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## Remembering Anti-Essentialism: Relationship Dynamics Study and Resulting Policy Considerations Impacting Low-Income Mothers, Fathers, and Children

Daniel L. Hatcher<sup>†</sup>

### Introduction

The Relationship Dynamics and Social Life Study (RDSL) is a new and important longitudinal study that examines the relationships, and the partners, of young unmarried women who become pregnant.<sup>1</sup> One of the particularly concerning findings of the RDSL is that the relationships resulting in pregnancies were more likely to include intimate partner violence.<sup>2</sup> This Article responds to the Study, asking that we remember the simple but crucial principles of anti-essentialism—that varying circumstances should not be met with uniform treatment.

The RDSL surveyed a random sample of 880 women ages eighteen and nineteen, from the same county in Michigan, for a period up to two-and-a-half years.<sup>3</sup> The study examines the intimate relationships of the women who became pregnant during the study period, compared to the women who did not become pregnant. For the young women who became pregnant during the RDSL period, multiple findings resulted: the fathers are older and less educated than the non-pregnant women's partners;<sup>4</sup> the relationships resulting in pregnancy tend to be of longer duration but are also unstable;<sup>5</sup> higher occurrences of intimate partner

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1. See Jennifer S. Barber et al., *The Relationship Context of Young Pregnancies*, 35 LAW & INEQ. 175 (2017).

2. *Id.* at 195.

3. *Id.* at 177, 182–83.

4. *Id.* at 187.

5. *Id.* at 189, tbl.3.

violence are present in the relationships resulting in pregnancy;<sup>6</sup> and the relationships further deteriorated and became more violent after the pregnancy.<sup>7</sup> The pregnancy-relationships included more than three-and-a-half times the rate of physical assault as the non-pregnancy relationships.<sup>8</sup>

RDSL raises significant concerns, including the linkages between intimate partner violence and pregnancy. Such concerns should be given considerable weight in debating policies and programs that impact young unwed parents. It is also crucial, however, not to respond with one-size-fits-all policy responses—essentialism—that will inevitably result in unintended harm. Rather, anti-essentialism reminds us that in addressing concerns brought to light in the RDSL, the data presents a range of circumstances—and we must not repeat past mistakes where such variations were ignored. Part I of this Article provides a brief history of the essentialist treatment of low-income mothers and fathers, which began the foundation of harm. Part II provides suggested responses to the RDSL to eliminate the uniformly harmful treatment of low-income mothers. In Part III, this Article describes how low-income fathers have long been considered unworthy of assistance and targeted as poverty’s cause—treatment that must be reformed and avoided. Finally, Part IV sets out why steps must be taken to remove essentialism from the courts and tribunals in which poor mothers and fathers are entangled.

### I. Caution from Past Essentialism

The need for anti-essentialism in social policy has been recognized in wide-ranging scholarship, including feminist scholarship, critical race theory,<sup>9</sup> and in writings regarding

6. *Id.*

7. *Id.* at 192–93, tbl.4.

8. *See, e.g., id.* at 196 (stating that pregnancy-relationships were “four times more violent, in terms of physical assault, than other intimate relationships in this age group”).

9. *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 136–37 (2012); Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism”*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71, 74–76 (Francisco Valdes, Jerome McCristal Culp, & Angela P. Harris eds., 2002); Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1259–62 (2011); Nancy E. Dowd, *The “F” Factor: Fineman as Method and Substance*, 59 EMORY L.J. 1191, 1199 (2010) (reviewing MARTHA ALBERTSON FINEMAN ET AL., FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (2009)) (explaining how Angela Harris’s and Kimberlé Crenshaw’s scholarship and

masculinities.<sup>10</sup> Despite the recognition, however, essentialism has long reigned in policies and practices that affect low-income parents and children.<sup>11</sup> Dating back to the 1500s, the English poor laws treated unwed mothers with disdain and aimed to protect society from the costs of their children.<sup>12</sup> The fathers were considered a target for blame, to be pursued by towns to reimburse any costs of assistance.<sup>13</sup> The essentialist treatment carried into early America, with old bastardy acts that forced unwed mothers and fathers to appear before tribunals and pay bonds to protect against the financial risks of illegitimate children.<sup>14</sup> For example, a Maryland law from 1781 required incarceration of unwed mothers until they have paid the required bond or named the father:

[A]ny justice of the peace . . . informed of any female person having an illegitimate child . . . shall call on her for security to indemnify the county from any charge that may accrue by means of such child, and, upon neglect or refusal, to commit her . . . to be . . . safely kept until she shall give such security; but in case she shall on oath discover the father, then the said justice is hereby required to discharge her . . . and directed to

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“critiques of the unexamined racial assumptions of feminists made anti-essentialism a core method of feminist theory”).

10. See 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”).

11. 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, 777 (2012) (“[W]hen fathers are addressed in social policy regarding women’s poverty, they are targeted as both enemy and cause. The mothers, also targeted as negligently contributory to their impoverished circumstances, are treated with disdain, burdened with paternalistic policies that undermine their autonomy and that derive from historically racialized and harmful stereotypes.”).

12. See, e.g., Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1134 (1999) (“The Elizabethan Poor Law of 1601 authorized local parishes to recover the money they spent in aiding single mothers and children from a nonsupporting father.”); 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, 1037–38 (2007).

13. E.g., Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407, 413–14 (2012).

14. Hansen, *supra* note 12, at 1144; Hatcher, *Child Support Harming Children*, *supra* note 12, at 1038.

call such father . . . before him, and shall cause him to give security . . . to indemnify the county from all charges that may arise for the maintenance of such child . . . .<sup>15</sup>

Over 230 years later, little has changed. Still today, paternity and child support laws force unwed mothers to identify the fathers for the purpose of protecting society from the costs of their children.<sup>16</sup> A low-income mother in need of public assistance is forced to make herself and her children available for DNA testing in order to determine paternity.<sup>17</sup> The mothers are hauled into public courtrooms alongside the putative fathers in order to sue the fathers for child support—all of which is usually taken by the government rather than used to help the mothers and their children.<sup>18</sup> If the parents fail to adhere to these draconian requirements, the mothers and children lose their financial assistance and the fathers may be incarcerated.<sup>19</sup>

Through these essentialist policies, low-income mothers and fathers are uniformly treated and labeled with disdain,<sup>20</sup> and the fathers are also uniformly targeted as poverty's cause. During the 1980s and 1990s, a conservative backlash against welfare benefit recipients occurred during the same time period that awareness increased regarding the feminization of poverty.<sup>21</sup> The needed

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15. *Virginia v. Autry*, 441 A.2d 1056, 1060 (Md. 1982) (citing 1781 Md. Laws, ch. 13, § 1). Similar requirements existed in other states. *See, e.g., Cahill v. State*, 411 A.2d 317, 321 (Del. Super. Ct. 1980) (quoting 1796 2 Del. Laws c. CVIII. c., p. 1304: “[I]t shall and may be lawful for any Justice of the Peace within this state, as often as he shall be informed of any female person having an illegitimate child, to issue his warrant to any Constable, who is hereby required to carry such person before some Justice of the Peace of the county, who shall call on her for security to indemnify the county from any charge that may accrue by means of such child, and upon neglect or refusal, to commit her to the custody of the Sheriff of the county, to be by him safely kept until she shall give such security; but in case she shall, on oath or affirmation, discover the father, then the said Justice is hereby required to discharge her from such warrant, and directed to call such father, if a resident of the county, before him, and shall cause him to give such security”); *see also Scott v. Ely*, 4 Wend. 555, 555 (N.Y. Sup. Ct. 1830) (noting that “[j]ustices of the peace may *commit* the mother of a bastard child to prison for refusing to discover the putative father,” and then describing facts of a case where a mother, “refusing to be sworn and examined as to the putative father of her child[,]” was therefore “committed to the common jail of the county, there to remain until she should consent to be sworn and examined[,]” but that the warrant was mistakenly issued for the wrong woman).

16. *See Hatcher, Don't Forget Dad*, *supra* note 11, at 777–79.

17. *Id.* at 779.

18. *Id.*

19. *Id.* at 781.

20. This Article refers to custodial parents as mothers and noncustodial parents as fathers, although certainly recognizes that the situation may be reversed.

21. *See generally* Laura T. Kessler, *PPI, Patriarchy, and the Schizophrenic*

recognition of growing poverty among women was therefore unfortunately inter-tangled with the anti-welfare movement that labeled female recipients “welfare queens” and the fathers as “deadbeat dads.”<sup>22</sup>

As a result, a bipartisan effort sought to place the burden and responsibility of poverty squarely on the backs of fathers.<sup>23</sup> Professor Anna Marie Smith explains that “the dominant bipartisan 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>24</sup>

The disdainful view of the poor during this time was highly racialized,<sup>25</sup> through the Reagan era and Clinton’s welfare reform efforts, with a continued backlash against welfare mothers and blame towards the poor fathers.<sup>26</sup> The essentialist treatment and views caused harm under the poor laws of England, and they continue to cause harm now.<sup>27</sup>

## II. Responding to the RDSL: Eliminate Forced Child Support Policies that Harm Custodial Parents

As indicated above, findings from the RDSL include significant linkages between intimate partner violence and pregnancy.<sup>28</sup> For example, the relationships resulting in

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*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 [sic] Pearce in 1978”); see also Diane Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28, 28 (1978).

22. Hatcher, *Don’t Forget Dad*, *supra* note 11, at 791.

23. David Ray Papke, *Family Law for the Underclass: Underscoring Law’s Ideological Function*, 42 IND. L. REV. 583, 599–601 (2009) (discussing how the targeting of deadbeat dads was bipartisan).

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

25. See 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.”).

26. See *Work and Responsibility Act of 1994: Hearing on H.R. 4605 Before H. Comm. on Educ. and Labor*, 103d Cong. 46–47 (1994) (statement of Donna Shalala, Secretary, United States Dep’t of Health & Human Services) (“We are proposing the toughest child support system ever to make sure fathers pay their child support[.]” and “mothers 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.”) (emphasis in original).

27. Hatcher, *Don’t Forget Dad*, *supra* note 11, at 778–82.

28. See Barber et al., *supra* note 1, at 189, tbl.3.

pregnancy included physical assault, almost half the relationships included disrespect, and three-quarters included fighting.<sup>29</sup> These results are a cause for concern. But with that concern in mind, we must not lose sight of the other sides of the statistics in which intimate partner violence did not occur. Varying circumstances call for varying responses: anti-essentialism. Moving forward with that principle in mind, existing essentialist policies must be eliminated and future essentialist responses must be avoided.

To begin, reform is necessary in existing welfare and child support policies so that custodial parents no longer face monolithic treatment and force. Current policies force low-income custodial parents (usually the mothers) who need welfare cash assistance to cooperate in identifying the noncustodial fathers, and to sue the fathers for child support that is then taken by the government to reimburse the costs of welfare.<sup>30</sup>

When Congress enacted the child support program through Title IV-D of the Social Security Act in 1974,<sup>31</sup> it implemented welfare cost recovery structural requirements that still exist today.<sup>32</sup> Although the old bastardy acts have long been repealed, unfortunate forced provisions and goals from the acts were brought forward—aimed at protecting society from the burden of poor mothers and children.<sup>33</sup> The forced provisions were tightened even further in 1996, when President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), replacing the Aid to Families with Dependent Children (AFDC) welfare program with a new block grant program titled Temporary Assistance for Needy Families (TANF).<sup>34</sup> TANF

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29. *Id.*

30. Hatcher, *Don't Forget Dad*, *supra* note 11, at 780–81.

31. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 1974 U.S.C.A.N. (88 Stat. 2337) 2716, 2732–40; *see also* Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 372 (2000); Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 345 n.85 (2005).

32. Relevant sections codified at 42 U.S.C. § 608(a)(2)–(3) (2012).

33. STAFF OF H. COMM. ON WAYS AND MEANS, 108TH CONG., 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 8–67 (Comm. Print 2004), <https://www.gpo.gov/fdsys/pkg/GPO-CPRT-108WPRT108-6/content-detail.html> [hereinafter GREEN BOOK] (“When Congress enacted the Child Support Enforcement program in 1975, the floor debate shows that members of the House and Senate supported the program primarily because retaining welfare collections would help offset welfare expenditures.”).

34. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 101–116, 110 Stat. 2105, 2110–85 (1996); *see* Murphy,

included yet harsher treatment for low-income mothers to give teeth to the forced requirements.<sup>35</sup> Under the AFDC welfare program, a mother could face a reduction, but not complete loss, of cash assistance if she failed to cooperate with the paternity and child support requirements.<sup>36</sup> With the enactment of TANF, however, a mother who does not cooperate loses all benefits for herself and her family.<sup>37</sup>

The forced treatment does not end there. Mothers face similar child support cooperation requirements when they need assistance with childcare, when they seek assistance to avoid hunger for their families, and when they need access to healthcare through Medicaid.<sup>38</sup> Further, some would like to see the mothers face even more forced child support cooperation requirements, such as when receiving Social Security benefits for a disabled child.<sup>39</sup>

The essentialist and forced treatment of low-income mothers causes harm. In addition to the obvious harm that results when the government takes child support payments from low-income mothers when they are in the greatest need of financial support, the cooperation requirements cause even further harm.<sup>40</sup> Forcing a mother to cooperate in establishing paternity and suing the father for child support removes the mother's autonomy, stripping her of choice in matters in which only she can know what decisions are best. In light of the findings of the RDSL, a mother's ability to make her own decisions in these matters is even more crucial.

If the mother's autonomy is preserved, she can consider all the circumstances and decide whether to establish paternity and

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*supra* note 31, at 328 & n.14.

35. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 101–116, 110 Stat. 2105, 2110–85 (1996).

36. HARRY D. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* 356 (1981).

37. *See* 42 U.S.C. § 608(a)(2)(A) (2012) (requiring states to reduce the assistance grant by at least twenty-five percent and allowing states to deny all assistance to the family when a TANF applicant fails to cooperate with child support enforcement).

38. Paula Roberts, *Child Support Cooperation Requirements and Public Benefits Programs: An Overview of Issues and Recommendations for Change*, CTR. FOR LAW & SOC. POLICY 3, 5, 12 (Nov. 2005), <http://www.clasp.org/admin/site/publications/files/0252.pdf> [hereinafter *Issues and Recommendations*].

39. *See, e.g.*, Susan Wilschke, *Improving Child Support Enforcement for Children Receiving SSI*, SOC. SECURITY BULL. 20–21 (2001/2002) <http://www.ssa.gov/policy/docs/ssb/v64n1/v64n1p16.pdf> (arguing for a child support cooperation requirement when single parents apply for SSI benefits on behalf of a disabled child).

40. *Id.*

whether to pursue child support. For example, the mother may be fearful that the father will seek retribution with increased intimate partner violence or by initiating custody litigation.<sup>41</sup> Countless reasons could cause the mother to decide that she does not want the father to be a part of the child's life.<sup>42</sup> Or, the father may already be providing in-kind or informal support and the mother may hope to preserve a positive relationship with the father.<sup>43</sup> The RDSL illustrates that the circumstances and concerns are varying. A parent who has been confronted with intimate partner violence may need support and counseling in reaching decisions, but the decisions about her children should remain with her. Likewise, parents in the study where intimate partner violence was not present should be able to decide what approach is best regarding child support and paternity. If the relationship is or has the potential to be positive, the relationship should be allowed to develop rather than forcing the mother to sue the father for money that will be taken away from the family—a policy that harms the relationship and contributes to systemic poverty.<sup>44</sup> If the mother is already receiving in-kind support from the father and if she desires to keep and grow a positive relationship, she may want to protect the relationship from the forced child support system. In a federal investigation, front-line caseworkers from child support and welfare offices reported precisely that: the most common reasons why so many mothers wanted to avoid the child support system were the mothers' hopes of protecting the relationship and concerns with losing informal support.<sup>45</sup>

States already do, in fact, have discretion to waive the paternity and child support cooperation requirement in some

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41. OFFICE OF INSPECTOR GEN., U.S. DEPT OF HEALTH & HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: CHALLENGES AND STRATEGIES TO IMPROVEMENT 6, tbl.2 (2000), <http://oig.hhs.gov/oei/reports/oei-06-98-00041.pdf> [hereinafter CHALLENGES AND STRATEGIES]; 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, 59–60 (2003).

42. See CHALLENGES AND STRATEGIES, *supra* note 41, at 6 tbl.2.

43. *Id.* Of the possible reasons for noncooperation, 94% of surveyed child support caseworkers report the mother's desire to protect the noncustodial parent and 88% report the fear of losing informal support, compared to 63% reporting the fear of domestic violence. *Id.* For the surveyed welfare office caseworkers, the numbers are similar: 92% report the desire to protect the noncustodial parent and 88% report the fear of losing informal support, while 73% report the fear of domestic violence. *Id.*

44. 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).

45. CHALLENGES AND STRATEGIES, *supra* note 41, at 6 tbl.2.

circumstances—known as “good cause” exceptions.<sup>46</sup> Many states make the good cause exceptions available when concerns with possible domestic violence are present.<sup>47</sup> States have flexibility to develop much broader good cause exceptions to take into account other circumstances. However, most states have unfortunately only created very narrow exceptions, which are even further limited because of a lack of sufficient notice to mothers that such exceptions are available.<sup>48</sup> Even in those cases where the mothers are made aware, the exceptions are rarely granted. For example, in Maryland’s entire child support caseload in 2015—over 207,000 cases—the state only granted six good cause exceptions.<sup>49</sup> Throughout Colorado, Indiana, New Hampshire, and New Mexico, each state only granted one good cause exception out of their entire caseload.<sup>50</sup>

### III. Responding to the RDSL: Avoid the Further Demonization of Low-Income Fathers

Similar to the uniformly disdainful and harmful treatment of young unwed mothers, centuries of social policy have treated the fathers with contempt and layered on an additional essentialist response—blame.<sup>51</sup> The fathers often struggle with poverty but

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46. 42 U.S.C. § 654(29)(A) (2012) (explaining that the cooperation requirements are “subject to good cause and other exceptions which . . . shall, at the option of the State, be defined, taking into account the best interests of the child, and applied in each case”); *Issues and Recommendations*, *supra* note 38, at 2 (explaining how good cause exceptions are also available for other public benefit programs in addition to TANF).

47. Fontana, *supra* note 31, at 375 (quoting VICKI TURETSKY & SUSAN NOTAR, MODELS FOR SAFE CHILD SUPPORT ENFORCEMENT, CTR. FOR LAW & SOC. POLICY 13 (Oct. 1999), [goo.gl/ZYGsDo](http://goo.gl/ZYGsDo)); *see* OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: USE OF GOOD CAUSE EXCEPTIONS 4 (2000), <http://oig.hhs.gov/oei/reports/oei-06-98-00043.pdf> [hereinafter GOOD CAUSE EXCEPTIONS] (noting that federal definitions of good cause include “cases of domestic violence, when conception was the result of forcible rape or incest, when adoption is pending, or when the client is consulting with a social service agency regarding the possibility of adoption”).

48. The AFDC rule requiring written notice regarding the availability of the good cause exception was eliminated under TANF. Stern, *supra* note 41, at 56–57; Hatcher, *Child Support Harming Children*, *supra* note 12, at 1047; *see also* GOOD CAUSE EXCEPTIONS, *supra* note 47, at 2 (“States report receiving very few requests for exceptions and granting even fewer.”).

49. FY 2015 ANNUAL REPORT TO CONGRESS, U.S. DEPT. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT app. at tbls.52 & 91, [https://www.acf.hhs.gov/sites/default/files/programs/css/fy2015\\_part\\_11.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/fy2015_part_11.pdf) (last visited Apr. 5, 2017).

50. *Id.* at tbl.91.

51. William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POLY

are largely considered unworthy of assistance and simultaneously targeted with the blame—and as the cure—for poverty's ills. As we consider the significant concerns present in the findings of the RDSL, we need to remember that the findings and the circumstances vary and are intertwined with multiple systems that impact the fathers. Just as essentialist treatment of the mothers must be remedied and not furthered, the same is true for the fathers.

As with the mothers, societal treatment of low-income fathers reaches all the way back to the sixteenth century English poor laws.<sup>52</sup> The notion of the unworthy poor meant that public assistance was given only in cases where the poor were considered unable to work. The poor laws considered mothers and children as part of the “impotent” poor who were treated with disdain but worthy of assistance.<sup>53</sup> The men, on the other hand, were not worthy of assistance. Rather, towns pursued the men to reimburse costs of children born out of wedlock—and subjected unemployed men to incarceration, public whippings, and worse:

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>54</sup>

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REV. 101, 103–04 (1998).

52. *Id.*

53. Heidi Meiner, *Idaho's Throwback to Elizabethan England: Criminalizing a Civil Proceeding*, 34 FAM. L.Q. 165, 169 (2000) (quoting LYNN HOLLEN LEES, *THE SOLIDARITIES OF STRANGERS: THE ENGLISH POOR LAWS AND THE PEOPLE, 1700–1948* 56 (1998)).

54. Quigley, *supra* note 51, at 103 n.36 (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 in Elizabethan poor law under “ordinances like the 1572 Act for the Punishment of Vagabonds, for instance, 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, *The U.S. and Them: Cutting Federal Benefits to Legal Immigrants*, 48 WASH. U. J. URB. & CONTEMP. L. 319, 322 n.18 (1995) (noting 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

The essentialist treatment of poor men, in particular poor fathers, continued in America.<sup>55</sup> In the prior welfare assistance program, AFDC, the rules virtually prohibited fathers from being present in the households of their children.<sup>56</sup> During this time, states went so far as to enact “man in the house” rules—including midnight raids and disqualifying families from the welfare assistance program if a man was found residing in the household:

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>57</sup>

Under the AFDC requirements, states did in fact have flexibility to provide welfare assistance to two-parent families in which the father was unemployed—so the father could stay in the house.<sup>58</sup> However, many states refused to provide the benefit to two-parent households or limited the benefit to as little as six months.<sup>59</sup> Then, under the 1996 TANF program, changes to the program were supposed to allow further access to benefits for two-parent families, but unfortunately the requirements are much stricter for two-parent benefits and the fathers are therefore still discouraged from staying in the households.<sup>60</sup>

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ed. 1994)).

55. Quigley, *supra* note 51, at 107.

56. 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, 1292–93 n.71 (2004).

57. Lee A. Harris, *From Vermont to Mississippi: Race and Cash Welfare*, 38 COLUM. HUM. RTS. L. REV. 1, 40–41 (2006) (footnotes omitted).

58. Edward M. Wayland, *Welfare Reform in Virginia: A Work in Progress*, 3 VA. J. SOC. POL’Y & L. 249, 299 (1996).

59. *Id.* at 299 (“[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).

60. See Yoanna X. Moises, *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 a 50% work participation rate for single parent families and a 90% participation rate for two-parent

Thus, from the past, low-income fathers have been banned from their children's households and simultaneously blamed for being absent. Much of the past essentialism continues today. Further, the essentialist treatment of low-income fathers does not end with the child support and welfare assistance programs.

Poor fathers face numerous other systems that employ essentialist treatment—each of which is intertwined with the others, and each further capturing the fathers in the tangles. For example, the criminal justice system ensnares the fathers in numerous ways. Connected to the forced child support policies, fathers are often too poor to pay the child support obligations and are jailed as a result.<sup>61</sup> The fathers are also frequently prosecuted for other reasons, including crimes that are often inextricably linked with poverty.<sup>62</sup> While the father is incarcerated, child support debt often continues to grow and a criminal record makes it even harder for the fathers to find employment. Lack of employment and large child support debts result in an even further inability to keep up with the payments. The ongoing inability to make child support payments results in the fathers being incarcerated again for nonsupport. Thus, the brutal cycle continues.

Moreover, rather than offering fathers periods of refuge, the subsidized housing system further adds to the harm. Although the parents often hope for father involvement, the fathers are usually excluded from housing assistance.<sup>63</sup> “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>64</sup> Low-income fathers are usually not considered eligible for subsidized housing,<sup>65</sup> and even if they

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families).

61. Hatcher, *Child Support Harming Children*, *supra* note 12, at 1031.

62. 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 CAL. L. REV. CIRCUIT 184, 188 (2012) (“[P]risons are full of low-income people and people of color who were prosecuted for crimes of poverty and minor drug use.”).

63. See Kirk E. Harris, *Fathers from the Family to the Fringe: Practice, Policy, and Public Housing*, in PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 210 (Margery Austin Turner et al. eds., 2009) (“Ninety percent of the households living in HOPE VI public housing are African American and female headed.”).

64. *Father's Day 2012—Reconnecting Families and Dads Saturday, June 16th, 2012*, YOUTH.GOV, <http://youth.gov/feature-article/father%E2%80%99s-day-2012-%E2%80%93-reconnecting-families-and-dads-saturday-june-16th-2012> (last visited May 10, 2017).

65. JOY MOSES, CTR. FOR AM. PROGRESS, LOW-INCOME FATHERS NEED TO GET CONNECTED: HELPING CHILDREN AND FAMILIES BY ADDRESSING LOW-INCOME

were, prior criminal records will often operate as a ban.<sup>66</sup> Not only are these fathers excluded from living in the housing with their children, the fathers are often banned from simply visiting.<sup>67</sup> If the fathers do try to see their children, they risk causing their eviction: “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>68</sup>

Even the education system, which is supposed to build an initial foundation of possibility, is failing poor fathers. Low-income boys are often severely disadvantaged by the time they begin school, and minority boys are impacted the most.<sup>69</sup> Rather than helping to overcome the prior difficulties, the school system can exacerbate the harm.<sup>70</sup> As schools have become increasingly criminalized, harsh school disciplinary actions impact troubled boys with the most need for supportive assistance—but are unfortunately often met with exclusion.<sup>71</sup> The boys are then more likely to end up in the juvenile delinquency system, and more likely to transition as adults into the criminal justice system.<sup>72</sup> Further, even after boys struggle through the education system, they continue to face exclusion as adults. If a father hopes to make up for lost education opportunities, federal student loans are

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FATHERS’ DISCONNECTIONS FROM EMPLOYMENT, SOCIETY, AND HOUSING 13 (2010), <http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/fatherhood.pdf>.

66. Harris, *supra* note 63, at 201.

67. See Gregory A. Beck, *Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?*, 2004 U. ILL. L. REV. 1223, 1234–39 (2004); Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES, Oct. 1, 2007, at A1; see also KINGSPOUR HOUS. & REDEVELOPMENT AUTH., KHRA CRIMINAL TRESPASS LIST, [http://www.kingsporthousing.org/downloads/ct\\_list.pdf](http://www.kingsporthousing.org/downloads/ct_list.pdf) (last updated Aug. 19, 2016, 2:24 PM); THE HOUS. AUTH. OF COVINGTON, NO TRESPASS LIST, <http://www.hacov.org/LinkClick.aspx?fileticket=EsqNPUadScQ%3d&tabid=2133> (last visited May 10, 2017).

68. Harris, *supra* note 63, at 210.

69. Nancy E. Dowd, *What Men?: The Essentialist Error of “The “End of Men”*, 93 B.U. L. REV. 1205, 1216 (2013).

70. *Id.* at 1205, 1216–19.

71. *Id.* at 1216–19 (describing the increased use of “arrest as school discipline” and examining the impact of this “criminalization of schools” on students).

72. *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.”) (footnote omitted).

often denied to fathers with past involvement in the criminal justice system.<sup>73</sup> The essentialist treatment of poor fathers continues in even more systems, and each is even further tangled with the rest, thus adding to the cycle of barriers.

#### IV. Responding to the RDSL: Remove Essentialism from Tribunals.

Backing up to what should possibly be the starting point, we can have all the best theories and legal policies in the world—and they will be meaningless if our courts and agency tribunals do not function well in enacting them. For low-income mothers and fathers, the courts and tribunals often fail.

For low-income mothers and fathers caught in the forced child support system, the issues of child support, paternity, and contempt are often shuffled away into separate and overcrowded dockets.<sup>74</sup> Family law proceedings for families with money may last for days. But for low-income parents forced into the system, the proceedings may last only minutes.<sup>75</sup> The fact finders are often not real judges.<sup>76</sup> The rooms are packed and overflowing with jaded chaos. The parents rarely have lawyers. Babies are crying. Some fathers brought in from prison are in chains.<sup>77</sup>

In these overburdened dockets, essentialism is controlling. All the varied and incredibly important individual circumstances are blended together as if the courts view poor mothers and fathers as all identically disdainful. After visiting several of these courts and tribunals, the Center for Family Policy and Practice concluded:

Another unfortunate aspect of the system for noncustodial

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73. 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), [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 Ann Cammett, *Deadbeats, Deadbroke, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL’Y 127, 147 (2011).

74. 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), <http://www.cffpp.org/publications/LookAtArrests.pdf>.

75. *Id.* at 43.

76. *Id.* at 42.

77. 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 J. POVERTY L. & POL’Y 5, 7–8 (2003); see also Kelly, *supra* note 44, at 301–05.

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>78</sup>

These tribunals sometimes barely give the cases a blink of attention as they dole out uninformed monolithic treatment. For example, a court magistrate in New Haven, Connecticut decided up to sixty of such cases in only three hours.<sup>79</sup> And, a court master in Harris County, Texas decided more than 500 paternity and child support matters in one day.<sup>80</sup>

### Conclusion

The message is simple, but so necessary to remember. Different circumstances require different treatment. The RDSL is a crucially important new study that calls out for deep and ongoing policy debate to consider how to best address the concerns present in the study’s findings. The study displays the complexities in the relationships of young parents—both the good and the bad. Thus, responding to the study with uniform one-size-fits-all policy suggestions would be a disservice to the individuals the study seeks to understand. Rather, the essentialist treatment in the forced welfare and child support system—and in the other systems impacting low-income parents—must be eliminated. The courts and tribunals that exist to understand and serve the varying interests of low-income mothers and fathers must be restructured to actually do so. Otherwise, until anti-essentialism is always present in the policies, systems, and courts impacting low-income parents, harm will continue.

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78. May, *supra* note 74, at 46.

79. 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/).

80. Carlos Byars, *County Court Hears 500 Paternity Cases in 1 Day/Docket Reportedly Largest Ever in Texas*, HOUS. CHRON., Mar. 26, 1995, at A1.