

Force African-American Fathers To Parent Their Delinquent Sons—A Factor To Be Considered At The Dispositional Stage

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Listen to the lambs, all are crying.

—Afro-American hymn¹

What species can survive and function when a substantial segment of its young male population is harnessed by the burdens of substance abuse, unemployment, and incarceration? Empirical data suggests that these maladies have infected African-American² males at a rate alarmingly disproportionate to that of other races. This trend, if it continues, suggests that America is creating a dysfunctional class. In this Article the term "dysfunctional" refers to a predicament wherein African-American males engage in violent activities.³ Their conduct may be attributable to their

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¹ "[An] Afro-American Choral Ensemble rose, sweet and sad" and sang. Jane Gross, *Police Killing of Student Stuns Indiana Residents*, N.Y. Times, Sept. 25, 1983, §1, at 34 (the Ensemble sang to mourn the death of a young African-American killed during a scuffle which involved questionable conduct by the police).

² The terms African-American, Black, Negro, and Afro-American have been used to describe the community of people with African descent in America. Although I prefer the term African-American, I use the relevant term within the context of statements by particular authors. I also capitalize Black throughout the paper in the spirit and power of politics.

³ I do not use the term dysfunctional as descriptive of single parent households. See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 Utah L. Rev. 387, 395 (1993) (dysfunctional critiques focus on single mother households as fostering deviate behavior in need of cures that would reinforce natural family structures). Professor Fineman considers Daniel Moynihan's contention that the problems in the Black community are momentous due to the deterioration of the traditional family structure. *Id.* at 395 n.18 (citing Daniel P. Moynihan, *The Negro Family: The Case for National Action*, reprinted in Lee Rainwater & William L. Yancey, *The Moynihan Report and the Politics of Controversy*, 51 (1967)). Moynihan's report has been critiqued by several members of the African-American community. See William H. Grier and Price M. Cobbs, *Black Rage* 83, 84 (1968) ("[I]n spite of the many simplistic half-truths that have been uttered, as in Daniel P. Moynihan's celebrated report on the Negro family, . . . [t]he problem

inability to contribute to the family or smaller groups which form the foundation of the social order of society.

In light of the increasing numbers of African-American males populating correctional facilities,⁴ becoming enslaved to drugs,⁵ and becoming unemployed,⁶ unskilled,⁷ and only minimally educated,⁸ drastic measures need to be taken to prevent them from becoming dysfunctional members of society. The problem is real.

Recognizing this burden, several theories of remedy have been suggested. Some propose single-sex, single-race schools,⁹ while others advocate rearing African-American children in non-African-American families.¹⁰ None of the suggested remedial measures will be effective if

is a latter-day version of the problem faced by the slave family."). Professor Fineman suggests that the problem is attributable to an institutional structure which prevents the family from building and strengthening itself. Fineman, *supra*.

⁴ See Philip Feldman, *The Psychology Of Crime* 69 (1993) (in 1981 46% of prisoners were African-American males; African-American males are incarcerated five times the rate of whites); see also Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769 (1992).

⁵ See Frances Cress Welsing, *The Isis Papers: The Keys to the Colors* 252 (1991) ("Many Black children . . . will become involved with drugs—either to medicate often unrecognized major depression, or to sell drugs to solve their own or their family's financial difficulties. Perhaps both. The drugs will be used to suspend briefly a grinding sense of hopelessness and doom. Then addiction sets in."). Although African-Americans are the focus of most of the coverage regarding illegal drug use, cocaine use does not differ much across racial lines. See Erica E. Tollett, *Drug Abuse and the Low-Income Community*, 24 *Clearinghouse Rev.* 496, 496-7 (1990).

⁶ See generally Hudson Institute, *Workforce 2000: Work and Workers for the 21st Century* (1987).

⁷ See Feldman, *supra* note 4, at 68 (the typical offender is young, Black, poorly educated, unemployed, unskilled, and unmarried).

⁸ See Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 *Colum. J. Envtl. L.* 211, 240 (1994) (statistics indicate that white men from 25-34 are twice as likely to become college graduates than African-American men of the same age). "The nation's children also reflect a differential in reading proficiency. On a reading scale of 0-500, the proficiency level in 1988 for 17-year-old African-Americans was 274.4 compared to 294.7 for whites." *Id.* at 240, citing Deborah Selsky, *The Nation's Reading Report Card*, *Lib. J.* (Nov. 15, 1990).

⁹ See, e.g., Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 *Harv. L. Rev.* 1741, 1744 (1992) [hereinafter *Inner-City*] ("Proponents of single-sex schools argue that Black boys urgently need school programs tailored to their unique problems."); Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 *Stan. L. Rev.* 1099 (1993); Charles Whitaker, *Do Black Males Need Special Schools?*, *Ebony*, March 1991, at 17; Thomas Toch, *Afrocentric Schools: Fighting a Racist Legacy*, *U.S. News & World Report*, Dec. 9, 1991, at 74.

¹⁰ Arguments have been raised that African-American children should be "reared"

we do not seriously consider the real problems that confront the African-American male child. The consequences of racism play a substantial role in the demise of these youth, and the placement of the delinquent child is vital in correcting the situation.

I suggest that a potential solution is placing African-American male children with their fathers. In proposing this remedy, I am not advocating separating them from their mothers. My focus is on children in the juvenile justice system who are thus wards of the state. I consider this remedy as pro-survival for African-American males. I am in no way implying that African-American women have failed in raising our male children, but I am suggesting that perhaps the burden is too heavy for us to bear, alone, today.¹¹

I advocate state interference in a family unit only when there are signs of profound distress and disturbance, as indicated by a child's entrance into the juvenile justice system. Once the child becomes a part of the "system," the state has an interest in the child sufficient to merit intervention and the state should act, as when non-delinquent conduct is involved, in the best interests of the child.¹²

The "best interests of the child" test for deciding custodial placement is the most recent standard delineated by the courts. At early common law, a father had the paramount right to custody of his children.¹³ Courts later considered the age and gender of the child as a deciding factor, and placed children of a tender and early age with their mothers.¹⁴ A more recent rule, the "primary caretaker" rule, allowed the child to be placed with the parent who was primarily responsible for the child's care.¹⁵ This rule allowed for a gender neutral determination. Today, however, placement

in a non-African-American setting, making them less likely to end up "Black." Adoption by non-African-Americans will alleviate some of the problems. See Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. Fam. L. 51 (1990). The results of rearing Black children in a white environment have been mixed, however. I recall a discussion with a North Carolina judge who said that his kids grew up in a predominantly white neighborhood, spent the night over at the white kids' homes, and attended games together at Duke and Chapel Hill but when his daughter began to attend high school, she was no longer a part of the group. This ostracization was so devastating to the daughter that she had to seek therapy. The son, however, was never a part of the white neighborhood gang.

¹¹ See Reginald Meyers, *The Wages of Success*, Miami Herald, Sept. 25, 1992, at C1 (only one out of three African-American children lives in two-parent homes).

¹² See generally Jack Klempner and Roger D. Parker, *Juvenile Delinquency and Juvenile Justice* (1981).

¹³ *Porter v. Porter*, 53 So. 546 (Fla. 1910).

¹⁴ *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978).

¹⁵ *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989).

decisions are determined by applying the "best interests" test.¹⁶ Courts focus on the child's needs and determine placement accordingly. Placement questions, for the most part, arise during custodial disputes, neglect, and child abandonment cases. The juvenile justice system needs to be transformed so that this test is similarly applied to a child's placement at the dispositional stage.

Part I of this Article discusses issues plaguing African-American males. Part II addresses the best interests of the child test as it arises in the dispositional stage for juvenile delinquents. Part III discusses the African-American father as nurturer, and considers the implications of forcing him to parent even though he is absent from the home. Part IV notes that the state has forced parents to "parent" in other areas, thus the notion of forced parentage can be implemented for delinquents. Part V concludes that the remedial measure of forced parentage may be necessary as a pro-survival measure, outweighing any anti-mother, anti-womanist, or anti-feminist notions.¹⁷ Understanding the role racism plays in our society, I conclude

¹⁶ See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727 (1988).

¹⁷ I have always been and always will be a woman and an African-American. I have not always consciously known that it was a two-fold struggle. For most of my life I was conscious of a racial struggle. Although I have suffered greatly as a woman, this suffering was not as recognizable as that caused by my race. I must admit that I am a very new member of the feminist movement. In 1989, as editor-in-chief of the *North Carolina Central Law Journal*, I insisted on having a special edition on women's issues for the 50th anniversary of the law school. As late as 1989, I was not in touch with a feminist movement or perspective, I just knew that special issues involving women were surfacing and thought that recognition of these issues was imperative. But even then I did not dedicate the edition totally to women; I dedicated it "to all those who continue to struggle against adversity." It was not a conscious decision to not dedicate the journal exclusively to women, rather it was a subconscious understanding of conflict. I did not understand or recognize the struggle I had within concerning gender and race. I was not familiar with either of the jurisprudential movements. It was not until I was enrolled at Columbia University School of Law as an LL.M. candidate that I consciously recognized the struggle. In one of my classes, I was grouped with a Canadian, middle-aged male and a young American white male for an assignment. (I saw the former as a white male, yet he insisted he was Canadian. I failed to understand the difference.) For our first assignment we had to write a paper concerning our class discussions of gender as Other. Our group handed in three different papers. This assignment was very difficult for me, first, because I had never been called on to separate gender from race, and second, because I did not know how to go about it. When the group met to discuss culminating our individual papers into one, we realized it was an impossible task. The Canadian handed in a critical essay, the white male a collage, and I prose. The prose denoted my struggle within, a struggle I had never realized. It was a very bold thing to do, to state my struggle, in a non-conventional manner, and to a seemingly elitist audience. (I certainly knew nothing of critical race theory.) When the prose was returned to me I was astonished at the comments. I was questioned about concerning myself with race. I was asked if I wanted my brothers to

continue raping my mothers and sisters. The struggle with race and gender is real, innocent, complex, and restrained. I offer the unpublished prose here to enlighten you on my struggle with gender and race as is reckoned with by so many other African-American feminists and to note that it is impossible to be one and not the other—the voices of both must be heard. The voice of race in this Article is shouting for the survival of our male children.

I Am Other Other

Now, I am told that because I am woman, I am other.
 But
 I have always been other,
 The color of my skin determined that I was other.
 Power is in the skin tone.
 I am Black.

I am told my sexuality determined that I was other.
 Power, I am told, is in the penis.
 If sexuality determined that I was other,
 Then I am other other.

Gender determines the dominant group and the subordinate group, so I am told.
 My slave roots defined these groups for me.
 I am woman, but I am also Black.
 I am a member of the subordinate, subordinate group.
 Subordinate to white men and subordinate to white women.

There is a struggle going on, now, I am told.
 The struggle is the feminist movement.
 Women want equal rights.
 Women want to share the power with men.
 What women?—all women.
 Now is the time for me, a Black woman—so I am told.

I will bond with my white sisters.
 I will fight for the rights of all women.
 A fight for . . .
 A fight to share power with white men.
 I, a Black woman, will share the power with white men.

After the struggle—
 Is my share equal to that of the white woman?
 I am not told.

During the struggle—
 What happens to my Black brothers?
 I am not told.

Who will bring them through their, which was our, struggle?
 I walked out on my brothers, I joined my white sisters.
 I joined *their* struggle.
Their struggle offers me a bigger piece of the pie.
 It offers me the opportunity to share the power with white men—
 So, I am told.

that forced parentage is necessary for the survival and prosperity of the African-American community, and that it would be in the best interests of both delinquent African-American male youth and society as a whole.

I. THE DEMISE OF THE AFRICAN-AMERICAN MALE

A. The Plight of African-American Male Children¹⁸

There are two concerns here: the plight of the African-American male child and the absence of the African-American father.¹⁹ At a very early

My struggle with my Black brothers
will provide me with a better life—
So, I am told.
A life like that of my white sisters?
A life like that of the dominant group?
A life like what?
A life to share equally with white men and women—
I am not told.

The struggle with my white sisters, I deem *their* struggle.
The struggle with my Black brothers, I deem *our* struggle.

Why did I walk away from *our* struggle to join *their* struggle?
I told you—for a bigger piece of the pie.

A bigger piece—I have always shared my pie equally with my Black brothers.

See also bell hooks, *Ain't I A Woman: black women and feminism* (1981); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139 (1989).

¹⁸ The following quote remains in the male gender simply because of the gender discussion in this Article. I believe the quote equally applies to a seventh daughter.

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. . . . One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

W.E.B. DuBois, *Souls of Black Folks* 8-9 (1990).

¹⁹ See Meyers, *supra* note 11; see also Karl Zinsmeister, *Parental Responsibility and the Future of the American Family*, 77 Cornell L. Rev. 1005, 1007 (1992) ("Seventy percent of juveniles now in state reform institutions grew up in single-parent or no-parent families.").

age,²⁰ an African-American male child is perceived as an adult.²¹ He must be ready at all times to address whatever situation arises.²² The most difficult and demanding situations are usually created by the color of his skin.²³ Skin color is seen before any actual conduct is exhibited.²⁴ It

²⁰ The physique of the African-American male child determines when he is perceived as a threat. I remember one of the students in my Juvenile Law class discussing a local case involving two teenagers who had stolen a car. He described the 16-year-old white teenager as having a boyish face. He described the Black teenager as being huge and dark, as wearing sloppy clothes, and as appearing much older than his 12 years. From the description, I assumed that the student was making the determination of guilt based on looks and race. See also Grier and Cobbs, *supra* note 3, at 59 ("In time [a young African-American male] comes to see that society has locked arms against him, that rather than help he can expect opposition to his development, and that he lives not in a benign community but in a society that views his growth with hostility.").

²¹ I remember driving with my then 12-year-old son to a small college town in Virginia to pick up my daughter. My daughter, a prospective student at the school, was invited to visit for the weekend. While en route to pick her up, my son and I stopped at a local fast food restaurant and were treated with stares and rudeness by other customers. The only other African-American customer ordered his food to go. It was the first time I saw fear (fear arising from the threat of racial persecution and violence) in my son's eyes. It appeared that for the first time he realized the depth of racism and its impact on his future. Two white men sitting at the table behind us moved and made ugly remarks because my son was seated in a position facing them. I, too, became frightened, not for my safety but for his safety, then, now, and in the future. See Janice E. Hale, *Black Children: Their Roots, Culture, and Learning Styles* 64-66 (1982). "One of the challenges the Black male must face is the conflicting images of masculinity that predominate in the Afro-American community against the images that predominate in the broader society. This conflict grows out of the duality of socialization [the attempt to live both within and outside the group]" *Id.* at 65.

²² It is often said that there is no protective environment for the African-American male. Several rap artists have suggested that confrontations include those with the police, as well as with other Black males. See Ice-T, *To Live & Die in L.A.*, *Playboy*, Feb. 1994, at 62.

²³ See A. Leon Higginbotham, Jr., *In The Matter of Color* 390 (1978) ("Unless their color was their crime, these [B]lack were innocent."); see also Kathy Russell et. al., *The Color Complex: The Politics of Skin Color Among African Americans*, 41 (1992) ("[T]housands of Black men have felt the effects of their dark coloring and broad features."); Haki R. Madhubuti, *Enemies: The Clash of Races* 117 (1978) ("As soon as Black babies struggle from their mothers' wombs, they are designated by this society as being 'abnormal[,] first by color."); *Id.* at 118 ("[T]he color of our skins takes on added significance"); *Id.* at 117 ("From birth, every minute of their lives will be a struggle to be recognized and respected as Black people. This struggle will intensify to the point where it will either make them or destroy them").

²⁴ "White people are conditioned from the time of their birth to the preferred status of their skin color." Bruce Wright, *Black Robes, White Justice* 19 (1987). "[S]omehow, the skin color of the [B]lack defendant would have effect upon what [he] would do." *Id.* at 27. Whites constantly accuse Blacks of seeing race in everything: "[Y]our trouble is that you're hung up on the question of race. Everything is race with you. We never see the color of a defendant's skin when he stands before the bench.

plays a significant role in determining the treatment an individual will be accorded in American society. An African-American child learns early on that his skin color entitles him to the worst treatment. Consequently, once an African-American child exhibits any unacceptable conduct, it is automatically perceived by all as deviant. Thus, when an African-American male child acts, he acts as a potential criminal; in contrast, when a white male child acts, the understanding is that "boys will be boys."²⁵ Differing standards based on race, or skin color, are un-American, unconstitutional, unfair, unclear, and the norm.²⁶

This disparate treatment contributes to the tendency of African-American male children to rebel and act in extreme ways. Because they understand that negative treatment will inevitably result simply because of their skin color, these children exhibit violent behavior in large numbers.²⁷ The lack of education,²⁸ the absence of role models, and the decrease in economic opportunities²⁹ significantly exacerbate this problem.

Just the other day, I had a little colored kid before me" Id.

²⁵ I am reminded of two actions before a Durham, North Carolina Superior Court Judge. One cause of action involved African-American teens who, with the use of a gun, attempted to rob an individual. These teens were tried as adults and received prison terms. The other case involved white teens who set fires to homes under construction in a new suburban housing development. The destroyed houses, if construction was complete, would have been valued in excess of \$200,000. The white teens' parents agreed to pay for the damages. These teens resided in the housing development. Their punishment was community service. The same African-American judge heard both cases. The community was outraged, but the judge commented that surely the community could see the difference in harm to a person and harm to property and race was not the underlying factor in deciding the punishment.

²⁶ Abraham Lincoln, thought to have been a friend of "the colored race," said,

I would save the Union. I would save it the shortest way under the Constitution. . . . My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all of the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. . . . I have here stated my purpose according to my view of official duty

Derrick Bell, *Race, Racism and American Law* 9-10 (1992).

²⁷ Tollett, *supra* note 5, at 499; Austin, *supra* note 4.

²⁸ The renowned case of *Brown v. Board of Education*, 349 U.S. 294 (1955), was supposed to assure that all American children received an unsegregated education. The problem is that *Brown* did not hold that all American children, regardless of race, are entitled to a good quality education. Failing to allow for a good quality education has resulted in schools serving as daytime care. The schools purport to educate, but instead serve as meeting places for criminal activity. See Terence P. Thornberry et. al., *The Effect of Dropping Out of High School on Subsequent Criminal Behavior*, 23 *Criminology* 3 (1985) (school failure and criminal behavior relate to delinquency).

²⁹ "Many Black men and boys twelve years and older now realize that they are,

The educational system as it now stands is failing African-American male youth.³⁰ Thorough educational reform is necessary if we are to turn these boys around. Recognizing this need for school programs tailored to the unique problems of African-American boys, many commentators have proposed single-sex, single-race schools as a potential solution. Programs addressing the violence, as well as programs "designed to change male behavior," are necessary.³¹ Questions have been raised about what would constitute a proper, quality education for African-American children.³² Responses have been distorted because American education "has functioned to prepare Black people to accept, value, and affirm white society."³³ A

indeed, marginal to this economy, and that as technology advances and job requirements become more technical, their chances of 'good' employment are just about negligible." Haki R. Madhubuti, *Black Men Obsolete, Single, Dangerous?: The Afrikan American Family in Transition* 78 (1990).

³⁰ As eloquently expressed by Ronald Coleman,

I ask you my children
What did you learn today
did anyone tell you how to meet tomorrow
did anyone tell you why there are people
who don't know you

did anyone seem to know who you were
did anyone know that you have the blood of Africa
in your veins
or did they pretend to be blind to your color and thereby
deny its value

What did you learn

did anyone explain the nature of freedom
did anyone explain the nature of racism

did anyone explain the nature of love
did anyone know anything about those things
did anyone know anything
What did you learn today?

Ronald Coleman, quoted in Hale, *supra* note 21, at 151. See also Carter G. Woodson, *The Mis-Education of the Negro* (1933).

³¹ Inner-City, *supra* note 9, at 1744.

³² See Hale, *supra* note 21, at 151-75; Woodson, *supra* note 30, at 1 ("Negroes are taught to admire the Hebrew, the Greek, the Latin and the Teuton and to despise the African.").

³³ Hale, *supra* note 21, at 155. See also Woodson, *supra* note 30, at 5-6:

When a Negro has finished his education in our schools then, he has been equipped to begin the life of an Americanized or Europeanized white man, but before he steps from the threshold of his alma mater he is told by his teachers that he must go back to his own people from whom he has been

quality education, rather than miseducation, includes African-American studies as an integral part of American history. The failure to learn about their culture and about themselves creates a sense of worthlessness and rage among young African-American males. African-American studies is significant for the survival of African-American males, particularly because it will break stereotypical molds and enhance self-worth through respect for their heritage.³⁴ Self-worth resists devaluation. Additionally, however, because African-American children must also be able to function in mainstream America, African-American studies should be taught in conjunction with what is generally considered white American history.³⁵

Programs targeting the special needs of these children, focusing on educating with an "Afrocentric" curriculum, are being taught by African-American male teachers.³⁶ Potentially, these programs could include "rites of passage" which would teach "boys to be men."³⁷ Why is being taught to be a man significant for African-American children? As it stands, African-American male youth, at least a large number, are learning from each other.³⁸ What are they learning from each other? They are learning the trades of the streets. Who are their teachers? Gangs.³⁹ What *should*

estranged by a vision of ideals which in his disillusionment he will realize that he cannot attain.

³⁴ Haki Madhubuti elaborates well on this point:

The Mormons of Salt Lake City, Utah teach their own; the Amish of Pennsylvania teach their own; the Irish of Chicago teach their own, the Italians of New Jersey teach their own; the Anglo-Saxons of Boston teach their own; the Jews of the world teach their own; and the [African-Americans] are taught by everybody else

Madhubuti, *supra* note 23, at 121-22.

³⁵ See Woodson, *supra* note 30, at 150.

³⁶ Inner-City, *supra* note 9, at 1746.

³⁷ *Id.*

³⁸ Regina Austin portrays this phenomenon well:

As a skeptical 16-year-old former gang member put it: 'Neighbors? Neighbors is for my grandmother, I ain't got the time. Church? People trying to get neat on Sunday and dissing people on Monday. . . . Community? What's that? Only community I know is my boys—when we get together that's my church, home, and community!'

Austin, *supra* note 4, at 1775.

³⁹ The following quote is revealing:

"I know people think gangs are terrible and that the kids are just disgusting individuals, but that just ain't bad kids, sure you gots some, but most ain't bad, they just not willing to quietly sit back and let the society take everything and give them nothing. . . . Sometimes I think some of the gangs go too far, but I understand where they're coming from, and I say, they ain't bad, they just made a bad decision that time, that's all."

they be learning? Who *should* be their teachers? Why not their fathers? Where are their fathers? Why have they gone? Why not find them?

The lack of role models is an additional problem for these endangered youths and further contributes to their downfall.⁴⁰ The media tells African-American youth that their acceptance into society is either by way of professional athletics or popular music. There has been an improper focus on musicians and athletes as role models for African-American male youth. Advertising, the news media, and politicians focus on the need for these individuals (Michael Jordan, Michael Jackson, Mike Tyson and O.J. Simpson, to name a few) to serve as role models. When these highly-visible public figures display flaws (Jordan's gambling, Jackson's alleged sex offenses, Tyson's sexual assault conviction, and O.J. Simpson's murder charge), the African-American male is pushed further to the "bottom of the well."

Furthermore, the role models are generally chosen by whites and reflect their preferences. For example, one seldom hears a reference to Malcolm X as a role model, while Martin Luther King, Jr. is frequently mentioned. These two figures present profound differences. Unlike Malcolm, who was a drug dealer, pimp, hater of whites, and identified with delinquents, Martin Luther King, Jr. was non-confrontational in his approach to racial problems. However, Malcolm came to terms with all of his vices. Malcolm, therefore, rather than Martin, should serve as a role model for these youth.⁴¹

Moreover, identifiable role models, such as Booker T. Washington, W.E.B. DuBois, Malcolm X, Martin Luther King, Jr., and Charles Drew, are, like many of the peers of African-American male children, dead, and therefore absent like their fathers. The African-American male youth does not have readily identifiable, living role models.⁴²

Id. at 1779.

⁴⁰ See *The Quest for Role Models*, U.S. News & World Report, Aug. 26, 1991, at 13.

⁴¹ See id.

⁴² Carl Taylor describes a 13-year-old gang member's criticism of the suggestion that Black professionals are 'positive role models in the community':

Positive? You must be ill All them niggahs is fraudulent. . . [sic] They be perpetrators, they ain't real. I know plenty of them kind of niggahs that get high and love some young tender ronies. . . . The only role models we need is George Washington, Thomas Jefferson, Abe Lincoln, and the rest of the dead presidents on some hard green cash backs. If I can't spend it, fuck it. I don't need or want it.

Carl S. Taylor, *Dangerous Society* 47-48 (1990), quoted in Austin, *supra* note 4, at 1774 n.14.

The lack of economic opportunity is another significant factor in the demise of the African-American male youth.⁴³ As Regina Austin has noted,

once upon a time poor young [B]lack children worked in shops and stores in the neighborhood or at jobs they made for themselves, like carrying groceries from the supermarket, delivering papers, or running errands for a small fee. Labor laws, economic disinvestment, and changing demographic patterns have narrowed employment opportunities for poor [B]lack children. Drug dealing is filling the void.⁴⁴

This filling of the void is seen as the "American way" for them, but at great cost, for young African-American males are paying with their lives.⁴⁵

What is necessary for the survival of our male children? What do we tell them? Can they relate to us; can we relate to them? African-American mothers will do what we have always done, raise our children to our best abilities—but is that enough today? If it is enough, then why are they dying?

It is clear that our male children need to understand the concept of being African-American and male in the '90s. Is it necessary that their African-American fathers show them? One argument for looking to the family for solutions is that "the family is the most basic institution of any people, the center and source of its civilization. Within the intimate concepts of family, individuals develop their concepts of themselves, their

⁴³ A reason for the over-representation of African-American males in the criminal justice system is their failure to see "prospects for future economic success in comparison to whites." Tom Joe, *Economic Inequality: The Picture in Black and White*, 33 *Crime & Delinq.* 287 (1987).

⁴⁴ Austin, *supra* note 4, at 1783. See Taylor, *supra* note 42, at 100, quoted in Austin, *supra* note 4, at 1777 ("As one Detroit gang member put it:

I didn't do shit in school, my people ain't got no paper. I tried to join the Marines, I couldn't pass their written test. Ain't got no transportation to get a job. So what's a fella to do? You talk all that righteous shit, but you got a job. Got one for me? So I'm going to get with somebody rolling. . . . That's the only job for fellas like me.").

⁴⁵ As Jefferson Morley states,

In this respect too, the cocaine economy resembles the national economy: The poor and the middle class pay the highest price for the new class conservative's vision of social progress. Drug bureaucrats and the drug bankers have arrived in the catbird seat. The drug war is the health of the state.

Jefferson Morley, *Contradictions of Cocaine Capitalism*, *The Nation*, Oct. 2, 1989, at 341, 347, quoted in Austin, *supra* note 4, at 1784.

values and their worth in relation to the others in their world."⁴⁶ Within the intimate concepts of families with African-American women as the sole parent, how are African-American male children developing concepts of themselves in the absence of their fathers?⁴⁷ Since children learn to do most things by watching and imitating their parents, how can African-American male children learn to be fathers if they have none to imitate?

It seems that African-American male children have a much more difficult task in handling the problems of today. Although they can sit at counters, enter through the front door, and attend the best schools, they are not functioning at a level that allows them to fully contribute to society. They are becoming more burdensome on society because of their increasingly violent criminal activity. We are all saying that they need male role models, that they need figures to demonstrate that they can rise above racism and its ill effects. But the existing role models are not real to them; they are not practicable, and they are not accessible. When you hear an African-American professional athlete praise his mother on national television, it is because she was there and the athlete knew how hard it was for her having to walk her teenage sons to school to keep gang members away. The father may be able to assist the youngster with coping with problems particular to the African-American male and give him the necessary strength and wisdom to walk alone, without seeking refuge from society by thrusting himself into the security of the "gang."

The problem we are confronted with is children having to endure the pangs of racism at an age when they are extremely vulnerable. An African-American child understands that unlike the rest of America, he is guilty until he proves himself innocent; he must prove himself right, when automatically he is perceived as wrong. As he matures, he develops self-hate and consequently loses sight of how he can contribute to society. Who can explain to him how to contribute? To cope? Male role models? Who should they be? Can anyone really show him?

B. The Absent African-American Father

It is not a secret that a significant number of African-American fathers are absent from participating in the development of their children. Their absence and unaccountability for raising their children places an undue

⁴⁶ Andrew Billingsley, *Black Families in White America* iii (1968).

⁴⁷ "We were poor as dirt. But at a certain hour I had to be home. . . . I credit my father. And the six or seven guys I hung out with, my buddies, they had smaller families, but they turned into zero. Tapped out. And they didn't have fathers." Nicholas Lemann, *The Origins of the Underclass*, *Atlantic Monthly*, July 1986, at 54, 55-56. The speaker and his nine siblings all made it out of the ghetto. *Id.* at 55.

burden on African-American mothers. It is a Herculean task to raise a child, alone, in a society which perpetuates the norm as a two-parent nuclear family with equal opportunity.⁴⁸ Essentially, although the nuclear family might not be the ideal form, it is popularly conceived as such. This puts additional pressure on mothers and children. We can try to change "the ideal," which will take time, but we can also try to relieve the current pressure.⁴⁹

Although "[B]lack women live with the necessity to educate their children about racism,"⁵⁰ can we educate our males about today's racism? Do we really know what lies ahead for them and what they are and will be confronted with?⁵¹ We do know that the probability, not possibility, of future incarceration for our male children is alarmingly high,⁵² although not quite as alarming as the rate at which they are dying.⁵³ Are we properly equipped today to do what we have always done:⁵⁴ raise our children?⁵⁵ Where are their fathers? They are either incarcerated,

⁴⁸ Under the concept of the extended family system, an absent father (male role model) is replaced by uncles, brothers, and cousins. However, the nuclear family structure (mother, father, children) is the acceptable "normal" family unit. Hale, *supra* note 21, at 59.

⁴⁹ By suggesting that the African-American father should assume some responsibility for his son and help guide him through the racial constructs in American society, I do not mean to imply that he is now automatically part of a "nuclear family."

⁵⁰ Martha R. Mahoney, *Whiteness and Women, in Practice and Theory: A Reply to Catharine MacKinnon*, 5 *Yale J.L. & Feminism* 217, 243 n.137 (1993).

⁵¹ See bell hooks, *Yearning: race, gender, and cultural politics* (1990).

⁵² More African-American youths are in the criminal justice system than in higher education; 20 billion dollars has been spent in the past few years building prisons mostly to house young African-American men. Rick Tetzeli, *Most Dangerous and Endangered*, *Fortune*, Aug. 10, 1992, at 78, 78.

⁵³ "In many American cities, young [B]lack men are a group in critical condition, growing up into lives of poverty, crime and early death." *Back to Square One*, *Time*, Aug. 26, 1991, at 23, 23.

⁵⁴ As Helmore and Laing point out:

Over the years, many single [B]lack women have successfully raised children—sometimes many children—and they have done so despite formidable obstacles. In the past, however, they were often aided by relatives and friends living in or near the home, who played an active role in helping to raise the children. But with [B]lack migrations to the cities, greater mobility, and the fragmentation that affects all segments of American society today, in many [B]lack communities the security and support of the extended family are largely things of the past.

Kristin Helmore and Karen Laing, *Exiles Among Us: Poor and Black in America—When Inner-City Poverty Pulls Families Apart*, *Christian Science Monitor*, Nov. 18, 1986, at 25-26.

⁵⁵ "Too much attention to father-absence, too much blame (for crime and violence and other social problems) laid at the feet of single mothers and too little

drugged, dying, or dead. Why have they gone? Why did they leave? There are innumerable ways to explain or justify their absence. Explanations could include economics, society, the governmental assistance system, and history.

Historically, African-American men have been denied the role of fatherhood:

Under the conditions of slavery, the American Black father was forcefully deprived of the responsibilities and privileges of fatherhood. The Black family's desire to remain together was subordinated to the economic interests of the slave-owning class. Only the mother-child bond continually resisted the disruptive effect of economic interests that dictated the sale of fathers away from their families. Not only did the practice of selling away fathers leave the Black mothers as the prime authority in the household, but whenever the Black male was present, he was not allowed to play the *normal* masculine role in American culture.⁵⁶

African-American women assumed the task of child-rearing, as well as most other domestic responsibilities:

In the plantation domestic establishment, the woman's role was more important than that of her husband. The cabin washers and rations of corn and salt pork were issued to her. She cooked the

acknowledgment of the contributions—even the heroism—of many of these husbandless parents." Dr. Mary Frances Berry, Chair of the U.S. Commission on Civil Rights and professor of American Studies at the University of Pennsylvania, quoted in William Raspberry, Reader Wants Praise For Single Mothers, *Tulsa World*, Jan. 19, 1994, at 15.

⁵⁶ Doris Y. Wilkinson and Ronald L. Taylor, *The Black Male in America* 176 (1977) (emphasis added). See also Na'im Akbar, *Chains and Images of Psychological Slavery* 28 (1984):

The African-American man was evaluated by his ability to endure strenuous work and to produce children. He was viewed by the slave master as a stud and a work horse. The stronger and more children he could sire, the greater the expansion of the master's slave-holdings and the greater was his financial worth. The more work the slave could perform, the greater the production, the greater were the profits that came to the master. African-American manhood was defined by the ability to impregnate a woman and the degree of his physical strength.

The virtues of being able to protect, support and provide for one's offspring, which is the cornerstone of true fatherhood, was not considered the mark of [this] man. In fact, the slave who sought to assert such rights for his offspring was likely to be branded as a trouble-maker and either punished or killed. After several generations of such unnatural treatment, the African-American man adapted and began to avoid the role of a true father.

meals, tended the vegetable patch, and often raised chickens to supplement the rations. If there was a surplus to sell, the money was hers. She made the clothes and reared the children. If the family received any special favors it was generally through her efforts.⁵⁷

African-American men were prevented from fulfilling their child-rearing responsibilities and were not a central component of the African-American family. Economics of the slave culture denied them the opportunity to participate as functional family members.

Perhaps African-American males left us because they could not protect us. There is adequate historical evidence that Black slave women were raped by white men.⁵⁸ African-American males were severely punished for their physical resistance to the rape of their women.⁵⁹ Economics as well as sexual behavioral norms that evolved after slavery played a significant role in the continued suppression of African-American males.

Governmental assistance programs have also contributed to the absence of fathers in the home. In order for a woman to receive governmental assistance for her dependent children, she has to show deprivation.⁶⁰ One such deprivation is the father's absence from the home.⁶¹ Because the fathers of their children are often unemployed, to insure their own financial stability, African-American women commonly declare the whereabouts, or even the identities, of the fathers "unknown."⁶²

Racism is another factor which plays a role in the disappearance of the African-American male: "[T]he main problem . . . is not [B]lack's attitudes about equality, but the condition of our lives because of racism."⁶³ Racial stereotypes and attitudes, which have been passed on from generation to generation,⁶⁴ prevent African-American males from

⁵⁷ Wilkinson and Taylor, *supra* note 56, at 176-77 (citing Maurice Davie, *Negroes in American Society* 207 (1949)).

⁵⁸ *Id.*

⁵⁹ "[T]he physical resistance of [B]lack males to the rape of their women was met with all the brutal punishment white society could muster." *Id.* at 178.

⁶⁰ See *Aid to Families with Dependent Children*, 42 U.S.C. § 602 (1988).

⁶¹ *Id.* See also Helmore and Laing, *supra* note 54, at 25, 26.

⁶² Forcing a mother to declare the whereabouts of the father may not be helpful, particularly in a case of domestic violence. See also Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 *Geo. L.J.* 1961 (1993) (a woman may elect not to identify the father because she does not want him involved in her family).

⁶³ John A. Powell, *Racial Realism or Racial Despair?*, 24 *Conn. L. Rev.* 533, 549 (1992). See also Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987); Nikki Giovanni, *Racism* 101 (1994).

⁶⁴ See Kimberlé Crenshaw, *Race, Reform, Retrenchment: Transformation and*

having a sense of value and self-worth. This lack of self-worth is eventually manifested in the negative contributions of these men to society. As Welsing suggests, "Blacks must discuss openly those means by which Black male . . . youth can be supported and developed maximally in order to counter the attack of white supremacy on Black male development and function."⁶⁵ In an effort to stop the cycle of increased violent conduct, the African-American father may be the crucial catalyst. He has traveled the path that lies ahead for his son.

In an interview with *20/20*, Nathan McCall discussed his childhood and troubled history as an example of the worthlessness of the life that Black youth are experiencing.⁶⁶ McCall's story begins with a discussion of him being bussed to a white school. He experienced a great deal of animosity and as a result was unable to concentrate on his studies. Because of the hostile environment and his falling grades, his mother returned him to a Black school. This was the first time he learned his place in the world; it was the beginning of his negativeness about himself and of his sense that his life lacked meaning. White America, he stated, should not be alarmed at today's violence, because "these are the consequences when you teach people to hate themselves."⁶⁷ You "carry out that self-hatred, killing someone else who is Black . . . is in a way killing myself."⁶⁸

Like so many African-American male youth today, Mr. McCall also sought the sanctity of the gang. McCall reflected on his boyhood identification with *Superfly*, a character in an exploitation film about African-Americans and drug abuse. *Superfly* sold drugs and presented an attractive way to earn money and enjoy the style of life that whites enjoyed. Just like today's African-American youth, Mr. McCall wanted to be a "Superfly" kind of Black man, the kind that no one would mess with, so he bought a gun. The gun gave him a sense of power: "[T]hat man doesn't know I can change it for him, I can make him disappear."⁶⁹ "Shooting someone for the first time was a sense of power—like an ejaculation."⁷⁰

Suggesting racial overtones for his subsequent incarceration, he contrasted the consequences of his shooting a Black man with his later

Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1370 (1988) ("Throughout American history, the subordination of Blacks was rationalized by a series of stereotypes . . .").

⁶⁵ Welsing, *supra* note 5, at 256.

⁶⁶ Interview with Nathan McCall, author of *Makes Me Wanna Holler: A Young Black Man in America* (1994), on *20/20* (Feb. 18, 1994).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

criminal activity of robbing a white business. He nearly killed the Black man and received thirty days. There was no bodily injury during the robbery yet he received twelve years.

Mr. McCall asserted that society does not take into consideration the fact that it is dealing with people who have no self-esteem and for whom life in general, even the lives of others, is of no value. He stated that "when I see the pattern, there is nothing wrong with Black men but something is wrong with the forces behind the pattern."⁷¹ "The Black man dies from rage—his own or someone else's. . . . If [Black men] see the world as I once did, they believed [sic] they had nothing to lose, including life itself. It made me wanna holler and throw up both my hands."⁷²

Mr. McCall's story is recounted to demonstrate how a significant number of African-American males view life. Their lives, and the lives of others, are of no value to them. In order to protect society from their continued destructive activity, drastic measures will have to be implemented. Worthlessness carries over from African-American father to son. This cycle must be broken. Perhaps one of the most important lessons to be taught to African-American male youth is how to cope with racism, because it will inevitably be a part of their lives. In addition, it must be demonstrated that their lives can have different conclusions than those of their forefathers.⁷³

⁷¹ Id.

⁷² Id.

⁷³ In addition to the proposal set out in this Article, I offer the following poem, Assata Shakur's "Affirmation," as solace to young African-American males:

I believe in living.
 I believe in the spectrum
 of Beta days and Gamma people.
 I believe in sunshine.
 In windmills and waterfalls,
 tricycles and rocking chairs.
 And i believe that seeds grow into sprouts.
 And sprouts grow into trees.
 I believe in the magic of the hands.
 And in the wisdom of the eyes.
 I believe in rain and tears.
 And in the blood of infinity.

I believe in life.
 And i have seen the death parade
 march through the torso of the earth,
 sculpting mud bodies in its path.
 I have seen the destruction of the daylight,
 and seen bloodthirsty maggots
 prayed to and saluted.

African-American males are dying, they are being incarcerated, and they are killing at alarming rates. They begin at a very young age. They appear to be in despair. What are we doing to break the cycle? Why not consider placing them in the same home environment as their fathers? Perhaps linking father with son will create a new sense of mutual responsibility: the responsibility of being a parent worthy of respect, and the responsibility of the child becoming a productive adult.

II. PLACEMENT IN THE BEST INTERESTS OF THE DELINQUENT AFRICAN-AMERICAN MALE

Custody issues generally arise during divorce proceedings. At the point of awarding the divorce decree, the state must then decide with whom children belong. At common law, custody was determined based on the idea that the natural parental responsibilities were those of the father. The father, being head of household, was responsible for the care, maintenance, education, and religious training of his children. Therefore, at common law, fathers had an absolute right to the custody of their minor children.⁷⁴

I have seen the kid become the blind
and the blind become the bind
in one easy lesson.
I have walked on cut glass.
I have eaten crow and blunder bread
and breathed the stench of indifference.

I have been locked by the lawless.
Handcuffed by the haters.
Gagged by the greedy.
And, if i know any thing at all,
it's that a wall is just a wall
and nothing more at all.
It can be broken down.

I believe in living.
I believe in birth.
I believe in the sweat of love
and in the fire of truth.

And i believe that a lost ship,
steered by tired, seasick sailors,
can still be guided home
to port.

Assata Shakur, *Assata: An Autobiography* 2 (1987).

⁷⁴ Porter v. Porter, 53 So. 546 (Fla. 1910).

Recently, however, courts have used various tests to determine custody. Courts have used the tender years presumption,⁷⁵ which promotes the assumption that women are ultimately responsible for children while men have the option to accept or deny the responsibility of caring for their children. The tender years presumption prefers placement of young children with their mothers. This reflects a societal belief that very young children need the nurturing of their mother.

The primary caretaker rule⁷⁶ has been used by courts to award custody of the child to the parent who has contributed the most to the child's welfare after birth.⁷⁷ The primary caretaker rule is generally favored by mainstream feminists who believe that women ultimately provide care for children.⁷⁸ Even if the father remarries, the new wife, and not the father, often becomes the primary caretaker. The test most widely accepted by the courts today, however, is the best interests of the child test.⁷⁹

The best interests test reflects a "preference for the child's well-being."⁸⁰ Harm to the child, rather than parental misconduct, should be the focal point in deciding which placement arrangement is in the child's best interests.⁸¹ Factors to be considered in deciding a child's placement should include economic well-being, physical health, and family setting.⁸²

⁷⁵ J.B. v. A.B., 242 S.E.2d 248 (W. Va. 1978).

⁷⁶ David M. v. Margaret M., 385 S.E.2d 912 (W. Va. 1989).

⁷⁷ See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727, 771 (1988) ("The only relevant inquiry should be which parent has already adapted his or her life and interests to accommodate the demands of the child."); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 Yale J.L. & Feminism 291, 294 (1992) ("[C]hildren should not be denied the care of loving, responsible parents simply because those parents are women.").

⁷⁸ See Sanford N. Katz, "That They May Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption, 8 J. Contemp. Health L. & Pol'y 123 (1992).

⁷⁹ Fineman, *supra* note 77.

⁸⁰ John Batt, *Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's Painter v. Bannister Jurisprudence*, 16 Nova L. Rev. 621, 622 (1992). But see Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. Davis L. Rev. 829, 834-35 (Spring 1989) (focusing on the child's interest as a component separate from the parents' interests increases the power of fathers in the placement process).

⁸¹ Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 Brook. L. Rev. 1213 (1991).

⁸² Batt, *supra* note 80.

"In theory, the best interest standard focuses on which parent can care for a child rather than which parent is unfit or at fault in the dissolution."⁸³ Theoretical results differ greatly from what happens in practice, and in practice, "some courts continue to consider fitness and fault under the best interest standard."⁸⁴ Courts should weigh adverse factors with all other relevant factors and determine whether a parent's condition will "have a substantial and lasting adverse effect on the best interests of the child."⁸⁵ Absent African-American fathers with social problems should be viewed in the same light.

The best interests of the child test is not restricted to use during a divorce proceeding, for it has been utilized in a variety of situations.⁸⁶ One example is the increasingly prevalent case of African-American children born to single women.⁸⁷ With African-American children, the issue of custody generally arises at the time of trouble: when the child is found on the streets, as a truant in the school system, as a delinquent or as a juvenile being tried as an adult.

Delinquents are generally removed from their mothers' homes and then become wards of the state. A minor is determined to be a delinquent based on his conduct and his need of treatment; if a minor in need of treatment commits an act other than murder, which if done by an adult would be a

⁸³ Penny Ladell Willrich, Joint Custody: Taking a Closer Look, *Nat'l Bar Ass'n Mag.*, Jan.-Mar. 1993, at 8.

⁸⁴ *Id.*

⁸⁵ *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979). The Supreme Court of California stated "[I]t is impermissible for the court to simply rely on that condition (physical handicap) as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child; rather, in all cases the court must view the handicapped person as an individual." After weighing all "relevant factors together, the court should then carefully determine whether the parent's condition will in fact have a substantial and lasting adverse effect on the best interests of the child." *Id.*

⁸⁶ See Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 *Issues L. & Med.* 283 (1991); Fineman, *supra* note 80, at 846 ("The very fact that so many different groups use the same best interest of the child standard to advocate . . . different conclusions about what ideal reforms would look like indicates that there are profound problems with the very articulation of the test.").

⁸⁷ Farley's statistics are illuminating:

By 1982 about one [B]lack child in five was living with a mother who had never married; among whites, about two percent of the children under age 18 were living with a mother who had never married. . . . [B]ecause of racial differences in rates of remarriage, [B]lack children who experience marital disruption are much more likely than similar white children to remain living with their mother only.

Reynolds Farley, *Blacks and Whites Narrowing the Gap?* 141 (1984).

crime, then he may be deemed to be a delinquent.⁸⁸ Even after a determination has been made that the minor is a delinquent, however, he is not treated as a criminal. The delinquent minor is adjudicated but not criminally charged unless he is certified as an adult. The purpose of having a special process for minors is to allow the state to provide rehabilitative treatment that is in the best interests of the individual child.⁸⁹ Because delinquents are generally fourteen years old or younger, the state has a substantial interest in rehabilitation. It has a responsibility to promote the safety and well-being of the minor as well as of society, whose interest is served in preventing future criminal activity. However, rehabilitation should take place in the least restrictive manner.⁹⁰

Nationally, African-American male youth in prison facilities exceed the percentage they represent in the general population.⁹¹ The problem is of such magnitude that states may receive federal funds for the purpose of "[a]ddressing efforts to reduce the proportion of juveniles detained or confined . . . who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population."⁹² The solution for over-representation is not necessarily to refrain from adjudicating young African-American males as delinquents, but to address their behavior. African-American male children tend to be adjudicated as delinquents because their conduct generally involves an assault against a person and the assault usually involves a weapon. The assault is also to a large extent against a peer—another African-American male youth. Because of the serious nature of the offense, removal from the custodial parent is considered when the child's welfare or the safety and protection of the public warrants it.⁹³

⁸⁸ See Uniform Juvenile Court Act §§ 2(2), 2(3), §29(b) (1987).

⁸⁹ *In re Gault*, 387 U.S. 1 (1967).

⁹⁰ See National Advisory Committee on Criminal Justice Standards and Goals: Juvenile Justice and Delinquency Prevention, Standard 14.1 (1976) [hereinafter National].

⁹¹ "Black youth make up approximately 12%-17% of the country's youth population but account for more than 50% of the nation's property crime arrests and more than one-third of all juvenile offenses involving violence." Jeffrey Fagan et. al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 *Crime & Delinq.* 224, 225 (1987). As an example, consider that in Oklahoma, of 136 juveniles certified as adults, 90 were incarcerated. Forty-six of those incarcerated were African-American, and of those 46, 45 were African-American males. *Equal Justice Under Law, A Report on the Over-representation of Minority Children in the Oklahoma Juvenile Justice System* (Sept. 1993) [hereinafter *Equal*].

⁹² 42 U.S.C. §§ 5601, 5665(a)(8) (Supp. 1993).

⁹³ *Id.* See also National, *supra* note 90; *J.K. v. State*, 228 N.W.2d 713 (Wis. 1975). The purpose of a disposition which recognizes the unique physical, psychological, and social characteristics and needs of juveniles, and which gives

Once the child is removed from the custody of his parent, the state, acting in its capacity as *parens patriae*, must determine placement based on careful consideration of the best interests and treatment needs of the child. Depending on the child's individual needs and the protective interests of society, disposition could involve any of the following: counseling the juvenile or his parents or guardians; putting him under supervision in his own home; placing him under custody of a probation officer; placing him with a friend or relative; transferring custody to a relative or to a county agency (for example, a camp, a state industrial school, a licensed child welfare agency); or placing him in a private institution.⁹⁴ Judges conduct broad inquiries into the delinquent's personality and family background, considering all past activities as well as future conditions.⁹⁵

In determining placement in the best interests of the African-American male delinquent, the court should consider as an additional option the possibility of placement with the African-American father. "Any parent [including a putative father] is entitled to custody of his or her child upon a showing that such an award will be in the child's best interest."⁹⁶ African-American male youth disproportionately comprise the residents of detention facilities for juvenile delinquents. Over-representation as a result of racism, bigotry, and a lack of cultural interaction have been discussed.⁹⁷ African-American male delinquents have been detained longer, certified more frequently as adults, and placed in custody outside the home more often than any other ethnic group, and yet the criminal activity by this group continues to escalate.⁹⁸ A lack of positive male role models as well as gang association are possible roots of the problem. If racism is at the core, compounded by gang association and the absence of role models, it

juveniles access to opportunities for normal growth and development, is to protect society, deter negative conduct, maintain the integrity of the substantive law proscribing certain behavior, and contribute to the proper socialization of the juvenile.

⁹⁴ See Fineman, *supra* note 77, at 770. See also *In re Jose P.*, 101 Cal. App. 3d 52 (1980); *Egan v. S.J.*, 304 N.W.2d 685 (N.D. 1981).

⁹⁵ See, e.g., *In re Groves*, 376 S.E.2d 481 (N.C. 1989).

⁹⁶ Frances P. Solari, *Custody of the Illegitimate Child*, 18 N.C. Cent. L.J. 18, 28 (1989). See also *Stanley v. Illinois*, 405 U.S. 645 (1972) (upon the death of the mother, the putative father was entitled to a hearing on fitness prior to terminating his parental rights); *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down a statute which permitted unmarried mothers, but not unmarried fathers, to block the adoption of their child). But see *Parham v. Hughes*, 441 U.S. 347 (1979) (a putative father who had not legitimated his child was not entitled to an award in a wrongful death action for his illegitimate son. The Court used a rational basis analysis and reached this conclusion because of the state's interest in preventing fraudulent wrongful death claims.).

⁹⁷ *Equal*, *supra* note 91, at 50.

⁹⁸ *Id.*

appears that fathers can assist young African-American males to form a better understanding of the racism perpetrated against them. African-American fathers can serve as the role models so desperately needed and can displace gang association with a real sense of cohesion through the family unit. However, the absent father may also be part of the problem. Therefore, placement with him should be facilitated like any other placement option: it should be taken into consideration during the determination for disposition.

Various questions have been raised about the lifestyles of African-American fathers. In particular, their disproportionately high rates of incarceration, drug usage, criminal activity, and unemployment have been of much concern to most of society. Although a court should take these factors into consideration when deciding placement, "[a] parent's lifestyle cannot be the sole factor by which his or her morality is judged,"⁹⁹ and therefore should not be the determining factor in deciding placement.

In assessing the appropriateness of placement with the African-American father, the viewpoints of the child's mother should weigh heavily. A single mother who has knowledge of abuse by the father, or for other reasons does not think it is in her son's best interests to be placed with his father, should have the power to assist in the decision-making process. In these cases, a placement decision which is truly in the best interests of the child must include the mother in the decision-making process.

III. THE AFRICAN-AMERICAN FATHER AS NURTURER FOR HIS DELINQUENT SON

"[T]hings women tend to stereotypically do for children . . . are grouped under the term 'nurture.'"¹⁰⁰ What is nurturing? What is it that women do for children? "Nurturance has most often been associated with femininity. Indeed, it is usually called 'mothering' rather than 'parenting' because of the . . . assumption that fathers simply do not parent."¹⁰¹ Fathers are generally seen as economically useful, rather than having some

⁹⁹ *Snyder v. Snyder*, 429 N.W.2d 234, 237 (Mich. Ct. App. 1988) (discussing whether moral fitness should affect visitation).

¹⁰⁰ Fineman, *supra* note 80, at 842 (although potentially a choice for men and women, nurturing, as a "decisional valve," is devalued because it is a task traditionally performed by women).

¹⁰¹ Jerry W. McCant, *The Cultural Contradiction of Fathers as Nonparents*, Fam. L. Q., Spring 1987, at 127. See also Alan M. Levy, *Fathers and Custody Determination*, Fairshare, Sept. 1992, at 3 ("It almost seems as if to be a parent one must be a woman.").

psychological significance for the family.¹⁰² The fact is that fathers do nurture, albeit in a manner different from that of mothers.¹⁰³

It is easy for society to accept that fathers should be forced to pay financial support, but difficult for society to force fathers to assume "care" support. Should fathers be held accountable for the care of their children?¹⁰⁴ Or as the question is phrased within this context, should African-American fathers be forced to assume the care of their sons once their sons are within the criminal justice system? Are there basic necessities that only African-American fathers can give to their sons?

In the first scene in the movie *Boyz N the Hood*, prior to any dialogue, it was immediately understood by the predominately Black audience why the African-American mother took her teenage son to live with his African-American father. The teenage son had reached the age of bonding with other men, and in his community, the bonding was with gangs. The mother took her son to live with his father so his father could teach him how to survive as an African-American male in America in the '90s. She recognized certain ills in society that her son would be confronted with, and she did not know how to prepare him for them. She knew that the road facing her son had been traveled by his father, and that he was better-equipped than she was to prepare their son for his ultimate survival.

The "'hood" is not a fictional community; it is real. An African-American male youth is faced with the problems of the 'hood each day. His survival, just like the survival of members of the general population,

¹⁰² See Levy, *supra* note 101.

¹⁰³ Alan Gurwitt, *Why Children Need Their Fathers: Understanding Developmental Needs*, Family Advocate, Winter 1993, at 18, 20 ("Fathers nurture too, though some aspects of the nurturing may be different [than the mother's]."). See also Alan M. Levy, *Debunking Myths: The Indispensable Role of Fathers*, Family Advocate, Winter 1993, at 30, 32 ("A father's style of nurturing is not merely that of a mother substitute or 'wife-mirror.'"); A.B.A., *Infants of Primary Nurturing Fathers*, Psychoanalytic Study of the Child, Vol. 38 (1983); K.D. Pruett, *Two Year Follow-Up Study of Primary Nurturing Fathers in Intact Families*, address before the Second World Congress of Infant Psychiatry (1983).

¹⁰⁴ See Susan Chira, *Novel Idea Welfare Plan: Helping Children by Helping Their Fathers*, N.Y. Times, Mar. 30, 1994, at A10:

[The Clinton administration] grapples for the *first* time with needs of a group usually pushed to the periphery of the welfare system: unwed low-income fathers. Staking a claim to welfare reform and family values, the Administration wants to train these men for jobs while giving them a sense of responsibility as fathers. The goal is to involve them in their children's lives and increase what the fathers can earn in order to help them lift their children out of poverty.

(emphasis added).

depends on whether he is prepared to confront these problems. Instruction by his father, a previous traveler, may be his only survival mechanism.¹⁰⁵

The question will be raised, though, about the abilities of their fathers if they are dope dealers, users, robbers, or murderers. In 1980, the Illinois Supreme Court held in the case of *Abdullah v. Lasumba* that the fact that a father was a murderer was not sufficient for him to be declared unfit.¹⁰⁶ In that case, the father's conduct was of an extreme nature. If the court could determine that his act of murder, without more, does not automatically determine him to be an unfit parent,¹⁰⁷ then certainly courts should be open to consider placement with African-American fathers who do not conform to other societal ideals. Courts should consider this option in an effort to break the cycle of decline of African-American males. As an alternative to placement with the father, courts could also become more open to placement with other, even non-related, African-American males.

IV. FORCED PARENTAGE IS NOT NEW

Courts usually consider custody arrangements for parties who have cared for or have had some degree of contact or bonding with their children.¹⁰⁸ Absent African-American fathers may not have been involved in such caretaking, or developed such bonds with their male children, but they should be given an opportunity to parent because of the special needs of their sons. In determining placement, a full consideration of the individual needs of the child is paramount. African-American male children need role models to guide and assist them in their development. All children need such guidance. However, as demonstrated earlier in this

¹⁰⁵ Admittedly, in some cases there may be a need to educate these fathers about "mothering." "[B]ecause of the historic removal of Black fathers from homes, classes are needed to promote high-level functioning of Black males in their roles as fathers." Welsing, *supra* note 5, at 256.

¹⁰⁶ *Abdullah v. Lasumba*, 400 N.E.2d 1063 (Ill. App. Ct. 1980). The trial court had found Abdullah unfit by reason of depravity and sentenced him to 60 years in prison. The Illinois Appellate Court, notwithstanding the sentence, granted Abdullah a new trial, and held that additional evidence must be presented and proven by clear and convincing evidence before a parent can be declared unfit. The assistant state attorney who testified at the custody hearing had not presented such additional evidence of heinousness and wanton cruelty.

¹⁰⁷ The Illinois Supreme Court found sufficient evidence of depravity from Abdullah's conviction of murder and 60-year prison sentence, and from the fact that the murder victim was the child's mother.

¹⁰⁸ See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

Article, African-American children, especially males, are in greater need of assistance with their growth.

In light of the endangered status of the African-American male child, the state's interest is of greater significance when making decisions as to the placement of this child. The state has an interest in promoting the welfare of its children, even those in the juvenile justice system.¹⁰⁹ The juvenile justice system was created as a forum to respond to a child's individual needs. The fundamental goal was, and continues to be, rehabilitation. Placing the child in an environment that will encourage his maturation should therefore be the court's first priority. Such placement could rehabilitate both father¹¹⁰ and son in their abilities to cope with the ills of society. Placement with the father, even if the father is absent or if placement is forced on the father, should be carried out upon a determination that it is in the best interests of the child.¹¹¹

Forced parentage is not new.¹¹² The state in several areas has forced parents to "parent" their children. For example, state truancy laws force parents to assume parenting responsibilities for their children and allow the state to impose civil or criminal sanctions on the parents or guardians for failing to do so.¹¹³ A second example of forced parenting involves state

¹⁰⁹ "The child . . . was to be made 'to feel that he is the object of [the state's] care and solicitude, not that he was under arrest or on trial.'" *In re Gault*, 387 U.S. 1, 15 (1967).

¹¹⁰ See Chira, *supra* note 104.

¹¹¹ An argument could be made that this connotes joint custody. See Fineman, *supra* note 77, at 768 ("[S]ome feminists argue for joint custody because they view it as a means of ensuring that men take equal responsibility for their children.").

¹¹² Forcing African-American men to parent their sons, for the survival of their sons, may be seen as another first, but perhaps not a negative first. As stated by Haki Madhubuti,

[I]n the United States Black men are still involved in the establishment of significant firsts, such as: first jailed, first killed in the streets, first underemployed, first fired, first confined to mental institutions, first imprisoned, first lynched, first involved with drugs and alcohol, first mis-educated, first denied medical treatment, first in suicide, first to be divorced, first denied normal benefits of this country, first to be blamed for 'Black' problems—indeed, Black men are the *first* victims.

Madhubuti, *supra* note 29, at 69. See also hooks, *supra* note 17, at 75 ("Seeing themselves [Black men] solely as victims, or potential victims, they may be blind to all that they have accomplished.").

¹¹³ See Cal. Educ. Code § 48260.5 (West 1994) (requiring parents to compel the attendance of their children and subjecting them to prosecution for failure to do so); Nev. Rev. Stat. Ann. § 392.210 (Michie 1993) (any parent or guardian who has control or charge of a truant child and was given notice of the child's prior truancy is guilty of a misdemeanor); Ohio Rev. Code Ann. § 3321.19 (Anderson 1993) (requiring parents who fail to compel their children to attend school to attend special "parental"

requirements that parents pay a fee for the child's supervision in a state juvenile delinquent institution.¹¹⁴ Such statutes effectively require parents in this situation to pay for failing to properly supervise their children.

The city of Los Angeles, in enforcing criminal penalties for parents of "known gang members," reflects this trend of connecting parental responsibility to conduct of their minor children.¹¹⁵ In an effort to protect communities from the rise in juvenile crimes, communities want parents to control their children. The increase in violent activity by our youth prompts an urgent need for parents to parent.

Additionally, states have begun to implement forced parentage through the issuance of curfew ordinances.¹¹⁶ For example, the city of Miami recently issued curfew ordinances forcing children off the streets before and after certain hours of the day.¹¹⁷ Curfews have been enforced in an effort to prevent drug use and sexual contact, as well as to protect minors' vulnerability to crime after dark.¹¹⁸

Generally, the states' curfew statutes have held up to constitutional challenge.¹¹⁹ However, several arguments have been raised that parental

education program); S.D. Codified Laws Ann. § 13-27-16 (1994) (parents of truant children will be reported to truant officer); Utah Code Ann. § 53A-11-103 (1994) (parents of truant children will receive truancy citations).

¹¹⁴ Ariz. Rev. Stat. Ann. § 8-241 (1994).

¹¹⁵ Frank E. Harper, *The Socio-Economic Struggle for Equality to Kill the Messenger: The Deflection of Responsibility Through Scapegoating (A Socio-Legal Analysis of Parental Responsibility Laws and the Urban Gang Family)*, 8 Harv. BlackLetter J. 41, 44 (1991).

¹¹⁶ See Haw. Rev. Stat. § 577-16.5 (1994) (parents or guardians may be required to participate in counseling for child's violation of curfew); Ill. Rev. Stat. ch. 720, para. 555/1 (1994) (parent or guardian is guilty of petty offense for child's violation of curfew); N.H. Rev. Stat. Ann. § 31:43-g (1993) (parents or guardians shall be guilty of a misdemeanor for their child's second offense in violating curfew); N.J. Rev. Stat. § 40:48-2.52(b)(c) (1994) (parents or guardians may be required to perform community service or be subject to a fine for allowing their child to violate curfew); Or. Rev. Stat. § 419.680 (1993) (prohibits parents from allowing minors to violate curfew).

¹¹⁷ Dade County, Fla., Curfew Ordinance 94-1 (effective Feb. 17, 1994). The ACLU challenged the ordinance in *Stanley Fred v. Dade County*. On June 6, 1994, Dade Circuit Judge Norman Gerstein presided over a hearing and issued an 18-page order striking down the ordinance as unconstitutional. As of January 5, 1995, the appeal is pending. It is interesting that Miami's curfew did not apply to homeless minors. What is the real interest here?

¹¹⁸ *Brown v. Ashton*, 611 A.2d 599, 608 (Md. 1992).

¹¹⁹ See *Village of Deerfield v. Greenberg*, 550 N.E.2d 12 (Ill. 1990); *Allen v. City of Bordentown*, 524 A.2d 478 (N.J. 1987); *City of Eastlake v. Ruggiero*, 220 N.E.2d 126 (Ohio Ct. App. 1966); *City of Panora v. Simmons*, 445 N.W.2d 363 (Iowa 1989). But see *Wadsworth v. Owens*, 536 N.E.2d 67 (Ohio 1987) (curfew ordinance violated minors' First Amendment right to attend midnight mass services); Toni Weinstein, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental*

guidance statutes violate the child's right to be raised by his family because the state forces parents to impose on the child the "state's conception of the liberties children should be granted."¹²⁰ Some courts have maintained that a determination that children lack the ability to make proper judgments at night does not justify the restriction of a child's constitutional rights.¹²¹

Although the scenarios previously mentioned involve forced parentage by custodial parents or guardians, the same practice can be imposed upon non-custodial parents. In *Hodgson v. Minnesota*,¹²² the Court held that a statute requiring a woman under the age of eighteen to notify both parents prior to obtaining an abortion was constitutional, since it allowed for judicial bypass of the notification requirement. In upholding the statute, the Court did not distinguish between custodial and non-custodial parents for purposes of notification. Requiring such notification could place a non-custodial, absent father in the position of parenting. The focal point in *Hodgson* was not the status of the parent, but rather the best interests of the minor. The same reasoning should apply in considering forced parentage by the African-American father in the context of a disposition proceeding for his delinquent son. In this case, the court should focus on the best interests of the African-American male delinquent, rather than on the custodial status of the parent.

In determining placement, courts should consider the father's amenability, ability, and aspirations to parent. Certainly there would be strict guidelines directing this analysis. The foster care system could serve as a model upon which to develop appropriate guidelines and criteria for placement. For example, in the foster care programs, the foster parents often must take parenting classes and make their homes child-proof before receiving a child. For the duration of the foster care placement, foster parents are subject to periodic review by state agencies. The same

Liability Statutes, 64 S. Cal. L. Rev. 859 (1991) (The mother of 15-year-old rape suspect was arrested for failing to properly supervise her minor child; criminal charges were subsequently dropped because mother had attended parenting classes. Weinstein asserts that this arrest put parents and guardians on notice of the potential of being criminally liable for the acts of their children. It is argued that the statutes warranting the arrests are unconstitutional because punishment for being a "bad" parent unconstitutionally punishes parents based on their status, that imprisoning parents for their child's acts is cruel and unusual punishment, and these arrests infringe upon parents' fundamental rights to privacy in their family life as well as in rearing their children.).

¹²⁰ Note, Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and The Constitution, 97 Harv. L. Rev. 1163, 1180 (1984).

¹²¹ Peter L. Scherr, The Juvenile Curfew Ordinance: In Search of a New Standard of Review, 41 Wash. U. J. Urb. & Contemp. L. 163 (1992).

¹²² 497 U.S. 417 (1990).

procedures could apply to placements of African-American male juveniles with their fathers.

V. CONCLUSION

In light of the decline of African-American male children and their need for male role models, forcing their fathers to assume custody and therefore to "parent" should be an option taken into consideration in determining the best placement of the child. If African-American male youth are not placed in an environment that meets their particular needs, their dysfunctional development is inevitable. There must be a resurrection of the African-American male or the African-American male species will cease to exist as a functioning part of society. Recognizing that African-American male children are in great despair and are in need of assistance from their fathers for their development is not anti-feminist, nor is it a reflection on the ability of their mothers to parent. Furthermore, considering the placement of these children with their fathers as a potential solution would not impair the parental rights of their mothers. This is particularly true at the dispositional stage, when the child is in the custody of the state. At this stage, the mother should be integrated into the decision-making process. She should be allowed to alert the court to any adverse conditions, such as domestic violence, substance abuse, or child molestation. In such extreme situations, she should be given the opportunity to prevent her child's placement with his father.

Although this Article presents a very grim picture for African-American males, it also presents a workable mechanism for their survival. President Clinton's timely financial assistance proposal to unwed fathers provides support services that will enable the forced parenting setting to be operational. Both my solution and President Clinton's proposal suggest that the problem is serious, but workable if these "fathers are motivated to take fatherhood seriously" ¹²³

¹²³ See Chira, *supra* note 104.