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Race, Gender, and Work/Family Policy

Nancy E. Dowd*

INTRODUCTION

Family leave is not an end in itself, but rather is part of a much bigger picture: work/family policy. The goal of work/family policy is to achieve a good society by supporting families.¹ Ideally, families enable children to develop to their fullest capacity and to contribute to their communities and society. Families are critical to children's success, particularly when other external factors might otherwise undermine children's opportunities.² Families are also critical to adult success, providing a haven for intimacy and love, as well as supporting adults' wage work and connecting them to the community.³

Public rhetoric in the United States has always strongly supported families. Our policies, however, have not. In the area of work/family

* Chesterfield Smith Professor of Law, University of Florida Levin College of Law. I have benefited from the comments, feedback and support of Sharon Rush, Berta Hernandez-Truyol, Tanya Hernandez, Nancy Ota, Katheryn Russell-Brown, Barbara Bennett Woodhouse, and Kenneth Nunn.

1. Children frequently live within more than one family structure prior to reaching age eighteen. What is most important about families is function, not form. See Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785 (2003). On definitions of "family," see Developments in the Law, *The Law of Marriage and Family*, 116 HARV. L. REV. 1996 (2003); Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. FAM. STUD. 1 (2003); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255 (2002).

2. Parental involvement is the most critical mediating factor to combat debilitating social context. Kristin Anderson Moore & Zakia Redd, *Children in Poverty: Trends, Consequences, and Policy Options*, Child Trends, at 5, available at <http://www.childtrends.org/PDF/PovertyRB.pdf> (last visited Oct. 2, 2003).

3. See generally JOAN WILLIAMS, UNBENDING GENDER: MARKET WORK AND FAMILY WORK IN THE TWENTY-FIRST CENTURY (1999) (discussing the role of families in supporting wage workers); see also GENERATIVE FATHERING: BEYOND DEFICIT PERSPECTIVES (Alan J. Hawkins & David L. Dollahite eds., 1997) (discussing the role of parenting and carework in adult development).

policy, the United States continues to lag behind every other advanced industrialized country, as well as many developing countries,⁴ in the degree to which we provide affirmative support for families.⁵ Limited family leave and child-care support are halting steps toward a policy that affirmatively supports families.⁶

The United States' continued lack of a comprehensive work/family policy is both a blessing and a curse. The curse is a serious one, as the lack of work/family policy undermines society's future by failing to support children. The human cost, individually and socially, is staggering. By every indicator, children are struggling, and their difficulties are clearly linked to this persistent lack of support.⁷ Thus, children struggle because their families

4. See, e.g., Berta Esperandez Hernandez-Truyol, *Building Bridges V—Cubans Without Borders: Mujeres Unidas por su Historia*, 55 FLA. L. REV. 225 (2003) (discussing Cuba's work/family policies).

5. See generally ANNE GAUTHIER, *THE STATE AND THE FAMILY: A COMPARATIVE ANALYSIS OF FAMILY POLICIES IN INDUSTRIALIZED COUNTRIES* (1996); Special Issue, *Families and Children's Inequalities*, 34 J. COMP. FAM. STUD. 479 (2003); see also *infra* text accompanying notes 46–84 (discussing European policies).

6. The Family and Medical Leave Act (FMLA) provides up to twelve weeks of job-protected leave for the birth or adoption of a child, serious illness of a family member, or the illness or disability of the employee. Family and Medical Leave Act, 29 U.S.C. § 2612 (2000). Because it is only available to full-time workers in businesses with fifty or more employees, nearly half of the workforce is not covered by the statute, and of those who have the right to take leave, many do not take it because it is unpaid. See, e.g., Marc Mory & Lia Pistelli, Note, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMPL. L.J. 689, 698 (2001); see also Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335 (1993) [hereinafter *Family Values*]; Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395 (1999) [hereinafter *Limited Vision*]. Our child care support is limited to some tax credits and some support for child care to implement welfare-to-work programs. See generally Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where Is the C in TANF?*, 61 MD. L. REV. 308 (2002); Thomas R. Marton, Comment, *Child-Centered Child Care: An Argument for a Class Integrated Approach*, 1993 U. CHI. L. SCH. ROUNDTABLE 313 (1993); Susan Traub, Note, *Child Care & PRWORA: Paying the Babysitter or Investing in Early Education?*, 9 GEO. J. ON POVERTY L. & POL'Y 249 (2002); Children's Defense Fund, *Child Care Basics*, at http://www.childrensdefense.org/cc_facts.htm (last visited Oct. 1, 2003); U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 1999, DETAILED TABLES (*PPL-168*), at <http://www.census.gov/population/www/socdemo/child/ppl-168.html> (last visited Oct. 1, 2003).

7. The statistics are startling:

1 in 2 will live in a single parent family at some point in childhood[;] 1 in 3 is born to unmarried parents[;] 1 in 3 will be poor at some point in their childhood[;] 1 in 3 is behind a year or more in school[;] 1 in 4 lives with only one parent[;] 2 in 5 never complete a single year of college[;] 1 in 5 was born poor[;] 1 in 5 is born to a mother

struggle.⁸ Fortunately, the blessing is that the possibility exists to construct a work/family policy that serves all children and families. The absence of policy provides an opportunity to learn from other countries' experiences and address our specific needs.

Close analysis of the Family and Medical Leave Act (FMLA) is critical, as it exposes the faults of the minimal structure that we have

who did not graduate from high school[;] 1 in 5 has a foreign-born mother[;] 3 in 5 preschoolers have their mother in the labor force[;] 1 in 6 is poor now[;] 1 in 6 is born to a mother who did not receive prenatal care in the first three months of pregnancy[;] 1 in 7 has no health insurance[;] 1 in 7 has a worker in their family but still is poor[;] 1 in 8 lives in a family receiving food stamps[;] 1 in 8 never graduates from high school[;] 1 in 8 is born to a teenage mother[;] 1 in 12 has a disability[;] 1 in 13 was born with low birthweight[;] 1 in 15 lives at less than half the poverty level[;] 1 in 24 lives with neither parent[;] 1 in 26 is born to a mother who received late or no prenatal care[;] 1 in 60 sees their parents divorce in any year[;] 1 in 139 will die before their first birthday[;] and 1 in 1,056 will be killed by guns before age 20.

CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK 2001, 25 KEY FACTS ABOUT AMERICAN CHILDREN (2001), at <http://www.childrensdefense.org/keyfacts.asp> (last visited Oct. 1, 2003); see also Press Release, The Annie E. Casey Found., High Cost of Being Poor Threatens Gains Made in Child Well-Being (Jun. 11, 2003), at <http://www.aecf.org/kidscount/databook/press.htm> (last visited Oct. 1, 2003); THE ANNIE E. CASEY FOUND., PROFILE FOR UNITED STATES, in KIDS COUNT 2003 DATA BOOK ONLINE (2003), at <http://www.aecf.org/cgi-bin/kc.cgi?action=profile&area=United+States> (last visited Oct. 1, 2003) (showing the rate of child poverty translates into poor outcomes).

8. For family income patterns, see NANCY K. CAUTHEN, NAT'L CTR. FOR CHILDREN IN POVERTY, POLICIES THAT IMPROVE FAMILY INCOME MATTER FOR CHILDREN 6 (2002), at <http://www.nccp.org/media/iec02a-text.pdf> (last visited Oct. 1, 2003) (discussing the beneficial effect of greater income & income stability); Executive Summary, *Children and Welfare Reform*, 12 THE FUTURE OF CHILDREN, Winter/Spring 2002, at 1 available at http://www.futureofchildren.org/pubs-info3133/pubs-info.htm?doc_id=102725 (last visited Oct. 1, 2003) (addressing the needs of the working poor); Linda Giannarelli & James Barsimantov, *Child Care Expenses of America's Families* (Dec. 1, 2000), at <http://www.urban.org/url.cfm?ID=310028> (last visited Oct. 1, 2003); Douglas W. Nelson, *The High Cost of Being Poor: Another Perspective on Helping Low-Income Families Get By and Get Ahead*, in KIDS COUNT 2003 (2003), available at <http://www.aecf.org/publications/data/2003%20essay%20book.pdf> (last visited Oct. 1, 2003) (costs are higher for poor families, which results in difficulties in improving their situation). The challenges of most families with children are not due to their absence from the workforce. Most families (90.7%) have at least one employed family member. Press Release, U.S. Dep't of Labor, Employment Characteristics of Families Summary (July 9, 2003), at <http://stats.bls.gov/news.release/famee.nr0.htm> (last visited Oct. 3, 2003); see also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2002, available at <http://stats.bls.gov/cps/minwage2002.htm> (last visited Oct. 2, 2003) (stating low wage workers make up three percent of all hourly-paid workers); Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, Poverty, Income See Slight Changes; Child Poverty Rate Unchanged, Census Bureau Reports (Sept. 26, 2003), at <http://www.census.gov/Press-Release/www/2003/cb03-153.html> (last visited Oct. 2, 2003) (reporting median income poverty rates).

put in place.⁹ Careful scrutiny of the Supreme Court's recent decision in *Nevada Department of Human Resources v. Hibbs*, which articulated a new standard under the FMLA,¹⁰ also is essential to construct legislation that will withstand future challenges. Although the FMLA, as a step, is certainly to be applauded, it nevertheless has been a policy that reinforces hierarchies among parents and families, which, in turn, reinforces race and class hierarchies among children.¹¹ It is an example from which we should learn, but a base upon which we should not build.

In structuring work/family policy, we must address whether any suggested policy promotes the equality and well-being of all children and families.¹² Race is the central issue that must be addressed within

9. This symposium volume begins this analysis. See also Inaugural Symposium, *Adopting More Kids: Barriers and Solutions*, 28 CAP. U. L. REV. 75 (1999); Symposium, *Feminist Theories of Relation in the Shadow of the Law*, 17 WIS. WOMEN'S L.J. 1 (2002); Symposium, *Gender, Work & Family Project Inaugural Feminist Legal Theory*, 8 AM. U. J. GENDER SOC. POL'Y & L. 1 (1999); Symposium in Honor of the late Professor Mary Joe Frug, *Still Hostile After All These Years? Gender, Work & Family Revisited*, 44 VILL. L. REV. 415 (1999); Symposium, *The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 (2001); Symposium, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 AM. U. L. REV. 823 (2000).

10. 538 U.S. 721 (2003) (holding the FMLA is a proper exercise of congressional power under Section 5 of the Fourteenth Amendment and does not violate principles of federalism). For an insightful critique of the constitutional arguments and the development of a "polycentric" model of power under Section 5 of the Fourteenth Amendment, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

The policentric model holds that for purposes of Section 5 power the Constitution should be regarded as having multiple interpreters, both political and legal. The model attributes equal interpretive authority to Congress and to the Court. The model thus entails (1) that Congress does not violate principles of separation of powers when it enacts Section 5 legislation premised on an understanding of the Constitution that differs from the Court's, and (2) that Congress's action does not bind the Court, so that the Court remains free to invalidate Section 5 legislation that in the Court's view violates a constitutional principle requiring judicial protection. This account of Section 5 power combines a robust legislative constitutionalism with a vigorous commitment to rule-of-law values.

Id. at 1947.

11. In this respect, my critique now is substantially the same as my critique at the time of enactment ten years ago. See *Family Values*, *supra* note 6.

12. See generally *Families and Inequalities*, *supra* note 5 (discussing children's inequalities); Barbara Bennett Woodhouse, *The Status of Children: A Story of Emerging Rights*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 423 (Sanford N. Katz et al. eds., 2000) (discussing children's rights). For insightful analyses of the

the presumed gender focus of work/family issues. In the context of ongoing racial inequality,¹³ advocates for work/family policy must commit to real equality among children by fostering and supporting all families. In the context of ongoing gender inequality in wage work¹⁴ and caregiving roles,¹⁵ advocates must envision deracialized gender equality and design policies to achieve it.

complexity of children's educational inequalities, see Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1 (1997) and Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1 (1999).

13. For a recent, exhaustive, multidisciplinary look at the impact of racial inequality, see MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) (stating blacks are far behind whites on any measure, including health, education, wealth, and employment). On race and employment, see Joe R. Feagin et al., *The Many Costs of Discrimination: The Case of Middle-Class African Americans*, 34 IND. L. REV. 1313 (2001); Theresa Glennon, *Knocking Against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL'Y 10 (2002) (discussing race and African American boys); Sharon E. Rush, *The Anticanonical Lesson of Huckleberry Finn*, 11 CORNELL J.L. & PUB. POL'Y 577 (2002) (discussing race and education); News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Status of the Civilian Population by Race, Sex, and Age, at <http://stats.bls.gov/news.release/empst.t02.htm> (last visited Oct. 1, 2003) (showing African Americans have twice the rate of unemployment as whites); News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Situation Summary, (Sept. 5, 2003), at <http://stats.bls.gov/news.release/empsit.nr0.htm> (last visited Oct. 1, 2003); News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Usual Weekly Earnings of Wage and Salary Workers: Second Quarter 2003, (July 17, 2003), at <http://ftp.bls.gov/pub/news.release/wkyeng.txt> (last visited Oct. 1, 2003) (reporting weekly race and sex earnings); News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Usual Weekly Earnings of Full-Time Wage and Salary Workers: Third Quarter 2003, at <http://stats.bls.gov/news.release/wkyeng.t02.htm> (last visited Oct. 1, 2003) (reporting, in Table 2, earnings by race).

For two recent essays on white racial identity and colorblind racism, see Martin Jacques, Comment, *The Global Hierarchy of Race*, THE GUARDIAN (Sept. 20, 2003), available at <http://www.commondreams.org/views03/0920-06.htm> (last visited Oct. 1, 2003) and Sally Lehrman, *Colorblind Racism* (Sept. 18, 2003), at <http://www.alternet.org/story.html?StoryID=16792> (last visited Oct. 1, 2003).

14. See generally Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000) [hereinafter *Family Leave*] (arguing workplace gender inequality requires persuading men to act more like women, rather than vice versa); Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119 (1994).

15. See Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177 (2000) (reviewing data on women's predominance in caregiving and analyzing the interrelationship between caregiving and wage work); see also Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441 (2001). Feminists have debated how best to address the issue of care. See Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57 (2002) [hereinafter *Care and Feminists*] (reviewing the care debate).

In this Article, I argue that our work/family policy must be race and gender conscious in order to affirmatively structure law and policy to achieve egalitarian goals.¹⁶ We have had the contrary experience in other areas of social policy. Housing and tax policies, for example, historically and currently have had a disproportionately negative impact in terms of race and gender.¹⁷ These examples tell us that race and gender consciousness in framing work/family policy is essential. If policy can be framed, consciously or unconsciously, to foster inequality, hierarchy, and segregation, it should also be possible to frame policy to do the opposite: to expressly attack subordination and affirmatively support equality, dignity, and well-being.

My examination of work/family policy from race and gender perspectives is a consciously intersectional analysis. In order to separate out the policy concerns, however, I engage in “strategic essentialism” and treat them separately.¹⁸ While remaining attentive

16. For a modern example of such a statute, see the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, 1953 (codified as amended at 42 U.S.C. § 13,981, Subch. III (2000)). For an older set of statutes, see the Reconstruction Era Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, 1985 (2000).

17. EDWARD MCCAFFERY, *TAXING WOMEN* (1997); see also Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implications for Women*, 66 U. CIN. L. REV. 535 (1998); Marjorie E. Kornhauser, *A Legislator Named Sue: Re-imagining the Income Tax*, 5 J. GENDER RACE & JUST. 289 (2002); Marjorie E. Kornhauser, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 AM. U. L. REV. 151 (1997); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996). On tax structure and race, see Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996). On housing, see MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998); John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair”*, 143 U. PA. L. REV. 1233 (1995); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995); Florence Wagman Roisman, *Teaching About Inequality, Race and Property*, 46 ST. LOUIS U. L.J. 665 (2002).

18. Strategic essentialism is the use of categories that have been challenged, disrupted, and made more complex (like race, sex or gender) for the purpose of accomplishing a strategic goal, but without essentializing or losing the knowledge of underlying complexity and interconnection with other kinds of subordination. Instead of choosing either/or, it is a both/and approach that is cognizant of the dangers of the strategy, but sees it as necessary to achieve incremental change. Gayatri Chakravorty Spivak, Address at the Center for Humanities, Wesleyan University (Spring 1985), cited in Vasuki Nesiiah, *Toward a Feminist*

to context and multiple intersecting systems of subordination,¹⁹ I use a unitary focus to move the analysis pragmatically forward. My analysis of race and gender issues in work/family policy is premised on a broader methodological position that race is a feminist issue.²⁰ In addition to its significance as a critical component in the methodology of antiessentialist feminist legal theory,²¹ race should be centered in feminist analysis because it is the core inequality with

Internationality: A Critique of U.S. Feminist Legal Scholarship, 16 HARV. WOMEN'S L.J. 189, 203 n.57 (1993); Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in SELECTED SUBALTERN STUDIES 3, 13–15 (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988) (arguing that “a strategic use of positivist essentialism is a scrupulous visible political interest.”).

The term “strategic essentialism” denotes recognition of the power that constructs like race, color, ethnicity, gender, and sexuality exert over human efforts to conceive and create progressive identities and communities and urges a strategic harnessing of this power to build anti-subordination solidarity within and among various essentialist categories.

Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1138 n.212 (1997). Some who have discussed the concept (and its dangers) include Penelope Andrews, *Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework*, 60 ALB. L. REV. 917, 937–38 (1997); Keith Aoki, *Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me*, 4 ASIAN L.J. 19, 33 n.58 (1997); Nancy Ehrenreich, *Confessions of a White Salsa Dancer: Appropriation, Identity and the “Latin Music Craze”*, 78 DENV. U. L. REV. 795, 807 n.44 (2001); Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUMAN RIGHTS L. REV. 47, 63 n.51 (1997); Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333, 335 (2001); Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States—Latin America Comparison*, 87 CORNELL L. REV. 1093, 1167 nn.456–57 (2002); Francisco Valdes, Foreword, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1, 30 (1997); Leti Volpp, *(Mis)identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN'S L.J. 57, 58 (1994); Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307, 312 (1997).

19. See generally Maxine Baca Zinn & Bonnie Thornton Dill, *Theorizing Difference from Multiracial Feminism*, 22 FEMINIST STUD. 75 (1996) (outlining a model of multiracial feminism and discussing the importance of intersectionality).

20. See Nancy E. Dowd, *Race as a Feminist Issue* (work in progress) (on file with the author).

21. See generally FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

which gender intersects.²² Moreover, equality gains have sometimes perversely, even unintentionally, reconstituted inequality in a way that trades gender gains for race losses or deferments. In the work/family realm, particularly on the family side, gender gains for some women have come at the expense of women subordinating other women, most often women of color.²³

In Part I of the Article, I briefly outline the nature of work/family conflicts and describe the core components of a comprehensive work/family policy. I include a discussion of models from other countries that might be drawn upon to construct U.S. policy.²⁴ In Part II, I contend that putting race at the center of gender analysis exposes critical issues for work/family policy. Most importantly, work/family policy must be constructed to support a variety of family forms and must include economic support so all children benefit equally from work/family policy, as opposed to benefiting children only if they fall within favored race and class-privileged groups. I then apply these insights to current suggested reforms of the FMLA, and the larger issue of the structure of a more comprehensive work/family policy. In Part III, I argue that the primary gender issue of work/family policy is envisioning an egalitarian model of families as the basis for structuring policy. I explore possible models and relate this to

22. *Id.* at 22; see also LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 21, 67–222 (2002) (stating race is the primary marker of inequality).

23. See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* 51 (1997); Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 *N.C. L. REV.* 45 (2000); Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 *AM. U. L. REV.* 851 (1999); see also ELIZABETH CLARK-LEWIS, *LIVING IN, LIVING OUT: AFRICAN AMERICAN DOMESTICS IN WASHINGTON, D.C., 1910–1940* (1994) (examining the experiences of black household workers who migrated from the South to work in Washington, D.C., during the 1910s and 1920s); BONNIE THORNTON DILL, *ACROSS THE BOUNDARIES OF RACE AND CLASS: AN EXPLORATION OF WORK AND FAMILY AMONG BLACK FEMALE DOMESTIC SERVANTS* (1994) (documenting the experiences of black women who worked as paid household workers during the 1940s and 1950s); EVELYN NAKANO GLENN, *ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE* (1986) (studying the twentieth century history of Japanese immigrant and Japanese American household workers in the San Francisco Bay Area); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 *UTAH L. REV.* 1 (2001) (discussing current international trends and the use of immigrant women to perform child care).

24. This by no means is a comprehensive comparative analysis, but, instead, focuses on policies in the European Union.

proposed FMLA reforms. I conclude that a comprehensive work/family policy framed around principles of race and gender equality, understood as interdependent with other equality efforts, is essential in order to make real our promise to our children that they are equal.

I. WORK/FAMILY POLICY: COMPONENTS AND MODELS

A. Work/Family Conflicts and Race, Class, and Gender Hierarchies

A comprehensive work/family policy would include policies that support families in the interface between work and family, rather than leave that relationship to private negotiation and workplace structure.²⁵ While the United States has a work/family policy in place, it is a policy hostile to families who do not have a caregiver at home to provide a support network for the wage worker, the children, and others in need of care.²⁶ This existing structure of hostility toward care is particularly challenging for parents in an economic climate where most parents must do wage work.²⁷ Very few two-

25. Proposals for change in work/family policy have ranged from utilizing existing legislation, like the antidiscrimination framework, to adding a parental status discrimination statute, to implementing more affirmative benefits or supports for families. See generally Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569 (2002); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443; Katherine E. Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1 (2002); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003); Young, *supra* note 23; P.K. Runkles-Pearson, Note, *The Changing Relations of Family and the Workplace: Extending Antidiscrimination Laws to Parents and Nonparents Alike*, 77 N.Y.U. L. REV. 833 (2002).

26. See generally Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 779 (1989) [hereinafter *Gender Paradox*]; Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990) [hereinafter *Restructuring the Workplace*]; WILLIAMS, *supra* note 3.

27. Dual income families are the norm rather than the exception; single earner families struggle to stay above poverty. See Alan Lavine & Fail Liberman, *Family Finances: Where Do Your Finances Stand Compared with Average U.S. Family's?*, PITTSBURGH POST-GAZETTE, Apr. 28, 2003, at B-2 (reporting median income as a "tad under \$40,000 per year"); Children's Defense Fund, *Frequently Asked Questions: Basic Facts on Poverty* (Dec. 2002), at http://www.childrensdefense.org/fs_cpfaq_facts.php (last visited Oct. 2, 2003) (reporting poverty threshold was \$18,104); Bureau of Labor Statistics, U.S. Dep't of Labor, *A Profile of*

parent families with children under age eighteen fit the caregiver/breadwinner model.²⁸ More commonly, both parents work and one parent works a “second shift,” doing all or most of the family work and care.²⁹ What varies among two-parent families is whether both parents work full time and whether there is a significant difference in income between the parents. For single parent households, on the other hand, due to inadequate child support and other income transfers, a full time job is necessary, but often economically inadequate. The high rate of poverty among single-parent households has predictable negative consequences for children.³⁰ Even in two-parent households with both parents working, some families remain at or below the poverty line.³¹

The conflicts between work and family are complex. Put simply, time conflicts exist, both daily schedule conflicts between work hours, school hours, and family time, as well as more long-range time conflicts between the occupational cycle of particular jobs and the life cycle of individual families and individual family members. There is also a conflict between the values and skills associated with caregiving and the devaluation of care as women’s work. Furthermore, there is a conflict in values between family and workplace—psychological, cultural, and ideological values—expressed in social and personal visions of self.³²

the Working Poor, 2000 (March 2002), at <http://www.bls.gov/cps/cpswp2000.htm> (last visited Oct. 1, 2003); Nat’l Ctr. For Children in Poverty, *Fact Sheets*, at <http://www.nccp.org/fact.html> (last visited Oct. 2, 2003) (“A family of four making double the federal poverty level (\$36,800) does not have enough to provide a family with basic necessities, like housing, food, and health care.”). Even dual income families are stressed. ELIZABETH WARREN & AMELIOR TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003).

28. The traditional breadwinner/housewife model fits only thirteen percent of all families, and both husband and wife work outside the home in sixty-one percent of married couple families. Young, *supra* note 23, at 3.

29. *Id.* Maldistribution of family work, even in families with two working parents, creates a “second shift” for mothers. ARLIE R. HOCHSCHILD, *THE SECOND SHIFT* (rev. ed. 2003). See *supra* note 15 (discussing women’s predominance in child care); Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 N.W. U. L. REV. 1, 8 (1996) (discussing women’s predominance in performing housework).

30. See NANCY E. DOWD, *IN DEFENSE OF SINGLE PARENT FAMILIES* (1997) [hereinafter *IN DEFENSE*]; see also *supra* note 8.

31. *IN DEFENSE*, *supra* note 30, at 18–20. See also *supra* note 8.

32. *Gender Paradox*, *supra* note 26, at 84–109; *Restructuring the Workplace*, *supra* note 26, at 450–51.

Work/family conflicts are exacerbated and reinforce race, class and gender hierarchies.³³ Because a focus on race exposes the intersections of class, gender, and race in a way that gender and, or class, alone, cannot, race should be at the center of our policy perspective. The burden of work/family conflicts falls most heavily on minority children because economic disadvantage correlates so strongly with race. When viewed from the perspective of minority children, the hostility of the work/family structure to families, and particularly families of color, is glaring and deep. Families of color have been subjected to constant undermining, which continues to threaten both individuals and communities.

Continuous, deep employment discrimination on the basis of race crosses the gender line and cancels male advantage.³⁴ Both women of color and men of color suffer from workplace discrimination. While the poverty rate is high in single- and two-parent households,³⁵ the predominance of single-parent households is linked, in part, to the disadvantage men of color suffer in the labor market. Thus, the destabilizing impact of discrimination in wage work intersects with a predominance of low-income, single-parent families lacking alternative income support. This economic context has translated into a different configuration of gender roles that is a harbinger of both the strengths and adversities of existing work/family conflicts. The extended family and community support patterns in the face of extreme adversity provide a model for policy and a lesson in the power of resistance to subordination.

Class hierarchies are reinforced by work/family conflict because, as family resources decline, the conflict is exacerbated to the point that there is family breakdown.³⁶ The working poor exemplify the ultimate "Catch 22" of work/family conflict: despite full-time work in the wage workforce, parents cannot provide for their children's educational, child care, health, and other needs. An increasing number of jobs do not provide sufficient income to support a family

33. See *Restructuring the Workplace*, *supra* note 26, at 451–68.

34. See generally *supra* note 13 (providing various employment statistics for men and women of color).

35. For poverty rates in two-parent black and Latino households, see *supra* note 13.

36. See *supra* note 13.

on a single income, or even in combination with a second income.³⁷ Income support has become increasingly limited under welfare reform, and health care and child care support is similarly insufficient.³⁸

Wealth disparity is clearly evident in the outrageous level of poverty among children in the United States.³⁹ *One in six children* in the United States lives below the official poverty line.⁴⁰ African American and Latina/o children are twice as likely to be poor compared to white children; the percentage of children of color in poverty is roughly thirty percent, or nearly one in three.⁴¹ Children in single parent households are *five times* more likely to live in poverty compared to children in two-parent households.⁴² The consequences of poverty are well known, and the impact of poverty on children early in life is devastating. Such children tend to have poor health outcomes, negative social and emotional development, negative educational outcomes, and poor economic outcomes as adults.⁴³

Finally, in addition to race and class consequences, work/family conflicts continue to reinforce gender hierarchies. Social and cultural expectations define women's and men's gender expectations very differently, and that socialization, combined with ongoing workplace discrimination and sex segregated labor patterns, creates different gender conflicts for most women compared to most men. For women, family remains definitional; for men, work remains definitional. Workplace structures continue to block women from combining wage work with family work, while those same workplace structures block men from greater parenting. For those couples who attempt to share equally in work and parenting, the workplace structure confounds egalitarian goals by creating structures geared toward sole

37. See *supra* note 13.

38. See *supra* note 13.

39. When measured by an international standard of poverty, defined as half the national median income, the poverty rate in the U.S. is 22%, compared to Sweden, 3%; France, 8%; Germany, 11%; and Canada, 15%. Moore & Redd, *supra* note 2, at 3. The only country that is close to the U.S. is the United Kingdom at 20%. *Id.*

40. *Id.* at 1.

41. *Id.* at 2 fig. 1.

42. *Id.* at 2 fig. 2. This higher likelihood exists in all racial and ethnic groups. *Id.*

43. *Id.* at 3–5; see also Nelson, *supra* note 8; Nat'l Ctr. for Children in Poverty, *Living at the Edge Series* (2003), at http://www.nccp.org/pub_lat.html (last visited Oct. 1, 2003).

breadwinner norms. In the family, despite the presence of most adults in the wage workforce, family work has not been redistributed. Rather, women disproportionately work a “second shift” of family work.⁴⁴

B. Work/Family Models: Comparative Policies

In certain respects, constructing an ideal work/family policy is not difficult. The components of a comprehensive work/family policy are largely indisputable: income support, generated by wage work and/or family benefits; decent housing; high quality education, including after-school and summer school programs; high quality child-care with well paid child care workers, including emergency and illness child-care; comprehensive health care, including pregnancy and maternity care; paid parental leave for birth, adoption, and illness (ordinary or severe) for a sufficient period of time to support family care; short-term leave to care for sick children, attend school meetings or functions, and engage in other parenting tasks; maternity leave for pregnancy-related disability and childbirth; wage work accommodation, including part-time work options and other flexibility; and support for single-parent families, whether under separate policies or folded into a unitary model.

These components are part of work/family policies in most of the current European Union countries. European family support policies have been designed to support working parents, single parents, and low-income families. Although these policies originated in male breadwinner models, they have shifted focus in the past thirty years in recognition of several factors: increased female participation in the workforce; the decline and postponement of fertility; rising rates for divorce, cohabitation, and non-marital births; increased economic pressure on families; and greater numbers of single-parent families. Work/family policies have also responded to the emergence of the European Union (EU), including the development of a social dimension in EU policy.⁴⁵ European Union trends are linked to the

44. *Id.*; see also Czapanskiy, *supra* note 6; Traub, *supra* note 6.

45. Anne H. Gauthier, *Family Policies in Industrializing Countries: Is There Convergence?*, 57 *POPULATION* 447 (2002) [hereinafter *Family Policies*]; see also GAUTHIER,

broader phenomenon of globalization.⁴⁶ As one scholar has argued, these pressures create four possible outcomes: a “race to the top,” in which all states will establish high levels of support; a “race to the bottom,” which will undermine work/family support; a “frozen” welfare state; or a divergence between states.⁴⁷

One typology of current work/family regimes in industrialized countries identifies four models.⁴⁸ (1) *Social democratic*: This model provides for universal state support of families, high support for working families, and a strong commitment to gender equality (Sweden and Norway). (2) *Conservative*: This structure is characterized by medium support for families, that varies depending on the worker’s level of employment, and support is also linked to a traditional gender division of labor within the family (Germany, Netherlands, and France). (3) *Southern European*: This is a fragmented pattern of support along occupational lines, with a mix of universal and private benefits, and no guaranteed national minimum scheme of income. (4) *Liberal*: This model is characterized by a low level of economic support, using need primarily as a criteria for support, and relying upon market provision of child care (United Kingdom, Switzerland, Australia, and the United States).⁴⁹

Over time, work/family policies have diverged, rather than converged, among these four models. A recent study evaluating twenty-two Organization of European Community Development (OECD) countries found a wide range of direct and indirect cash support, leaves, and other supports for working parents.⁵⁰ Financial

supra note 5; A.H. Gauthier, *Comparative Family Benefits Database, Version 2* (2003), at http://www.soci.ucalgary.ca/FYPP/DCC_Fam_benefits_database_Feb_03.doc (last visited Oct. 1, 2003).

46. *Family Policies*, *supra* note 45.

47. *Id.*

48. GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

49. *Id.*; see also Janet C. Gornick & Marcia K. Meyers, *Parental Care of Children: Family Leave Policy and the Regulation of Working Time*, in *EARNING AND CARING: WHAT GOVERNMENT CAN DO TO RECONCILE MOTHERHOOD, FATHERHOOD AND EMPLOYMENT* (forthcoming 2004), available at http://depts.washington.edu/crfam/Symposium1/Gornick_Meyers_chap5.pdf (last visited Oct. 2, 2003) (on file with the Washington University Journal of Law & Policy). This model has been critiqued for its general lack of attentiveness to gender issues, but remains useful.

50. See Clare McGlynn, *Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy*, 7 COLUM. J. EUR. L. 241 (2001).

support for families increased in all countries, although it had not converged. The rate of support is highest in conservative countries, followed by social democratic countries.⁵¹ Leave, including both maternity and child care leave, substantially increased, from an average of eighteen weeks in 1970 to eighty weeks in 1999.⁵² Maternity leave is nearly universally paid. Child-care leave may be paid, unpaid, or some combination of the two, although it is largely paid in the conservative and social democratic countries.⁵³ Finally, child-care facilities are most extensive in social democratic countries; are fairly extensive in conservative countries; and are largely unavailable in southern Europe and liberal countries.⁵⁴

European Union policies, in theory, promote gender equality, but have had little impact in terms of contributing either to uniformity of policy or embracing much more than formal equality.⁵⁵ Under various EU policies, the combination of maternity and parental leave provides paid leave for as much as one year, and unpaid leave for up to four years.⁵⁶ In addition, many of the leave schemes permit taking additional leave until children are age eight, by combining leave with part-time employment.⁵⁷ Three Nordic countries have benefits designed to encourage fathers to take leave, by making fathers eligible for more benefits and providing additional leave.⁵⁸ Public campaigns to encourage men to redefine fatherhood support these policies.⁵⁹ In addition, policies include sick day leave, for temporary care of ill children.⁶⁰ Two other time policies that contribute to greater work/family time are shorter work weeks and longer vacation time. Work weeks average forty hours and vacation time averages four weeks annually. Finally, benefits are paid as a social insurance

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*; see also Catherine Barnard & Simon Deakin, "Negative" and "Positive" Harmonization of Labor Law in the European Union, 8 COLUM. J. EUR. L. 389 (2002) (generally discussing upward and downward harmonization).

56. McGlynn, *supra* note 50.

57. *Id.*

58. Gornick & Meyers, *supra* note 49.

59. *Id.* at 24 n.14.

60. *Id.*

system, not as a tax on employers.⁶¹ The cost of the programs per capita is quite reasonable, even in the generous Nordic countries.⁶²

Another critical component of European models is child care.⁶³ The European models include both care and education, and therefore are linked to both the welfare and education systems.⁶⁴ Universal, publicly funded preschool is a reality for eighty percent or more of children in the fifteen EU countries.⁶⁵ However, the number of child-care facilities for children below age three varies widely and is significantly lower than available facilities for older children.⁶⁶ Parents are provided little support during the period for which parental leave is assumed to be taken. While some countries require parents to pay for care, the rate is affordable. Finally, some countries' structures are underfunded, so the quality of child-care varies.⁶⁷

The countries most committed to gender equality and shared parenting are the Scandinavian countries. Sweden offers perhaps the most extensive work/family model.⁶⁸ Sweden provides maternity benefits, including prenatal and postnatal care, childbirth care, and the right to transfer or leave the work environment two months prior to delivery if work presents a risk. Parental leave policies give employed parents eighteen months of paid leave per child, and can be taken until the child is age eight. There is also a job-protected entitlement to part-time work, which is defined as six hours per day.⁶⁹ Parents have 120 days of paid sick leave per year for each child under twelve. Extensive publicly funded daycare is available for children

61. *Id.*

62. *Id.* at 28.

63. See Lene Madsen, *Citizen, Worker, Mother: Canadian Women's Claims to Parental Leave and Childcare*, 19 CAN. J. FAM. L. 11 (2002) (critiquing family support models without adequate child care).

64. Wolfgang Tietze & Debby Cryer, *Current Trends in European Early Child Care and Education*, 563 ANNALS AM. ACAD. POL. & SCI. 175 (1999).

65. *Id.* at 180.

66. *Id.*

67. *Id.*

68. Lesley J. Wiseman, Note, *A Place for "Maternity" in the Global Workplace: International Case Studies and Recommendations for International Labor Policy*, 28 OHIO N.U. L. REV. 195, 219 (2001). On the broader Swedish welfare system, see generally Stephanie M. Westhuis, Comment, *Social Welfare and the Family: Examining the Policy Considerations, Similarities and Differences in the State of Wisconsin and Sweden*, 9 TULSA J. COMP. & INT'L L. 213 (2001).

69. *Id.*

eighteen months to twelve years of age. Despite gender equality norms, this set of structures has not resulted in gender integration in the workplace; Sweden's workplace remains gender segregated to an even greater extent than in the United States.⁷⁰

Sweden also has specific programs geared toward single parents, which primarily benefit single mothers. Approximately twelve percent of children under eighteen are being raised by a single mother, which is less than half the number of children raised by single mothers in the United States.⁷¹ Single mothers in Sweden do not live in poverty because the benefit structure, including family allowances and child care, ensures that they have adequate income, housing and child-care.⁷²

In contrast to the gender neutral/shared parenting goal of Sweden, France has a strongly mother-oriented model. French work/family policy organizes policies around working mothers' needs, based on the assumption that mothers will continue to provide sole or primary care to children.⁷³ Under French policy, maternity leave is provided for six weeks before and ten weeks after the birth of a woman's first two children, and longer leave is available for additional children or multiple births. Maternity leave is mandatory and paid, generally equal to net salary.⁷⁴ At the end of maternity leave, paid parental leave is available to either parent until the child turns three. Families with at least two children under age eighteen are paid family allowances, which constitutes roughly 9.5% of the average male wage.⁷⁵ In addition, there is means-tested supplementation of the family allowance and means-tested benefits linked to special needs, including the needs of single parents.⁷⁶ Child care is provided for younger children, and at age two and a half, children are eligible for

70. Jane Lewis & Gertrude Astrom, *Equality, Difference, and State Welfare: Labor Market and Family Policies in Sweden*, 18 FEMINIST STUD. 59, 79–80 (1992).

71. *Id.*

72. Wiseman, *supra* note 68, at 219–22.

73. Rachel Henneck, *Family Policy in the U.S., Japan, Germany, Italy and France: Parental Leave, Child Benefits/Family Allowances, Childcare, Marriage/Cohabitation, and Divorce*, at <http://www.contemporaryfamilies.org/public/articles/Int'l%20family/%20Policy.htm> (last visited Oct. 1, 2003).

74. *Id.*

75. *Id.*

76. *Id.*

all-day preschool programs. Virtually all children are enrolled in such programs, irrespective of whether their parents are in the workforce.⁷⁷

Roughly the same proportion of French women as American women are employed.⁷⁸ However, more French women work full-time, compared to their American counterparts, who often work part-time.⁷⁹ In their prime childbearing years, nearly eighty percent of French women are employed.⁸⁰ Because the French model is explicitly geared toward mothers, very few fathers utilize work/family benefits, despite their formal gender neutrality.⁸¹

Other countries' policies provide templates and cautions for the United States. Many scholars have expressed concern about the gender consequences of these policies. As a recent analysis suggests, the availability of strong work/family policies has not necessarily translated into greater gender equality, because the pattern of usage remains disproportionate and labor market patterns remain gender identified as to work and wages.⁸² The model that is the most gender specific, that is, targeted at the needs of mothers as the presumed primary caregivers, rather than a gender-neutral model premised on equal parenting, is correlated with the best workplace gender-equality outcomes.⁸³

Thus, comparative data tells us several things. First, it provides a rich lode of data and policies. Second, it exposes the depth of the gender pattern, the difficulty of changing it, and suggests some variable approaches. Third, it indicates that the implicit model of how work and family responsibilities should be balanced is a critical element in the construction of work/family policy. Finally, the data tells us that in many countries their work/family policies are situated

77. *Id.*

78. *Id.* (stating approximately fifty percent of French women are employed).

79. *Id.* (citing Rossana Triffiletti, *Women's Labour Market Participation and the Reconciliation of Work and Family Life in Italy*, in WORK-FAMILY ARRANGEMENTS IN EUROPE 83 (Laura den Dulk et al. eds., 1999)).

80. *Id.*

81. Henneck, *supra* note 73.

82. *Id.*; Williams, *supra* note 15.

83. Henneck, *supra* note 73. However, one of the ironies of the lack of policy in the United States is that, because most families cannot afford unpaid leave, men are doing more care while women's family work hours have declined. Men in the United States put in an average of sixteen hours of housework, weekly. This is exceeded only in the Scandinavian countries, where men put in about twenty-four hours, weekly. *Id.* at 20.

within a norm of attentiveness to class issues that goes far beyond American welfare norms. It is a reminder that we must consider class issues if work/family policy is to create true equality for children and families. Attentiveness to class issues is the closest that these models come to addressing race concerns. Given the centrality of race to American inequality patterns, it is important that the absence of race consciousness in European models not be carried over to American policy analysis. Racial issues *must* be at the center, rather than at the margin, of work/family policy.

II. RACE AND WORK/FAMILY POLICY: RACE AT THE CORE OF GENDER

Race is a critical work/family issue, and more broadly a critical feminist issue, in a number of respects. While race is an important component of any feminist theoretical perspective or strategic move, it should also be a substantive focus, even a priority, for feminists. More than adding race in methodologically or considering race when constructing priorities, as the critique of antiessentialism demands, confronting and challenging racial inequality and imagining a world of racial justice should be a core goal of the feminist agenda. One might even argue it should be among the feminist agenda's top priorities.

Patriarchy incorporates racism as a primary tool for separating and subordinating women and some men. *Race should be at the center*, a precondition or integral piece to sexual equality, because of the interconnectedness of race and sex identities. Race is the core of inequality both because of its unique history and the ongoing consequences of slavery, as well as racial equality's stalled progress and retrenchment, compared to gender. Women's progress, compared to the minimal forward movement of racial minorities, lays a foundation for a common pattern of using gender to hide race: affirmative change for women means change is possible, thus, minorities' lack of change can be ascribed to old justifications, grounded in inferiority and subordination. The refusal to acknowledge this pattern drives a wedge between white women and women of color.

Just as in the area of affirmative action in education, where women have advanced while racial minorities have stalled, so too in the area of work/family policy primarily middle class women have benefited from current policy. This can be attributed to the structure of the FMLA.⁸⁴ The structure of child-care also is raced.⁸⁵ Middle-

84. The pattern of leave use under the FMLA has been remarkably low, and most leave has been used to cover the lack of job-protected sick leave and disability leave for employees' own illnesses. According to the two studies commissioned by the Department of Labor, only roughly 1.9% to 6.5% of *all* employees use the FMLA, and overwhelmingly leave is taken for the employee's own health reasons (over half of leaves taken). COMMISSION ON LEAVE, U.S. DEP'T OF LABOUR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 83 (1995), available at <http://www.dol.gov/esa/regs/compliance/whd/fmla/family.htm> (last visited Nov. 5, 2003); DAVID CANTOR ET AL., U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE 8-1, 4 (2001), available at <http://www.dol.gov/asp/fmla/main2000.htm>. The low utilization rate must be seen in the context of the FMLA's coverage: while two-thirds of the workforce work for covered employers, only about half of the workforce is eligible for leave by virtue of meeting the FMLA's requirements for number of hours worked and time at the job. COMMISSION ON LEAVE, *supra*, at 4-5. The likelihood of coverage and eligibility rises with income and increasing education levels, as well as unionization. *Id.* at 64-65. The greatest gap between those covered versus those covered and eligible to take leave is for the youngest employees, those never married, and those with the lowest incomes. *Id.* at 65.

Contrary to its avowed purpose of resolving work/family conflicts, then, the FMLA has been used largely to fill the gap in entitlements in the workplace to job protection when employees are sick or temporarily disabled. Moreover, leave is used when close family members require their attention. Altogether, leaves for medical reasons constitute eighty percent of leaves taken. *Id.* at 5. Parental leave was the second most common reason for leave, accounting for about 18.5% of leaves in 2000, while caring for a seriously ill child (11.5%) or seriously ill parent (13.0%) were roughly equal in leaves taken. *Id.* at 2, 5; see also CANTOR ET AL., *supra*, at 2-5. The distribution of employees who take parental leave as a proportion of all leaves taken by the demographic group demonstrates the low proportion of employees who take parental leave: males, 22.8%; females, 15.3% (but note that only females take maternity leave); whites, 18.4%; blacks, 10.2%; Hispanics, 31.5%; and others, 16.3%; 22.4% married; 0% separated, divorced, or widowed; 9.8% never married; 25 to 34, 40%; 18 to 24, 20.9%. *Id.* at tbl. A2-2.6. In total, parental leave is taken by only 3.1% of the total employee population. *Id.* at 2-5.

Overwhelmingly, the reason why more leaves are not taken and why most leaves are quite short, with a median of four to ten days, is the lack of pay. *Id.* at 8-3, 4. Interestingly, both those at the lower end of the labor market and the higher end of the labor market face difficulties, although of a different sort. Low-end employees simply cannot afford the loss of income; high-end employees feel more pressure not to take lengthy leaves. COMMISSION ON LEAVE, *supra*, at 168.

The profile of those who took leave in 1995 was that those who more frequently took leave were in the 25 to 34 and 35 to 39 age ranges, with children under 18 at home, hourly workers and with incomes from \$20,000 to \$30,000 annually. *Id.* at 5. In 2000, these same basic characteristics of most likely leave-takers existed, with the addition of more leave-takers in the 50-64 age range, more leave-takers likely to be married, and more leave-takers likely to have children. CANTOR ET AL., *supra*, at 2-8. Additionally, the income level at which leave was

class women rely on poorer women to care for their children, either at centers or as providers in their homes. Good quality child-care is affordable only for middle- or upper-income parents. These are patterns of white privilege, wrapped in a gender package. The pattern of women of color caretaking for white women is an old one; the pattern of white women using the race card cloaked as a gender card is a contemporary version of trading race privilege for gender subordination.

Race is a central issue in work/family policy because work/family is an area in which women historically have subordinated women of color for gender purposes based on white privilege. Because equal treatment of children irrespective of family form is critical, and thus the support of single-parent families is essential, race consciousness again is critical to policy because of the predominance of single-parent families in communities of color. Finally, because one of the most important factors in resolving work/family is economics, that

taken increased, reflecting at least, in part, a ten percent inflation factor in incomes. *Id.* Not surprisingly, the issue of money and income as a barrier to taking leave rose as a significant factor in not taking leave from 65.9% to 77.6%. *Id.* at 2–16.

Women take leave more than men, for both their own health and to care for others, while men more frequently take leave to care for themselves. Women are 58.1% of leave takers, and men are 46.8% of leave takers. *Id.* at tbl. A2-2.5. This is despite the fact that men are more broadly covered and are more likely to have some wage replacement. *Id.* at 8-4, 5. Twelve to fourteen percent of men took leave for a covered reason, while nearly double that number of women (20%) took leave for a covered reason. *Id.* at tbl. A2-2.7. Most of those who take leave are married or living with a partner (75%). *Id.* at 2–8. Although women are less than half of the workforce, they take sixty percent of the leaves. *Id.* at tbl. A2-2.4.

By race, blacks and Latinos are as likely to be covered and eligible as whites, proportionately, while their usage rates were somewhat higher. The percentage of covered and eligible white employees was 59.7%; blacks, 71.8%; Hispanics, 66.2%; and Asians, 73.4%. *Id.* at tbl. A2-3.4. The percentage of white employees that took leave for a covered reason was 16.2%, compared to a usage rate of 18.3% for blacks, 18.9% for Hispanics, and 12.8% for Asians. *Id.* at tbl. A2-2.7. Latinos are more likely to work in non-covered worksites; blacks are more likely to work for covered employers and to be eligible. COMMISSION ON LEAVE, *supra*, at 62, 64. On the other hand, differentials by race as to whether any pay was received during leave varied by racial groups: for whites, 66.4%; blacks, 58.8%; Hispanics, 72.6%; and Asians, 62.6%. CANTOR ET AL., *supra*, at tbl. A2-4.1. By numbers alone, whites take the most leave, representing their higher presence in the workforce and lower unemployment, as well as their placement in higher income jobs. Whites are 76.2% of leavetakers; blacks 10.6%; and Hispanics, 8.2%. *Id.* at tbl. A2-2.4.

85. See *supra* note 23 and accompanying text (discussing the history and ongoing subordination of women of color, poor women, and immigrant women as childcare workers by white women).

factor also inescapably leads to the importance of race in constructing policy.

The race issue that must be at the core of policy, therefore, is constructing the FMLA, and a broader work/family policy, in a way that serves all women and eliminates trading gains in gender equality for racial subordination. Current efforts to reform the FMLA have focused on making leave a paid benefit. If not done in tandem with making leave a universal benefit, and if not paid at a level sufficient for single parents and low-income parents to take advantage of leave, then those reforms will continue to reproduce race and class hierarchies. To the extent policy presumes the presence of a male breadwinner (or a female breadwinner who has taken on that economic role), it will deliver a double gender disadvantage that is disproportionately distributed by race. That is, to the extent that minority parents, both fathers and mothers, are less able to achieve a sole or primary breadwinner position, the persistence of that assumption in policy delivers a racial burden cloaked in gender disadvantage, an assumption that ignores the disadvantage of men of color.

As the FMLA example demonstrates, addressing race and bringing it from the margin to the center presents an opportunity for coalition with men. That same opportunity exists in the larger framework of work/family policy. Instead of focusing on male gender privilege and female gender disadvantage, the raced nature of the paradigm exposes the interaction of race and gender and the ways in which race trumps gender privilege. This requires seeing connections, instead of opposition, between men and women, and recognizing how racial patriarchy operates. Looking at the position of men of color exposes the economic hurdle to greater male nurture. Solving the dilemmas of men of color, and all men, does not mean retaining, reinforcing, or conferring patriarchal advantage. Rather, it means thinking through a model of work/family that eliminates conflict, while promoting egalitarian goals among partners, children, and families. Surely we can envision combining work and family without subordination.

Putting race first, or as a primary priority, would mean attacking economic inequality and opportunity along racial lines. With race at the center, an attack on economic inequality would be essential.⁸⁶ What feminists can offer, in addition to support for efforts to deal with economic racial inequality, is additional analysis of the differences between the poverty of women and the poverty of men of color. The feminization of poverty is a well-established phenomenon linked to women's disproportionate burden of caregiving work, the lack of value attached to that work, and their continued discrimination in wage work. When race is included in that analysis, it exposes black men's poverty, and their persistent subordination, which is linked to wage work discrimination and their disproportionate presence in the criminal justice system. The linked subordination of black men exposes the operation of racial patriarchy and how it maintains itself by dividing people by race and gender. The record of white women's advancement suggests that racial patriarchy deals with what is perceived as the least dangerous inequality, in order to stave off a more revolutionary equality outcome. At the same time, a response to gender equality perpetuates a myth of choice, transforming white women's patterns of poverty and wage work from discrimination to individual choice.

Feminist analysis should link the problems of divorced women and never married women, women on welfare and women with inadequate child support, but it should also link the problems of economically disadvantaged women to those of economically disadvantaged men. The resolution of poverty and economic disempowerment on the basis of race would inevitably benefit all women, as it targets the goal of economic equality. It would require not only that economic hierarchy not be raced, but also that deracializing the economic hierarchy would not leave a gendered pattern. In addition, it would require that the bottom of the economic pyramid no longer be a bottom without opportunity or sufficiency.

86. It is important to note that employment policies alone are insufficient to address family poverty and inequality. Increased employment may even lead to less income due to loss of benefits without a comprehensive policy aimed at family economic security. CAUTHEN, *supra* note 8, at 5.

Children would no longer be viewed as unfortunate, but inevitable, victims of the perceived “sins” of their parents.

Economic marginalization is the common link, and the critical one. By putting race first, insisting on economic equality based on race, and exposing how economic equality is constructed differently based on gender, feminists could create an agenda that would benefit all women and marginalized men. This might mean that wage work and family support issues would come first, while the redistribution of care work would come second. The goal in work/family policy is to maintain our focus on race and structure policy, and therefore institutional and cultural structures, in a way that maximizes racial justice and equality and permits gender coalitions across race, class, and sex lines. Work/family issues are, potentially, one of the most unifying areas for women across race and class lines. There is also the potential to unify with men, to enable men to nurture, and thus forge a cross-gender coalition.⁸⁷

Race analysis, therefore, would require that the key focus of work/family policy, or at least its initial priority, would be economic issues: family income and the means to finance necessary support structures. Race analysis would then underscore the importance of valuing and supporting all family forms, particularly single-parent families. Finally, race analysis would require attention be given to paid caregivers, in order to value their work and ensure their dignity and respect.

With respect to these concerns, comparative models are useful in providing ways to fund policies and ensure support for all families.⁸⁸ However, employment discrimination goes beyond the bounds of work/family policy as delineated by comparative models. This should remind policymakers that the resolution of work/family issues points in the direction of other deeply embedded inequalities that, as of yet, have not been resolved by conventional antidiscrimination law and policy.

87. The opportunity for a cross-gender coalition does not negate the need to address the presence of gender issues within racial and ethnic minorities. See generally Berta Esperanza Hernandez-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997).

88. Universal economic support supplemented as necessary by needs-based entitlements is a common structure.

III. GENDER AND WORK/FAMILY POLICY: KEEPING RACE AT THE CENTER

Concentrating on race as a core inequality does not mean failing to consider gender as a category that crosses race and class lines. In the area of work/family policy, a critical cross-cutting issue is the concept of gender roles in order to achieve equality. Under current thinking, it is an assumption that work/family policy should not support traditional gender roles. The dominant view is that parents function on the basis of individual choice, consistent with notions of personal liberty in matters as fundamental as family. This presumes that the state plays a neutral role and maximizes personal choice—as formal equality is assumed to have taken care of express barriers that limited choice.

The FMLA's work/family model is consistent with this view. The findings of and premise for the legislation erases any notion that gender roles are grounded in outdated stereotypes of wage work or caregiving/nurturing work. Nevertheless, the statute operates within a context of a strongly gendered distribution of employment and family work, which corresponds with the traditional assumption that women are caregivers and homemakers far more often than are men. Particularly in the absence of paid leave and separate maternity benefits for mothers at childbirth, this neutral law, in fact, predictably operates so that women are the primary workers who utilize it. Maximizing family income at a time when needs increase dictates that the lesser wages, typically the mothers', will be sacrificed. Moreover, in the absence of any effort to encourage fathers to nurture, longstanding social norms serve to maintain traditional notions of fatherhood as earning, rather than caring.⁸⁹

The alternative to the FMLA's predictable gender outcomes is not simply to think in gender-specific terms about the differences in our

89. According to a 1996 report to Congress, of the eighty-eight million people who were eligible, twenty million took leave; the overwhelming reason not to take leave was the lack of pay. Mory & Pistelli, *supra* note 6, at 698. Leave under the FMLA has "disproportionately [been] taken by female caretakers, despite the gender neutral entitlement." Dowd, *supra* note 1, at 787 n.13, citing Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001); *Limited Vision*, *supra* note 6.

definitions and social support for mothers and fathers and how to encourage more fathers to nurture their children.⁹⁰ Nor is it solely to devise a scheme that does not economically skew the structure to encourage mothers but not fathers to parent, or continues to work toward gender desegregation of wage work. Although these social, cultural, and economic issues are critical, a more central issue must be addressed: What is our model of parenthood? The appeal of traditional gender roles is that they are certain, seem natural, and are socially and culturally supported. At the same time, our commitment to gender equality, individual justice, and freedom dictate that no individual be denied the opportunity to consider the same range of life choices as any other. Choice is attractive and maximizes individual liberty. But, choice to do what?

Does gender neutrality and the support of choice mean a choice to vary the traditional role assignment, so that fathers can stay at home and mothers can be the primary breadwinners? Or does gender neutrality and choice mean the ability to share parenting equally, either by dual parenting and working or some regular tradeoff of the primary working and primary parenting roles? Or does it mean permitting both of these choices, degendering the traditional allocation of wage and family work and male/female gender roles, as well as providing a continuum of possible ways to engage in equal parenting? It is this core confusion about what an ungendered structure of work and family would look like that must be addressed in order to determine the shape of work/family policy.

There are additional concerns that follow from these questions. The questions' framing presumes a two-parent family, and, because the questions function from the context of the traditional family model, the questions also presume a heterosexual (and preferably married) couple. Given the strong and growing presence of single-

90. See NANCY E. DOWD, REDEFINING FATHERHOOD (2000) (discussing the reorientation and redefinition of fatherhood). For two examples of arguments in support of explicit gender specific policy to encourage fathers to engage in caregiving, see *Family Leave*, *supra* note 14 (advocating incentives for men to take family leave) and Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 967 (2001) (examining the gap between formal policies and informal culture that makes the use of family policies inadvisable for fathers).

parent families in our society,⁹¹ what are the implications of any presumed model for those families? If single-parent families are the dominant family form among African-American families and a significant portion of Latina/o families, does a two-parent model reinforce race privilege? Because women are disproportionately the single parents who maintain and care for children, does a two-parent model reinforce gender privilege? Given the presence and increasing recognition of the value and rights of same sex couples,⁹² how can a model be constructed without a justification framed by heterosexist assumptions?

In articulating the norms of family life at the heart of our work/family policy, the danger is that the two-parent assumption will hide and reinforce certain hierarchies. By keeping race central, however, that danger is acknowledged. The gender issue can then be framed from the two-parent perspective.

A. Work/Family Policy Models

There are, basically, three alternatives to the traditional breadwinner/housewife division of labor. The first alternative is to maintain the same roles, but break the gender association. Thus, there would be a sole or primary caregiver and a sole or primary wage worker, and, correspondingly, a secondary caregiver and secondary wage worker. None of these roles would be associated with men or women. A second alternative is to share wage and household work equally, requiring both parents to do caretaking either simultaneously or serially.⁹³ A third alternative is a gender-specific model (although gender-neutral in name), designed and oriented around the assumption that women will be caregiving. Under this alternative, the work/family structure must be women-centered. While men would be afforded the opportunity to take advantage of this policy, the goal

91. IN DEFENSE, *supra* note 30.

92. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 WM. & MARY J. WOMEN & L. 207, 208-17 (2003) (reviewing the progress and challenges in gay and lesbian rights).

93. See Cahn, *supra* note 15 (advocating for dual parenting); *Family Leave*, *supra* note 14.

would not be to eliminate gender roles, but rather to equally support gender roles.⁹⁴

The consequences of choosing any of these models are significant. We begin from a context that supports a traditional allocation of gender roles.⁹⁵ If the state is to be neutral, then the existing structures must be dismantled or significantly reformed. If individuals are to exercise real choice, the state should support full, as opposed to partial, agency.⁹⁶

1. Rotating Gender Roles

Under the rotating gender role model, the goal would be to degenderize the traditional norms of work and family. Neither in theory nor in reality would “breadwinner” be associated with men nor “caregiver” with women. Work/family would operate on the traditional model of a single wage earner and a full time caregiver, or a modification of those roles, with a primary caregiver, a backup caregiver, a primary wage earner and a backup wage earner. This would require breaking down cultural and social barriers to men’s

94. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* (1999); *Care and Feminists*, *supra* note 15; Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (1999); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL’Y & L. 13 (1999).

95. Tax policy is an example of the existing structure. As Edward McCaffrey has powerfully demonstrated, existing tax structure is premised on an express norm of the traditional family in sex specific work/family roles. MCCAFFERY, *supra* note 17. Express sexism has given way to neutral norms, but the heteropatriarchal structure remains. McCaffrey has argued that if our goal is to maximize shared parenting, the tax structure must provide an incentive or a penalty for male wage earners, which would encourage them to parent. *Id.*; see also Nancy E. Dowd, *Women’s, Men’s, and Children’s Equalities: Some Reflections and Uncertainties*, 6 S. CAL. REV. L. & WOMEN’S STUD. 587 (1997). Whether or not we agree with his goal or his radical solution, his identification of the assumptions of the tax structure, and the incentives and barriers it creates for various classes of wage earners, demonstrates the lack of neutrality of the existing tax structure and the necessity for change. We are not operating from neutrality. Choices are affected by the question: “What will happen on our taxes?” A similar set of assumptions underlies unemployment, worker’s compensation, and employee rights. *Reconstructing the Workplace*, *supra* note 26; WILLIAMS, *supra* note 3 (discussing the concept of the ideal worker).

96. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (discussing agency and partial agency).

parenting. This model would appeal both to the familiarity of traditional roles and the egalitarian norms of gender neutrality and choice. In addition, it is a model that might be beneficial to single parent families, since they would be part of the sole or primary parental norm. The focus would be on sufficient income for the primary wage earner and any needed supplements.⁹⁷ Thus, while the general structure would remain the same, the model would have significant modifications regarding gender roles and would require strong income supplements and incentives for fathers.

2. Coequal Gender Roles in Work and Family

Coequal gender roles in work and family is the shared parenting and work model. In this model, shared work would be the norm rather than the exception. This would push toward more modification of work in order to permit greater sharing of care. This model would require greater work flexibility and income supplements to the extent that two incomes were insufficient. It would also require a significant reform of workplace practices and benefit structures. Furthermore, the model would require significant change in family work patterns, although it would still build on existing trends and ideological commitments. It has the benefit of reinforcing sharing and allows children to have the benefit of dual nurture. Although this model provides additional nurture, it poses a greater challenge for single parent families.⁹⁸

One downside of this model is the implicit heterosexual assumption, which is that two parents are better than one and that the two parents should be a mother and father, because children need to experience both gender roles. This model would also require more radical reform of existing structures. Thus, critical analysis suggests that gender neutral language that presumes coequal gender roles and leaves them to choice may mask the reinscribing and reinforcement of traditional gender roles.

97. Without income support, current economic demands would make a single income model unworkable.

98. KITTAY, *supra* note 94.

3. Supporting Mothers

The final model would be one that supports mothers (and those who act like mothers) as they currently function, but in gender-neutral language. Using gender neutral language would preserve men's choice and avoid a constitutional challenge. This model is based on current realities as well as being grounded in cultural feminist notions of valuing what is female identified, just as we have valued what is male identified.⁹⁹ This model requires constructing a structure that is responsive to existing primary caretakers. It might include some gender specific maternity/pregnancy benefits and encourage (or at least support) breastfeeding. It would look to needs with women's workforce patterns in mind, and it would address economic issues by primarily focusing on the feminization of poverty. By dealing with these issues, the caretakers would be cared for. Men also could be caretakers and thereby benefit from this structure.¹⁰⁰

B. Using Race Analysis to Resolve Gender Model Problems

To evaluate these gender models, it is essential to return to the centrality of race to the analysis. None of these models are viable if they do not resolve the economic issues race analysis exposes. Each model must also be evaluated for how it affects both two-parent and single-parent families. Finally, none of the models explicitly guarantee better support for paid child-care workers.

For each of these models, it is critical to notice where they lead policymaking. Perhaps this can best be seen by examining how they might affect FMLA reforms. As currently structured, the FMLA provides up to twelve weeks of unpaid leave, annually, for the birth or adoption of a child, disability of the employee, or serious illness of a close family member.¹⁰¹ Reforming the FMLA under any of the

99. Arguably the Violence Against Women Act does this, as evidence by its title and findings, despite its gender neutral definitional language and entitlements. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended at 42 U.S.C. § 13,981, subch. III (2000)).

100. This is an approach that mirrors the analysis of FINEMAN, *supra* note 94.

101. Family and Medical Leave Act, 18 U.S.C. §§ 2611-54 (2000).

three models would make it a universal benefit with paid leave. A model based on degendering traditional work/family roles would concentrate on bolstering women's access to jobs so they would be just as likely to be the primary wage earner, and on implementing programs that would support men as nurturers. Rather than an equal entitlement to leave, this primary caretaker norm might mean reallocating the leave entitlement so the primary caretaker would get a longer period of leave. In order to prevent employers from subtly discouraging men from taking leave, or assuming that primary wage earning women would take leave, penalties or additional causes of action might be created to deter such conduct. Employers who hire and retain women in non-traditional, primary wage earner jobs, and those who support fathers' leave-taking might receive incentives.

A dual parenting/worker model, on the other hand, would focus on ensuring that parents could take leave simultaneously. Financial incentives or resources might be provided to undermine economic incentives for mothers to take leave instead of fathers. At the same time, the rotating gender role model's vigorous job desegregation policy would be pursued, so that both work and family roles would be equalized, in terms of ability to generate income. Because both mothers and fathers would be engaged in care, however, this model would impose a more significant burden on employers, as more parents, particularly fathers, would be absent from the workforce than under the current model. In order to prevent employers from discouraging fathers from taking leave, incentives might need to be used. Another possibility would be to use a mandatory leave system to ensure that fathers take leave, thus ensuring that parenting would be coequal from the start.

Under a gender-specific, mother-focused model, enforcement could be oriented toward employers with high concentrations of women workers. Employers might be given incentives to support leaves and to deal with the expenses and consequences of leave. In addition to parenting leave, pregnancy and maternity benefits would be provided, and parenting would be separated from other caregiving, such as caring for an ill family member. Thus, the length of leave, as a combined benefit, might significantly expand to address the predicted average amount of time needed for each leave category.

The length of leave, also would be sufficient for a better transition into child-care.

The issue of which model to adopt is a gender issue that cross-cuts race, class, and sexual orientation, because it asks what should replace the homemaker/breadwinner or second-shift models in terms of economics and care. Once a model is constructed, we must ask what norms, biases, and perspectives we have adopted, and what the implications of that model are, being attentive to differences. In addition, it remains critical to underscore that although we currently do not have much of an affirmative work/family policy, we do have institutions and structures that push in a negative direction, as they are premised on traditional allocations of gender roles and stereotypes about work and family. If we simply build on that ground we will reproduce the very hierarchies that it is our goal to destroy.¹⁰²

IV. CONCLUSION

The central goal of work/family policy should be the equality and well-being of children. In order to achieve equality for children, we must confront and deal with parents' inequalities. Although focusing on race within the construction of our gender models seems to focus on parents, the ultimate goal is better outcomes for children and families. We need to keep our eyes on the prize—supporting children within their families to enhance their equality and liberty, for the benefit of us all. Support for families, in every form, is the best way to support children.

By focusing on the centrality of race to children's and parents' inequalities, we first must focus on families' economic needs. Family allowances, tax credits, guaranteed income levels, and the elimination of job discrimination are some, although not all, of the possible policies that will ensure income sufficient for families to take time from work to be with children, ensuring their nurture and growth. Structures that ensure children's minimum needs are a second economic component. These would include universal, high quality

102. See *supra* note 17 (showing perpetuation of housing discrimination by shift from explicitly racist to race neutral policies).

child-care, preschool, and afterschool programs available at no, or a reasonable cost, and universal health care.

Because they are the most common family form in communities of color, single-parent families would be at the core of policy formation, as either the model for constructing policy or as a family form that requires additional support through the use of preferences, additional programs, or other alternatives. Because the intersection of race and gender constructs subordination so deeply for black men, policy must avoid reinforcing and deepening that subordination. Because the intersection of race and gender has so strongly devalued black women's mothering, policy must be grounded in drawing upon the strengths and accomplishments of all women of color, who provide powerful affirmative models of work and family.

Addressing the race and gender intersections of those most marginalized in current work/family conflicts leads to the necessary resolution of models for work and family. Establishing economic policies based on making race central to work/family analysis allows us to more realistically and freely envision a reconfigured vision of work/family roles that does not incorporate limited, constricted, differentiated norms of fatherhood, motherhood, and collaborative parenting.

We can begin this process by reforming the FMLA. Leave should be universal and paid at a level that permits all workers to take leave, irrespective of family form or income. Those two requirements are essential, even if the length of leave does not change; even if no incentives or public education are included to encourage fathers to reimagine fatherhood; and even if the available child care and preschool structure is not expanded. The second step is the development of universal quality child care, preschool, and after school care. Universal parental leave gives all children a good start by allowing their parents time to be with them. Universal preschool gives all children care and education, so they can begin their formal education on a more equal footing. This comprehensive approach would be far more beneficial to children, families, and society. Let us at least begin with these baby steps, however much we might view them as giant steps.

