always due to circumstances of poverty.<sup>97</sup> Further, the child-welfare system has a disproportionate impact on impoverished minority communities.<sup>98</sup>

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BLACK BOYS AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION, at xx (2008)).

<sup>93</sup> *Id.* at 1219 & n.84 (describing the increased use of “arrest as a form of school discipline” and examining the impact of this “criminalization of schools” on students).

<sup>94</sup> *Id.* at 1220 (“Studies show that being arrested has detrimental psychological effects on the child: it nearly doubles the odds of dropping out of school and, if coupled with a court appearance, nearly quadruples the odds of dropout; lowers standardized-test scores; reduces future employment prospects; and increases the likelihood of future interaction with the criminal justice system.”) (quoting CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 113 (2010)).

<sup>95</sup> PAUL SAMUELS & DEBBIE MUKAMAL, *LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS* 18 (2004), available at [http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf) (“The Higher Education Act of 1998 makes students convicted of drug-related offenses ineligible for any grant, loan or work assistance.”); see also Cammett, *supra* note 3, at 147.

<sup>96</sup> Brito, *supra* note 3, at 643.

<sup>97</sup> Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 *BROOK. L. REV.* 1333, 1338 (2009); see also Kathleen A. Bailie, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285,

The child-welfare system works against poor fathers in multiple ways. Many impoverished fathers grew up in the foster-care system, suffered through the system's failings and aged out of foster care with little assistance, thus encountering the unfortunate barriers to self-sufficiency facing former foster children.<sup>99</sup> Young adults who grew up in foster care are more likely to be unemployed, poorly educated, homeless, in need of public assistance, suffering from learning and mental disabilities, and former foster-care boys in particular are likely to have repeated encounters with the criminal justice system beginning at a young age.<sup>100</sup> Thus, as poor boys who grew up in foster care become poor men, the statistics are disturbingly against them as they become poor fathers.

Further, impoverished fathers who themselves have children taken into the foster-care system often face systemic barriers to reunification with the children, or at least maintaining a healthy relationship. Fathers have been historically overlooked in the child-welfare system, other than as a target for financial support.<sup>101</sup> Similar to the interaction between child support and welfare cash assistance, when children are removed from poor families and placed in foster care, an obligation of child support owed to the government arises to repay the costs of foster care. Although distinct from the obligations from welfare cash assistance, the child-support obligations resulting from children in foster care are imposed on both fathers and mothers.<sup>102</sup> The requirement targets impoverished mothers and fathers whose children are most often taken into foster care due to neglect – with such neglect caused by the circumstances of poverty.<sup>103</sup>

The resulting child-support obligations provide no assistance to the children because the money is owed to the government rather than to the children or

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2294-98 (1998); Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 125-26 (1999).

<sup>98</sup> DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE*, at vi-vii (2002).

<sup>99</sup> Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1490 (2007) (“[T]he system is self-perpetuating. Research has begun to show the intergenerational cycle of foster care. Many parents of children in foster care today were once in foster care themselves.”); see also Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1799 (2006) (attacking the practice of some foster-care agencies of taking foster children’s Social Security benefits and turning them into state funds rather than using them to “aid the children in their forthcoming and difficult transitions from foster care to independence”).

<sup>100</sup> Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 STAN. L. & POL’Y REV. 267, 278 (2004); see also COURTNEY ET AL., *supra* note 8, *passim*.

<sup>101</sup> See Hatcher, *supra* note 97, at 1352-53, 1363 n.207.

<sup>102</sup> See 42 U.S.C. § 671(a)(17) (2006); Hatcher, *supra* note 97, at 1334.

<sup>103</sup> See Hatcher, *supra* note 97, at 1333, 1338.

their foster-care providers.<sup>104</sup> The poor fathers, likely already pushed away from the children due to the other system interactions, are further alienated.

Again, like the essentialist policies resulting from child support and other public assistance programs, the poor fathers are simply targeted as the cause of the problem without consideration of the individualized circumstances of each parent and child.<sup>105</sup> The fathers are further pushed away rather than sought out as a potential placement resource for the children. The chances are diminished that the fathers are able to assist the mothers to overcome issues that may have caused removal in order to make reunification possible. The vilification of deadbeat dads continues, the children are more likely to stay in foster care for longer periods of time, the cyclical interactions of the other systems strengthen, and the boys who are trapped in foster care will soon become poor fathers themselves.

#### CONCLUSION: BEGINNING TO CORRECT THE MATH

This Essay's assertions regarding the harmful treatment of poor fathers are not new. Scholars have long recognized the harm caused by essentialist policies regarding low-income fathers. But when the unworthy poor are treated poorly, there is little outrage.

"Deadbeat dads," who often also have criminal records, are not a very politically popular group. Support for the needed sympathetic and nuanced approaches can be very difficult to explain. Whereas the simple targeting of poor fathers as poverty's cause is all too easy – at least politically – even if the effort has proven to be unsuccessful and harmful time and time again.

The needed fixes are really not difficult to understand. In each system, the uniformly harmful treatment of poor fathers must be replaced with flexible policies that recognize the harm of essentialism. Individualized circumstances must be considered. Each system must consider how it interacts with the others. The best interests of the child standard must be the true guide, rather than a false rationale for unwavering punitive policies against poor parents. Policies must allow poor mothers and fathers to work together, and possibly to be together – rather than tearing them apart. Common sense must have room to breathe.

But the fact that we have known for so long about the harm is part of the problem. Even as scholars and advocates occasionally push back, there seems to be a larger feeling of resigned acceptance that poor fathers will always be treated as the unworthy poor. Unless we can shift our collective mindset away from that resigned acceptance, break down the silos that divide our advocacy and research, and work together across perceived lines of gender, race, and politics, the necessary desire to begin correcting these essentialist policies will continue to be lacking.

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<sup>104</sup> *Id.* at 1343.

<sup>105</sup> *Id.* at 1345-46.



If the essentialist view and treatment of poor fathers is not changed – with each system's math corrected by treating the fathers as variables rather than constants – poor fathers like John will, unfortunately, be correct in their view that the whole world is against them. The math will continue to be wrong. And of those fathers who nonetheless try to overcome the math, the vast majority will fail.

John will continue to be harmed. His son will be harmed. The mother will be harmed. We all will be harmed. And the cycle will continue as John's boy becomes a man.