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# What Men?: The Essentialist Error of the End of Men

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# WHAT MEN?: THE ESSENTIALIST ERROR OF THE “END OF MEN”

NANCY E. DOWD\*

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## INTRODUCTION

Many aspects of *The End of Men*<sup>1</sup> are debatable. Among them is the critical issue of essentialism: do Rosin’s claims about women withstand scrutiny when we ask, “Is this representative of all women?” While women as a group may have progressed in some domains, they have remained the same or worse in others, and some women have not progressed at all.<sup>2</sup>

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\* Professor and David H. Levin Chair of Family Law; Director, Center on Children and Families, University of Florida Fredric G. Levin College of Law. I appreciate the invitation to present this work at the Boston University School of Law Conference, “Evaluating Claims About the ‘End of Men’: Legal and Other Perspectives,” on October 12-13, 2012. I am grateful for the outstanding research assistance of Lauren Januzzi.

<sup>1</sup> HANNA ROSIN, *THE END OF MEN: AND THE RISE OF WOMEN* (2012); see also Hanna Rosin, *The End of Men*, ATLANTIC, July/Aug. 2010, at 56.

<sup>2</sup> See, e.g., Stephanie Coontz, *The Myth of Male Decline*, N.Y. TIMES, Sept. 29, 2012, at SR1 (“[M]en still control the most important industries, especially technology, occupy most of the positions on the lists of the richest Americans, and continue to make more money than women who have similar skills and education.”); see also Philip N. Cohen, *Still a Man’s World: The Myth of Women’s Ascendance*, BOS. REV., [http://www.bostonreview.net/BR38.1/philip\\_cohen\\_hanna\\_rosin\\_end\\_men\\_liza\\_mundy\\_sex\\_gender\\_equality\\_feminism.php](http://www.bostonreview.net/BR38.1/philip_cohen_hanna_rosin_end_men_liza_mundy_sex_gender_equality_feminism.php) (last visited Mar. 13, 2013) (“So many people continue to be so attached to this narrative of women’s rapid advance in the labor force that they haven’t noticed there has been no advance in almost two decades: women occupied between 46 and 47 percent of the labor force every year from 1994 through 2011, the last year for which we have data. This stagnation undermines Rosin’s . . . account[], in which continuous and fast-paced change is not just taking us toward equality but beyond it.”).

An even more significant shortcoming of *The End of Men*, however, is its essentialism about men. Rosin assumes a beginning, namely, men's prior place of power and privilege in the domains she addresses. To assume that is true of all or most men ignores significant differences among men; it makes the argument one that predominantly focuses upon white middle- and upper-class men and women.<sup>3</sup> Further, it ignores a fundamental aspect of male dominance: it is not only about the relationship of all men to all women, but just as important, it is about the relationship of men to each other.<sup>4</sup> By rendering this male hierarchy invisible, Rosin excludes those men at the bottom of the hierarchy, suggesting a false, or at least limited, perspective on men's position as a whole. Indeed, her argument reinforces male hierarchy by ignoring persistent subordination that benefits only those men at the top of the patriarchal heap. The end-of-men argument, then, recasts hegemony.

To illustrate this point, I focus on one group of males excluded by this essentialism: black boys. Although Rosin's argument implicitly is about adult males, the basis for some of her argument of decline in position or change in status is grounded in differentials between girls and boys.<sup>5</sup> That argument assumes a historic and contemporary position of power, privilege, and dominance by men in critical domains.<sup>6</sup> The subordinated position of many adult black men, grounded in a history of oppression and violent victimization,

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<sup>3</sup> See Hanna Rosin, *Who Wears the Pants in This Economy?*, N.Y. TIMES, Sept. 2, 2012 (Magazine), at 22 ("In the last decade, men, especially working-class and middle-class men, have had very different experiences in this economy from the women around them."). Every story in this 2012 *New York Times* Sunday magazine cover article (excerpted from the book) was about white men. By the same token, none of the women pictured in Rosin's 2010 article appear to be African American. In Rosin's book, both women and men are predominantly white. See generally ROSIN, *supra* note 1. Of the women profiled by name in the book, only one is African American. See *id.* at 53 ("Beverly, an African-American executive in Washington, DC, [was] fed up with her couch-potato husband."). One chapter at the end of the book focusing on Korea ("The Gold Misses") profiles Korean women and men. See ROSIN, *supra* note 1, at 231. In the index to the volume, African Americans are listed as having seven pages in the volume; with the subtopics included, the total is eleven pages out of 276. There is but a single reference to Latinos in the entire book. See *id.* at 180, 305. White or European Americans, though the primary focus of the book, are not a category in the index. See *id.* at 303, 310. The sole substantive comment on African Americans, in a chapter called "The New American Matriarchy," is as follows: "The whole country's future could look much as the present does for many lower-class African-Americans: The mothers pull themselves up, but the men don't follow. First-generation college educated white women may join their black counterparts in a new kind of middle class, where marriage is increasingly rare." *Id.* at 94.

<sup>4</sup> NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 216 (2010).

<sup>5</sup> For example, Rosin discusses the difference between boys and girls in terms of educational performance. See ROSIN, *supra* note 1, at 161.

<sup>6</sup> The domains Rosin focuses on in her book are education and employment, and to a lesser degree, family. See *infra* note 9.

belies that claim.<sup>7</sup> My argument here is that the contemporary position of adult black men is grounded in the undermining of opportunity and harsh repression of black boys.

For most black boys, privilege and dominance in the sense Rosin assumes have almost never been present in their lives. Part I explores the context of the lives of black boys. I include in this description the systems that subordinate rather than support them. Although in theory these are "helping" systems, designed to assist children and families or to foster development, they actually function to collectively funnel children, and black boys in particular, toward outcomes that undermine opportunity. Part II considers where this context leads us and what is needed. I identify the levels of inequalities present in the lives of black boys. In addition, I suggest that the criminalization and stigmatization of black boys and men as "dangerous" serves continued white male hegemony. This conclusion challenges at a deep level the assumptions and arguments Rosin makes in *The End of Men*.<sup>8</sup> Part III explores several theoretical frameworks that I believe could be helpful in ensuring social justice and individual opportunity for black boys. These include masculinities theory, critical race theory, and vulnerabilities theory. In addition to raising questions critical to the analysis of boys and men, these frameworks also suggest we should ask who benefits from the argument made in, and the attention given to, *The End of Men*.

#### I. THE CONTEXT OF BLACK BOYS: FUNNELING TOWARD SUBORDINATION

*The End of Men* focuses on women's status and comparative position, particularly with respect to employment, education, and to some extent, family (or the combination of work and family).<sup>9</sup> Its core claim is not only that women are surpassing men in these domains, but that the reason why this is so is that women are better suited to the needs and challenges of life in the twenty-first century.<sup>10</sup> Thus, the book argues, the dominance of men is over; essentially, patriarchy is done.<sup>11</sup> Rosin's 2012 book expands on her 2010 article<sup>12</sup> of the same name and includes new chapters on sexuality and violence. Despite these additions, the book remains focused on its core thesis: women's adaptation and rise in education and employment, and men's concurrent resistance, stagnation, and decline. "Our vast and struggling middle

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<sup>7</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 31-32 (2012); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1044-45 (2010).

<sup>8</sup> It also suggests that adjusting our focus with respect to boys and men should lead us to question how we view girls and women in Rosin's book.

<sup>9</sup> ROSIN, *supra* note 1, at 94, 108-09, 117, 145.

<sup>10</sup> *Id.* at 263.

<sup>11</sup> *Id.* at 10-11.

<sup>12</sup> Rosin, *supra* note 1.

class . . . is slowly turning into a matriarchy,” Rosin proclaims, a “mismatch between tradition-minded men and forward-marching women.”<sup>13</sup> She describes this difference by comparing “Plastic Woman” and “Cardboard Man.” Plastic Woman is flexible, adaptable; Cardboard Man, on the other hand, “hardly changes at all.”<sup>14</sup> Rosin writes:

A century can go by and his lifestyle and ambitions remain largely the same. . . . For most of the century men derived their sense of manliness from their work, or their role as head of the family. . . . Some decades into the twentieth century, those obvious forms of social utility started to fade. . . . They lost the old architecture of manliness, but they have not replaced it with any obvious new one. . . . As a result men are stuck.<sup>15</sup>

Rosin presumes an essentialist truth that all men benefitted by patriarchy to some degree, but that this entitlement has changed, moving us toward a new hierarchy: a matriarchy.<sup>16</sup> What this presumption ignores, among other things, is how the old hierarchy included a hierarchy of men. By largely ignoring that hierarchy, it reinforces it. Rosin misses how the patriarchy reconstitutes itself both by sustaining power over women as well as by hierarchies among boys and men. By attributing to men stereotypes about masculinity that suggest men are slow or unable to change, she ignores the structural and cultural factors that subordinate men at the bottom of male hierarchy while constructing a world of choice and equality that does not exist. At the same time, Rosin ignores the persistence of male dominance and power over women as well as the persistence of hegemonic masculinity by writing off patterns of male dominance as the dying gasp of patriarchy, rather than the reconstruction of male power.

Male hierarchy is raced, classed, and gendered on the basis of sexual orientation.<sup>17</sup> At the bottom of the male hierarchy are black males. Their disadvantaged position is reflected in virtually every measure of wellbeing. “With respect to health, education, employment, income, and overall wellbeing, all of the most reliable data consistently indicate that Black males constitute a segment of the population that is distinguished by hardships, disadvantages, and vulnerability.”<sup>18</sup> One of the most powerful and horrific statistics about black males is the number who will experience incarceration in their lifetime: one in three.<sup>19</sup> This pattern begins in the juvenile justice system.

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<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 8-9.

<sup>16</sup> Any doubt about this is clarified in her article, *Who Wears the Pants in This Economy?*, where the answer to the question posed in the title is “Women.” This answer presumes the replacement of patriarchy. Rosin, *supra* note 3.

<sup>17</sup> DOWD, *supra* note 4, at 28.

<sup>18</sup> PEDRO A. NOGUERA, *THE TROUBLE WITH BLACK BOYS AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION*, at xi (2008).

<sup>19</sup> See Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race,*

Disproportionate minority confinement (DMC) is rampant at every stage of the system, and manifests not only in the disproportionate concentration of black boys but also in the disproportion of harsher outcomes for them at each decisionmaking point.<sup>20</sup> Accordingly, more black boys and other boys of color come into the system, more go deeper in the system, and the consequences for them are harsher.<sup>21</sup> In the words of one judge, we have a "dual system of juvenile justice in this country, one track for white adolescents, a separate and unequal one for black adolescents."<sup>22</sup>

Presence in the juvenile justice system, particularly at the "deep end" of the system, has harsh consequences. Going forward, it is linked to depressing employment and education statistics and the likelihood of a fragile family structure.<sup>23</sup> Presence in the system also predicts future involvement with the adult criminal justice system.<sup>24</sup> Working backward, it connects to an even more disturbing picture. The so-called "helping systems" put in place to help and support children are not only inadequate, but also appear to actively funnel black boys in particular into an end result that will lead to lost opportunity on a massive scale.<sup>25</sup> The most egregious, but certainly not the only, aspect of this systemic picture is the education system, the primary opportunity structure for children as they develop. The high school graduation rate for black boys is fifty-two percent; accordingly, roughly one in two black boys fail to graduate from high school.<sup>26</sup> Black boys have the highest rate of exclusion from school, and the greatest likelihood of referral from school into the juvenile justice system.<sup>27</sup> This profound inequality verges on exclusion of black boys, not by

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*Incarceration, and Wage Growth*, 58 SOC. PROBS. 257 (2011).

<sup>20</sup> Nancy E. Dowd, *Introduction to JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM* 1, 3 (Nancy E. Dowd ed., 2011).

<sup>21</sup> Kenneth B. Nunn, *The Black Nationalist Cure to Disproportionate Minority Contact*, in *JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM*, *supra* note 20, at 135, 136.

<sup>22</sup> Honorable Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 489 (2005) (citing Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)).

<sup>23</sup> See Dowd, *supra* note 20, at 5.

<sup>24</sup> *Id.* at 1.

<sup>25</sup> NICOLE TAYLOR & CHRISTINE B. SIEGFRIED, NAT'L CHILD TRAUMATIC STRESS NETWORK, *HELPING CHILDREN IN THE CHILD WELFARE SYSTEM HEAL FROM TRAUMA: A SYSTEMS INTEGRATION APPROACH* 21 (2005) ("Many systems' stakeholders recognize the importance of helping systems communicate more efficiently in the process of helping a child and his or her family deal effectively with trauma.")

<sup>26</sup> SCHOTT FOUND. FOR PUB. EDUC., *THE URGENCY OF NOW: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 13-15* (2012), available at [www.blackboysreport.org/urgency-of-now.pdf](http://www.blackboysreport.org/urgency-of-now.pdf).

<sup>27</sup> See Christine A. Christle et al., *Breaking the School to Prison Pipeline: Identifying School Risk and Protective Factors for Youth Delinquency*, 13 EXCEPTIONALITY 69, 83 (2005).

“killing the black body,”<sup>28</sup> but by steadily stripping them of opportunity and physically restraining them in the juvenile and adult criminal justice systems.

Compared to a “normal” developmental trajectory for children and young adults, the life course of black boys is not a picture of support and resources devoted to individual development and movement toward adulthood. Rather, it appears to reflect a systematic effort to undermine and subordinate.<sup>29</sup> But this is not a new reality; rather, it is linked to a long history of inequality and subordination based on race and gender. We need not go back very far in time to find instances of outright, legally enforced segregation in every aspect of life, including education, employment, and housing; public lynchings and violence against black communities; and prohibited, criminalized racial intermarriage and harsh consequences for violating perceived sexual lines.<sup>30</sup> If we return to a contemporary focus, the data and measures on virtually every subject Rosin discusses evidence some racial progress, but also troubling, persistent racial differentials that continue to challenge our ideal of equality.

#### A. *The Early Years: Poverty, Income Support, and Child Welfare*

For black boys, the differential begins at birth. Black males have the highest risk of death in the first year of life.<sup>31</sup> Things do not improve with age. In fact, due to the high rate of black homicide, black males are unique among demographic groups in that they have a declining life expectancy.<sup>32</sup> Homicide is the leading cause of death for black males between the ages of fifteen and twenty-four.<sup>33</sup>

A significant number of black boys are born into circumstances with known risks, poverty in particular.<sup>34</sup> One in three black children lives in poverty, twice

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<sup>28</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

<sup>29</sup> See John F. Chapman et al., *Violence Risk and Race in a Sample of Youth in Juvenile Detention: The Potential to Reduce Disproportionate Minority Confinement*, 4 *YOUTH VIOLENCE AND JUV. JUST.* 170, 181 (2006) (“[A]dults are responsible for most of the risk factors for violent juvenile behaviors.”).

<sup>30</sup> See VANN R. NEWKIRK, *LYNCHING IN NORTH CAROLINA: A HISTORY, 1865-1941*, at 4-5 (2009); Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 *HOW. L.J.* 229 (1998); William Tucker, *Zoned Out*, 22 *REASON* 27 (1990).

<sup>31</sup> NOGUERA, *supra* note 18, at 17.

<sup>32</sup> *Id.* at xv.

<sup>33</sup> John A. Rich & Courtney Grey, *Pathways to Recurrent Trauma Among Young Black Men: Traumatic Stress, Substance Use, and the “Code of the Street,”* 95 *AM. J. PUB. HEALTH* 816, 816 (2005).

<sup>34</sup> Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmary: Equal Protection, Child Poverty and Place*, 71 *MONT. L. REV.* 1, 17-18 (2010) (“The study revealed that ‘half of all rural poor are segregated in high poverty areas,’ while rates of concentration are even greater for minorities.” (quoting DANIEL T. LICHTER & DOMENICO PARISI, *CARSEY INST., CONCENTRATED RURAL POVERTY AND THE GEOGRAPHY OF EXCLUSION 1* (2008))). The

the rate of white children.<sup>35</sup> The impact of this statistic cannot be underestimated: according to one study, the impact of poverty is more deleterious than early drug exposure.<sup>36</sup> "The myriad consequences of child poverty include hunger and poor nutrition, as well as inferior health and education outcomes."<sup>37</sup> Poverty impacts early development, which is critical to later functioning. Poor children are less likely to develop cognitive and academic skills and, accordingly, enter kindergarten at a disadvantage.<sup>38</sup> They are unlikely to have high-quality childcare or attend good schools that will attend to or eliminate that gap.<sup>39</sup> In addition, the available health care for poor children, Medicaid, is riddled with inadequacies that result in the poorest children having the greatest likelihood of no coverage.<sup>40</sup>

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federal poverty line is set both by individual and by family. In 2007 for a family of four, the figure was \$21,203 and \$10,590 for an individual. *Id.* at 16.

<sup>35</sup> Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 59 (2012) ("Children born into poor families suffer a lifetime of negative consequences and children of color are more than twice as likely to be impoverished than their white counterparts.").

<sup>36</sup> NOGUERA, *supra* note 18, at 21; *see also* Steven H. Hobbs & Shenavia Baity, *Tending to the Spirit: A Proposal for Healing in the Hearts of Black Children in Poverty*, 26 B.C. THIRD WORLD L.J. 107, 110-14 (2006) (describing the negative consequences of childhood poverty with respect to health, education, and living conditions). Additional effects are housing inadequacy and homelessness; higher likelihood of birth with low birthweights; and stress, with its attendant impact on families and family relationships. *Id.*

<sup>37</sup> Pruitt, *supra* note 34, at 22. Developmental differences emerge by age two and are evident when children enter school, particularly with respect to math skills. Birkhead, *supra* note 35, at 59. Hunger or "food insecurity," as well as poor nutrition, is a problem. Pruitt, *supra* note 34, at 22. Poor health care is linked to both delay in seeking care because of its high cost and the subsequent use of expensive emergency room care. *Id.*

<sup>38</sup> *See* Douglas D. Ready, *Socioeconomic Disadvantage, School Attendance, and Early Cognitive Development: The Differential Effects of School Exposure*, 83 SOC. EDUC. 271, 271 (2010) ("Perhaps the least disputed conclusion to emerge from educational research over the past half-century is that socioeconomically disadvantaged children are less likely to experience school success. Low-income students enter kindergarten academically behind their more advantaged peers[,] . . . and these initial cognitive differences increase as children progress through school.").

<sup>39</sup> Pruitt, *supra* note 34, at 23 ("A child who enters kindergarten significantly lacking school readiness skills is unlikely to close the consequent readiness gap, even if the child is later lifted out of poverty."); *see also* CHILDREN'S DEF. FUND, CHILD POVERTY IN AMERICA 4 (2008), available at <http://www.childrensdefense.org/child-research-data-publications/data/child-poverty-in-america.pdf>; Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes*, 1136 ANNALS N.Y. ACAD. SCI. 243, 244 (2008).

<sup>40</sup> Karl Kronebusch, *Children's Medicaid Enrollment: The Impacts of Mandates, Welfare Reform, and Policy Delinking*, 26 J. HEALTH POL. POL'Y & L. 1223, 1224-25 (2001) ("Since the implementation of welfare reform, children's Medicaid enrollment has declined, especially among the very poorest families who were likely to have been eligible through



Low economic circumstances therefore affect family, neighborhood, childcare, and parenting. “[Y]outh from low socioeconomic backgrounds generally come to school with weak preacademic skills. These students begin school at a disadvantage and are more likely to experience academic failure. Peer and community risk factors . . . also may contribute.”<sup>41</sup> Some of the factors that lead to the achievement gap begin *as early as age three*.<sup>42</sup> The creator of a model designed to assess the developmental competencies of minority children has observed that school does not exist in a vacuum, nor do children.<sup>43</sup> This model takes into account “the role of critical aspects of social position, racism, and segregation in the environment of the minority child.”<sup>44</sup> For example, a black child’s “relative disadvantage [may include] aspects of neighborhood (social disorganization), family (less income, more authoritarian attitudes, and less verbal stimulation) and schooling (teachers with lower expectations)” that can disadvantage him in comparison to a white child.<sup>45</sup>

The income-support and child-welfare systems provide assistance for children both in terms of economic assistance to families and intervention in instances of family breakdown, abuse, and neglect. Both systems are racialized, provide inadequate services, and in the case of child welfare, arguably exacerbate bad outcomes for children.

The income-support system is grounded in a history that first excluded, and later demonized, black women.<sup>46</sup> Reforming the system, or “end[ing] welfare

welfare.”). Medicare remains tied to the inadequate income-support system.

<sup>41</sup> Christle et al., *supra* note 27, at 70 (citation omitted).

<sup>42</sup> Margaret Burchinal et al., *Examining the Black-White Achievement Gap Among Low-Income Children Using the NICHD Study of Early Child Care and Youth Development*, 82 CHILD DEV. 1404, 1404 (2011) (“Black children in the U.S. start school about one half of a standard deviation behind their White peers on standardized reading and mathematics tests, and racial disparities in school achievement increase by about one tenth of a standard deviation during each year of school. . . . [T]he achievement gap is a developmental process that unfolds in the years prior to school entry and then is acted on by school experiences.” (citations omitted)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1405.

<sup>45</sup> *Id.* at 1405-06. School does not exist in a vacuum. The model, attributed to Cynthia Garcia Coll and her colleagues, “was designed to help researchers better study the developmental competencies of racial minority children.” *Id.* at 1405.

<sup>46</sup> See generally Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647 (2005) (providing a history of the system, which excluded black women well into the twentieth century, then implicitly identified those on welfare in derogatory, racialized ways, for example, as “welfare queens”). White women disproportionately were placed in a separate system by putting widows in a separate program providing higher benefits. *Id.* at 1667. Large numbers of black women were kept off welfare well into the 1960s by administrators who deemed them unworthy. *Id.* at 1668. As the proportion of African American mothers and children increased, derogatory stereotypes increased, and mothers were blamed for their poverty. *Id.* at 1669. Only bad mothers – that is, black mothers – would not marry or work.

as we know it,"<sup>47</sup> has meant reform of a structure perceived as having undeserving black women and black children as its primary beneficiaries. Reduced income support is due to five primary changes: (1) shifting primary responsibility to the states and allowing them to mold their own programs; (2) ending income support as an entitlement, so benefits can be denied even to qualifying individuals; (3) funding benefits by block grants that reduce the amount of federal dollars given to states; (4) requiring states to put a percentage of their caseload to work; and (5) strongly discouraging states from providing benefits to families for more than five years.<sup>48</sup>

These changes did little to alleviate poverty. The benefit level provides inadequate support to raise families' income above the poverty line, and is time-limited. "Current TANF benefits, combined with food stamps, still amount to less than the poverty level in every state; in fact, the median TANF benefit for a family of three is approximately one-third of the poverty level."<sup>49</sup> This contrasts sharply with the Social Security benefits children receive when they lose parents due to death.<sup>50</sup> The number of poor has risen while the number of people receiving benefits has declined.<sup>51</sup> If poverty is a reality for one in three black children, then the income-support system does nothing to change that reality.

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*Id.* at 1672-73. Professor Onwuachi-Willig is critical of efforts to "remedy" poverty with pro-marriage policies and explains that the marriage cure does not work. She argues in favor of an expansive notion of family and dealing with real problems of poverty, observing also the impact of incarceration and lack of opportunity for urban black men. *Id.* at 1686 (citing WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 3-24 (1996)); see also MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 227 (1995); Lisa A. Crooms, *The Mythical, Magical "Underclass": Constructing Poverty in Race and Gender, Making the Public Private and the Private Public*, 5 J. GENDER RACE & JUST. 87, 94 (2002); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); Dorothy Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 874 (1994).

<sup>47</sup> Press Release, President Bill Clinton, Remarks by the President at National Forum on Welfare to Work (Aug. 3, 1999), available at <http://clinton2.nara.gov/WH/New/html/19990803.html>.

<sup>48</sup> Jasmin Sethi, *Lessons for Social Scientists and Politicians: An Analysis of Welfare Reform*, 17 GEO. J. ON POVERTY L. & POL'Y 5, 9-11 (2010).

<sup>49</sup> *Id.* at 6.

<sup>50</sup> In 2010 children under the age of eighteen that received survivor benefits from Social Security received an average of \$747 per month. SOC. SEC. ADMIN., PUB. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 2011, at 5.52 tbl.5.F6 (2012), available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2011/supplement11.pdf>.

<sup>51</sup> Sethi, *supra* note 48, at 6. Sethi focuses on the subgroup that will have difficulty obtaining and keeping work. The gap between the need for benefits and their availability contrasts sharply with the system's expectation that individuals should and must work.

Like the income-support system, the child-welfare system also is racialized. There are a disproportionate number of black families who are system-involved, and a disproportionate number of black children who are separated from their families and placed into foster care. "African Americans are more likely to be investigated for maltreatment, are more likely to have a child placed in foster care, spend more time in foster care, and are less likely to achieve family reunification."<sup>52</sup> Importantly, the greatest number of cases the child-welfare system addresses involve neglect, not abuse. Neglect cases constitute approximately sixty percent of the basis for removal.<sup>53</sup> In other words, system involvement is strongly linked to poverty. The known risks associated with poverty may trigger stresses that bring families into the child-welfare system, and greater oversight and intervention makes it more, not less, likely that the outcome will be unfavorable to the child.

Roughly fifteen percent of all children are black, but black children represent thirty-one percent of the foster-care population, and this disproportion to white children increases dramatically in cities. In Chicago, for example, eighty percent of foster-care children are black.<sup>54</sup> The same disproportion does not exist for Latino or Asian children. Separation is simply more common for black children; it seems they are more easily removed from their families.<sup>55</sup> Poverty does not provide an easy or simple explanation for such racial disproportion. At the same time, what cannot be ignored is that the

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<sup>52</sup> Joseph P. Ryan et al., *Maltreatment and Delinquency: Investigating Child Welfare Bias in Juvenile Justice Processing*, 29 CHILD. & YOUTH SERVICES REV. 1035, 1047 (2007); see also Denise C. Herz et al., *Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism*, 48 FAM. CT. REV. 305 (2010) (discussing disproportionate minority contact in both child-welfare and the juvenile justice system, while examining the crossover of children from one system to the other).

<sup>53</sup> See ANDREA J. SEDLAK ET AL., U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 5 (2010).

<sup>54</sup> Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 604-05 (2011). For detail on disproportionate outcomes in the reporting of child abuse and use of the category "emotional mistreatment," see *id.* at 606 n.160. See also Leslie Joan Harris, *Challenging the Overuse of Foster Care and Disrupting the Path to Delinquency & Prison*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 20, at 62.

<sup>55</sup> King, *supra* note 54, at 608. On child welfare and racialization in the system, see generally ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS (2007); RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM (Dennette M. Derezotes et al. eds., 2005); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); and Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983). For a controversial critique of DMC in child welfare, see Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

child-welfare system is one that primarily focuses on poor families and children. Class, in addition to race, is a powerful factor in this system, and the two are frequently entangled.<sup>56</sup> Accordingly, poverty does not explain the disproportion, but does link to the most common basis for system involvement, neglect.

The outcomes for children in the child-welfare system are bleak. Of all children in the system, black children are the least likely to be reunited with their parents and the least likely to be adopted.<sup>57</sup> Moreover, greater separation of children from their families means a higher likelihood of later involvement in the delinquency system.<sup>58</sup> This risk is increased if there is placement instability, placement with relatives, or school suspension. On the other hand, one study shows that strong attachment and involvement with religious organizations decreases the risk of delinquency.<sup>59</sup> Given the limitations of the

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<sup>56</sup> For a powerful analysis of class in the child-welfare and other systems, see generally Birckhead, *supra* note 35.

<sup>57</sup> King, *supra* note 54, at 612 n.178. The poor outcomes for children in care are economic, educational, and psychological. See Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 661 (2006) ("Even if eventually reunified with a biological parent or placed in an adoptive home, children who were once in foster care typically suffer economic, educational, and psychological hardship."). The system does not help, but rather contributes to poor outcomes. *Id.* at 662.

<sup>58</sup> Birckhead, *supra* note 35, at 70. Children taken out of the home are twice as likely to end up in the delinquency system as those who remain at home and receive services, and are also more likely to recidivate than children in the juvenile justice system. *Id.* at 70-71. William Armaline makes the same point, looking particularly at the overlap between the child-welfare and juvenile justice systems: "Overlapping, seemingly benign institutions employ 'color blind' policies and practices that systematically place these young populations 'of color' in detention – sometimes indefinitely, often without any criminal charge or conviction, and all (ironically) under the guise of 'child protection.'" William T. Armaline, *Human Rights Abuses and Systemic Racism Through the Criminalization of Survival: An Ethnographic Exploration of Juvenile Detention in a New England City* (2007) (unpublished Ph.D. dissertation, University of Connecticut) (on file with University of Connecticut Digital Commons). He calls this "criminalization of survival," especially when the state places children removed from their homes in state institutions. *Id.* at 1. There are links between poverty, maltreatment, and crossover into the juvenile justice system; truancy is the most common status crime for boys. Learning disabilities and emotional disturbance are warning signs for later juvenile justice involvement. The type of maltreatment makes a difference for boys, with educational neglect being the most important negative factor. Youth of color are more likely to be petitioned for status or delinquent offenses. See Charlotte Lyn Bright & Melissa Johnson-Reid, *Onset of Juvenile Court Involvement: Exploring Gender-Specific Associations with Maltreatment and Poverty*, 30 CHILD. & YOUTH SERVICES REV. 914, 924 (2008).

<sup>59</sup> Joseph P. Ryan et al., *African American Males in Foster Care and the Risk of Delinquency: The Value of Social Bonds and Permanence*, 87 CHILD WELFARE 115, 120 (2008).

system, negative outcomes seem predictable.<sup>60</sup> This is particularly confounding given that there are alternatives to separation that would provide support for many families and improve outcomes for some children.<sup>61</sup>

The risks associated with poverty might be alleviated by a host of interventions. The systems we have do not alleviate the burden and consequences of poverty, nor do they intervene effectively in instances of maltreatment. Both systems are highly racialized. The lack of effective, positive intervention makes school the most powerful system that affects children's future opportunities and development. Particularly with respect to black boys, however, it is an institution that causes harm rather than fostering growth or providing support. The pattern of disproportionate racial outcomes in the first years of life becomes a raced *and* gendered pattern at school.

### B. *School: Gendering the Racial Gap*

For black males, school is not a place of education and opportunity. Instead, it is a place that significantly undermines opportunity and pushes black males into the juvenile justice system. Pedro Noguera writes:

Throughout the United States, Black males are more likely than any other group in American society to be punished (typically through some form of exclusion), labeled, and categorized for special education (often without apparent disability), and to experience academic failure . . . . [T]he failure of Black males is so pervasive that it appears to be the norm and so does not raise alarms.<sup>62</sup>

The data is so stark that one scholar concludes, "Unexplained by family structure, poverty, or culture, [the data] reveal widespread institutional and personal racism."<sup>63</sup>

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<sup>60</sup> See Melissa Jonson-Reid & Richard P. Barth, *From Placement to Prison: The Path to Adolescent Incarceration from Child Welfare Supervised Foster or Group Care*, 22 CHILD. & YOUTH SERVICES REV. 493, 494 (2000).

<sup>61</sup> For a discussion of ways to help families without separating children from their parents, see King, *supra* note 54, at 613 n.181. See also Harris, *supra* note 54; Shani M. King, *Owning Laura Silsby's Shame: How the Haitian Child Trafficking Scheme Embodies the Western Disregard for the Integrity of Poor Families*, 25 HARV. HUM. RTS. J. 1 (2012).

<sup>62</sup> NOGUERA, *supra* note 18, at xvii.

<sup>63</sup> Theresa Glennon, *The Stuart Rome Lecture: Knocking Against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL'Y 10, 11 (2002). Black boys are overrepresented in failure, and underrepresented in success and education, as demonstrated by: the achievement gap, presence in gifted classes, Advanced Placement courses, graduation rates, presence in college, placement in lower tracks, and special education representation. *Id.* at 14-35. Glennon points to three main issues:

First, African American boys are much more likely to be identified as disabled or delinquent than other children, including African American girls. Second, they are more likely than other children to be placed in educational, mental health, and juvenile justice programs that exert greater *external* control and deliver fewer services despite identified needs. Third, these negative experiences lead African American boys to stay

Black males are "physically marginalized" in basements, detention, and special classes where no learning takes place, as well as generally "psychologically and socially isolated."<sup>64</sup> Separation reinforces failure; it does not cure behavioral or other problems.<sup>65</sup>

The racial achievement gap is persistent.<sup>66</sup> Even more disturbingly, it begins early. The gap in achievement is measurable by age three. For many children, especially children of color,<sup>67</sup> school is unlikely to close the gap because their schools are poorly funded and underperforming. We are clear about what causes schools to fail:

[T]he denial of adequate educational services sets up many students for failure. Overcrowded classrooms, racially and socioeconomically isolated environments, a lack of effective teachers and school leaders, and insufficient funding for "extras" such as counselors, special education services, and even text books lock too many students into second-rate educational environments.<sup>68</sup>

On the other hand, what makes a difference is equally clear: "high-quality preschool; highly effective teachers; support for students with disabilities and mental health issues, including access to guidance counselors, school psychologists, and well-trained special educators; effective instruction for English language learners; reasonable class sizes; safe and healthy facilities; school libraries; and up-to-date college-bound curriculum and curriculum resources."<sup>69</sup>

Achievement gaps for black boys seem particularly linked to pervasive and powerful stereotypes about their capabilities. "Black males are portrayed by the mass media in a limited number of roles, most of them deviant, dangerous,

away from or exit these institutional settings. These statistics are stark and disturbing. Unexplained by family structure, poverty, or culture, they reveal widespread institutional and personal racism.

*Id.* at 11.

<sup>64</sup> NOGUERA, *supra* note 18, at xx.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 8-9.

<sup>67</sup> CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 34 (2010).

<sup>68</sup> *Id.* at 1.

<sup>69</sup> *Id.* at 17-18. Characteristics of schools have an impact on students' success. This seems rather elementary, yet we do not require that schools meet standards for success. For example, "schools that provide positive structure, along with high-quality academic programs and consistent, schoolwide, proactive behavior programs may counteract the risks for delinquency that youth may be exposed to, especially the school-related risks of academic failure, suspension, and dropout." Christle et al., *supra* note 27, at 87. The characteristics of schools and their relation to crime and disorder is well established. See Philip J. Cook et al., *School Crime Control and Prevention*, 39 CRIME & JUST. 313, 316-17 (2010). Positive approaches that minimize well-known risks associated with academic failure, exclusion, and drop-out are available. See Christle et al., *supra* note 27, at 83.

and dysfunctional.”<sup>70</sup> Young black males are commonly stereotyped by the five “Ds”: dumb, disadvantaged, delinquent, deviant, and disturbed.<sup>71</sup> These stereotypes are linked to an overall assumption of dangerousness associated with black males, which translates into negative treatment. “Most often, Black men have been regarded as individuals who should be feared because of their uncontrolled and unrefined masculinity. And their very presence . . . has been regarded as a menace . . . and a potential danger to the social order. They are a threat that must be policed, controlled, and contained.”<sup>72</sup> This reaction to perceived danger becomes noticeable as black boys begin to transition from young children to young men. One scholar identifies this as the “fourth-grade” phenomenon, when disciplinary rates begin to climb disproportionately for black boys.<sup>73</sup>

The pattern of disproportionate discipline of black males<sup>74</sup> begins in elementary school.<sup>75</sup> Factors that contribute to this pattern include lack of teacher preparation for working with diverse learners, gender and cultural gaps between a predominantly white female teaching staff and black boys, the devaluing of patterns of language and usage of African American boys, sharply contrasting cultural preferences for physical and verbal behavior, and inappropriate use of specific instructional strategies.<sup>76</sup>

Discipline is particularly tied to the perception that black boys are more aggressive. In addition there are disturbing links between students who have the greatest needs and those most likely to be disciplined,<sup>77</sup> a mismatch of

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<sup>70</sup> Seymour Bryson, *Relationship Between Race and Attitudes Toward Black Men*, 26 J. MULTICULTURAL COUNSELING & DEV. 282, 284 (1998) (citing J.T. GIBBS, YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES 2 (1988)).

<sup>71</sup> *Id.* “Researchers have come to recognize that they have operated from a ‘deficit’ model concerning African American boys. The research literature generally ignores the many black boys who function well in high-risk environments, and they and their families are usually described in terms of pathology.” Glennon, *supra* note 63, at 28.

<sup>72</sup> NOGUERA, *supra* note 18, at xi.

<sup>73</sup> The critical age is nine or ten, when black boys begin physically to look like young men. This is when their decline in school and adverse treatment intensifies, in what Noguera calls the “fourth-grade syndrome.” *Id.* at 42.

<sup>74</sup> DMC appears in discipline as early as elementary school. Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the “School-to-Jail” Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 640 (2011).

<sup>75</sup> NOGUERA, *supra* note 18, at 6, 119 (discussing the early implementation of intense disciplinary regimes in schools serving disproportionately high numbers of students who struggle academically).

<sup>76</sup> Glennon, *supra* note 63, at 19-20.

<sup>77</sup> See Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28-29, 31 (2003); *id.* at 6-7 (quoting 145 Cong. Rec. S9025 (daily ed. July 22,

needs and responses to those needs. For example, children who are harassed, bullied, or suffer from abuse or neglect are more likely to be disruptive or perform poorly academically.<sup>78</sup>

At the extreme, in-school discipline results in suspension or expulsion, both of which lack empirical support as means to improve behavioral or academic outcomes.<sup>79</sup> "Exclusionary discipline practices, such as suspension, interfere with [] educational progress and perpetuate a failure cycle, decreasing the opportunities to gain academic skills and appropriate social behaviors."<sup>80</sup> Discouragement along with the effect of discipline leads to high dropout rates, which are disproportionate by race.<sup>81</sup> On the other hand, keeping kids in school "reduces the probability of crime, arrest, and incarceration."<sup>82</sup>

Discipline may also lead to out-of-school consequences. There is an increasing use of arrest as a form of school discipline<sup>83</sup> for behavior that in the past would have been handled within school.<sup>84</sup> In addition to the consequences

1999) (statement of Sen. Wellstone)).

<sup>78</sup> NOGUERA, *supra* note 18, at 113. Catherine Kim and her coauthors have traced the rates of suspension by race and gender. Between 1973 and 2006, the annual rate of suspension of African American children in public education increased from six percent to fifteen percent. KIM ET AL., *supra* note 67, at 2. Moreover, during the same period African American children went from being twice as likely as white children to be suspended, to being three times as likely. *Id.* Note that all data indicates that exclusion from school is harmful, not helpful. *See id.* at 3. They also report:

In 2002-2003, the risk of suspension for African American males was nearly 18 percent, as compared to just over 7 percent for white males. . . . [M]iddle-school suspension rates for minority students are consistently over 20 percent, and in many cities it is not uncommon for over half the African American males to have been suspended at least once in a given year.

*Id.* These children are referred to the juvenile justice system for even minor infractions, including talking back, disrupting class, loitering or trespassing on school grounds. *Id.* at 122-23.

<sup>79</sup> Tulman, *supra* note 77, at 37.

<sup>80</sup> Christle et al., *supra* note 27, at 70 (citing Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL. 59 (1998)).

<sup>81</sup> KIM ET AL., *supra* note 67, at 1.

<sup>82</sup> *See* Cook et al., *supra* note 69, at 316.

<sup>83</sup> KIM ET AL., *supra* note 67, at 112.

<sup>84</sup> Sarah Farmer, *Criminality of Black Youth in Inner-City Schools: 'Moral Panic', Moral Imagination, and Moral Formation*, 13 RACE ETHNICITY & EDUC. 367 (2010) (discussing the high rate of oversight and criminalization of schools, as shown through the extensive use of dog sniffs, drug tests, and metal detectors); *see also* KIM ET AL., *supra* note 67, at 112. "There has also been an important trend in the official response to school crime. It has become increasingly formal over the last 20 years, with greater recourse to arrest and the juvenile courts rather than school-based discipline – a trend that has been dubbed the 'criminalization' of student misbehavior." Cook et al., *supra* note 69, at 314.



of juvenile justice system involvement, the impact of arrest on children is devastating:

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.<sup>85</sup>

Some of the reasons children do poorly in school or trigger disciplinary actions are related to mental health issues.<sup>86</sup> To the extent that is the case, in theory disability laws should protect students and provide necessary supports in order for them to learn and succeed. But to the contrary, the failure of the school and mental health systems to provide such support is profound, and here as well the disproportionate racial pattern is stark.<sup>87</sup> The failure to address learning disability and mental health issues means that there is a disproportionate number of individuals with mental health disabilities who end up in the child-welfare and juvenile justice systems.<sup>88</sup> Failure of schools to recognize children's education-related disabilities leads to overrepresentation of children with such disabilities in the delinquency system: roughly fifty percent of the children in the juvenile justice system have learning or mental health issues.<sup>89</sup>

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<sup>85</sup> KIM ET AL., *supra* note 67, at 113. "Classmates who witness a child being arrested for a minor infraction may develop negative views or distrust of law enforcement." *Id.*

<sup>86</sup> Children who are not identified early fall behind a grade or two, develop behavioral problems in middle school, may be involved in substance abuse, and, even if identified at this point, may fail to get services or lack access to appropriate services. Tulman, *supra* note 77, at 28-29, 31.

<sup>87</sup> Tulman, *supra* note 77, at 4-5.

<sup>88</sup> *Id.* at 3. For discussion of the inadequacies of the mental health system, see Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305 (2005). To the extent services are provided, most are through schools, and those in greatest need are least served. *Id.* at 1321.

<sup>89</sup> Tulman, *supra* note 77, at 4; *see also supra* note 2 and accompanying text. There are a disproportionate number of African American children, especially males, who suffer from learning disabilities; who, as a result of those disabilities, end up in the juvenile justice system; and who, as a result of their placement, ultimately are underserved through poor educational outcomes. *Id.* at 4-5 & n.3; *see also* Joseph C. Gagnon & Brian R. Barber, *Preventing Incarceration Through Special Education and Mental Health Collaboration for Students with Emotional and Behavioral Disorders*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 20, at 82. In the delinquency system, children often fail to get services, reintegration is difficult, and they also experience problems with probation, judges, and school personnel. *See* Tulman, *supra* note 77, at 29-31, 66, 70-72 (discussing examples of such failure, and some of the systemic failures and misconceptions that lead to such problems).

On the other hand, failure to identify mental health needs is not the only problem. Overidentification of learning disabilities leads to diverting children into marginalized educational settings. Misidentification means that real needs are not served. Inadequate services lead predictably to behavior problems, discipline, and delinquency issues.<sup>90</sup> With respect to mental health, we have an odd and perverse picture: children have less access to mental health services, but are more likely to be referred to an inadequate public mental health system – a problem similarly reflected in the healthcare system.<sup>91</sup> In the most severe cases, when children are in crisis, they may end up institutionalized as “boarder kids” until the system finds a way to treat them.<sup>92</sup> It is ironic and perverse that juvenile justice system involvement is the trigger to provide some, albeit often inadequate, mental health services for children.<sup>93</sup>

Children of color, particularly boys, are more likely to be overidentified, and misidentified, with disabilities and mental health issues.<sup>94</sup> The overrepresentation of children of color in mental health and learning disability categories is an underresearched phenomenon. Conduct problems are a strong predictor for arrest, but the overidentification of conduct disorder is equally troublesome. Signs of conduct disorder should generate intervention. Low

<sup>90</sup> See, e.g., Glennon, *supra* note 63, at 41 (discussing how inadequate mental health care perpetuates racial biases and thus contributes to delinquency); Tulman, *supra* note 77, at 4 (discussing generally the negative effects of inadequate services); Weithorn, *supra* note 88, at 1321-23 (discussing the hazards and effects of inadequate mental health care on children).

<sup>91</sup> See W. John Thomas et al., *Race, Juvenile Justice, and Mental Health: New Dimensions in Measuring Pervasive Bias*, 89 J. CRIM. L. & CRIMINOLOGY 615 (1999).

<sup>92</sup> Lois Weithorn describes the challenges faced by this group of children:

[L]arge numbers of families have been unable to access mental health care for their children and turn elsewhere when they or others in the community reach their breaking points. Many children in emotional crisis end up in hospital emergency rooms. They remain there, or are transferred to non-psychiatric medical wards, where they wait – sometimes for hours, sometimes for days – until the recommended services become available. Their appearances in these settings are sufficiently frequent that writers have coined a phrase to describe them: “boarder kids.”

Weithorn, *supra* note 88, at 1309.

<sup>93</sup> Glennon, *supra* note 63, at 11.

<sup>94</sup> KIM ET AL., *supra* note 67, at 53-54 (discussing the overrepresentation of blacks in referrals for evaluation, and the subsequent excessive placement of the same children in overly restrictive special education programs). In addition, there is the failure to correctly identify the difference between overidentification of mental retardation and emotional disturbance among African American and other minority students, and underidentification of learning disabilities in those populations. Tulman, *supra* note 77, at 26 (suggesting that the disproportion in overidentifying, misidentifying, and underserving African American children calls for a focus on a combination of racial- and disability-based discrimination theories). For a discussion on the lack of care for children of color and the use of emergency systems as an entry point, see Lonnie R. Snowden et al., *Ethnic Differences in Children's Entry into Public Mental Health Care via Emergency Mental Health Services*, 18 J. CHILD & FAM. STUD. 512 (2009).

academic performance is another risk factor where intervention would make sense.<sup>95</sup> But the pattern in schools is not one of intervention but rather of discriminatory labeling or failure to identify needs, coupled with separation and exclusion, or criminalization, all of which funnels a disproportionate number of black boys into the juvenile justice system.<sup>96</sup>

C. *Juvenile Justice: The Injustice System*

Black males are more likely than any other demographic group to be involved in the criminal justice system, beginning with the juvenile justice system.<sup>97</sup> Both the adult and juvenile systems are designed around the assumption that it is boys and men who are in the system.<sup>98</sup> Black males have the highest rates of arrest, conviction, and incarceration.<sup>99</sup> A remarkable number are incarcerated for nonviolent offenses or probation violations. “A quarter of all children placed in secure confinement after being adjudicated juvenile delinquent were charged with violent offenses; 22 percent were incarcerated as a result of a technical violation, and 6 percent were confined due to a status offense.”<sup>100</sup> Probation seems designed to conflict with everything we know about juvenile development. “Approximately 42% of all persons released from prison or jail into parole or probation supervision eventually are returned to confinement.”<sup>101</sup> Probation is a particularly problematic part of the system, given that so many offenders are there for relatively minor offenses.<sup>102</sup>

DMC is present throughout the system, reflected in disparate and harsher treatment, as well as disproportionate and unnecessary entry and penetration into the juvenile justice system.<sup>103</sup> DMC is not due to differential offending.<sup>104</sup>

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<sup>95</sup> Paula J. Fite et al., *Explaining Discrepancies in Arrest Rates Between Black and White Male Juveniles*, 77 J. CONSULTING & CLINICAL PSYCHOL. 916, 924 (2009).

<sup>96</sup> Glennon, *supra* note 63, at 10-11.

<sup>97</sup> *Id.* at 11 (“African American boys are much more likely to be identified as disabled or delinquent than other children, including African American girls.”).

<sup>98</sup> See Dowd, *supra* note 20, at 4.

<sup>99</sup> NOGUERA, *supra* note 18, at 17.

<sup>100</sup> KIM ET AL., *supra* note 67, at 128.

<sup>101</sup> Fortunato, *supra* note 22, at 510.

<sup>102</sup> *Id.* (pointing out that probation has the effect of sending violators, mostly on probation for nonviolent offenses such as substance abuse, to prison without a full criminal trial).

<sup>103</sup> Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 530 (2009). DMC has been extensively studied but little has changed; James Bell and Laura John Ridolfi identify this as “adoration of the question.” JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 2 (2008). They point to historic segregation of black children on the basis of devaluation and the belief that such children are not worth saving. *Id.* at 3. This express race policy of the historic system remains embedded. *Id.* They also point out that there are

Race, class, and neighborhood are critical to one's likelihood of being arrested.<sup>105</sup>

Michelle Alexander has detailed the configuration of the adult system, including the statistic that in Washington, D.C., three of every four black men can expect to be imprisoned in their lifetime, and this rate of incarceration is common in other areas as well.<sup>106</sup> The drastic consequences of the adult criminal justice system begin in the youth system. "Two-thirds of all youth in public detention facilities today are youth of color – though they represent only 39 percent of the overall youth population – who are still treated more harshly even when charged with the same offense as White youth."<sup>107</sup> Thus, the

strategies to address DMC; we are still asking the same questions, and little has changed, although there have been some pockets of change. *Id.* at 11, 13-15 (discussing suggested reforms, the problems of implementation, and the final stage of stalled movement in which society continues to adore the question without answering it). There are effective violence prevention programs that are empirically substantiated. Soler et al., *supra*, at 489-90. Prosecution of children in adult court is "ineffective and . . . counter-productive." *Id.* at 498.

<sup>104</sup> DAVID HUIZINGA ET AL., DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM: A STUDY OF DIFFERENTIAL MINORITY ARREST/REFERRAL TO COURT IN THREE CITIES 41 (2007), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/219743.pdf>. In a report prepared for the Department of Justice in 2007, the authors found that DMC exists, the rate of offending does not explain it, and risk factors yield mixed results which also do not explain it. DMC can be substantially reduced by considering the effect of risk factors, which include the type of neighborhood, family economic status, family structure, age of mother at first birth, and youth educational problems. *Id.* at ii. Race, social class, and neighborhood are also predictors of contact with the justice system. *Id.* at 43.

The evolution of a harsher and more punitive system has its origins in the 1970s with a study by Robert Martinson who argued that no prison reforms had worked. Soler et al., *supra* note 103, at 484 (citing Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974)). This influential article became known as the "nothing works" position; and if nothing works, the solution is to lock people up to protect society. *Id.* at 484-85. In the 1990s the argument emerged that based on demographic data, there would be a surge of teenagers, and they would be "super-predators." *Id.* at 486. It turned out both of these claims were wrong. *Id.* But the damage was done; in particular, "super-predator" became "a code word for young Black males." *Id.* at 487 (quoting Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 712 (2002)). Thus, out of these two ideas come policies that are "tough on crime," including boot camps with no empirical basis for the effectiveness of such policies and resulting in higher recidivism. *See id.* at 488.

<sup>105</sup> HUIZINGA ET AL., *supra* note 104. There is a higher risk of arrest if one is older and black. Michael J. Leiber & Joseph D. Johnson, *Being Young and Black, What Are Their Effects on Juvenile Justice Decision Making?*, 54 CRIME & DELINQ. 560, 570 (2008) (detailing the outcome of a study showing that older, black youths had a higher rate of court referral compared to whites and younger offenders).

<sup>106</sup> *See* ALEXANDER, *supra* note 7, at 6-7.

<sup>107</sup> BELL & RIDOLFI, *supra* note 103, at 8.

combination of the adult and juvenile criminal justice systems leads to the incarceration of a profound number of black boys and black men:

At current incarceration rates, 33 percent of all African American . . . males will experience incarceration at some time in their lives. Black males of low socioeconomic status (SES) have been particularly impacted. Among Black male high-school dropouts in 1999, nearly 60.0 percent had been incarcerated by their early 30s, compared with only 11.2 percent of comparable Whites.<sup>108</sup>

Changes in the juvenile justice system have moved toward harsher punishment and more incarceration, despite the lack of empirical data to support the effectiveness of these outcomes for public safety, recidivism, or rehabilitation. Adolescent brain research has begun to change the dialogue, with the research demonstrating that the prefrontal cortex – the area that deals with reasoning, planning, and regulating behavior – is the last area of the brain to mature, continuing development into the early twenties.<sup>109</sup> This data, however, has primarily had an impact on the most extreme sentencing, rather than becoming a guiding principle of the system.<sup>110</sup> Thus, for those youth who come into the system and are not diverted or redirected, but instead end up in the “deep” end of the system (that is, incarcerated), the consequences are severe.<sup>111</sup> Waiver into the adult system is not uncommon – despite the empirical data indicating waiver has not been effective and that it increases recidivism rather than deterrence – and has severe consequences that impact life opportunities for youth who emerge with a felony record.<sup>112</sup> Although incarceration is an equally ineffective solution, secure detention has increased

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<sup>108</sup> Michael E. Roettger & Raymond R. Swisher, *Associations of Fathers' History of Incarceration with Sons' Delinquency and Arrest Among Black, White, and Hispanic Males in the United States*, 49 *CRIMINOLOGY* 1109, 1110 (2011) (citation omitted). A collateral consequence is the effect of the father's incarceration on the child, creating a risk for delinquency. *Id.* at 1114-15.

<sup>109</sup> Soler et al., *supra* note 103, at 493 (citing Jay N. Geidd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *ANNALS N.Y. ACAD. SCI.* 77 (2004)); Press Release, Nat'l Inst. of Mental Health, *Imaging Study Shows Brain Maturing* (May 17, 2004), available at <http://www.nimh.nih.gov/science-news/2004/imaging-study-shows-brain-maturing.shtml>.

<sup>110</sup> See Soler et al., *supra* note 103, at 494-95 (discussing the Supreme Court's recognition of the limitations of adolescent brain development and capacity in holding that sentencing youths under the age of eighteen to death violated the Eighth Amendment).

<sup>111</sup> *Id.* at 488 (“Conditions in many juvenile facilities in the United States are dangerous and abusive . . .”).

<sup>112</sup> Jeffrey Fagan, *JUVENILE JUSTICE POLICY AND LAW: APPLYING RECENT SOCIAL SCIENCE FINDINGS TO POLICY AND LEGISLATIVE ADVOCACY*, 183 *PLI/Crim.* 395, 408 (1999); see also Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 *HARV. C.R.-C.L. L. REV.* 511 (2009) (discussing the problems that stem from use of the waiver process to try youths as adults, as well as efforts to incorporate safeguards and reforms into the juvenile justice system).

substantially, despite its high cost.<sup>113</sup> Thus, despite the lack of effectiveness, greater recidivism rates, and the presence of alternative programs with better outcomes, we still lock kids up.<sup>114</sup> Structural disparities are the problem and there are models for change.<sup>115</sup>

The persistence of this system, which arguably is an *injustice system* for boys, particularly boys of color, may be linked to its objects. The system was developed around boys and assumes boys are its targets.<sup>116</sup> "As a result, approaches to incarceration and rehabilitation of youthful offenders long focused on the male population."<sup>117</sup> Victor Rios' brilliant study of urban boys exposes the criminalization of low-income youth and young men of color, in a vicious cycle producing hypermasculinity and then criminalizing it through constant surveillance.<sup>118</sup> Rios illustrates the race and gender components of the system. The young men he studied "found themselves in situations in which their everyday behaviors and styles were constantly treated as deviant, threatening, risky, and criminal."<sup>119</sup> Rios sees this "*youth control complex* [as] a system in which schools, police, probation officers, families, community centers, the media, businesses, and other institutions systematically treat young people's everyday behaviors as criminal activity."<sup>120</sup> He asserts that this system is one where "boys were defined as criminal for almost any form of

<sup>113</sup> Soler et al., *supra* note 103, at 521 (discussing increased incarceration rates, with no evidence of a corresponding decrease in juvenile crime).

<sup>114</sup> See BELL & RIDOLFI, *supra* note 103, at 9, 11-14; Soler et al., *supra* note 103, at 518-19.

<sup>115</sup> See BELL & RIDOLFI, *supra* note 103, at 11-15 (detailing the studies and plans to treat problems with the current system, as well as the difficulties solutions have encountered thus far); Soler et al., *supra* note 103, at 489-91 (listing juvenile treatment centers that have demonstrated effectiveness).

<sup>116</sup> Research on girls and the juvenile justice system tries to account for the increase of girls in the system. Scholars conclude that the system response has changed, not the behavior of girls. LaWanda Ravoira & Vanessa Patino, *Girl Matters: Unfinished Work*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 20, at 157, 165-69; see also Soler et al., *supra* note 103, at 500 (pointing out that girls are a growing portion of the juvenile justice system population and that the arrest ratio between boys and girls has shifted from four to one to two to one, indicating a change in the systemic response to juvenile misbehavior). Furthermore, the concern about girls is with white girls, transgressing not only gender but race norms – if black girls behave the same way it is less troublesome because they are seen as more "masculine." VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 123-33 (2011) (associating violent behavior of black adolescent females with those girls adopting a "masculine" persona); Soler et al., *supra* note 103, at 504 (discussing signs of an increase in violent juvenile female offenders). This is contrary to the assertion of some that girls are acting like boys, a consequence of greater freedom and gender equality. See RIOS, *supra*, at 132-33.

<sup>117</sup> Soler et al., *supra* note 103, at 499.

<sup>118</sup> See RIOS, *supra* note 116, at 133-38.

<sup>119</sup> *Id.* at xiv.

<sup>120</sup> *Id.*

transgression or disrespect of authority.”<sup>121</sup> This hypercriminalization means constant punishment beginning at a young age, before any arrest, and generates a predictable response: “oppositional culture, perilous masculinity, and other actions that attempt to compensate for punitive treatment,” as well as politicization.<sup>122</sup> The characteristics promoted by this treatment were an overconformity to aspects of masculinity: “Toughness, dominance, and the willingness to resort to violence to resolve interpersonal conflicts are central characteristics of masculine identity. . . . Criminalization intensified the boys’ conflicts over manhood, and they ran a collision course with the criminal justice system’s demands of passivity, compliance, and conformity to a subjugated, racialized social status.”<sup>123</sup>

The lifetime opportunity cost of this structural funneling toward educational failure and juvenile or adult criminal system involvement is predictable. Black males are the least likely to be hired and the most likely to be unemployed, outcomes linked in particular to educational and criminal-record problems as well as to stereotypes.<sup>124</sup> The collateral consequences of juvenile justice involvement and adult criminal justice system prosecution are the “invisible punishment”<sup>125</sup> of these systems for black youth.<sup>126</sup>

#### D. *Employment: Foreclosed Opportunity*

The employment disadvantage of black teenage boys is stark. It is linked to their difficulty entering the labor market, often due to inability. This disadvantage is evidenced in the youth-employment pattern of black boys, reflected in the following data:

- (1) [A]s few as 20 percent of Black teens are employed at any time; (2) among young Black men age 16-24 not enrolled in school only about half are working, and (3) roughly one-third of all young Black men are involved in the criminal justice system at any given time.<sup>127</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 20-21.

<sup>123</sup> *Id.* at 133-34. Violent youths are over-conformists to this norm. *Id.* at 133 (citing Michael S. Kimmell & Matthew Mahler, *Adolescent Masculinity, Homophobia, and Violence: Random School Shootings 1982-2001*, 46 AM. BEHAV. SCIENTIST 1439 (2003)).

<sup>124</sup> NOGUERA, *supra* note 18, at 17.

<sup>125</sup> Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15 (Marc Mauer & Meda Chesney-Lind eds., 2002).

<sup>126</sup> According to one team of economist researchers, “increasing high school graduation rates would decrease violent crime by 20 percent and drug and property crimes by more than 10 percent. . . . [E]ach additional high school graduate yields an average of greater than \$26,500 in a lifetime cost savings to the public from averted costs associated with crime.” KIM ET AL., *supra* note 67, at 9. For discussion of the consequences of imprisonment and a criminal record, see Haney López, *supra* note 7, at 1056-57.

<sup>127</sup> Dana L. Haynie et al., *Race, the Economic Maturity Gap, and Criminal Offending in*

The employment problems faced by black boys as they attempt to enter the labor market have been identified as producing what some scholars call an "economic maturity gap," layered on top of a racially defined "dual labor market."<sup>128</sup> The economic maturity gap is the lack of initial job experience that, in combination with post-secondary education and further experience, would lead to an ascending employment trajectory.<sup>129</sup> The dual labor market phenomenon refers to the longstanding persistence of racial differentials in employment.<sup>130</sup> "Blacks disproportionately begin their occupational careers in secondary sector jobs characterized by poor work conditions, low wages, and job instability."<sup>131</sup> If that is where you start, then what follows is a dead end, without a career ladder or a step to a better job.<sup>132</sup> The impact of a criminal record on economic and employment opportunities that are limited to begin with is profound.<sup>133</sup> "These disadvantages coupled with structural changes in the economy, trap a sizable portion of the poor and/or racial minority groups in areas characterized by high levels of unemployment, substandard education

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*Young Adulthood*, 25 JUST. Q. 595, 617 (2008) (citing PETER B. EDELMEN ET AL., RECONNECTING DISADVANTAGED YOUNG MEN (2006); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003)). As Professor Moffitt observes, the stated causes of the economic maturity gap are "elevated by institutionalized prejudice and by poverty." Terrie E. Moffitt, *Natural Histories of Delinquency*, in CROSS-NATIONAL LONGITUDINAL RESEARCH ON HUMAN DEVELOPMENT AND CRIMINAL BEHAVIOR 3, 38-39 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994). The conditions in which poor black children grow up leave many infants at greater risk for nervous system problems. *Id.* This in turn leads to difficulties that place black parents under stress and loosens family bonds. *Id.* at 39. Due to inadequate support from disadvantaged schools, these children then grow up with a school system that cannot support their needs. *Id.* As a result of all these factors, "the snowball of cumulative continuity is anticipated to begin rolling earlier and it rolls faster downhill." *Id.* Black teens who may have no prior behavioral problems now face the transition from adolescence to adulthood in an environment that encourages delinquent behavior as a way to earn status and respect. *Id.*

<sup>128</sup> Haynie et al., *supra* note 127, at 599 (discussing the economic maturity gap hypothesis in conjunction with the assertions of dual labor market theorists).

<sup>129</sup> *Id.* at 597-98 (pointing out that the slower and limited access to respected, adult roles effectively creates a "maturity gap" that slows the economic development and overall prosperity of many young black people, especially males (citing Moffitt, *supra* note 127, at 39)).

<sup>130</sup> *Id.* at 599.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 599-600. The limited flexibility in the labor market connects to a range of explanations for the poor outcomes of black youth, including: lack of community opportunities, less investment in human capital, less social skills, fewer family and other networks that help youths acquire jobs, and increased criminal justice involvement. *Id.*

<sup>133</sup> See *id.* at 595 (discussing the impact of criminal history and adolescent criminal involvement on long-term economic successes and opportunities).



resources, inadequate housing, and family disruption. Given these circumstances, the chances for upward mobility are slim . . . ."<sup>134</sup>

None of this is lost on black boys as they approach the age when they would hope to get their first job while completing their education, and might begin to imagine the work they will do as adults.

By adolescence, many disadvantaged youths have become aware of their material conditions through first-hand experience or observation. As such, the barrage of indicators signifying their powerlessness can affect adversely their social-psychological well-being and lead to the despair and nihilism thought to be associated with some of the most serious forms of delinquency.<sup>135</sup>

If we were to construct a colorblind continuum of developmental hurdles or stages, and then overlay the challenges faced by black boys that are ignored or exacerbated by the systems and institutions currently in place, the picture is daunting. We can identify with great precision the risk factors for failure. We simply do little or nothing about them. But we also seem to have a particular focus on subordinating black boys, ensuring the same for black men. The system which creates such disadvantages for black boys causes damage that is not limited to them but is most profound for them, and approaches a level that should be disturbing to those who embrace core values of equality, fairness, and justice. As others have also concluded, the disadvantages appear linked to racial biases within the structures and grounded in stereotypes.

In summary, initial difficult circumstances related to poverty that generate predictable risk factors go largely unaddressed.<sup>136</sup> The system of state intervention for cases of abuse or neglect is ineffective, creating a negative impact on families and layering more risk upon children.<sup>137</sup> Mental health issues related to an ecology of stress and other unaddressed risks also often go undetected and largely unaddressed, while simultaneously being misused to exclude students from mainstream public education.<sup>138</sup> School, rather than finally catching some of the unattended-to risks and unsupported opportunities, instead becomes an accelerator of a race, gender, and class pattern that propels black boys, who are disproportionately represented in every negative aspect of school, into the juvenile justice system.<sup>139</sup> Many are faced with limited employment opportunities even if they do not have the mark of a juvenile or adult criminal record to act as a barrier.<sup>140</sup>

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<sup>134</sup> Marino A. Bruce, *Inequality and Delinquency: Sorting Out Some Class and Race Effects*, 2 RACE & SOC'Y 133, 135 (2000) (citation omitted).

<sup>135</sup> *Id.* at 136 (citation omitted).

<sup>136</sup> *Id.* at 135; see also Tulman, *supra* note 77, at 43.

<sup>137</sup> Weithorn, *supra* note 88, at 1346, 1352, 1439.

<sup>138</sup> Tulman, *supra* note 77, at 28-29.

<sup>139</sup> *Id.*; see also Glennon, *supra* note 63, at 17-19.

<sup>140</sup> Haynie et al., *supra* note 127, at 597.

This situation is not that of Cardboard Boy or Cardboard Man. Disadvantage is not by choice but by design: the design of systems and cultural norms.

## II. IMPLICATIONS: LEVELS OF INEQUALITIES

What the lives of black boys expose is a picture of disadvantage so extreme and profound that it cannot, and should not, be ignored. It is a disturbing picture, one that should engage us to identify and challenge the levels of discrimination implicated, and to question who else is affected. While the focus is on black boys, this should lead to inclusion, not exclusion. Black boys deserve our attention, but so do the others who suffer in these interlocking systems. Black boys serve as the miner's canary, not as the premise for a new hierarchy of exclusion.<sup>141</sup> The systems implicated in the context of black boys do not work for anyone and have the most serious negative impact on children with certain identity markers, the worst and most disadvantaged being those children marked by gender, race, and class.<sup>142</sup> In order to address the near extermination of opportunity for black boys, we need to eliminate disproportionate treatment in both its manifestations: disproportionate presence of young black men within systems and disproportionate severity of outcomes. Society also needs to demand positive outcomes from evidence-based programs proven to serve children's needs, and to limit confinement and control to the narrowest evidence-based reasons. Rios suggests that we should have a youth *support* system rather than a youth *control* system.<sup>143</sup> This should include a developmental lens that is race and class inclusive.<sup>144</sup> Institutionally, it means reorienting a number of systems not only to reduce racial disproportionality but also to challenge the goals and direction of those systems. So if we are to change what is happening to boys and men where race and class combine with gender to affect their opportunity and equality, then the systems serving or intersecting with boys have to be evaluated.

The subordination facing black boys also challenges our notion of equality. Do we mean simply to change who is at the top of a hierarchy, and require that the most privileged not be gender-defined? Or defined by race, class, other significant social markers, or some other stand-ins for those markers? Or do we intend equality to mean assurance of a basic level of opportunity for all that may not do away with hierarchy, but would change its shape and how it functions at the bottom? Rosin's argument seems to suggest not a vision of equality, but rather the perpetuation of hierarchy, with gender defined

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<sup>141</sup> See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 254-302 (2002). "Without race as the miner's canary, institutional hierarchies of power that threaten the well-being of everyone remain invisible." *Id.* at 298.

<sup>142</sup> See Devon W. Carbado, *Men in Black*, 3 J. GENDER RACE & JUST. 427, 433-34 (2000); Tulman, *supra* note 77, at 5.

<sup>143</sup> RIOS, *supra* note 116, at 156-67.

<sup>144</sup> *Id.* at 160.

explicitly and race defined by exclusion. Her argument has it wrong, I believe, in assuming the advancement of women marks the end of male power and privilege. But more significantly, it presents a definition of equality that should be challenged. I would argue the goal of equality is not to flip who is the most powerful, but to empower all. Moreover, it is to engage all of us in examining the persistent beliefs and cultural norms that are used to justify hierarchies based on identities.

The current position of black boys reveals the intersection of several levels of inequality. First, subordination functions at an individual level, affecting individual identity and psychology in response to the environment. This identity level of inequality is filtered by identities of race, masculinity, and class.<sup>145</sup> Identities construct self-perception and the creation of one's personal identity, and also affect the perceptions, stereotypes, and assumptions of others. This dual impact of identities – the problem of how to construct a healthy identity amidst a negative context, and how stereotypes construct the context through others' perceptions of black boys – is critical to the world as experienced by black boys.

Second, there are structural inequalities, as evidenced by subordination and bias within every system that impacts the lives of black boys, including those designed to help children or support them in the process of their development – from education, health, mental health, and child protection, to economic resources from work, wealth, and housing.<sup>146</sup> Disproportionality exists within those systems that have the most negative impact on opportunities (child welfare and juvenile justice). Particularly disturbing is what appears to be a funneling of poor children of color, primarily males, into the juvenile justice system, and once there, to the harshest, deepest end of that system. The size and oppressiveness of these interlocking systems is evident in the relative consensus on risk and protective factors in predicting youth involvement in violence and the likelihood of youth entering the juvenile or adult criminal justice systems. The identification of those factors points to the failure of the systems that surround children, systems controlled by adults. The tendency to focus on risk factors redirects attention away from systems, turning the focus away from the structural and toward the individual or familial. It is structural factors, supported by cultural and ideological justifications, where inequality creates the greatest obstacles to opportunity.

The third level of inequality is cultural and ideological, functioning at the macro level. The racial and gender patterns of these systems are also not new or unknown.<sup>147</sup> Black boys in particular are set up for failure, which offends fairness and basic needs.<sup>148</sup> If this is tolerated or justified at the macro level, it supports failing, harmful structures.

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<sup>145</sup> See, e.g., Carbado, *supra* note 142, at 429-30, 432-34.

<sup>146</sup> See generally Tulman, *supra* note 77.

<sup>147</sup> *Id.* at 4.

<sup>148</sup> Soler et al., *supra* note 103, at 487.

Persistent across these levels of inequality is the power of stereotypes. One of the most powerful beliefs about black males, especially as they move from childhood to manhood, is the perception that they are dangerous.<sup>149</sup> This drives efforts by many to contain, control, and subordinate them as a means to protect against their perceived threat.<sup>150</sup> The impact of stereotypes is profound when matched against the normative arc of development from child to adult.<sup>151</sup> Noguera writes:

Adolescence is typically a period when young people become more detached from their parents and attempt to establish independent identity. For racial minorities, adolescence is also a period when young people begin to solidify their understanding of their racial identities. . . . Adolescence is often a difficult and painful period for many young people. And for young people struggling to figure out the meaning and significance of their racial identities, the experience can be even more difficult.<sup>152</sup>

The effect of pervasive stereotypes is powerful and heartbreaking, including rejection of racial identity. For example,

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<sup>149</sup> NOGUERA, *supra* note 18, at xi (pointing out that over time American society has depicted black men as violent and a "potential danger to the social order"); *see also* Glennon, *supra* note 63, at 41 (stating that even black children are frequently perceived as delinquent and dangerous).

<sup>150</sup> NOGUERA, *supra* note 18, at xi ("Black men have been regarded as individuals who should be feared . . . . They are a threat that must be policed, controlled, and contained.") (citing LEE D. BAKER, *FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF RACE, 1896-1954* (1998)).

<sup>151</sup> In education black males are regarded as "a problem, pathologize[d] and den[ied] . . . the opportunity to learn." *Id.* at xxi. For a discussion on the "othering" of black children, see Shani King, *Challenging MonoHumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 461 (2009). For information on the history of African American adolescence and the impact of discriminatory treatment on those youths, see Nunn, *supra* note 104. Pedro Noguera explains the pervasive problems facing black boys in schools as follows:

[T]hey are assumed to be at risk because they are *too aggressive, too loud, too violent, too dumb, too hard to control, too streetwise, and too focused on sports*. . . . [M]ost never have a chance to be thought of as potentially smart and talented or to demonstrate talents in science, music, or literature. . . . [T]hey are placed in schools where *their needs for nurturing, support, and loving discipline are not met. Instead, they are labeled, shunned, and treated in ways that create and reinforce an inevitable cycle of failure.*

NOGUERA, *supra* note 18, at xxi (emphasis added). This then is the intersection between identity and vulnerabilities: black boys are not allowed to be vulnerable in the sense of having the support to achieve developmental goals; there is no allowance for the development of vulnerability as a positive attribute. Instead the educational system develops negative vulnerabilities and negative characteristics that lead them into the juvenile justice system at worst, and at best leave them without the education they deserve.

<sup>152</sup> NOGUERA, *supra* note 18, at 5.

it is not uncommon for minority children to express a desire to reject group membership based on skin color, especially during early adolescence. As they start to realize that in this society to be Black or Brown means to be seen as “less than” . . . they often express a desire to be associated with the dominant and more powerful group.<sup>153</sup>

Children react not passively but by pushing back, creating what one pair of researchers call “oppositional identities.”<sup>154</sup> This is consistent with the classic work of Claude Steele on stereotype threat and Elijah Anderson’s work on the “code of the street.”<sup>155</sup> Street life is a place of resistance and resilience; it offers “a means for economic survival, given most have experienced little access to quality economic and educational opportunity.”<sup>156</sup>

Stereotypes pose not only individual identity challenges, but also create structural discrimination.<sup>157</sup> What is persistent in the situation of black boys is the enduring significance of race, as well as the gendered construction of race. Ian Haney López has described and identified the racialized state.<sup>158</sup> Structural racism, according to Haney López, creates a racial stratification system.<sup>159</sup> I would argue that the context within which black boys develop illustrates that system, funneling them early and often into situations and conditions that result in a loss of opportunity and oppression. Although not limited to incarceration, for many it leads to that result, which perpetuates racial stratification:

The public security system in the United States produces shocking racial disparities at every level . . . . The United States today places almost one in every thirty of its residents under correctional control in a racial pattern that generates state prison populations that are two-thirds black and

<sup>153</sup> *Id.* at 7.

<sup>154</sup> Signithia Fordham and John Ogbu, *Black Students' School Success; Coping with the Burden of Acting White*, 18 URB. REV. 176, 177 (1986). “Recognizing that Black males are not merely passive victims but may also be active agents in their own failure means that interventions designed to help them must take this into account.” *Id.* at 22. At the same time black boys want to succeed. *Id.* at 31.

<sup>155</sup> ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995). Street-oriented youth are not treated in a way that helps them or society. “[Y]oung men ultimately position their street orientation as an adaptive identity to have inside schools.” Yasser Arafat Payne & Tara M. Brown, *The Educational Experiences of Street-Life-Oriented Black Boys: How Black Boys Use Street Life as a Site of Resilience in High School*, 26 J. CONTEMP. CRIM. JUST. 316, 316 (2010).

<sup>156</sup> Payne & Browne, *supra* note 155, at 318.

<sup>157</sup> See generally Rebecca J. Cook, *Structures of Discrimination*, 28 MACALESTER INT’L 33 (2011).

<sup>158</sup> See Haney López, *supra* note 7.

<sup>159</sup> *Id.* at 1023.

Latino. Racial differences in the penal context dramatically exceed those in every other social domain: "Whereas racial disparities in unemployment and infant mortality stand at roughly two to one, and the disparity in unwed childbearing is three to one, the differential with respect to imprisonment is eight to one."<sup>160</sup>

Haney López draws on the work of Douglas Massey, who argues social stratification is based on "the creation of social categories, and the misallocation of resources between those groupings. . . . Massey distinguishes between 'exploitation,' wherein one group expropriates resources from another, and 'hoarding,' in which a group that has previously acquired disproportionate resources acts to preserve its advantage."<sup>161</sup> Haney López argues that race in the United States functions in this way, using both methods of misallocation.<sup>162</sup> He asserts two "foundational insights: first, racism assists in the misallocation of wealth, power, and prestige; and, second, racial stratification in turn both requires and contributes to the construction of races."<sup>163</sup> Haney López suggests two insightful questions from this analysis: if we were not a racially stratified society, would we have a criminal justice system that operates the way it does? And second, what would a system look like if not structured by race?<sup>164</sup> I would further modify these questions to include gender, reflecting the fact that these are male-focused systems.<sup>165</sup>

The systemic level described by Haney López is mirrored in the identity constructed for black boys by others, affecting their developmental path and life opportunities. The challenge is how to get the same attention for this gross

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<sup>160</sup> *Id.* at 1025 (quoting DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 99 (2007)). Haney López links lack of outcry over incarceration to the continuing view that "racial inequality reflects the natural order of things," in addition to the ideology of colorblindness. *Id.* at 1064; see also Ian Haney López, *Freedom, Mass Incarceration, and Racism in the Age of Obama*, 62 ALA. L. REV. 1005, 1015 (2011) (discussing the concept of a "racial state," a term that "emphasize[s] that the state does not stand above the racial fray, but is itself thoroughly immersed in racial contests" (quoting MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 82 (1986))).

<sup>161</sup> Haney López, *supra* note 7, at 1027 (citing MASSEY, *supra* note 160, at 5-6).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1028.

<sup>164</sup> *Id.* at 1051-71 (discussing the deep structural flaws in the current stratified system, and the debate over what changes would have to take place in order to fix the system and its long-term lingering effects).

<sup>165</sup> See Keith O. Lawrence, *Introduction* to RACE, CRIME, AND PUNISHMENT: BREAKING THE CONNECTION IN AMERICA 4-7 (Keith O. Lawrence ed., 2011) (discussing the vastly disproportionate racial involvement in the criminal justice system, focused almost entirely on the rates of incarceration for boys and men); see also Carbado, *supra* note 142, at 434 (detailing the system's near-exclusive focus on the interests of black boys, to the detriment of the interests of black girls).

inequality as *The End of Men* has obtained for white middle- and upper-class males.

### III. THEORETICAL PERSPECTIVES/ASKING THE OTHER QUESTIONS

If we are to get beyond the limitations of *The End of Men*, we must insist on asking a richer set of questions. At the same time, we should question who benefits from the more limited perspective represented by *The End of Men*, and how it relates to the persistence of inequalities. The attention generated by Rosin's article and book may present an opportunity to engage in a much richer, and much-needed, discussion about men that includes all men, but with particular attention to the most marginalized men.

Rosin's work has the potential to reconstruct harmful dualities that replicate the worst stereotypic gender mythology. It is essential to ask questions in the complex way that women and men deserve so that we do not continue to hide inequalities in the name of understanding them. At the same time, privilege also needs to be interrogated, wherever it appears and whoever is contained within the new category of privilege. Gender analysis in particular must examine how the women identified in *The End of Men* may themselves subordinate others or take on the characteristics identified with privilege – that is, race and masculinities characteristics associated with middle- and upper-income white males. The inequality most lost in the way the questions were asked in *The End of Men*, and the assumptions that drove the answer, is the essentialist error. The consequence of that error is particularly likely to render race invisible in the name of gender.

Three theoretical perspectives suggest more complex, nuanced questions. The rich analytical perspectives of feminist theory include Mari Matsuda's classic insight that we "ask the other question": when we think something is about gender, we should ask about race and class; when we think something is about race, we should ask about gender and sexual orientation; and so on.<sup>166</sup> When we ask about gender, and focus on women, we must be careful to avoid essentialism by questioning whether the analysis fits all women. When we are comparing women and men, we must do the same for men. Masculinities theory, more recently recognized and used in the legal academy, offers insights on how to ask the "man" question.<sup>167</sup> Masculinities theory reminds us to ask, "Is this true of all men?" and "Would a change in policy or structure reinforce hegemonic masculinity?"<sup>168</sup> Masculinities theory also reminds us not to ignore gender when we think in terms of race. Therefore, when evaluating the

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<sup>166</sup> Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

<sup>167</sup> See DOWD, *supra* note 4 (discussing generally how to ask questions about men and masculinity in a way that advances scholars' ability to engage in gender and feminist discourse).

<sup>168</sup> *Id.* at 26-29, 38-39 (detailing the perspective and questions encouraged by masculinities theory).

situation of black boys, it is gender – the construction of masculinities – that is as much a factor in their subordination as is race.<sup>169</sup>

Second, critical race theory reinforces our insight into the interaction of gender and race, and suggests that we look structurally and culturally to examine bias, stereotypes, and racial stratification.<sup>170</sup> The complex interplay of identity, structure, and cultural/ideological norms is evident in the constraints on black boys, and requires us to stay focused on identity.

Finally, vulnerabilities theory pulls us back to more general frameworks.<sup>171</sup> If considered together with identities analysis, this avoids essentializing or the creation of a hierarchy of subordination. The institutional issues exposed by looking at black boys are issues for many other groups of children. Vulnerabilities theory reminds us to keep that broad focus.<sup>172</sup> Talk about black boys should not “privilege” their subordination,<sup>173</sup> but rather should lead us to question how these same structures work for other children.

The structural focus of vulnerabilities theory and critical race approaches such as that of Haney López suggest also that the argument of *The End of Men* suffers from the error of neutrality. The book’s argument treats the world as though it is objective and neutral, and in its shift to a new set of needs, women, formerly the square peg trying to fit into a round hole, now fit the needs of the twenty-first century while men do not. This ignores embedded ways in which structures and culture are racialized, gendered, and in other ways infused with norms and outcomes that reinforce hierarchies rather than serving needs. It feeds the myth of color and gender blindness, and further ignores the racialized, gendered, hierarchical way of the world where, in order to fit in,

<sup>169</sup> *Id.* at 45-46 (pointing out a tendency to subordinate gender concerns to racial ones).

<sup>170</sup> See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1760 (2003) (discussing critical race theory and the theory it adopts of race as a social construction, suggesting a need to look at the structural foundations of social biases in order to eliminate inequalities).

<sup>171</sup> See generally Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey*, in TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY (Martha Albertson Fineman ed., 2011); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012) (comparing the embodiment of legal equality in the United States and other countries); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8-10 (2008) [hereinafter Fineman, *Anchoring Equality*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 269 (2010). For an overview of vulnerability work, see *Resources*, VULNERABILITY & HUM. CONDITION, <http://web.gs.emory.edu/vulnerability/resources/index.html> (last visited Apr. 1, 2013).

<sup>172</sup> Fineman, *Anchoring Equality*, *supra* note 171, at 10 (pointing out that human vulnerability is universal).

<sup>173</sup> MENAH A.E. PRATT-CLARKE, CRITICAL RACE, FEMINISM, AND EDUCATION: A SOCIAL JUSTICE MODEL (2010); see also Carbado, *supra* note 142, at 429, 434.



individuals have to get past sorting mechanisms that separate not by merit but by identities (although permitting some gender and race gains).

One final question is critical: Who benefits from existing inequalities and cultural justifications for those inequalities? More specifically, who benefits from ongoing subordination of black boys and men? I would argue all men benefit because their subordination reinforces male power through the stereotype of danger, while reinforcing the privilege of white men at the top of the hierarchy.

Who benefits from *The End of Men's* argument? Irrespective of the intent of the author, the provocative title and the thesis of the book has taken on a life of its own. Who benefits from this? Who is served? I conclude that the article and book reconstruct hegemony, validating men's place by reinforcing stereotypes and myths. I would argue that the most-privileged men benefit, because sympathy for their "downfall" obscures the persistence of power and renders hierarchy invisible. So many men and women are ignored in this vision. Children are also largely ignored as well, presumed to be under the care of their mothers and disconnected from their fathers.

If *The End of Men* meant a comprehensive look at all men and evidence of the undermining of male hierarchy over other men as well as over women, and the dismantling of hierarchy itself, then we might well applaud this new beginning, for all women and men. But if this argument only serves to reinforce the hegemony of a few by suggesting a skewed or partial reality, then it disserves the goal of social justice. Instead of the potential to reframe masculinities, it does the opposite. *The End of Men* recreates hierarchy as the natural order, and undermines the meaning and goal of "equality." In the end it views men as determined, not as socially constructed, and not as beings capable of change. Most harmfully, it ignores those who never exercised privilege just as it renders invisible those who retain it.

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