

A Father's Race to Custody: An Argument for Multidimensional Masculinities for Black Men

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This Article applies masculinities theory to custody proceedings in family court and, in particular, applies the theory of “bipolar black masculinity” to black fathers. This Article explores the two extreme images of black men: 1) the default image of the excessively masculine “Bad Black Man,” who is seen as animalistic, inherently criminal, and sexually unrestrained; and 2) the non-threatening “Good Black Man,” who is seen as passive, non-assertive, and non-aggressive. This Article argues that the pervasiveness of this dichotomy cultivates a false binary of black fatherhood. On the one hand, the qualities of the Bad Black Man have created a mythical image of the “Absent Black Father”: 1) animalistic, and therefore unable and unwilling to participate in the institution of marriage; 2) inherently criminal, and therefore incarcerated and unable to financially provide for his family; and 3) sexually unrestrained, and therefore has many children by different women. The prevailing mythical image of the Absent Black Father affects how black fathers are viewed in custody cases in family court, as they are either unfairly seen as the Absent Black Father if they have a criminal record or are unable to pay child support. On the other hand, if a black father does not fit the stereotypical, default Bad Black Man image, he is given an overly positive presumption as a Good Black Man—and therefore a “Good Black Father.” Because of the particularly subjective nature of custody cases, such categorization deeply impacts the fact-finder’s decision in determining whether the black father should receive custody, when such categorization has little to do with what is in the “best interest” of the child. This Article therefore argues that a multidimensional

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masculinities approach is necessary to prevent the detrimental bipolar categorization of black fathers in family court custody proceedings.

INTRODUCTION

“He shows up once a week for an hour to see her. Why is everyone treating him like he’s the best father in the world?”

Anne is sitting in a tiny interview room with her attorney at the courthouse waiting for her case to be called. Anne is the mother of a four-year-old girl, Christy, and is in the midst of an embittered custody and visitation battle with Brandon, Christy’s father.¹

After allegations of Brandon’s domestic abuse towards Anne, and after Brandon tested positive for marijuana and cocaine, Brandon has had weekly-supervised visitations with Christy at a court-appointed organization for about four weeks. The organization has just issued its report on their observations of Brandon’s visits, and it is a glowing review of Brandon’s attributes as a father. The report described him as “quiet, unassuming, devoted, and caring,” and goes on to detail the gifts and candy Brandon had brought Christy. While the judge had asked the organization to draft a recommendation report solely on whether Brandon’s visits should continue to be supervised, the organization took the liberty of also describing Anne’s interactions with the organization. Their report portrayed her as “pushy and difficult,” and described her “unreasonable demand” of taking a tour of the facilities where she would be leaving her child every week for the next month.

This was not the first time Anne and her attorney had read such a complimentary evaluation of Brandon. At her initial court appearance, the assigned Attorney for the Child² did not believe Anne’s claim that Brandon was under the influence of narcotics while Christy was under his care. However, when the judge issued an onsite drug test, Brandon tested positive for marijuana and cocaine. Weeks later, Brandon went to a private drug-testing facility. Brandon’s attorney happily shared the drug-tester’s report that not only indicated there were no longer traces of marijuana or cocaine in Brandon’s system, but also stated that: “In all of my years at this job [as a drug-test evaluator], I have never seen a better or more dedicated father than Brandon. He is mild-mannered, committed, and completely devoted to his child.”

Brandon is African-American and in his early 40s. The few times he has been in court for the custody matter, he has worn dress pants, a button-down shirt, and dress shoes. He has a job working for a tech company, and pulls in an average annual income of \$80,000. He has no criminal record, and is current on

1. Anne, Brandon, and Christy’s story is inspired by a real case I worked on, with details changed to protect their identities.

2. In the state of New York, an Attorney for the Child is automatically assigned to represent the child’s position in a custody matter.

his child support payments. At court he speaks in a low voice, and only when directly addressed by the judge or his attorney.

Anne is also African-American and is in her early 40s. She has a similar education level, and worked at the same tech company as Brandon before she was laid off due to economic cut-backs. As a result, she has been receiving unemployment benefits for close to a year now. Being in Brandon's presence makes her upset and emotional, as she is reminded of the mental and physical abuse Brandon subjected her to during their time together. These emotions sometimes spill over when she has to be near him in court, and she has, at times, interrupted the judge to share facts of the abuse. Though it is undisputed that she has been the primary caretaker of Christy since Christy's birth, she has been met with suspicion and resistance throughout the custody process.

Though it is not unusual for evaluators from court-appointed or private agencies to give their subjective opinions on the fitness of a parent, the adjectives used to describe Brandon ("unassuming," "mild mannered") and Anne ("pushy," "difficult") are striking and of little relevancy in a custody case. It is also note-worthy that both the court-appointed organization and private drug-testing facility so confidently concluded that Brandon was a "committed" and "devoted" father after spending such little time with him. While the court-appointed organization may have observed Brandon with Christy for one hour, once a week for four weeks, the drug evaluator had likely never even seen Brandon interact with Christy. These descriptions and conclusions raise several troubling questions. What about Brandon made him seem so palatable and such a good father? And why was Anne, the primary caretaker and victim of abuse described so negatively in comparison?

In this article I attempt to answer these questions by arguing that the race of the father, and the stereotypes that attach to that race, has a significant impact on how both the mother and father are perceived in family court custody proceedings. While there are many different racial combinations of mothers and fathers that could have varying effects on how they are perceived in custody proceedings,³ in this article I concentrate primarily on the effect the father's race has on those proceedings when both the mother and father are black.

In order to better understand the stereotypes associated with black fathers, this article applies masculinities theory and Professor Frank Rudy Cooper's theory of the "bi-polarity of black men," and explores the two most prevalent stereotypes of black men that exist in the United States today: 1) the "Bad Black Man," who is seen as animalistic, inherently criminal, and sexually

3. I recognize that there are many different racial combinations that can occur between parties in custody proceedings, each having differing impacts on how the mother and father are treated in court. There are also distinct issues that pertain to interracial parties who have a child in common. Though there is scholarship that deals with this area in an in-depth manner, such discussion is outside the scope of this Article.

unrestrained, and 2) the “Good Black Man,” who is seen as passive, nonassertive, and nonaggressive. This article then applies the bipolar stereotypes of black men and argues that they create bipolar stereotypes of black fathers: 1) the Absent Black Father, who is seen as absent because he has the stereotypical attributes of the Bad Black Man, and is thought to be incapable of raising a child, and 2) the Good Black Father, who is seen as good because he has the stereotypical attributes of the Good Black Man. This article also argues that regardless of which category the black father is placed into, such bipolar imaging is detrimental to the fact-finder’s assessment of the best interest⁴ of the child. Even when a father is placed into the Good Black Father category, the characteristics that lead to such a positive presumption are oftentimes irrelevant to what is actually in the best interest of the child. More importantly, it is harmful because it is based upon the default assumption that black fathers are absent. Consequently, I argue for a multidimensional, masculinities approach in family court custody proceedings.

The article proceeds in four parts. Part I gives an overview of multidimensional masculinities theory and addresses the influences critical race theory, feminist theory, and intersectionality theory have had on the developing movement of scholarship. Part II gives broad context to the images of motherhood and fatherhood, and addresses the gendered and race-based expectations associated with both. Part III explores the theory that black masculinity is bipolar, and details the history and impact of the Good Black Man and Bad Black Man images. Part IV applies bipolar masculinity to black fathers in custody cases, and addresses how such extreme imaging creates the stereotypes of the Absent Black Father and the Good Black Father. Part IV also explores the impact this imaging has on the black mother and the custody case as a whole. Finally, the conclusion argues that multidimensional masculinities should be applied to custody cases to ensure the fact-finder’s decision is not influenced by bipolar black masculinity.

I. AN OVERVIEW OF MULTIDIMENSIONAL MASCULINITIES AND THE INFLUENCES OF CRITICAL RACE THEORY AND INTERSECTIONALITY THEORY

Multidimensional masculinities theory posits that masculinity interconnects with race and other individual categories of identity like gender and sexuality, and that those individual categories cannot be understood in isolation.⁵ This section will give an overview of multidimensional theory by

4. Though the “best interest” standard differs slightly from state to state, all states have statutes that require that the child’s best interest be considered whenever specified types of decisions are made regarding a child’s custody or placement. The standard is usually made by considering a number of factors related to the child’s and parent or caregiver’s circumstances.

5. Frank Rudy Cooper, *The King Stay the King: Multidimensional Masculinities and Capitalism in The Wire*, in *MASCULINITIES AND THE LAW* 96, 97 (2012).

describing the influence critical race theory and intersectionality theory have had on masculinities theory as a whole.

Masculinities theory is the study of the pervasive influence the meaning of manhood has on society, institutions, and individual behavior.⁶ It argues that masculinity is not a biological or inherent characteristic, but rather a social construct that is learned through societal expectations.⁷ “Men” are not born, but made through societal pressures and expectations, just as gender identity as a whole is a social construct.⁸

To understand masculinities theory, it is crucial to understand that it has been developed from critical race theory, feminist theory, and intersectionality theory.⁹ Critical race theory explores the study of race by acknowledging that race is both a social construct and a category of identity that subjects people to a hierarchy.¹⁰ Critical race theory posits that race is a category of identity used for subordination, with whites holding the most power within the hierarchy.¹¹ Similarly, feminist theory explores how gender is a social construct and a category of identity that subordinates women.

Intersectionality theory acknowledges that there are multiple categories of identity used for subordination that intersect for individuals of certain groups.¹² This theory highlights the experiences of those who are subordinated in more than one category of identity, like women of color.¹³ For example, intersectionality theory asserts that the experiences black women face are distinct from white women and black men: while black men are in a

6. Ann C. McGinley, Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another*, in MASCULINITIES AND THE LAW 1,1 (2012).

7. Ann C. McGinley, *Ricci v. Desteano: A Masculinity Theory Analysis*, 33 HARV. J.L. & PUB. POL’Y 581, 585-586 (2010).

8. See Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y, 13, 18 (2011).

9. See generally McGinley & Cooper, *supra* note 6.

10. McGinley & Cooper, *supra* note 6, at 6. McGinley and Cooper define critical race theory as the following: “Critical race theory is fundamentally about investigating the paradox that race is simultaneously socially constructed and materially crucial (Cooper 2006b). One of the major tenets of critical race theory is that identities are ‘socially constructed.’ The meanings of race do not derive from nature, but nurture; people are trained to associate particular characteristics with particular phenotypes (Onwauchi-Willig and Barnes 2005). Second, there are hierarchies among and within categories of identity (Cooper 2006a). Third, the material consequences of the hierarchization of identities include the skewed distribution of goods ranging from money to social capital (ibid.). Fourth, the skewing of the distribution of goods, previously accomplished by de jure and de facto regimes of intentional discrimination, is now most often accomplished by means of implicit bias (Kang 2005). Fifth, identities are intersectional. This means that people’s identities intersect; we are simultaneously raced, gendered, sex-oriented, classed, and so on (Crenshaw 1991; Harris 1990).”

11. See generally RICHARD DELGADO, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001).

12. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

13. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-67 (1989).

subordinated category in comparison to white men and white women are in a subordinated category in comparison to white men, black women are subordinated in both categorical identities.¹⁴ Intersectionality theory can be used to explain how Anne experienced the custody case differently from Brandon, or from a white mother, because she is subordinated in both categories of gender and race.

Multidimensional theory further expands upon the tenants of intersectionality theory by acknowledging the hierarchies and privileges within each category of identity, but, in addition, posits that identities are co-constituted and cannot be viewed discretely.¹⁵ Multidimensional masculinities theory therefore argues that masculinity interconnects with race and other individual categories of identity.¹⁶

Multidimensionality theory asserts that white men control the landscape of masculinity and define normative masculinity.¹⁷ White, heterosexual men are epitomized in hegemonic masculinity, the most desirable or “proper” way of being a man.¹⁸ Consequently, white men are deemed “naturally” masculine, while black men must fit their masculinity to the confines of the white man’s definition.¹⁹ While intersectionality theory argues that black men are privileged in comparison to black women because of their gender, multidimensional

14. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 1241 (1991); see also Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2007).

15. McGinley & Cooper, *supra* note 6, at 6–7. Cooper and McGinley assert: “Multidimensionality theory stems from intersectionality theory and was developed by critical race theorists who were also concerned with queer theory (Hutchinson 2000; Kwan 1997; Valdes 1998). Multidimensionality theory can be broken down into at least five insights that are well identified by Athena Mutua (this volume). As a general matter, these boil down to two principles: (1) identities are co-constituted and (2) identities are context-dependent. A multidimensional approach argues that since identities are co-constituted, race, gender, class, sexual orientation, and other discrete identities are actually imbricated within one another and cannot be understood in isolation.”

16. Frank Rudy Cooper, *The King Stay the King: Multidimensional Masculinities and Capitalism in The Wire*, in *MASCULINITIES AND THE LAW* 96 (Frank Rudy Cooper & Ann C. McGinley, eds., 2012).

17. Devon W. Carbado, *Masculinity by Law*, in *MASCULINITIES AND THE LAW*, 53 (Frank Rudy Cooper & Ann C. McGinley, eds., 2012). Carbado asserts, “White men are ‘natural’ men. That is to say, the normative man is not only appropriately masculine, he is also white. He is the norm. Our reference. We are defined with him in mind. We are all the same as or different from him.”; see also Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671,687 (2009) (“To be white, or straight, or male, or middle class is to be simultaneously ubiquitous and invisible. You are everywhere you look; you are the standard against which everyone else is measured. . . . People tell you they went to see a woman doctor, or they say they went to see the doctor.” (quoting Michael Kimmel, *Toward a Pedagogy of the Oppressor*, in *PROGRESSIVE BLACK MASCULINITIES* 63 (Athena D. Mutua, 2006)).

18. Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13 (2012).

19. See generally Devon W. Carbado, *Masculinity by Law*, in *MASCULINITIES AND THE LAW*, 51 (Frank R. Cooper & Ann C. McGinnis, eds., 2012).

masculinities theory asserts that black men experience a form of gendered racism that is specific and unique to their experiences as black men.²⁰ A multidimensional approach to masculinities theory therefore explores and explains the effects gendered racism has on black men. Applying multidimensional masculinities highlights how the family court system views and treats black fathers, which has a deep impact on the black mother, child, and overall outcome of a custody case.

II. MOTHERS AND FATHERS: A STUDY OF FEMININITY AND MASCULINITY

The perception of femininity and masculinity plays a significant role in how mothers and fathers are perceived, particularly within the context of family court custody proceedings. Oftentimes, femininity is tied to images of the “Good Mother,” while hegemonic masculinity sets the standard for the “Good Father.” This section gives context to the evolving views of motherhood and fatherhood, and how femininity, masculinity, and race intertwine with such perceptions.

A. *Motherhood and Femininity*

Just as masculinity is a social construct, so too is femininity and its defining characteristics. The role of mother is arguably the epitome of society’s definition of femininity, as the woman serves a role that the man literally cannot when she carries a fetus in her uterus. Traits of femininity are oftentimes intertwined with the characteristics of the ideal mother. The traditional image of the ideal mother is one who is “soft and delicate,” “neat and feminine,” “obedient and helpful, darning the socks and baking the bread; the primary caregiver of the children; a warm and tender presence, who teaches the children religion and ethical values . . . and blankets them with the unique blessing of mother love.”²¹ Such images are significantly based in race and class, as the image of the ideal mother is that of a white, middle-class woman.²² She is

20. See generally Athena D. Mutua, PROGRESSIVE BLACK MASCULINITIES (2006); Athena D. Mutua, *The Multidimensional Turn: Revisiting Progressive Black Masculinities*, in MASCULINITIES AND THE LAW, 78 (Frank R. Cooper & Ann C. McGinnis, eds., 2012). Professor Mutua and other scholars have previously worked on the body of scholarship known as “progressive black masculinities” that applies a multidimensional approach to masculinity. Professor Mutua states: “Given that black men’s oppression appeared to be based on both race and gender, as well as class, sexuality, and a host of other oppressive social structures, we doubted that removing racism alone would free black men. Stated differently, we questioned whether racism could be eliminated without also attacking its gender, class, and sexual components. Further, we suspected that black male complicity in the subordination and oppression of others, including patriarchal practice, might also reinforce and contribute to their subordination.”

21. Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1009 (2013) (quoting Joanna L. Grossman & Lawrence M. Friedman, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA (2011)).

22. See Melissa Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555 (2012). See also DOROTHY ROBERTS, KILLING THE

pristine, moral, and selfless, which are characteristics that are associated with her whiteness and femininity. Motherhood has often been referred to with reverence; stereotypical images of the naturally giving, white, perfect mother who exhibits morality, nurture, caring, and domesticity are still dominant within society today.²³

As a result of such characterizations of mothers, there has been a long history of assuming women are better suited to have physical custody of a child in disputed custody cases,²⁴ as it was perceived that it was a woman's natural, feminine disposition to want to nurture and care-give.²⁵ Such idealization and romanticism often brought heightened scrutiny of mothers. A mother's actions and choices were examined to ensure that the woman met the fact finder's image of the feminine ideal.²⁶ Consequently, mothers were often penalized for working outside the home, and a mother's sexual history and choices were scrutinized and considered relevant to determining the "best interest" of the child in custody proceedings.²⁷

BLACK BODY 10 (1997). (Roberts describes how white women were deemed the "True Woman," which became especially obvious during the Victorian era. She writes, "The nineteenth-century image of the True Woman was delicate, refined, and chaste. Although she was considered physically and intellectually inferior to men, she was morally superior to them. She was perfectly suited to the home, where she served as mother and wife. All of her attributes were precisely the opposite of those that characterized Black women"). See also Jane Murphy, *Legal Images of Motherhood*, 83 CORNELL L. REV. 688, 695 (1998) (Professor Murphy discusses the deep impact the image of the ideal, feminine mother had on court proceedings by quoting Justice Terrell of the Florida Supreme Court in 1941: "She is morally, spiritually, and biologically best suited to care for the child during infancy and adolescence. She is more sensitive to influences that are derogatory in its health and character and has been known to pursue it to the gutter and retrieve it after the father had abandoned it").

23. See Breger, *supra* note 22, 565-67. Professor Breger describes the expectations we have of mothers as the following: "Mothers instinctually are supposed to know how to raise children and raise them well. Mothers are envisioned as selfless and self-sacrificing. Society envisions mothers as ever-nurturing and ever-protective of their children." See also Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61 (1995); Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1009 (2013).

24. See Jane Murphy, *supra* note 22, at 694. (Murphy describes the "tender years" doctrine: "By the middle of the twentieth century, a maternal or 'tender years' presumption had replaced the paternal preference. The presumption provided that mothers should have custody of their children, particularly those under age five. The presumption was grounded in the view that women's natural disposition toward nurturing made them the preferred caretakers. Both the assumed biological superiority of mothers as parents and social custom, which assigned responsibility for parenting to mothers, justified the doctrine.").

25. NANCY E. DOWD, *Economic Fathers*, in REDEFINING FATHERHOOD 135 (2000) (describing how family court's "tender years presumption" made the assumption that very young children need to be with their mothers).

26. See generally Murphy, *supra* note 22.

27. *Id.*

1. *The Mythical Image of the Unfeminine Black Woman and the Unfit Black Mother*

To understand the dynamics of how black fathers are viewed in custody proceedings, it is essential to address the history of bias and stereotyping black mothers have faced. Historically, black women have been depicted as pushy, overbearing, overly sexual, assertive and domineering.²⁸ These characteristics contribute to the stereotypical image that black women are unfeminine in both their appearances and actions.²⁹ Such unfeminine characteristics conflict with the normative image of the white, pristine, innocent, and feminine ideal mother,³⁰ thus contributing to the negative stereotyping of black mothers.

Three images of black mothers are prevalent in the history of the devaluation of black women: 1) the matriarch, or the Mammy; 2) the Careless Black Mother; and 3) the Welfare Queen.³¹ All three images contribute to the stereotype of the Unfit Black Mother that still exists today.

The images of the Careless Black Mother and Mammy emerged from slavery.³² The Mammy image was of a passive slave who committed herself to her white slave-owner.³³ Though Mammy cared for and looked after the white children of the slave-owners, she had no real power of her own. Her purpose was to serve her white mistress, and she had no real authority over her mistress's white children or even over her own black children.³⁴ Additionally, though the Mammy figure was seen as nurturing and compliant, and she was neither idealized nor feminized. Instead, she was forced to care for children

28. See bell hooks, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981). See also Dorothy Roberts, *KILLING THE BLACK BODY* 10 (1997) (Roberts describes the stereotype of black women being lascivious and Jezebels. Roberts writes: "From the moment they set foot in this country as slaves, Black women have fallen outside the American ideal of womanhood. . . Jezebel was diametrically opposed to the prevailing vision of the True Woman, who was chaste, pure, and white. . . This construct of the licentious temptress served to justify white men's sexual abuse of Black women. The stereotype of Black women as sexually promiscuous also defined them as bad mothers").

29. Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 370 (1996) (Perry asserts: "The message is that black women are immoral, unfeminine and undesirable and that white women should not be like them"). See also Brenda V. Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers' Sexual Interactions With Men and Boys in Custody*, 59 UCLA L. REV. 1690, 1701 (2012) (discussing how black women "were cast as sexually loose and aggressive in their behavior, and unfeminine and animal-like in their appearance").

30. Cristina Gallo, *Marrying Poor: Women's Citizenship, Race, and TANF Policies*, 19 UCLA WOMEN'S L.J. 61, 77 (2012).

31. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 61 (2003); see also Nicole Huberfeld, *Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent 'Workfare' Law*, 9 UCLA WOMEN'S L.J. 97 (1998).

32. Roberts, *supra* note 22; see also Roberts, *supra* note 31.

33. See Patricia A. Broussard, *Black Women's Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systemic Racism—Who Will Tell Her Stories?*, 16 J. GENDER RACE & JUST. 373, 420 (2013).

34. Roberts, *supra* note 31.

who were not her own, and thus was seen as incapable of nurturing her own children.

The Careless Black Mother emerged from the Mammy image. Due to poor nutrition, labor, and severe abuse that black mothers endured during slavery, the infant mortality rate for children born to slaves was high.³⁵ Slave masters and mistresses claimed, however, that infants died from the black mother's own carelessness.³⁶ After the abolishment of slavery, the image of the careless black mother continued to thrive, as economic turmoil amongst recently emancipated blacks forced women to work long hours doing manual labor.³⁷ As the ideal mother was expected to stay home and spend time with her children, black mothers were deemed unfit for the many hours they worked to financially support their children.³⁸

As black mothers continued to work outside the home to financially support their families, they were de-feminized and blamed for family instability.³⁹ A report issued in 1965 from sociologist Daniel Patrick Moynihan titled *The Negro Family: A Case for National Action*, illustrates this tendency.⁴⁰ The Moynihan Report, infamous today for its racially problematic conclusions, reflected the judgment and critique whites targeted towards black mothers and their work schedules.⁴¹ While the Moynihan Report criticized black fathers for their inability to provide for their family, the Report also concluded that black mothers were at fault for being too domineering and aggressive.⁴² According to the Moynihan Report, black women did not express femininity in the way that they should: they worked, provided financially for the families, and "wore the pants" in the family.⁴³ Black mothers emasculated black men and prevented black fathers from having a role in the family.⁴⁴

35. *Id.* at 62.

36. *Id.*

37. *Id.*

38. *Id.*; see also Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 50 (2010).

39. Roberts, *supra* note 32.

40. See Herbert Fain & Kimberly Fain, *Socio-Economic Status and Legal Factors Affecting African Fathers*, 21 BUFF. J. GENDER L. & SOC. POL'Y 1 (2012-2013) (citing Daniel Patrick Moynihan, *The Negro Family: The Case for National Action* (1965)); see also Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 625 (2011).

41. See Fain & Fain, *supra* note 40, at 1.

42. See *id.* at 19 (2012) (Fain and Fain write: "According to the Moynihan report, and similar arguments, the matriarch is your quintessentially bad black mother. She's domineering and unfeminine, always wearing the pants in the family. She's heft and gruff. She spends so much time away from home that she can't supervise her own kids. And when she is at home, she's too bossy and strong; thus, she emasculates her man and drives him away. If only the matriarch could be a little more feminine, a little less strong, a little whiter, suggested the report, the black family could lift itself up out of poverty").

43. *Id.*

44. *Id.*; see also Martha Albertson Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031, 1044 (2001).

Today, the unfeminine Careless Black Mother has morphed into the unworthy, unfeminine Crack Mom, or the Welfare Queen. Ronald Reagan's War on Drugs in the 1980s helped contribute to the myth of the Crack Addicted Welfare Queen.⁴⁵ During the crack "epidemic" of the 1980s and 1990s, the media wrongly reported that black mothers bore a higher percentage of infants who tested positive for drugs.⁴⁶ In fact, rates were roughly the same for black and white mothers. Moreover, despite the fact that there was little disparity between white mothers and black mothers in abusing narcotics while pregnant, black mothers were ten times more likely to be reported to the state.⁴⁷ Additionally, Ronald Reagan's campaign rhetoric was based on being "tough on crime." With his rhetoric and policies, Reagan contributed to the narrative that black women who were on welfare conned the state into receiving tens of thousands of dollars in unwarranted aid.⁴⁸ Consequently, "the term 'welfare queen' became a not-so-subtle code for 'lazy, greedy, black ghetto mother,'" which has had a significant impact on how black mothers are viewed today. This, in turn, affects how black mothers are viewed in custody and child welfare proceedings.

2. *Applying the Careless Black Mother Stereotype*

The evolution of the stereotype of the Unfit Black Mother has had a substantial impact within the legal system. Black mothers have a long history of disproportionately losing custody of their children within the child welfare system.⁵⁰ Black mothers are more likely to interact with state actors as the recipients of state benefits, and thus are more likely to be scrutinized by the child welfare system.⁵¹ The image of the Unfit Black Mother indisputably plays a role in the disproportionate number of black children in state care as well.⁵² The pervasiveness and insidious nature of these stereotypes has created a

45. MICHELLE ALEXANDER, *THE NEW JIM CROW* 48 (2010); Roberts, *supra* note 31.

46. Roberts, *supra* note 31 (The media reported that drugs were a bigger problem amongst black mothers than whites despite similar findings amongst white and black mothers).

47. Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326 (2004) (citing the report published by Ira Chasnoff, Harvey Landress, Mark Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *New England Journal of Medicine* 1202 (1990). See also Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). See also Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 U.M.K.C. L. REV. 789, 821 (2007) (referring to how black mothers of drug-exposed children were more likely to have their children stay in state care two years out than white mothers were).

48. MICHELLE ALEXANDER, *THE NEW JIM CROW* 48 (2010) (Professor Alexander recounts one of Reagan's favorite anecdotes of the "welfare queen" in Chicago who had dozens of names and addresses and brought in a "tax-free income" of over \$150,000).

49. *Id.*

50. See Roberts, *supra* note 47; see also Roberts, *supra* note 31.

51. See Roberts, *supra* note 47.

52. *Id.*

default image of black mothers who are unfit, unfeminine, and do not care for their children. She must therefore jump through hoops in order to be seen as a “good mother.”

The image of the Unfit Black Mother affects child custody cases as well. In Anne’s case, the system actors consistently expressed skepticism and suspicion towards Anne. The police did not believe Anne when she called them after an incident of domestic abuse.⁵³ The child’s attorney in the case did not believe Anne when she said that Brandon had abused drugs—until Brandon had tested positive during the court-mandated drug test. The organization that conducted Brandon’s subsequent supervised visitation described Anne as “pushy” and “overbearing” for asking to take a tour of the facilities.

The stereotypical image of the unfeminine, Unfit Black Mother helps explain why Anne consistently met with skepticism. As a black woman and mother, Anne was seen as unfeminine and aggressive regardless of her actions. Intersectionality theory addresses how Anne was subordinated in the categorical identities of gender and race, and consequently, how Brandon was in a position of privilege over Anne because of his gender. Intersectionality theory does not, however, fully explain why the system actors, like the drug evaluator and the organization that conducted his supervised visitation, used terms like “mild-mannered” and “unassuming” to describe Brandon as a father, or why they had gone out of their way to describe Brandon’s commitment as a father. Multidimensional masculinities theory explains how black men face gendered racism that is specifically associated with the identity subcategories of black and male. Multidimensional masculinities theory further explains how gendered racism causes people to view and react to black men depending on the characteristics they portray. Because the reaction people have to black fathers has a significant impact on black mothers, it is important to explore why by applying masculinities theory to the expectations we have of fathers as a whole.

B. Masculinity and Fatherhood: the “Good Father” and the “Bad Father” Under the Law

Just as motherhood is deeply associated with femininity, the ability to father a child arguably reflects the height of masculinity. As the act of conception traditionally entails a man inseminating a woman, a man’s ability to father a child represents his virility. Fathering a child means that a man’s

53. See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE JOURNAL OF LAW AND FEMINISM 75 (2008) (explaining that the prevailing narrative for a woman subjected to abuse is that she is a victim, she is scared, and she does not fight back. She is also white. Goodmark therefore concludes that women who do not fit the prevailing narrative, like black women, are often met with skepticism in the courtroom.).

sexuality does not need to be questioned, that his sperm is strong enough to fertilize, and that he is inarguably a man.⁵⁴

While the ability to physically father a child represents masculinity, fatherhood's relationship to masculinity has evolved throughout the years; "men's identities as fathers do not exist in isolation from their identities as men."⁵⁵ Legally, the definition of fatherhood has changed over the course of history.⁵⁶ While marriage to a child's mother initially defined fatherhood,⁵⁷ that definition broadened to biology after the rights of unmarried fathers were addressed.⁵⁸ Though there are now expanded factors to consider when defining what being a father means under the law, the definition of fatherhood still has strong roots in biology and marriage.⁵⁹

The functional definition of fatherhood for married fathers has also changed with time. Initially, the primary function of a father was to provide financially for the family: the mother provided nurture and care for the children at home while the father provided money and financial stability.⁶⁰ Masculinity was therefore tied to this model of parenting for fathers; "They were breadwinners, providers, and role models of manhood."⁶¹ Since providing care and nurture have been historically identified with mothers, such actions were often deemed as feminine, or un-masculine.⁶² Though the functional meaning of fatherhood for married couples has changed much throughout the years as married fathers gradually took on greater caretaking responsibilities, the definition of fatherhood for divorced or separated men divorced has not developed in the same manner.⁶³

While society has encouraged married fathers to take a more active role in childrearing, the message to divorced or separated fathers who live apart from

54. Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1321 (2005). Virility has long been tied to a man's masculinity, strength, and manhood, and such sentiment has been expressed in the media, as well. In the television show *Mad Men*, character Pete Campbell and his wife, Trudy, are trying to conceive but are having difficulty. After Pete finds out that his sperm is viable, he expresses his relief: "Well. What do you know? That is a relief, I do say. Able to leap tall buildings in a single bound, are they? To viability!"

55. NANCY E. DOWD, *Gender Challenges: Masculinities and Mothers*, in REDEFINING FATHERHOOD 181, 190 (2000) ("The connection between fatherhood and masculinity exposes the way current constructions of fatherhood are connected to aspects of masculinity deemed essential in separating men from women, giving men power only by thinking in terms of hierarchy, and defining power as violence.").

56. See generally Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325 (2005).

57. *Id.* at 326.

58. *Id.* at 326–28. See also Dowd, *supra* note 55.

59. Dowd, *supra* note 54, at 1309.

60. Murphy, *supra* note 56, at 327.

61. Robert L. Griswold, *The History and Politics of Fatherlessness*, in LOST FATHERS 24 (Cynthia R. Daniels ed., 2000).

62. Dowd, *supra* note 54, at 1321.

63. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 922–923 (2005).

their children has been far more ambiguous.⁶⁴ Historically, once parents no longer live with one another, traditional notions of parental roles and masculinity resurfaced and were reinforced. The default assumption was that mothers were better suited to care for the children, as mothers were expected to fall back into traditional feminine roles of caretaking and nurturing the child.⁶⁵ In custody proceedings, only the most “unfit” mothers were denied physical custody of the children, and fathers were delegated to weekend visitations with little room to participate in the childrearing.⁶⁶

While the caregiving expectations of the father post-divorce or post-separation have been ambiguous, it is clear that divorce or separated fathers still have a financial obligation to their children.⁶⁷ With the creation of the Child Support Enforcement Act, The Federal Office of Child Support Enforcement in the 1970s, and the Child Support Enforcement Amendment of 1984, Congress made clear its intention to rigorously enforce child support payments.⁶⁸ The law therefore reinforces the idea that fatherhood and masculinity are tied to the ability to provide financial support.

1. *The Law's Definition of the Unmarried “Good Father”*

As a result of the economic obligations noncustodial fathers face, the definition of a good father post-divorce or post-separation has become synonymous with the ability to pay child support.⁶⁹ A divorced or separated father need not contribute much to the day-to-day childrearing or caretaking of the child to meet his obligations, as that was a standard only expected of mothers. The law “does not require that nonresidential fathers see their children, provide them with moral or educational guidance, or meet their friends and teachers.”⁷⁰

Moreover, when court orders grant specific visitation times and arrangements for the noncustodial fathers, they will not be held in contempt when they do not exercise their visitation rights. Visitation is deemed the father's right to access his child, and is a right that he is free to exercise or ignore. This contrasts greatly with the noncustodial father's child support order, as they are held in contempt and even incarcerated for failure to pay child support.⁷¹ Consequently, the courts, either intentionally or inadvertently, give the impression that a noncustodial father's financial obligation is more important than his emotional obligation towards the child. As a result, a divorced or separated dad who pays and is current on his child support is a

64. *See id.* at 939.

65. Dowd, *supra* note 55, at 204.

66. *See generally* Maldonado, *supra* note 63.

67. Murphy, *supra* note 56, at 326; *see generally* Maldonado, *supra* note 63.

68. Murphy, *supra* note 56, at 345.

69. Maldonado, *supra* note 63, at 940.

70. *Id.* at 941.

71. *See generally* Maldonado, *supra* note 63.

“Good Father,” regardless of what his interactions with the child are.⁷² The fact that Brandon had a professional job and was current on child support payments therefore played a significant role in how he was viewed as “the best father in the world.”

2. *The Law’s Definition of the Unmarried “Bad Father”*

Just as a noncustodial father is deemed a Good Father for being current on his child support payments, fathers who are unable to pay child support are deemed Bad Fathers, a notion popularized by the media’s depiction of the “Deadbeat Dad.” The “Deadbeat Dad” is the father who refuses to pay child support despite the ability to do so, the man who would rather let his children starve than give away money that he could use on himself.⁷³

While there are certainly men who willfully choose not to pay child support, many fathers do not pay child support because they simply do not have the ability to do so.⁷⁴ A recent study estimates that poverty contributes to about 33.2% of noncustodial parents’ inability to pay child support.⁷⁵ Non-paying parents may have substandard education or a criminal history that prevents them from obtaining marketable skills and employment; they also may have substance abuse or mental health issues that prevent the ability to have a stable job or home life.⁷⁶ Enforcing child support obligations that indigent noncustodial parents cannot meet contributes to the cycle of poverty, and reinforces the stereotype that fathers who cannot afford to pay child support are “deadbeat dads” and bad fathers.⁷⁷ Additionally, the term “Deadbeat Dad” becomes class-based and racialized because the inability to pay child support disproportionately affects black fathers and other men of color.

72. *Id.* at 940. (describing how the differing gender roles create low expectations for fathers: “In many communities, so long as a divorced father pays child support—even if he does nothing else for his children—he is perceived as a decent, maybe even a good, father. Even if he has little contact with his children, so long as he supports them financially he will not elicit the moral opprobrium of most of his neighbors, coworkers, or relatives. We have only to look at the labels used to describe fathers who do not financially support their children (‘deadbeat,’ ‘deadbeat dads’) and the law’s and media’s obsession with such fathers and contrast it with the lack of attention given to fathers I refer to as ‘emotional deadbeats’ to conclude that society condemns economic deadbeat dads but apparently cares little about emotional deadbeat”).

73. *Id.* at 941.

74. Dowd, *supra* note 25, at 143 (discussing a 1997 study that shows that fifteen to twenty-five percent of noncustodial fathers have annual incomes lower than \$5,000, while only ten to fifteen percent have an annual income higher than \$40,000). *See also* Murphy, *supra* note 56; Maldonado, *supra* note 63.

75. Murphy, *supra* note 56, at 354.

76. *Id.* *See also* *New Research On Inner City Fathers*, THE DIANE REHM SHOW, NPR (May 28, 2013), <http://thedianerehmshow.org/shows/2013-05-28/new-research-inner-city-fathers>, in which Rehm interviews various guests, including professors Kathryn Edin and Lawrence Mead, youth advocate Wes Moor, and father of four Joe White, about the increase of children who live without their fathers. The interviewees discuss the assumption that inner city fathers who do not live with their children are “deadbeat dads,” but in reality are involved and care deeply about their children.

77. Murphy, *supra* note 56.

C. *How the Legal Images of Fatherhood Contribute to the Disparate Treatment of Mothers and Fathers in Custody Cases*

The differing expectations of mothers and fathers play a significant role in family court custody proceedings. Though historically, courts assumed that it was in the best interest of children to live with their mothers, the idealized expectations courts have of mothers put a spotlight on their parenting and life decisions. Fathers, on the other hand, are given credit for any time they spend with their children,⁷⁸ and in particular, for *wanting* to spend time and serve as caretaker for their children. While fathers may face bias in family court regarding their ability to serve as primary custodian, particularly when the child is in his or her “tender years,” men receive a positive presumption when they seek primary physical custody.⁷⁹ In fact, studies show, when fathers fight for custody they are awarded sole or joint legal custody in fifty to sixty-five percent of cases even where the mother was the child’s primary caretaker.⁸⁰ When fathers sought physical custody, they won primary custody one third of the time, and joint physical custody almost half the time.⁸¹ Fathers who were current on their child support payments benefited from the legal presumption that they were good fathers, and fulfilled their masculine duty by providing financially for their children. Mothers, however, were scrutinized and punished if they did not exhibit the proper feminine characteristics that have been idealized within the court system.⁸²

III. BIPOLAR BLACK MASCULINITY: THE “BAD BLACK MAN” AND THE “GOOD BLACK MAN”

Multidimensional masculinity allows for a study of society’s expectations of heterosexual black men.⁸³ Black men are put into one of two categories: that of the Bad Black Man, who is threatening in his unbridled masculinity, and the Good Black Man, who is seen as good because he assimilates into white

78. Katherine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV., 877 (2000) (Bartlett writes: “Similarly, caretaking by mothers sometimes is taken for granted by courts in custody cases, whereas when fathers ‘help out,’ their contributions tend to be highly exaggerated”).

79. See NANCY E. DOWD, *Economic Fathers*, in REDEFINING FATHERHOOD 132, 141 (2000).

80. Maldonado, *supra* note 63, at 974. See also Dowd, *supra* note 56, at 141 (citing to a 1989 Massachusetts Gender Bias Study report that states men obtain custody seventy percent of the time they seek custody in contested cases).

81. Dowd, *supra* note 56, at 141 (pointing out that fathers receive primary residential custody only between two and three percent of the time, and joint physical custody with mothers four percent of the time).

82. Murphy, *supra* note 26, at 701 (Murphy describes how unmarried mothers met deeper scrutiny than unmarried fathers regarding their sexual relationships, particularly when mothers were involved in same-sex relationships).

83. See generally Cooper, *supra* note 14; Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama’s Feminine Side*, 83 DENV. U.L. REV. 633 (2009).

normative standards.⁸⁴ As a result, black men are seen as either Absent Black Fathers or Good Black Fathers, depending on the characteristics they exhibit.

A. *Hegemonic Masculinity and the White Heterosexual Male Ideal*

Hegemonic masculinity is the privileged masculinity; it is the masculinity that has the most influence and is considered the most desirable way of being a man.⁸⁵ Hegemonic masculinity is the image of the white, middle-class heterosexual male, the image that is more common and prominent, and displayed more dominantly in the media and popular culture, than is any other masculinity.⁸⁶ The definition of masculinity therefore depends on three negatives: that one is not “feminine”; that one is not homosexual; and that one is not of color.⁸⁷

While the white, heterosexual, masculine ideal has changed throughout the years, there are a few characteristics that have remained, such as dominance, toughness, and competitiveness.⁸⁸ Scholars have described “John Wayne syndrome,” the explicit yet unwritten code of masculine conduct that extols being hard, tough, and unemotional.⁸⁹ The normatively masculine white man is therefore rational and logical, and exhibits natural authority and respect.

B. *The Bad Black Man*

1. *The Bestial Black Man and the Foundation of the Bad Black Man*

Black men have a long history of being viewed as exceeding the white, hegemonic, normative standard of masculinity. The image of the overly masculine “Bad Black Man” is the result. According to Frank Rudy Cooper, there are three defining characteristics of the Bad Black Man: he is 1) animalistic; 2) inherently criminal; and 3) sexually unrestrained.⁹⁰ Such defining characteristics stem from the “bestial black man image”, an image that was first created centuries ago when Europeans and Africans first interacted with one another.⁹¹ Africans were depicted as animalistic, savage, and

84. See Cooper, *supra* note 14.

85. Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 20–21 (2011).

86. LINDA BRANNON, *Gender Stereotypes: Masculinity and Femininity*, in GENDER: PSYCHOLOGICAL PERSPECTIVES 152, 172 (2000).

87. Ann C. McGinley, *Ricci v. Destefano: A Masculinities Theory Analysis*, 33 HARV. J. L. & GENDER 581, 585–586.

88. MYRIAM MIEDZIAN, *BOYS WILL BE BOYS: BREAKING THE LINK BETWEEN MASCULINITY AND VIOLENCE* 33 (2002).

89. *Id.* at 36–37 (2002) (describing the western films starring John Wayne and the rugged masculinity that Wayne exhibited).

90. Cooper, *supra* note 14, at 876.

91. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321 (2004). See also Marques P. Richeson, *Sex, Drugs, . . . Race-to-Castrate: A Black Box Warning of Chemical Castration’s Potential Racial Side Effects*, 25 HARV. BLACKLETTER L.J. 95, 103 (2009).

subhuman, with some Europeans even believing that they birthed apes and other unknown African animals.⁹² Europeans also described Africans as overly sexual and “lecherous,” and reported on African men’s supposed enlarged genitalia.⁹³ Finally, Europeans saw Africans as inherently criminal, perverse, and naturally villainous.⁹⁴

Europeans, who already viewed blacks as subhuman, then subjected blacks to slavery. The myths of black animalism and sexuality were reinforced and enhanced. Slavery also significantly contributed to the assumption that black people were inherently criminal, as slavery made freedom itself a crime for blacks. Slave-owners therefore had the right to scrutinize every single one of their slaves’ movements to police rebellion.⁹⁵ Black men’s sexuality was also closely scrutinized; their supposed enlarged genitalia caused white slave-owners to feel threatened in their comparatively diminished manhood.⁹⁶ Slave-owners punished black men for their sexuality, claiming that black male slaves were an extreme threat to white women.⁹⁷ Though there were very few reports of slaves sexually assaulting white women, and far more documentation of white men sexually assaulting black female slaves, the myth of the bestial black man flourished.⁹⁸ The mythical bestial black man image both justified and reinforced slavery.

Despite the eventual abolition of slavery, the myth of the bestial black man lived on in the post-Civil War era.⁹⁹ For decades, this myth was one of the many justifications for the lynching of “freed” slaves, particularly those who were accused of raping white women.¹⁰⁰ The black man’s relationship with the legal system has been historically different than that of the white man’s.¹⁰¹ Even after lynching was made illegal, black men were disproportionately legally executed for the alleged rapes of white women.¹⁰² Moreover, Jim Crow laws made it legal to arrest black people for using spaces that were marked for white people only.¹⁰³

Today, in our post-racial era, Jim Crow laws no longer exist, but black men are still subjected to vilification.¹⁰⁴ The media is filled with images of

92. Duru, *supra* note 91, at 1321.

93. *Id.* at 1322.

94. *Id.*

95. *Id.* at 1322-23.

96. *Id.*

97. *Id.* at 1324.

98. Richeson, *supra* note 91, at 103; *see also* Duru, *supra* note 91, at 1324-25.

99. Duru, *supra* note 91, 1325.

100. Richeson, *supra* note 91, at 103; *see also* Duru, *supra* note 91, at 1325.

101. *See generally* Alexander, *supra* note 45.

102. Duru, *supra* note 91, at 1333 (Duru also notes that the race of the victim is also relevant, as no defendant of any race has ever been sentenced to death for the rape of a black woman).

103. Alexander, *supra* note 45, at 31.

104. *See generally* Tricia Rose, *Rap Music and the Demonization of Young Black Males*, in *BLACK MALE* (1994).

black men entrenched in violent crime who participate in drug-related shoot-outs.¹⁰⁵ With the popularization and appropriation of rap music and hip-hop, black men became viewed as excessively masculine misogynists. This was reflected in widely publicized criminal cases against famous black men.¹⁰⁶

2. *The Pervasiveness of the Bad Black Man Stereotype*

The systemic mass incarceration of black men has reinforced the idea that black men are inherently criminal.¹⁰⁷ The War on Drugs made it legal to arrest and incarcerate impoverished black men who had substance abuse issues. Criminal laws that issued harsher sentences for crack cocaine than cocaine gave police a reason to make mass arrests of black men in poor communities.¹⁰⁸ Moreover, racial profiling and the misuse of prosecutorial discretion have created an overrepresentation of incarcerated black men.¹⁰⁹ While only 1.6 percent of white men between the ages of twenty and thirty-four are in jail or prison, twelve percent of black men are.¹¹⁰ Twenty-eight percent of black men will be imprisoned at least once in their lifetime.¹¹¹

Cases popularized in the media reflect how deeply ingrained the stereotype of the hyper-masculine Bad Black Man is in American society. In the “Central Park Five” case, the public, police, and prosecution all rushed to arrest and convict five teens, four of whom were black, for the rape of a white woman. This indicated the general public’s tendency to assume and believe in black men’s inability to control himself sexually.¹¹² In a more recent case that has caused a media stir, George Zimmerman was found not guilty of shooting and killing a seventeen-year-old black boy, Trayvon Martin, during a neighborhood watch. Despite the fact that Trayvon Martin was simply walking around the neighborhood he lived in, Zimmerman claimed that Mr. Martin had

105. See generally Rose, *supra* note 104.

106. *Id.* at 153; see also Timothy J. Brown, *Welcome to the Terrordome: Exploring the Contradiction of Hip-Hop Masculinity*, in PROGRESSIVE BLACK MASCULINITIES 194 (2006) (Brown refers to the popularized image of black hip-hop as “hip-hop masculinity.” As an example, Brown describes the media’s coverage of former NBA star Allen Iverson’s criminal case: “Judging from TV interviews, plenty of people-whites in particular-seem focused on what punishment Iverson might receive, as if they suddenly find the wildly popular cornrowed and tattooed 76ers guard menacing, not just edgy or hip anymore’ . . . Ultimately, the media coverage of the Iverson incident constructed an image of Iverson as a menacing person whom people should fear”).

107. See Alexander, *supra* note 45. (Alexander writes of the effects of the War on Dugs has on black men).

108. See *id.*

109. John O. Calmore, *Reasonable and Unreasonable Suspects*, in PROGRESSIVE BLACK MASCULINITIES, 137, 138-139 (2006) (citing a recent Department of Justice report); see generally Alexander, *supra* note 45.

110. Calmore, *supra* note 109, at 138-39.

111. *Id.* at 139.

112. See generally Duru, *supra* note 91.

attacked him and was such a threat that he had to shoot Mr. Martin in “self-defense.”¹¹³

These cases provide just a few, discrete examples that reflect how entrenched the image of the Bad Black Man has become within the context of the criminal justice system and society as a whole.

C. *The Good Black Man*

The Good Black Man is everything that the Bad Black Man is not. His sexuality is not threatening to white hegemony because he is desexualized by being “passive, nonassertive, and nonaggressive.”¹¹⁴ Like the image of the Bad Black Man, the Good Black Man has its roots in history, starting from the depiction of Uncle Tom in Harriet Beecher Stowe’s *Uncle Tom’s Cabin*.¹¹⁵ In the novel, Uncle Tom, a slave, is depicted as submissive, subservient, and loyal to his white slave master. He is powerless, and has no agency. This depiction of a black man’s loyalty to a white man who literally owns him has developed into the image of a “sellout:” a black person who is disloyal to other blacks in order to gain favor with white people in power.¹¹⁶

In order for a black man to gain favor with white people in power, he must act in a way that white people find nonthreatening.¹¹⁷ Because the Bad Black Man is the default image for the black man, to appeal to whites, the Good Black Man must distance himself from his blackness. Because the Bad Black Man is an overly sexual being who needs to be tamed, the Good Black Man must desexualize himself in order to seem nonthreatening.¹¹⁸ The Good Black Man seeks white acceptance by adopting the mannerisms, dress, and speech of a white man. He must diminish his overly masculine image and emasculate himself to achieve the normative masculinity that white men hold. Instead, he is defined by the image of what the white man would find least threatening¹¹⁹ and least powerful.¹²⁰

There are many who argue that Supreme Court Justice Clarence Thomas is the epitome of a Good Black Man, or today’s equivalent of an “Uncle

113. See Amanda Terkel, ‘Stand Your Ground’ Laws To Be Scrutinized For Racial Bias By Civil Rights Commission, HUFFINGTON POST (May 31, 2013), http://www.huffingtonpost.com/2013/05/31/stand-your-ground-racial-bias_n_3365893.html. It has been reported that Zimmerman had called law enforcement before he shot Mr. Martin because he had been following him for “suspicious behavior.” Even after law enforcement told Zimmerman not to engage with Mr. Martin, Zimmerman still accosted Mr. Martin.

114. Cooper, *supra* note 14, at 881.

115. See generally Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation From African-Americans*, 48 St. Louis U. L.J. 327 (2004). See also Cooper, *supra* note 14, at 880.

116. Cooper, *supra* note 14, at 880.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

Tom.”¹²¹ Justice Thomas has voted against positions that would have arguably contributed to the advancement of blacks and other communities of color, finding that the Equal Protection Clause of the Fourteenth Amendment prohibits race-based affirmative action or preferential treatment.¹²² Most recently, he voted against the Voting Rights Act, legislation that protected the voting rights of the most disenfranchised in states that historically oppressed black voters.¹²³ Justice Thomas is thought to have “sold out” the interests of blacks to successfully assimilate into white mainstream culture as the second black Supreme Court Justice.¹²⁴

D. Resulting Bipolarity of Black Masculinity and its Effects

The extreme and competing images of the Good Black Man and the Bad Black Man result in the bipolar image of black masculinity.¹²⁵ This bipolarity of black masculinity means there are few, if any, nuanced or complicated images of heterosexual black men.¹²⁶ This is epitomized in mainstream pop culture and the media, as there have been very few black male roles in television and movies that portray black men in a complex manner.¹²⁷

Bipolar imaging of black masculinity presents two extremes of black men that prevent the black man from being viewed as a nuanced, complicated, full-dimensional person. As a result, bipolar black masculinity helps enforce the status quo of mainstream inclusiveness. As Cooper states, “the Bad Black Man image is used to justify containment of the masses while the Good Black Man

121. See Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J. L. & LIBERTY 583 (2009); Leonard M. Baynes, *Who Is Black Enough For You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205 (1997); JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); Jack E. White, *Uncle Tom Justice*, TIME, Jun. 26, 1995, at 36.

122. See *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). See also *Gratz v. Bollinger*, 539 U.S. 244 (2003).

123. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

124. Jane Mayer & Jill Abramson, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994). See also Smith, *supra* note 121, at 602.

125. See generally Cooper, *supra* note 14.

126. *Id.*

127. The television show *30 Rock* is an example of this. It includes two black heterosexual male characters, Tracy Jordan and Toofer. While it may seem like progress to have two black heterosexual male characters on one television show so prominently featured, the two characters are representative of black bipolar masculinity. Tracy Jordan, the wild, partying actor and star of the fictional show *TGS*, represents the Bad Black Man. He shares stories of his poverty, has strong ties to the black community, and his actions are wild and unpredictable. He has had a history with the criminal justice system, and in one particular episode, even had to wear an ankle bracelet as a result. *30 Rock*, “Ludachristmas,” Season 2, Episode 9. Toofer, on the other hand, is one of the writers for *TGS*, and is Harvard-educated. He dresses in button-down shirts, sweaters, and ties, and does not speak of his blackness. Instead, he brings up his Harvard education repeatedly. Despite being black himself, he has been described as being “afraid of black people.” Toofer is never seen dating or explicitly expressing sexual desires. He is therefore representative of the Good Black Man, as he is desexualized and disassociates himself from his blackness.

image is used to justify the remaining status quo of inclusion and resistance to substantive change are maintained.”¹²⁸ The achievement and mainstream success of Good Black Men like Clarence Thomas help justify the existence of the mythical Bad Black Man image, as well as the mass incarceration and criminalization of black men who fall into the category of the Bad Black Man.

IV. BLACK MASCULINITY AND BLACK FATHERS

Bipolar imaging of black men's masculinity contributes to the extreme stereotyping of black fathers, which consequently has a deep impact on how black fathers are treated in custody cases. The Bad Black Man image contributes to the assumption that black fathers are bad fathers, and what this Article calls “Absent Black Fathers.” The image of the Absent Black Father is one of a man failing to raise his children with their mother, does not see his children, not make his child support payments, and has fathered many children with different mothers.¹²⁹ As Roberta L. Coles and Charles Green state in *The Myth of the Missing Black Father*: “The black male. A demographic. A sociological construct. A media caricature. A crime statistic. Aside from rage or lust, he is seldom seen as an emotionally embodied person. Rarely a father. Indeed, if one judged by popular and academic coverage, one might think the term ‘black fatherhood an oxymoron.’”¹³⁰ The Absent Black Father does not marry or contribute financially to the family, and his many “baby mamas”¹³¹ and children must therefore fend for themselves. The Absent Black Father is excessively masculine and therefore does not nurture his children: As Dorothy Roberts states, “African-American men are viewed as verbs but not nouns; that is, it is frequently assumed that Black men *father* children but seldom *are* fathers.”¹³²

Like the images of the Bad Black Man and the Unfit Black Mother, the Absent Black Father dates back to slavery. Though female and male slaves technically had their own families and children, slave law mandated that the white master was the head of the slave family.¹³³ Thus, the children of slaves were given the white master's surname and were taught to respect the slave

128. Cooper, *supra* note 14, at 891,

129. See generally ROBERTA COLES & CHARLES GREEN, *THE MYTH OF THE MISSING BLACK FATHER* (2009). See also Dorothy Roberts, *The Absent Black Father*, in *LOST FATHERS* 145 (1998).

130. See Coles & Green, *supra* note 129.

131. See Jason C. Miller & Hannah B. Murray, *Wikipedia In Court: When and How Citing Wikipedia and Other Consensus Websites is Appropriate*, 84 ST. JOHN'S L. REV. 633, 654 (2010). See also Meredith Johnson Harbach, *How (Not) to Talk About Abortion*, 47 U. RICH. L. REV. 425, 432 (2012) (Harbach discusses how the term “baby momma” has been popularized in mainstream culture to refer to an unmarried pregnant woman or mother, “who may or may not have a relationship with the fetus's child or child's father”). The term evidently invokes racial and gendered stereotypes, as it is often associated with black women from poor communities.

132. See Dorothy Roberts, *The Absent Black Father*, in *LOST FATHERS* (1998).

133. *Id.* at 148.

master rather than their biological father.¹³⁴ Though slave families participated in childrearing, slave fathers (and of course, slave mothers) had no authority when it came to decisions made about their children.

While the media has popularized the term “Deadbeat Dad” to mean any father who fails to provide financially for his children, fatherlessness has been viewed as a problem specific to the black community.¹³⁵ The default image of the Absent Black Father serves one major function: to offer a “convenient explanation” for the issues the black community faces, such as poverty, mass incarceration, and unemployment.¹³⁶ By highlighting the absence of black fathers in the family home, the black family structure is blamed for the disproportionate number of black Americans who suffer from mass incarceration, unemployment, and poverty.¹³⁷

A. How the Bad Black Man Contributes to the Mythical Image of the Absent Black Father

This section takes the three main characteristics of the Bad Black Man and argues that they contribute to the Absent Black Father image. First, the black man’s resistance to marriage shows that he is inherently animalistic and therefore refuses to be “tamed” by a woman, and therefore will not participate in an institution that would restrict him. Second, the Bad Black Man is inherently criminal and spends time incarcerated and is therefore unable to have a job or support himself financially. Third, the Bad Black man is unable to control himself sexually, and therefore has many children and “baby mommas.”

134. *Id.*

135. *Id.* at 145. The stereotype that black men are absent fathers is well ingrained within society, and has been the talking point for many politicians. See Arturo Garcia, *Tea-partying Deadbeat Dad Joe Walsh Has ‘A Dream’ That Black Men Won’t Be Deadbeat Dads*, THE RAW STORY (August 28, 2013), <http://www.rawstory.com/rs/2013/08/28/tea-partying-deadbeat-dad-joe-walsh-has-a-dream-black-men-wont-be-deadbeat-dads/> (quoting former Rep. Joe Walsh (R-IL) as saying on his radio show: “I have a dream that young black men won’t become fathers until after they’re married and they have a job. . . . I have a dream that young unmarried black women will say ‘no’ to young black men who want to have sex. I have a dream that today’s black leadership will quit blaming racism and ‘the system’ for what ails black America.”). See also Loren Marks, Katrina Hopkins-Williams, Cassandra Chaney, Olena Nesteruk, and Diane Sasser, *‘My Kids and Wife Have Been My Life’: Married African American Fathers Staying the Course*, in THE MYTH OF THE MISSING BLACK FATHER 19 (2009) (“Is any demographic fact more disturbing, more demanding of our collective attention, than the fact that the great majority of African American children do not live with their fathers?”) (quoting the opening page of *Black Fathers in Contemporary American Society*).

136. Roberts, *supra* note 132, at 146. (Roberts writes, “The absent Black father is a main character in the story that says poverty is caused by family form and not by racism or the unequal distribution of wealth, and that reinstating fathers is therefore the solution to poverty”).

137. *Id.*

1. *The “Inherently Animalistic Bad Black Man” and His Resistance to the Institution of Marriage*

There has been much scholarship in recent years about marriage, particularly same-sex marriage.¹³⁸ Marriage between opposite sex couples has long been expected for parents and represents adulthood and stability. Couples who have children together *should* be married, some would argue, given the evidence that children are better off when their parents are married and living together.¹³⁹ In fact, the institution of marriage may have been invented for the sole purpose of “facilitating and specially supporting biological procreation.”¹⁴⁰

Marriage, an institution with both explicit laws¹⁴¹ and implicit rules, is arguably an opportunity for the government to coerce people into acting in conformity with both laws and societal expectations. The black man, however, is seen as inherently uncivilized and “savage,”¹⁴² an overly masculine and animalistic creature who needs to be disciplined and controlled. As Dorothy Roberts asserts: “Some commentators believe that the hypersexual and violent Black man needs the taming influence of marriage more than anyone. But in their rhetoric, he is someone to be disciplined, not given power or respect.”¹⁴³

Much has been written about the “marriage crisis,” or marriage decline, within the black community.¹⁴⁴ Black Americans have the lowest rate of marriage of any other racial group in America, and, as Professor Ralph Richard Banks writes in his recent book, *Is Marriage for White People? How the African-American Marriage Decline Affects Everyone*, black women are three times as likely as white women to never marry.¹⁴⁵ Professor Banks rightly points out that black women have “surged ahead” despite obstacles, and have become statistically more likely to have a higher education and income than their black male counterparts. Yet, Professor Banks points out that as a result, black women who marry black men end up marrying “down” because they are more likely to marry someone who is less educated.¹⁴⁶ Professor Banks therefore urges black women to participate in interracial marriages and to marry “out” instead of “down.” Professor Banks, thereby, perpetuates the assumption that the average black man is not meant for marriage or is not worth marrying.

138. See Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467 (2013).

139. See Murphy, *supra* note 56.

140. Joslin, *supra* note 138, at 1478 (2013).

141. Though divorce laws differ from state to state, there are certain acts that are common grounds of divorce, like adultery and desertion.

142. See Duru, *supra* note 91; Roberts, *supra* note 134.

143. Roberts, *supra* note 134, at 148.

144. See generally RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* (2011). See also Nancy Leong, *Is Marriage for Rich People? A Book Review of Ralph Richard Banks's 'Is Marriage for White People?'* 44 CONN. L. REV. 1325, 1326 (2012).

145. Nancy Leong, *supra* note 144, at 1326.

146. See Banks, *supra* note 144.

While it is statistically true that a black father is less likely to be married to the mother of his children than a white father is¹⁴⁷, there are numerous institutional issues that make this the case.¹⁴⁸ Black men are eight times more likely than white men to be incarcerated,¹⁴⁹ thus making it more difficult to participate in the institution of marriage. Additionally, studies show that there is a causal link between marriage and socioeconomics: those who are considered middle- to upper-class are much more likely to be married than those who are considered impoverished.¹⁵⁰ As the black community is more likely to be impoverished, black men are less likely to marry. Finally, there are causal links between marriage and employment, as studies suggest that black men's underemployment may decrease his desire to marry.¹⁵¹

2. *The "Inherently Criminal Bad Black Man" and the Economic Effects of His Criminality*

Because the excessively masculine Bad Black Man is seen as inherently criminal, it is assumed that he should be incarcerated. Though the assumption that black men are inherently criminal is a myth, statistically speaking, there is a much higher likelihood that a black father is incarcerated and unable to see his children than for a father of any other race in the United States. Even if the black father is not incarcerated, one in three young black men are "under the control" of the criminal justice system, which includes being on probation or parole.¹⁵² As Michelle Alexander writes in *The New Jim Crow*, those who have a criminal record are subject to various forms of legal discrimination and are literally cast in a segregated group.¹⁵³

The impact of a criminal record is strong, particularly in employment. Though having a criminal record hurts all job applicants,¹⁵⁴ black men who are

147. See Coles & Green, *supra* note 129 (Coles and Green site the statistic that in 2000, only 16 percent of African-American households were married couples with children, "the lowest of all racial groups in America").

148. See Leong, *supra* note 144.

149. See ALEXANDER, *supra* note 45.

150. See Leong, *supra* note 144.

151. Anthony V. Alfieri, *Post-Racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921, 949 (2010). See also Coles & Green, *supra* note 129, at 5.

152. Alexander, *supra* note 45, at 9.

153. Alexander, *supra* note 45, at 2. (Alexander asserts: "Today, it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination- employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service- are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it").

154. Alexander, *supra* note 45, at 137, 146. (Alexander shares disturbing statistics regarding the lack of employment opportunities for those who have been convicted of a felony, including a 2002 survey that states less than 25% of employers were willing to consider hiring a person convicted of a drug-related felony, 7% of employers were willing to consider someone convicted of a property-related felony, and less than 1% for a violent felony).

convicted of felonies “are the least likely to receive job offers of any demographic group.”¹⁵⁵ Additionally, these jobs pay minimum wage, or less. Moreover, oftentimes an ex-offender’s driver’s license has been suspended or revoked, thus causing severe challenges in obtaining and maintaining employment.¹⁵⁶ On the rare occasion that an ex-offender is able to obtain a job that pays a living wage, he is still confronted with large debts related to his criminal conviction, as newly released ex-offenders oftentimes must make payments to the court, state-agencies, and probation departments.¹⁵⁷ In fact, many ex-offenders go back to prison for failure to meet their financial, probation supervision requirements.¹⁵⁸

It is assumed that black fathers who have child support obligations are unable to make their payments, and therefore cannot provide for their children financially.¹⁵⁹ To some extent, this assumption rings true, but not because the black father is absent or a “deadbeat.” Rather, the institutional challenges that black men face in the criminal justice system, and the legal discrimination they face with employment upon release, puts black men at a severe disadvantage when it comes to economic mobility.¹⁶⁰

3. *The “Inherently Over-Sexual Bad Black Man” and His “Baby Mamas”*

One of the most prevalent stereotypes of the Bad Black Man is that his excessive masculinity causes his purportedly outsized sexual appetite,¹⁶¹ which supports the belief that black men father many children with different women. As the ability to father a child is seen as the epitome of a masculine feat, this assumption about black men supports the theory that black men as a whole are

155. *Id.*

156. *Id.* at 137, 147-48 (Alexander describes how Murray McNair, a twenty-two-year-old ex-offender who had been locked up for a drug offense, found a \$9-an-hour job. The job, however, was at a warehouse twenty miles away from his home in Newark, New Jersey, and McNair therefore had to take two buses and a taxi ride to get out there. Alexander further explains how an “underemployed thirty-six-year-old black man quit his suburban job because of the transportation problems. ‘I was spending more money getting to work than I earned working’”).

157. *Id.* at 137, 150. (discussing how in addition to paying probation departments, courts, and child-support enforcement offices, many newly released prisoners are often billed for drug testing and drug treatment).

158. *Id.* at 161 (citing a study that found twelve percent of probation revocations “were due at least in part to a failure of probationers to pay their debts”).

159. Vivian L. Gadsen, Stanton E. F. Wortham, Herbert M. Turner III, *Situated Identities of Young, African American Fathers in Low-Income Urban Settings: Perspectives on Home, Street, and the System*, 41 FAM CT. REV. 381, 385–86 (“African American fathers are predicated on the assumption that they do not systemically provide for their children financially.”).

160. Roberts, *supra* note 132, at 149, 150 (1998) (“These appalling incarceration rates stem not only from the poverty and desperation that plagues Black communities, but also from federal and state sentencing policies that are tougher on Black drug offenders. Locking a man up essentially makes him ineligible for marriage, rips him away from his family, and prevents him from providing financial support. Ex-convicts have a hard time finding a decent job, which makes it difficult for them ever to become the ideal father.”).

161. *See* Duru, *supra* note 91.

hyper-masculine. In reality, there are no studies to support the assumption that black men are overly sexual or have more sexual partners than white men. However, studies have shown that young black males are more likely than white males to discourage women from having abortions due to religious beliefs,¹⁶² and are therefore more likely to become fathers from unplanned pregnancies than white males.

As a result, the default image of the Absent Black Father is that he is inherently animalistic, and therefore resistant to “civilized” institutions like marriage; that he is overly sexual, and consequently has many sexual partners and baby mamas; and that he is inherently criminal, and therefore incarcerated or recently released from incarceration, and does not provide financially for his children, even if he is able to do so.

B. The Default “Good Black Father”

Just as bipolar black masculinity contributes to the creation of the Good Black Man and the Bad Black Man, it also contributes to the bipolar images of the Absent Black Father and “Good Black Father.”

The Good Black Father is defined by the white standard of goodness for black men. He is influenced by the default assumption that black fathers are absent. The Good Black Father may therefore be seen as “good” because he has one or more characteristics that do not coincide with the Absent Black Father. A black father may be seen as a Good Black Father solely because he is married to the mother of his children, or has not fathered children with other women. Additionally, a black father may be seen as a Good Black Father for not having a criminal record, or for being gainfully employed. A black father may be seen as a Good Black Father because he is a professional, and is part of a higher socio-economic class than society expected of him. Most of all, a black father may be seen as a Good Black Father if he is current on his child support payments, as the law generally finds fathers who pay child support by assuming they are “good fathers.”¹⁶³

Typically, a father is not expected to be nurturing to his children, or to be the primary caretaker, as such actions are historically considered to be the role of the mother.¹⁶⁴ Consequently, a father’s contributions to childrearing are exaggerated. This is particularly the case when a black father is involved with childrearing, because such actions conflict with the excessively masculine, Bad Black Man/Absent Black Father image. As a result, a black father’s contributions to childrearing can be exaggerated even more than a father of any other race. Mark Anthony Neal writes in his chapter, “Bringing Up Daddy” in

162. See Herbert Fain & Kimberly Fain, *supra* note 40, at 1 (citing William D. Allen & William J. Doherty, *The Responsibilities of Fatherhood As Perceived by African American Teenage Fathers*, 77 FAM. IN SOC’Y: J. OF CONTEMP. SOC. SERV. 142, 143 (1996)).

163. See *supra* Part II.B.1.

164. See *supra* Part II.B.

Athena D. Mutua's book *Progressive Black Masculinities*, about the reactions he receives as a black man who practices attentive parenting techniques:

Even worse are folks who want to bestow the Nobel Peace Prize of parenting on me simply because they have seen a black man as a good parent. When the wife of one of my colleagues once remarked to me that she had never seen a man so attentive to his child, I was not quite sure whether she was talking about men in general or black men in particular, especially because I saw her husband as a man who was particularly attentive to his son . . . and I have to admit that at times I resist patting myself on the back for doing the kinds of things society would have us believe black men were genetically challenged to do. What I do is not [the] exception; it comes with the territory of being a parent in the twenty-first century.¹⁶⁵

With such low expectations of black fathers, it is not surprising that fathers in situations like Brandon are seen in such a positive light. Though Brandon did test positive for two forms of narcotics, he had a professional job, was upper-middle class, was current on his child support payments, appeared for the scheduled visitations, and had no criminal history. This caused him to be viewed as not only a Good Black Father, but as one of the "best" fathers the drug evaluator and the organization that conducted the supervised visitation had even seen.¹⁶⁶ Just as Mark Anthony Neal explains, when evaluators described Brandon as one of the best fathers, they meant Brandon was one of the best *black* fathers they had seen.¹⁶⁷ The adjectives they chose to describe Brandon, such as "quiet," "mild-mannered" and "unassuming," are characteristics that highlight how nonthreatening they found Brandon. Instead of meeting the mythical image of the excessively masculine, animalistic, inherently criminal, and sexually depraved Absent Black Father, the evaluators met a polite black man with a professional job, which automatically made Brandon less threatening and less masculine to them. The system actors therefore highlighted attributes that reflected how non-threatening they found Brandon.

C. Reality: Noncustodial Black Fathers are No More Absent Than Noncustodial White Fathers

Notwithstanding the prevailing image of the Absent Black Father, black men do not value family relationships less than white men or other men of color do.¹⁶⁸ Instead, black men are less likely to marry the mother of their children or live with their children because of institutional issues like poverty,

165. Mark Anthony Neal, *Bringing Up Daddy*, in *PROGRESSIVE BLACK MASCULINITIES* 263, 270 (2006).

166. See *supra* Introduction (the report described Brandon as the following: "In all of my years at his job, I have never seen a better or more dedicated father than Brandon. He is mild-mannered, committed, and completely devoted to his child").

167. Neal, *supra* note 165, at 270.

168. Roberts, *supra* note 132, at 150.

incarceration, and unemployment.¹⁶⁹ Therefore, the narrow, limited definition of a good noncustodial father is all they may be able to aspire to. But because the definition of a good noncustodial father is limited to his financial contribution,¹⁷⁰ black men are at a significant disadvantage in meeting such a standard and their other parenting efforts are overlooked.

While black men have more challenges with financially supporting their children, many black fathers who cannot pay formal child support still contribute and are involved in their child's life in other ways.¹⁷¹ As Professor Solangel Maldonado notes, studies have indicated that the majority of poor black fathers who do not pay child support make "in-kind" contributions to their children that are not formally recognized by the court, such as buying diapers, baby formula, baby furniture, and clothing.¹⁷² These contributions mean more to fathers who are struggling financially than giving cash, as they are tangible evidence that the father has contributed to his children's lives. Moreover, studies show that black men have the "highest rates of visitation or provision of some caretaking or in-kind support (more than formal child support)."¹⁷³ A recent study delineated how amongst fathers who were not living with their child, 44 percent of unmarried black fathers were visiting the child regularly, compared to only 17 percent of white and 26 percent of Hispanic fathers.¹⁷⁴

Dorothy Roberts sums up the issue as follows:

What condemns the absent Black father, then, is not his lack of involvement with his children but his marital and economic status. A good father is a married breadwinner . . . The economic definition of father has excluded the Black family from society's respect and support . . . It has branded Black men as irresponsible fathers and justified a stingy welfare system that disadvantaged Black families from the outset. The absent Black father is the antithesis of the ideal of the wage-earning husband. His frightening image bolsters the patriarchal paradigm, which, in turn, justifies preserving a social order that has consigned generations of Black children to poverty.¹⁷⁵

169. See Coles and Green, *supra* note 129, at 7. (Coles and Green site a study that indicates only 37 percent of black nonmarital fathers were living with the child, compared to 66 percent of white fathers and fifty-nine percent of Hispanic fathers). See also Nancy Leong, *supra* note 144.

170. See Murphy, *supra* note 26, at 345.

171. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1004 (2006).

172. *Id.* at 1004 (2006).

173. See Coles & Green, *supra* note 129, at 7–8.

174. See *id.*

175. Roberts, *supra* note 132, at 154.

D. The Resulting Effects of the “Absent Black Father” Image in Family Court Custody Proceedings

Once parties reach family court to deal with a custody dispute, it is fair to assume that the parents are less likely to be living together. Perhaps they are divorced or separated, or were never in a committed, long-term relationship. Often, the child in question lives with the mother,¹⁷⁶ which means that the majority of fathers who enter the courtroom over a custody dispute are noncustodial parents. Though unmarried, noncustodial black fathers are more likely to visit and spend time with their children than unmarried, noncustodial fathers of other races, black men must contend with the stereotype that they are Absent Black Fathers when they enter the courtroom. These fathers likely face unfair bias if the fact-finder sees attributes of the stereotypical Bad Black Man or Absent Black Father, particularly if he has a criminal record, has children with other mothers, or struggles to pay child support.¹⁷⁷

As an example, Andrew was stereotyped as a Bad Black Man in court when he was litigating over custody of his two children, Patrick, age 9, and Gemma, age 6.¹⁷⁸ Patrick and Gemma lived with their mother, Katie. Unlike Brandon, Andrew was unemployed and had several drug-related convictions. In terms of child support, he was in more than \$10,000 in arrears because he had not found steady employment since being released from prison. He appeared in a large white t-shirt and baggy black sweatpants. Andrew did not have an attorney because he could not afford one, and confused by the proceedings, interrupted the judge to ask him several questions. The judge in Andrew and Katie's case openly chastised Andrew for “being disrespectful” in court by “dressing ghetto” and for being a “deadbeat” by not paying his child support. The judge did not inquire about the activities that Andrew did with Patrick and Gemma, or ask how often Andrew saw them. Instead, Andrew was stereotyped as a Bad Black Man and Absent Black Father.

Though Andrew and Brandon presented themselves as polar opposites in family court, neither of their parenting skills or actual contributions were addressed. Judges have an unusual amount of discretion in custody cases, as the “best interest” standard can be applied and interpreted broadly.¹⁷⁹ Though

176. See Murphy, *supra* note 56.

177. There are many black fathers who feel they are treated unfairly within the family court system today. Organizations like “Fathers with Voices,” whose mission is to “increase the involvement of separated/divorced and non-custodial fathers in the lives of their children,” helps serve as a resource in assisting fathers navigate the family court system. <http://www.fatherswithvoices.info/index.html>. The author spoke with the founder of Fathers with Voices, Mr. Eric Legette, in 2012 about his work and motivations about creating the organization. Mr. Legette stated that he felt his “voice wasn’t being heard,” and how he felt his child “was kidnapped and [he] was being punished for it.” Telephone Interview with Eric Legette, Founder, Fathers with Voices (July 3, 2012).

178. Andrew’s story is inspired by a real case I worked on, with details changed to protect identities.

179. About 21 states have a “best interest” factor test, and while these factors differ from state to state, they often include the following: 1) the emotional ties between the child and his or

many states have suggested factors for judges to consider, many states allow judges to consider all relevant factors that could determine what is in the best interest of the child. Therefore, judges have broad discretion and can oftentimes be influenced by external characteristics that have little to do with the best interest of the child. Consequently, in response to such stereotyping of men like Andrew, black fathers benefit from attempting to present themselves in a manner that is contrary to the societal expectations of them. Brandon presented himself in a way that was non-threatening to the white family court system actors by speaking in a low voice, wearing dress pants and button-down shirts, and speaking only when he was addressed. By doing so, the system actors were able to find him unthreatening, “quiet,” “mild-mannered,” and “unassuming.”

The generally low expectations of fathers who are not married or living with the mothers of their children, coupled with the assumption that black men are absent fathers who do not contribute to childrearing in any way, may cause system actors to exaggerate or over-credit black fathers who do not fit the stereotypical image of the Absent Black Father. The simple fact that the black father seeks custody or visitation challenges the default assumption that he is absent. Fathers like Brandon are labeled “committed” and “devoted” for showing up to weekly supervised visitation with presents.

For black mothers, though, such credit is not given, as mothers in general are held to the highest standard of scrutiny.¹⁸⁰ A black mother must therefore contend with the stereotype that she is unfit. When faced with a Good Black Father, she is at a significant disadvantage.

CONCLUSION

* * *

A multidimensional masculinities approach to black men means that black men would be seen as individuals and not essentialized into the two extreme stereotypes of the Bad Black Man or the Good Black Man. A multidimensional masculinities approach in a custody setting would mean that a black father’s actual contributions to his child would be considered and applied to the best interest standard. Though it may acknowledge that financial contributions can be important, a multidimensional masculinities approach would allow fact-finders to assess the economic challenges a black father may face, and would not penalize a man because he was impoverished or reward him because he could afford to pay child support.

It is unclear what type of father Brandon actually is, or who was truly deserving of gaining custody over Christy in the above-referenced example just as it is unclear what type of father Andrew is, and whether Katie was the right

her parents, siblings, family and household members; 2) the capacity of the parents to provide a safe home and adequate food, clothing, and medical care; and 3) the mental and physical needs of both the child and parents.

180. See Murphy, *supra* note 22.

person to have custody of Patrick and Gemma. This Article does not intend to demean the contributions Brandon, or to over-credit the contributions Andrew made. Rather, this Article argues that with regards to Brandon, the characteristics the system actors highlighted had more to do with Brandon's race and gender, and the expectations attached to Brandon as a black father, than they had to do with Brandon's actual ability to parent. Similarly with regards to Andrew, the judge saw and spoke to him in a manner that reflected he felt threatened by him, going so far as accusing Andrew of being disrespectful. The system actors and fact-finders in both cases were influenced by the bipolarity of black masculinity, and, as a result, automatically placed Brandon in one of two categories: that of the Bad Black Man, or Absent Black Father, or that of the Good Black Man, or Good Black Father. The fact that Brandon was found to be "mild-mannered" and "unassuming" have little to do with what was in the best interest of the child and should not be characteristics that are heavily considered in a custody case. They are, however, characteristics that reflect that Brandon was seen as less masculine and less threatening than the default image of the Bad Black Man. Similarly, Andrew's clothes and demeanor in court have little to do with how he parents.

Brandon should not have received an overly positive presumption because he did not fit the excessively masculine, mythical image of the Bad Black Man, or the Absent Black Father. Such a presumption devalues the real contributions that black men and fathers make in their children's lives, and unfairly puts black fathers in the category of Bad Black Man who, like Andrew, have attributes that evaluators assume are stereotypically associated with the Absent Black Father. Finally, such a presumption impacts the child, as the fact-finder and system actors are not evaluating what is truly in the best interest of the child, but rather are influenced by which category the black father falls in.

Consequently, the bipolarity of black masculinity is harmful to black fathers, black mothers, and their children. A multidimensional masculinities approach is therefore necessary. Such an approach acknowledges the gendered racism black men face, as well as the impact such gendered racism has on black women. Instead of automatically putting black fathers into the Good Black Father or Absent Black Father categories, a multidimensional masculinities approach would recognize and acknowledge the real contributions of black fathers, as opposed to the ones that are related to the white standard of masculinity.