BOOK TALK

NANCY DOWD
Discussion of
Reimagining Equality: A New Deal for Children of Color

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Reimagining Equality: A New Deal for Children of Color Speaker Bios

Nancy Dowd

Professor, David H. Levin Chair in Family Law; Emeritus Director, Center on Children & Families

Professor Dowd is a professor at the University of Florida Law School, where she also served as the Emeritus Director of the Center in Children and Families and is the David H. Levin Chair in Family Law. She is also the 2017 Fulbright-Lund University Distinguished Chair in Public International Law at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Lund University. Her research focuses on social justice issues connected to family law, and therefore touches on not only family law but also juvenile law, constitutional law, race and gender analysis, and social change theories. She is currently engaged in research and writing about a developmental model of equality and focusing on the life course of African American boys from birth to age 18.

As the Director of the Center on Children Professor Dowd focused on issues of juvenile justice, social justice, non-traditional families, gay and lesbian rights, and collaboration with the Center for the Study of Race and Race Relations on issues of race and families. While director, she was also involved with successful grants that established the Intimate Partner Violence Assistance Clinic led by Professor Teresa Drake, a groundbreaking collaboration between law and medicine to establish a cutting edge clinic. That work has exposed the importance of trauma informed scholarship and service, and feeds back into Professor Dowd’s current scholarship as well.

Robin A. Lenhardt

Professor, Fordham Law School; Faculty Director, Center on Race, Law and Justice

Robin A. Lenhardt is a Professor of Law and Faculty Director of the recently launched Center on Race, Law and Justice at Fordham Law School. Professor Lenhardt specializes in matters pertaining to race, family, and citizenship. In addition to Fordham, she has held teaching positions at Columbia Law School, the Georgetown University Law Center, and the University of Chicago Law School. Before entering legal academia, Professor Lenhardt held a number of positions in the private and non-profit sectors. A law clerk to U.S. Supreme Court Justice Stephen G. Breyer and Judge Hugh Bownes of the U.S. Court of Appeals for the First Circuit, Professor Lenhardt was formerly a Counsel in the Washington, D.C. office of Wilmer, Cutler & Pickering, where she was a member of the litigation team that defended the University of Michigan in the Grutter v. Bollinger and Gratz v. Bollinger affirmative action lawsuits. Professor Lenhardt received a Skadden Foundation Fellowship to work as a staff attorney for the National Lawyers’ Committee for Civil Rights and was employed as an attorney advisor in the U.S. Department of Justice’s Office of Legal Counsel. She later returned to DOJ to review civil rights issues as part of President Barack Obama’s transition team. Professor Lenhardt’s scholarship has appeared in numerous books and journals, including the California Law Review, the New York University Law Review, and the UCLA Law Review. Professor Lenhardt is currently co-editor of a book entitled Critical Race Judgements: U.S. Opinions on Race and Law that will be published by Cambridge University Press. She holds an A.B. degree in English from Brown University; a JD from Harvard Law School; an MPA from Harvard University’s John F. Kennedy School of Government; and an LLM from the Georgetown University Law Center.
INTRODUCTION

The American Dream is one of equality and opportunity; the ability to succeed and be whoever and whatever one wants to be, limited only by one's own drive and talent. But for Black boys, this is not the reality. As Ta-Nehisi Coates so eloquently explains in *Between the World and Me*, his letter to his then seventeen-year-old son, the overriding reality is danger to the body, literally the threat to one's life, filling him with fear for his son. 2 Grounded in his own experience growing up in inner-city Baltimore, it is a no less justified fear for his son raised amidst relative wealth and privilege. 3 Coates writes about being stopped in his car by the Prince Edward County police while he was in college. He had done nothing but was acutely aware that meant nothing in this dangerous moment when anything could happen to him, and be justified. 4 Quite literally, you hold your breath as you read this passage; you know his fear is warranted. Nor is his fear for his son misplaced. Indeed, his letter 48 to his son was triggered by his son's reaction to the refusal to indict the Ferguson police officer who killed Michael Brown. 5 But, Michael Brown was neither the first nor the last young Black man or boy to lose his life to private or state violence. Every new death reinforces that this is unexceptional. The fear for the body, for life itself, is real for every Black boy and man.

But this fear is only the tip of the iceberg. Beyond the danger to the bodies of Black boys and men is the reality that as children or as adults, if they survive, most will fall far short of realizing the American Dream. This Article confronts that larger reality and aims to change it. Allowing this reality to persist violates fundamental principles of law, of morality, of humanity. 6 In this Article, I confront this reality and articulate a groundbreaking strategy for change. 7 I propose developmental equality as a model to accomplish children's equality. 8 Using developmental scholarship grounded in the lives of children of color and other outsider children, I aim to infuse and shift the law's perspective on development and harness developmental insights to achieve equality. A developmental equality model would be the basis for policy and litigation strategies to identify and dismantle structural discrimination, prevent ongoing replication of inequality for children, and provide affirmative support for all children's opportunity to develop. 9
I make the case for the developmental equality model by looking to the life course of Black boys from birth to age eighteen. In this Article, I gather and distill the social science research on the development of Black boys. This data is important in its own right, because Black boys matter: they deserve our focus and attention as a group. The data also serves to expose structural discrimination that fosters not only the inequality and subordination of Black boys, but also inequalities generally for children linked to their identities. This deeper look into the lives of Black boys from birth until legal adulthood informs the model of developmental equality, and that model as applied to their lives points to structural factors and the role of the state in children's continuing inequalities.

My analysis is not intended to create a hierarchy of harm or need. I do not claim that Black boys matter more, or Black girls matter less. Nor do I claim that Latino, Asian, or Muslim children are less affected. Rather, the life course of Black boys demonstrates the centrality of developmental equality to all children who face unequal developmental hurdles tied to the intersection of identity (or identities) and state-supported structures. And, while my focus is on children subordinated and challenged in normative development due to identity, this same model might be used as well to identify how privilege is reinforced for some children, advantaging them unfairly and reproducing hierarchies among children.

Developmental equality identifies the structural components of inequality created and sustained by the state. Exposure of that structural inequality should trigger an obligation on the part of the state to dismantle, reorganize, and reorient those systems. The state should take evidence of bias seriously, whether linked to policies and practices, or people, or both. Beyond dismantling barriers to development, an affirmative approach would require state action to insure equality of development and opportunity.

The Article proceeds in three parts. In Part I, I evaluate the use of a developmental frame in legal analysis and public policy and outline my developmental equality model. Typically, the developmental perspective imagines the child as neutral: race-less, gender-less, class-less. Using such a frame in the guise of progressive policy is fundamentally flawed. Even worse, it reinscribes inequalities rather than attacking them, while claiming a more child-centered, progressive approach. After critiquing the neutral child of those models, I suggest reframing the legal developmental lens to a “developmental equality model.” This model incorporates insights from social scientists who have focused on the development of children of color, in particular the work of Margaret Beale Spencer and Cynthia Garcia Coll. The developmental equality model is a powerful tool to make the promise of equality real. It can be used (1) to expose and dismantle barriers to equality; (2) to recognize and celebrate positive racial identity development; and (3) to create concrete benchmarks to achieve real equality by maximizing potential and opportunity for all children.

In Part II, I argue for the necessity of the model by examining the life course of Black boys based on social science research specifically focused on them and their development. This scholarship exposes steep developmental challenges. These challenges arise not from individual families or communities, but rather from conditions designed by the state or known by the state to harm particular families and communities. The individual pattern of exacerbated developmental challenges is reinforced by identity-based policies affecting families and communities in a cycle that perpetuates inequality.

In Part III, I explore how the developmental equality model generates strategies for equality. The model highlights the structures and cultural norms of the state that create substantial negative developmental hurdles that differentially affect identifiable groups of children based on identity. Undermining development generates potentially lifelong subordinating consequences that are difficult or impossible to overcome. I focus here on the poverty system, the educational system, and the juvenile justice system.
Having identified three critical systems that block development, I then consider the use of the developmental equality model for legal analysis and public policy to support not only the equality of Black boys, but of all children. Beyond dismantling what currently harms and discriminates among children, a developmental equality framework could be the basis to construct affirmative policies, structures, and culture that support all children and youth. Such affirmative obligations must be constructed with great care, to maximize family autonomy and integrity, given the history of destructive, counter-productive interventions into the lives of families of color and the poor.

The exploratory discussion of strategies in Part III includes both litigation and policy. From a litigation perspective, a developmental equality model might expand the scope of the landmark case brought against the Compton Unified School District. From a policy perspective, a developmental equality model could be implemented in systems that currently block rather than support developmental growth and opportunity, or be the basis to create an affirmative system of children's rights and support. Although this strategic project will be more fully fleshed out in future work, I demonstrate here how focusing on the example of Black boys, transforming their development from a pathway littered with challenges and dead ends to one reflecting a fundamental guarantee of individual support and opportunity, can meaningfully insure their equality. Making Black boys matter is a path to embrace a commitment to developmental equality that benefits all children currently treated as less than full and equal persons.

I. A DEVELOPMENTAL MODEL

A developmental model or perspective in law is critical to both a theoretical, strategic vision for children, and as a metric to hold the state accountable to dismantle existing barriers and to insure developmental support for all children. Such a perspective imagines the state as a responsive state dedicated to the equality of its citizens. It is crucial that this developmental perspective be informed by an intersectional race and gender model, rather than a “colorblind,” gender-neutral approach. A developmental equality model insures that the power of the developmental perspective is harnessed to achieve equality for children, rather than inadvertently or deliberately used to reinforce hierarchy among children.

In this Part, I first describe the existing developmental model assumed in current legal frameworks. I then explore the work of two social scientists, Margaret Beale Spencer and Cynthia García Coll, who put children of color at the center of their analysis, and expose the impact of identities and structural discrimination. Using their work, and fusing it with legal principles of equality and our obligations to children, I construct the model of developmental equality. This model can be used to identify barriers to equality from birth and provide support for real, substantive equality of opportunity for all children. The life course example of Black boys, explored in Part II, validates the usefulness of the developmental equality model in exposing the role of identity factors in state-created structural barriers to development. The model points the way forward not only for Black boys but for all children.

A. Critique of the Dominant Model

Developmental research has been a powerful tool to reorient legal rules and social policy related to children and youth. Indeed, one might argue that a developmental lens has begun to fundamentally reshape family law and juvenile justice.

Developmental arguments have been particularly effective toward reframing juvenile justice to reflect the immature and incomplete brain development of adolescents that affects their judgment, risk taking, and susceptibility to peer influence. The consequence has been to dismantle harsh sentences for juveniles on the basis that they are different
from adults, not yet fully neurologically or emotionally developed and, therefore, are both less culpable while also having greater potential for rehabilitation. The potential exists to extend this developmental understanding throughout the juvenile justice system.

Conversely, the same scientific evidence has been important to determine capability and maturity in the reproductive rights realm. Many teenagers are sufficiently mature to make decisions about their reproductive choices. The consequences if youth are not allowed this choice, coupled with recognition of their capability to make their own decisions in a setting that permits time and reflection, suggest that maturity and capability may be defined differently in different situations, at different ages, and based on the specific experience and capabilities of particular youth.

These two seemingly opposing positions, recognizing immaturity and poor decision making versus respecting sufficient maturity and capability to make major life decisions, suggest that the use of the developmental lens needs to be nuanced and careful so as not to infantilize children and youth, but at the same time to recognize the fluid developmental dynamic that affects behavior and relates to legal concerns of capability and capacity. As children's rights scholar Barbara Woodhouse has so eloquently written, adolescents in particular need to be supported in their opportunity to develop, including their opportunity to make mistakes.

One final example of an area where the developmental perspective has been helpful has been with respect to issues of custody and shared parenting, particularly to differentiate between the needs and support of children at different ages and over time. Florida, like many states, recognizes developmental information as a relevant factor in determining the best interests of the child in devising parenting plans. In addition, guidance and sample plans of the courts expressly differentiate between the needs of infants versus middle school children or older teenagers. As distinguished from juvenile justice and reproductive rights, here the developmental data is used as a guidepost to formulate individualized plans that adjust over time congruent with normative developmental stages.

The use of developmental scholarship in law commonly conceptualizes development as linear, represented most familiarly in the developmental charts from infancy to adulthood that organize physical, cognitive, emotional, and other aspects of development according to age-linked norms. The linear view reminds us that children are a moving target, with unique needs at various ages and stages. So, for example, normative adolescent needs and behavior are far different from those of newborns. This linear progression also highlights particular periods as especially critical: infancy and adolescence are the two most dynamic periods of development.

An ecological development model, grounded in the work of Uri Bronfenbrenner and most strongly advocated in legal analysis by Woodhouse, provides a more complex picture that situates the individual's linear development within an ecology, capturing the impact of the environment on the child and the dynamic interaction of various aspects of the environment with individual aspects of the child. Conceptualized as concentric networks of self, family, community, systems, and ideologies, all aspects of this complex ecology affect outcomes. This perspective is incorporated in law in the recognition that context matters. Of these interlocking systems, the most significant are microsystems--those systems that have a direct impact on children (family, peers, community, schools). Where those systems overlap creates mesosystems, ideally reinforcing the overlapping microsystems. So, for example, the family and schools mutually support academic achievement; and, neighborhoods support both the families within them and the schools located within the neighborhoods that serve children. Exosystems more indirectly, but no less significantly, impact children through their
effects on the micro- and mesosystems, through institutions and systems (for example, policies and systems of anti-
poverty support, child welfare, education, health care, and juvenile justice). Overarching the entire ecology is the
macrosystem of cultural ideals, biases, and beliefs (for example, beliefs about development, core societal principles, and
pervasive stereotypes).

The value of the ecological approach is in seeing the interlocking nature of the various pieces of the ecology. Instead of
isolating the child, or narrowly focusing on the family as the sole determinant of the child's well-being, the ecological
model recognizes that families are only part of the picture; they do not function independently. Ideally, the interlocking
systems are functional for all children, sharing what Woodhouse has called generist values, creating a healthy, supportive
ecology; when they lack that goal, systems on various levels can be highly dysfunctional and toxic to children.

One other valuable insight into development comes from neuroscience. Neuroscience tells us both of the impact of
negative ecological factors and of the brain's resiliency. Focusing on neurological development and capability,
neuroscience is a more narrow perspective than the ecological model or the linear progression model, both of which
include multiple systems as part of development. Neuroscience nevertheless can be particularly helpful in understanding
the physical developmental foundation of complex behavior. For example, neuroscience explains why adolescents are
both capable and immature, by reminding us that this is linked to the lack of full development of the frontal lobe. The
outsized risk-taking propensity of teens is because their neurological skill at making judgments is not yet fully
developed. Indeed, neuroscience would suggest that from a brain architecture perspective, legal adulthood might
arguably be delayed to age twenty-five. At the same time, increasing maturity and capacity for judgment may be
the basis to encourage independent judgment-making as part of the very process of development of judgment and
maturity.

Neuroscience also informs us about the impact of a range of factors on the brain's developmental process. We can
measure scientifically the toll taken on normal brain development by being confronted with severe stressors. Just
as abuse and domestic violence have an impact on the developing brain, so too do factors like racism, linked
particularly to stress. At the same time, neuroscience reminds us of the brain's resiliency and what factors contribute
to that resiliency.

In recent U.S. Supreme Court cases where the Court has strongly embraced a developmental perspective, the Court has
particularly relied on the markers of linear, normative development, and neuroscience scholarship on the progression of
brain development in the teenage years. The Court has given some attention to contextual factors, but tends to keep
the focus narrower than that suggested by the ecological model. So, for example, in Miller v. Alabama, where two cases
were consolidated to consider whether juveniles who committed homicide could be sentenced to life without parole, the
Court critiqued the practice of mandatory sentences of life without parole because the practice “precludes consideration
of... chronological age and its hallmark features-- among them, immaturity, impetuosity, and failure to appreciate risks
and consequences.” In addition, the Court noted that the rule also precluded taking into account the circumstances
of the offense as well as of the home and family environment. The Court noted that one of the two defendants, who
was an accessory to robbery and murder of a store clerk but did not shoot the clerk, had a family background which
the Court characterized as “immersion in violence” because his mother and grandmother had shot other individuals.
That defendant was fourteen when charged as an adult, and was African American. The Court described the second
defendant's home life in considerable detail as “pathological,” including a drug-addicted mother, a life in and out of
foster care, and a physically abusive stepfather. This second defendant had tried to kill himself four times, beginning
in kindergarten.\textsuperscript{55} Also fourteen when he committed his crime, he beat his victim, then set a fire to cover his crime.\textsuperscript{56} This defendant was white.\textsuperscript{57} In the analysis of the white defendant, the Court seemed to be sympathetic \textsuperscript{59} to the difficulties he experienced in his life; in the analysis of the Black defendant, the Court appeared to lay blame on the family for encouraging the use of violence, although the defendant did not commit the acts of violence but rather was charged as an accessory.

The Court did not explicitly take race into account in evaluating the maturity, competence, and responsibility of the \textit{Miller} defendants for their crimes, nor was race explicitly considered in the context relevant to their sentencing. Even if race is not the explanation for the Court's differential evaluation of the two defendants, the absence of consideration of race to assess the life course and developmental pathway of the defendants obscures the challenges specific to race and gender in development. This is not surprising given the “neutral” child of mainstream developmental analysis. But it obscures the limits of that model, which is hardly neutral.

The developmental research base is not diverse. Much of the psychological research on children that is the basis for understanding and constructing developmental norms has been critiqued as racially biased.\textsuperscript{58} The children initially researched were exclusively white, and research continues to be dominated by study of white children. “[M]iddle class White behaviors, norms and values are used as the standard of normality and psychosocial adjustment against which non-White youth are evaluated.”\textsuperscript{59} In addition, white and African American youths are “assumed to have similar experiences and equal access to participation in American social institutions.”\textsuperscript{60}

The research patterns have persisted despite this critique.\textsuperscript{61} In other words, like many “sciences,” the assumptions or questions generating research claim universality without examining that assumption or what \textsuperscript{60} subjects are studied. Norms reflect who is in the field and what children they study. This suggests the dominant developmental lens is deficient because it is racialized but presented as universal and neutral. So, for example, the application of norms has been completely one way:

Although it is relatively common to apply models of parenting from Whites of European descent to other ethnic or racial groups, it seems unthinkable to test models of normative development derived from minority ethnic groups on White children of European descent. This double standard illustrates the culturally parochial approach to understanding normative development in much of the extant research.\textsuperscript{62}

When minority children are studied, historically and currently, the dominant perspective is deviancy.\textsuperscript{63} The research question commonly is some variant of “what is going on that causes children of color to behave badly.”\textsuperscript{64} Connected to this research pattern focused on deviancy is limitation of the subjects of study to kids characterized as “high risk,” “urban,” or “urban low income” youth, all of which begin to sound like euphemisms or code words for children and youth of color, ignoring differences among their circumstances.\textsuperscript{65} There is little study of successful youth of color,\textsuperscript{66} varying ecologies, or positive models of resilience.\textsuperscript{67} Much remains unknown about positive developmental pathways for minority children because those questions continue to be so little studied.\textsuperscript{68} One scholar suggests three areas have not been significantly researched for children of color: normative development in context; intergroup relations and attitudes; and identity development.\textsuperscript{69} Moreover, the evidence from children of color reminds us that all children's development is racialized, although the process of racialization differs for minority versus majority children.\textsuperscript{70}
Psychoanalytic theory as well has been criticized as normatively white. The exposure of this bias brings the core assumptions of psychoanalytic theory into question, and it raises questions about whether kids and adults of color are unnecessarily pathologized while also ignoring the basis for their state of being, their strengths, and the cognitive and emotional skills forged in this toxic emotional/psychological environment:

[W]ritings of minority psychologists and social scientists have appreciated for many years the limitations of traditional psychological theories when applied to people of color. From the early 1900s, pioneers in this field emphasized the importance of cultural values, socioeconomic factors and the realities of discrimination and racism in understanding the psychology and life experience of minority group peoples.

One critique of the existing developmental model in law, therefore, is that mainstream models are based on the experiences and assumptions of middle class white males (and only more recently have included females). So they are hardly universal, neutral, or dispassionate. As one researcher put it, “Even the rat was white.” Second, race remains missing, or at best, marginalized, from the mainstream model as a developmental factor. This second critique is explored in the following Subpart.

B. Adjusting the Lens: Developmental Equality

Developmental models generally presume a child unraced and ungendered. That approach misses the role of race and gender in development and the ways in which race and gender render children unequal, and subordinate them, because of ways in which their normative development is made more difficult due to the hurdles those identities trigger. Two scholars whose work describes this dynamic are Margaret Beale Spencer and Cynthia García Coll. Their work suggests the necessity of reframing the developmental model to one of developmental equality. Such a model would be the basis to challenge state policies and institutions; provide a metric for equality; and be the basis for support of racial/ethnic identity. Such a model might also have the potential to uncover the replication of privilege.

1. Margaret Beale Spencer

Spencer's phenomenological variant of ecological systems theory (“PVEST”) model combines Bronfenbrenner's ecological approach with phenomenological perspective (the study of the development of human consciousness and awareness). Spencer sees development as framed by the interaction of identity, context, and experience. The model considers the impact of critical identity factors on individual perceptions of self and opportunities, imposed expectations or stereotypes, and the interaction of these processes with the normal maturational processes such as puberty and identity exploration in adolescence. According to Spencer, in this model “risk is best viewed as an exacerbation of normative challenges and competencies due to larger sociopolitical processes ... and/or lack of resources and resilience as successful coping with these exacerbated challenges.” This is a critical part of Spencer's theory: the normative--meaning normative developmental stages and growth to meet developmental benchmarks--is exacerbated by identity.

Spencer's model focuses on five basic components that contribute to identity: risk, stress, coping, identity, and life outcomes. The interaction of these translates into net vulnerability, net stress management, reactive coping mechanisms, emergent identities, and adverse or productive life stage specific coping mechanisms. As youth engage in
this process, they are creating an identity that is either reinforced and supported, or not: “Identity lays the foundation for future perception, self-appraisal, and behavior, yielding adverse or productive life-stage-specific coping outcomes.” 84

Spencer's model is specifically designed to take into account the development of youth of color. In this model, both risk and stress are strongly affected by systemic and institutional factors; and systemic factors also come into play when a youth adopts a coping mechanism identified as maladaptive, which can have serious consequences for their emerging identity. As Spencer points out, all children develop in the context of culture, but do so differently: “Some children develop in a cultural context in which their culture, race or ethnicity are considered privileged over other cultural and racial groups. This privilege is, unfortunately, neither recognized as such nor acknowledged as a significant life-course asset.” 85 Neither privilege nor subordination has been explored in most mainstream development scholarship. 86 The dominant questions have been geared to “what” is happening in development, not “how.” 87

The exacerbation of risk is identified in the early part of Spencer's model and has an impact throughout the individual's process of constructing identity. Risk contributors are factors that are part of self-appraisal and depend on the individual's interaction with society. 88 This *64 includes the individual's response to stereotypes and biases. Here Spencer includes race, sex, socioeconomic status (“SES”) factors, physical characteristics of the individual, and biological/temperament characteristics as factors that contribute to risk. 89 Each of these factors is influenced by stress engagement. 90 Stress is subdivided into neighborhood dangers, social supports, and daily hassles. 91 In sum, this part of Spencer's model identifies the interaction of identities, structures, culture, and social factors. Identity factors by their terms generate risk; structural factors trigger stress dynamics.

It is this exacerbation of the normative that should, I would argue, trigger mandatory affirmative action by the state because the exacerbation flows from state action. Spencer's model exposes at a very individual level the costs and challenges facing children of color, and their source. Their very identity, by race and gender, is characterized as risk because it is linked to the structural interactions that incorporate stereotypes and cognitive bias. 92 In addition, those triggers are exacerbated by neighborhood conditions and daily micro-aggressions and prejudices that are race- and gender-linked to the families and communities within which children of color function. Rather than providing support, that context is itself poorly supported and undermined. The source of those familial and community developmental challenges are state structures and policies.

The remaining factors in Spencer's model continue to expose how individual responses to this exacerbated risk are linked to structural factors. Coping with exacerbated risk (the risk triggered by identity factors, located in structures that disproportionately hamper or block development) can be adaptive or maladaptive, in that the individual engages in strategies that can help or hurt in relation to structural responses to their behavior. 93 Maladaptive actions identified by Spencer include hypermasculinity, reactive ethnocentrism, or personal orientation. 94 It is important to note, however, that these responses are “maladaptive” to the extent that they are likely to lead to further structural responses that create even more difficult developmental *65 challenges--such as interaction with the juvenile justice system, which can result in direct and collateral roadblocks to development and opportunity. Each of the maladaptive responses can be exacerbated by ongoing stress, so it is an even more negative interaction. The lethal interactions between police and young Black men are the extreme examples of this interaction, so commonplace that they must be deemed a systemic response, not rogue action. 95 Adaptive solutions on the other hand reinforce positive identities. This parallels the resistant identities as well as the positive consequences of racial identity as a strength and resilience factor. 96 How this developmental dynamic ultimately affects life stages is Spencer's final factor, with adverse outcomes including juvenile
or adult justice systems, mental illness, poor health, and lack of intimacy. Surviving this series of challenges is tricky but also generates real strengths:

Structural racism in American society stems from systematic, institutionalized practices resulting in the subordination and devaluation of minority groups and the setting up of life course barriers for all of its members' life course experiences. The consequences of structural racism for minority youth are twofold. First, minority youth in America often live and mature in high-risk environments characterized by systemic, structural barriers to individual success .... Second, instances of resilience ... often go unrecognized, thus, denying individuals a sense of success and accomplishment.

A specific example that Spencer discusses in her work is the adoption of hypermasculinity as a coping mechanism, frequently triggering very negative systemic results. Fear of violence and insecurity trigger this coping mechanism. Thus, hypermasculinity is an expression of vulnerability. As Spencer explains, “[i]n addition to the normative maturational challenges, Black boys must also deal with prejudice and the negative, stereotypic connotations associated with Black masculinity, which is often inherently viewed as hypermasculinity. These stereotypes are pervasive, as they cut across multiple ecological settings.” Her model exposes this ultimate “catch-22” of risk and stress that is reinforced and generated from systems that generate highly negative images and assumptions that lead to predictable coping mechanisms that then trigger further negative response. The social and systemic response to white boys acting out as teenagers is frequently that “boys will be boys,” that they will outgrow this behavior (which, in fact, most teenagers do); the response to Black boys and other boys of color engaging in the same behavior is to view them as serious threats.

The interaction of race and gender is a particularly strong component of Spencer's model. As Spencer points out, adolescent identity development “involves coming to understand one's self as a member of a society within a particular ethnic, cultural, religious, or political tradition”; it is a process of “defining oneself [by] becoming part of a normative cultural tradition.” For African American males:

The PVEST analysis exposes how development is impacted in negative ways, and the kinds of interventions needed to build social capital. But Spencer also cautions that we not overlook the resilience and strength of Black boys.
Most importantly, her model exposes structural and cultural factors that are within the power and control of the state that generate developmental challenges. The identification of the state as the source of developmental barriers should trigger the necessity of state action to correct the state's own discrimination in not only failing to support developmental equality, but also its role in actively subordinating the development of children of color.

2. Cynthia García Coll

Cynthia García Coll's child development model focuses on social stratification and its impact on child development—separating stratification into social position, racism, and segregation. As with Spencer, her model is a modification of Bronfenbrenner's ecological model. García Coll's focus is on the context in which children of color live. She articulates the impact of culture in the life of every child, but also the uniquely dualistic nature of culture for outsider children: external or mainstream culture and its shaping of institutions has a powerful impact on children individually and on their families, as well as infusing the structures within which they function, including schools, housing, and community resources. Families construct as well as live within culture, responding to racial and ethnic subordination by majority white culture, parenting their children to live and survive in two worlds. Families embody both resistance and identity.

*68 García Coll's model “incorporates the contextual, racial, and cultural factors that play critical roles for children who are not part of mainstream society.” Three key conclusions flow from her model:

It is the interplay of ... social position, racism, and segregation--that creates the unique conditions and pathways for children of color ... [Second, a] segregated school or neighborhood environment that is inhibiting due to limited resources may, at the same time, be promoting if it is supportive of the child's emotional and academic adjustment, helping the child to manage societal demands imposed by discrimination. [Third, the] behavioral, cognitive, linguistic, and motivational deficits of minority ... children are more appropriately recognized as manifestations of adaptive cultures, as families develop goals, values, attitudes, and behaviors that set them apart from the dominant culture.

Context thus powerfully impacts development. As García Coll states, “A fundamental assumption of the model is that cognitive, emotional, and behavioral development is profoundly affected by the child's social position within a socially-stratified society replete with racism and discrimination, and by the promoting or inhibiting nature of the child's school and neighborhood.” The three aspects of social stratification--social position, racism, and segregation--collectively create the distinctive conditions faced by these children, and “it is these ‘non-shared’ experiences with mainstream populations that define the unique pathways of development for children of color.” These unique experiences can be harshly subordinating and challenging:

What is the cost to the development of the child who is teased or even hit or kicked by other children in school because he or she has darker skin, slanted eyes, or an accent? What is the cost of coming to know that people of your cultural background are considered dumb, no good, ugly, or lazy? What is the cost of growing up in a neighborhood that is predominantly non-Anglo and poor? What is the cost of thinking that your teachers do not care if you learn and do not expect you to succeed because of your cultural background? What is the cost of consistently fighting stereotypes and prejudices that are saturated with negative images and demeaning conceptualizations of the culturally different? What are the costs associated
with these experiences to an individual's health, well-being, and developmental outcome. What are the benefits, if any.\textsuperscript{119}

García Coll identifies eight constructs in her model that affect cognitive, emotional, and behavioral development based on the child's social position within a society characterized by racism and discrimination, plus the supporting or inhibiting nature of the child's school and neighborhood.\textsuperscript{120} The eight constructs are social position; racism; segregation; promoting/inhibiting environments; adaptive culture; child characteristics; family; and developmental competencies.\textsuperscript{121} She maintains that what are labeled as deficits of minority children--behavioral, cognitive, and motivational--are more accurately seen as coping mechanisms and adaptive cultures.\textsuperscript{122} Diversity is a protective factor, a resource for children.\textsuperscript{123}

One extremely important factor in the developmental context for children of color is segregation, which García Coll defines not only as housing segregation but also economic and social/cultural segregation. She points out that segregation may generate support for children as compared to an integrated setting where children are treated as outsiders.\textsuperscript{124} Segregation's effects include what is available in the neighborhood for kids to do, and the level of safety, which can influence parents to isolate their children in order to keep them safe.\textsuperscript{125}

García Coll also focuses on families' interactions with media/culture, which can embrace or isolate their culture, as well as deliver messages about their culture/identity.\textsuperscript{126} She argues for rethinking the role of families, neighborhood, and culture: “Most developmental research, clinical interventions, and social policies have regarded the child-rearing values, attitudes, practices, and norms of the dominant culture (that is, white, Anglo-Saxon, middle class) to be optimal for child development.”\textsuperscript{127} This translates into difference as deviance or deficit, and directing interventions to compensate or correct the deficits. To the contrary, “[f]amilies and children of color develop goals, values, attitudes, and behaviors that set them apart from the dominant culture because of social stratification deriving from prejudice, discrimination, racism, or segregation, and the differential access to critical resources”:\textsuperscript{128}

Racism, discrimination, and diminished life opportunities related to segregation constitute the critical, underlying source of risk for children of color .... Experiences of exclusion at various societal levels constitute, at a minimum, insults to children's healthy social and cognitive development. Segregation, in its many forms--including residential, economic, linguistic, social and psychological--not only places the child at risk, but also contributes to significant mistrust among populations of diverse cultural backgrounds.\textsuperscript{129}

García Coll's model exposes the presence of racism, and the subsets of prejudice, discrimination, and oppression, as normative for outsider children; identifies segregation as normative, evidenced by the resegregation of American society; and points to schools, media, and healthcare as critical environments that either promote or inhibit the child.\textsuperscript{130} Just as Spencer's model identifies exacerbated risk triggered by identities as normative, García Coll's model identifies subordination in children's context as normative. Equally critical is García Coll's insight about culture. The goal of equality is not to dismantle cultural identity, but to dismantle subordination.
*71 3. A Developmental Equality Model

Using Spencer and García Coll's work to reframe the developmental model in law generates a developmental perspective that can serve not just to describe what happens, but to expose how it happens. Development is affected by systems and state-supported culture that marginalize and subordinate some children. A model focused on these dynamics and committed to children's equality can serve as a metric to trigger state responsibility to dismantle state structures and policies that undermine children's development. It may also serve to generate positive state responsibility to support children's developmental equality.

In tandem, these scholars expose the developmental burden placed on children of color. The source of much of that burden is the state. Their stark illustrations of the developmental costs and challenges together with the principles of equality should generate a more nuanced and realistic developmental perspective that might meaningfully be used as a theoretical and practical tool to challenge inequality sustained and supported by the state. Because developmental insights have already made inroads into legal analysis, reframing the developmental model so that it supports all children does not require persuading courts or legislatures to adopt an entirely new analytical tool, but rather to refine and adjust their analysis. Developmental equality, however, mandates far more. Fused with legal principles of equality, this model exposes the location and sources of inequality that negatively impact the developmental trajectory of children by their identities (singly or in combination). It tells us the playing field for a child at birth is determined and predictable, and the end result is hierarchy and inequality, not opportunity and support to become the best each child can be. Unequal outcomes, as exposed by fusing developmental knowledge with equality principles, expose the critical role of state actions and structures in creating developmental hurdles and roadblocks. Together, the powerful critiques of Spencer and García Coll expose the importance of intersectional analysis to understand how identity, as currently experienced by children of color, triggers an exacerbated set of developmental challenges that operates to expose them to risk, harm, and failure. Infusing this knowledge in law adds to our use of development to understand children better, to assess their needs, and to recognize their competency and voice.

By using a developmental equality lens, the source of exacerbated risks is exposed: as long as identity alone or in combination triggers heightened developmental challenges or differential developmental support, this analysis exposes continuing inequalities for identifiable *72 groups of children. Spencer and García Coll identify the impact of structural and cultural factors. As long as those factors persist and continue to be supported by the state, the state is complicit in generating children's inequalities. Fundamental equality, long since recognized, should make this pattern, once clear, unlawful as well as morally unacceptable.131 Making children unequal, supporting them not only differentially but in a way that subordinates some, contradicts our most fundamental idea of equality. The developmental equality lens is then essential to achieving the long delayed goal of equality. It must include not only dismantling but also a substantive standard of maximizing developmental potential for every child.

The power of the developmental equality lens, and its potential, are explored in the next section by examining the developmental arc of Black boys. This is a synergistic analysis: the model explains the pattern of their development, by telling us where to focus; and their life course substantiates the model, validating the focus on state-created structures and policies. Developmental equality is essential and critical to legal analysis focused on moving the developmental context of Black boys from a toxic ecology of predictable harm and hopelessness, or even death, to a supportive path valuing their identities, individuality, and opportunities.132 The example of Black boys illuminates, through the developmental equality model, all children who are currently tracked for a life of inequality. Using the model in legal analysis is critical to expose structural and cultural factors that underlie the persistence of those inequalities, as a foundation for attacking those sources of inequity via litigation or public policy strategies.
II. BLACK BOYS

Why focus on the lives of Black boys? Because their lives starkly illuminate how developmental inequality functions and replicates hierarchy among children. The high likelihood of negative life *73 outcomes, and the funneling of their lives toward subordination, show us how it is done. And, they lead us to ask the other question(s): 133 “Who else?” When we do, we more specifically look for other identities and intersectionalities linked to inequality of gender, race, ethnicity, class, and immigration status that expose similar patterns.

I began this research in the juvenile justice system. 134 That system not only exposes a sharp pattern of racial and ethnic disparities, but also the overwhelming failure of the system, for all boys and for society, to produce positive outcomes (in addition to its mismatch and distinctive failures for girls). 135 The racial configuration, however, is particularly disturbing, and in exploring that pattern, I began to search earlier in their lives. One of the pipelines into the juvenile justice system is schools. 136 But schools not only feed the juvenile justice system, they produce unequal educational outcomes along race and gender lines. Pushing back further, the link to later negative achievement outcomes is evident on day one of kindergarten; and even on day one of preschool. 137 It became evident that inequality begins with the context into which Black boys are born. This developmental story, from birth, is essential to understanding the inequality of Black boys and why developmental equality is critical for all children. Study of the lives of children of color, as noted earlier, has been limited, submerged under a developmental norm grounded in the study of mostly white children, or when directed at children of color, has focused on questions that presume deficit and deviance. 138 Despite the unevenness and underdevelopment of the research, however, several clear themes emerge from the available research regarding the development of Black boys.

First, racialized patterns of development emerge early, literally at birth and in early childhood, traceable to several factors: the impact of *74 poverty; lack of support of Black families and communities; the impact of early racial awareness; and the poor quality of child care and pre-kindergarten. 139 Second, this racialized pattern becomes an intersectional race and gender pattern to the disadvantage of Black boys once they reach school. 140 As Black boys engage with the world outside their families and communities, they face stark stereotypes and significant cognitive bias, particularly at school. Third, adolescence, as critical as the early years of development to neurological growth and overall development, generates further challenges for all children but particularly for Black boys. 141 All adolescents experience a confusing and challenging array of physical, emotional, cognitive, and other changes at this stage, and move from dependency to emerging identity as adults. For Black boys, to that volatile mix is added the necessity of constructing a racial identity. This identity is both a strength and a danger. One of the keys to success for Black males is a strong racial identity. But that very identity can trigger dangerous reactions, particularly from police and other authority figures. Policies of discipline and policing, both in schools and on the streets, affect their lives, in addition to their exacerbated risk of interface with the juvenile justice system. Fourth, resistance to oppression and stereotypes emerges in this context that constrains and funnels Black boys toward failure. 142 Those Black boys who succeed resist and build a persona of strength. The patterns of those who succeed are grounded in strong family relationships, strong racial identity, and the positive impact of racial socialization.

The dualism of the developmental patterns of Black boys, of the effects of subordination as well as positive resistance and success, cautions that the developmental data not be read either as a deterministic mark of failure, inadequacy, and inferiority, nor as an identification of a resilient path that simply needs to be followed by all. Too often in the analysis of Black boys, Black families, and Black communities, any evidence of what is perceived as negative is read quickly against a persisting script of racial inferiority and blame of family and communities, rather than confronting the strength and
persistence of racism and its structural manifestations and state responsibility. The *75 pattern of dualism instead suggests the importance of removing the obstacles to developmental success and adult opportunity, while recognizing and sustaining unique and positive cultural strategies.

In the Subparts that follow, I present the interdisciplinary research according to these four themes. In Part III, based on this data, I use the developmental equality model (1) to identify the role of the state in constructing inequality, and (2) to generate strategies for change.

A. Early Developmental Patterns, Poverty, and Racial Awareness

From birth to age three is a period of critical development where the context of children's families (neighborhood, work, economic circumstances, wealth, stability) has a huge impact on children reaching developmental benchmarks. Indeed, even before birth, the impact of maternal circumstances and health on the developing fetus has significant impact. From birth to age three, there is an explosion in neurological growth. Positive support or interventions to facilitate early development at the familial level can have tremendous impact. Conversely, trauma has significant developmental effects. While trauma is a part of life for virtually all children, toxic levels of trauma generate significant developmental consequences. Chronic stress for Black boys emanates from two sources: economic disadvantage, including violence connected with poverty; and racism, both from the consequences of historical racism in the current lives of their families and communities, as well as from the current manifestations of racism. Poverty and racism generate stress, and stress challenges children's development in a very significant way.

*76 Two-thirds of African American children are born into poverty. Poverty affects the opportunity structures that impact parental well-being, family formation, and parent-child bonds, thereby potentially rendering toxic the most critical ecology for children in their early years-- their family. The developmental set-up here is the interaction this will foreseeably create between children and school, as well as how this compromises the ability of parents to provide support for their child's education. Poverty exacts a terrible price on development, particularly the development of very young children. It is associated with consequences for physical, intellectual, and emotional development. It affects where children live and how they live, including nutrition, family well-being and interaction, safety, and community well-being.

The positive support of families is especially critical to foster children's attachment, which is linked to warm and responsive parenting. Secure attachment affects school readiness and behavior. What affects parents most strongly, and derivatively their children, are context and SES factors. While racial differences in early childhood frequently are framed as differentials in parenting, to the contrary, those differences are more often linked to SES factors. Those factors, in turn, are significantly linked to state-created environments and structures that lead to, and perpetuate, poverty.

Poverty also has a significant impact on family forms. The dominant family form for African American children is a single parent, mother-headed family. Single parents generally are not well supported; this is especially true of non-marital families. In addition, there are strong negative stereotypes about women of color and their role as mothers. Maternal education level, family income level, maternal age, neighborhood quality, and family structure can all negatively impact school readiness. Although mothers often function within networks of support, they are
subject to ongoing stress—and maternal stress has a negative impact on child development. There are particular maternal behaviors that have been correlated with better school achievement: maternal warmth, for example, correlates with better reading, and home learning stimulation links with math skills. Supporting mothers, and helping them to avoid maternal depression and stress, can have a strong positive impact on children and their school readiness at kindergarten.

Fathers have significant developmental impact as well:

Fathering is a dynamic, multidimensional construct that has direct links to children's health, education, and social-emotional development. Early childhood research suggests that fathering may be particularly important during the first 5 years of life, when children are rapidly acquiring cognitive skills that can contribute to early school success. There is very little literature on the specific ways in which African American fathers contribute to their children's early academic achievement and readiness for school.

Sustaining father involvement is particularly important given the patterns of family and residence for children and their biological parents. Low income fathers engage significantly with their children, but poverty and fathers' lack of opportunity and hopelessness, as well as the impact of mass incarceration coupled with a punitive child support systems, make parenting for some fathers difficult and conflicted.

It is critical to emphasize that policies that undermine poor families and parents, and fail to provide opportunity for them or their children, are a public policy choice, structurally carried out, that consigns their children to the likelihood of failure. The links between parental poverty and outcomes for children are clear. The correlations between poverty and children's socio-emotional development include poor school outcomes (including low achievement and higher rates of dropping out), teen parenthood, substance abuse, gang involvement, and violence. Family, instead of being a resilience factor, becomes a risk factor.

Infants are incredibly malleable, and there are identifiable positive interventions that work to foster development. “More optimal patterns of cognitive development [are] associated with intensive early educational child care, responsive stimulating care at home, and higher maternal IQ .... Child care experiences [are] related to better cognitive performance in part through enhancing the infant's responsiveness to his or her environment.” The issues that arise for children once they begin school have already emerged by ages three to five years.

Especially important is the support of cognitive development, as the potential impact of poverty on cognitive development is well known: “The cognitive development of children reared in low-income families is generally characterized by average performance on standardized tests during infancy, followed by gradual declines during early and middle childhood for U.S. children in general and for African American children specifically.” This is a critical point to emphasize: children begin their lives at relative cognitive equality. Inequality emerges in the first few years. Cognitive development is correlated with social competence, which includes emotional regulation and impulse control. Supporting cognitive skills in higher order thinking increases the ability to self-regulate and creates less
behavioral issues for children once they begin school. This link between cognitive skills and behavior continues through fifth grade.

This consequence is particularly important for Black boys: “Cognitive skills during kindergarten and first grade are especially important in the positive emotional functioning of Black boys throughout childhood.” Black boys are often scrutinized and evaluated under stereotypes assuming that they will behave poorly and may experience harsh discipline to counter this perceived stereotypic behavior. The very definition of norms in emotional regulation and externalizing behavior conventionally has been defined by white middle class children, in racial comparisons of young children. For Black boys, “the cast for the patterns may have been set as early as kindergarten.”

Cognitive skills also directly impact academic achievement. The achievement gap appears very early, by age three, and reflects differences in resources in families and neighborhoods that impact development. “[T]he relative disadvantages in aspects of neighborhood (social disorganization), family (less income, more authoritarian attitudes, and less verbal stimulation), and schooling (teachers with lower expectations of Black children compared to white children) may account for differential attainment and achievement between the two.” These linkages return us to contextual factors in infancy and toddlerhood.

Because of the impact of context on families, child care and pre-kindergarten systems are more important for poor children and children of color than for higher income children as possible sources of resilience and support not provided directly to their families and communities. Yet, child care in the United States generally does not reflect a high level of care, and low-income parents are less likely to have access to high quality care. So children with the greatest needs have limits on access to the least resourced systems.

In addition to the impact of poverty on early development, pervasive racism impacts children of color very early in their lives. Racial awareness emerges early in all children and has an impact on self-awareness as well as the perception of others. Such cultural and social cognition of discrimination and stereotypes emerges by age three and is the foundation for racial awareness in children as they begin kindergarten. “The first years of elementary school have been identified as a ‘critical period’ in the development of young children because dramatic changes are occurring within the child in terms of growth in cognitive skills as well as outside the child in terms of changes in the social environment.” Children act on the basis of learned stereotypes, as well as sensing how they are viewed. Young children learn to sort and separate the meanings of such differences, from social and cultural clues embedded in stereotypes.

The perception of discrimination begins as part of social and cultural cognition. There is evidence of awareness of discrimination in preschool and elementary children.

By age 10, children can recognize discriminatory actions that are both overt ... and covert ..., understand that these actions may be caused by others' social stereotypes, and use contextual information to make decisions about whether discrimination is likely to have occurred. The underpinnings of this understanding appear to emerge as early age 5 or 6.

The perception of discrimination is “likely to affect individuals' identity formation, peer relations, academic achievement, occupational goals, and mental and physical well-being. Perceiving other individuals ... to be the victims of discrimination
is likely to affect these domains as well," so this impacts all children with messages of subordination, privilege, or both. To combat the negative impact of racial awareness, parents engage in racial socialization, defined by one *82 scholar as including cultural socialization, preparation for bias, and promotion of mistrust, and parents must start this at a very young age with their children. Racial socialization helps children in both cognitive development and engaging less in behaviors that trigger behavioral issues. This process of racial awareness and racial socialization intensifies in middle childhood, from six to twelve, when children to a greater degree move beyond their family and engage in the process of identity formation.

Thus both race and poverty generate major developmental challenges for a disproportionate number of children of color. Even for those children raised in middle- and upper-income families, race generates developmental issues. The state's role in creating and perpetuating this context is strong. State policies create and perpetuate structural causes of poverty, fail to provide support to families and communities to move out of poverty, and fail to provide resources sufficient for families of whatever form to provide critical developmental support to their children. All of these state actions collectively generate deep developmental consequences for Black children who disproportionately are poor. Their primary critical *83 environment after family is school. As the next Subpart details, the early developmental challenges (which continue throughout their childhood) are not addressed or equalized once children begin school. Rather, inequality is exacerbated, and this is particularly the case for Black boys.

**B. School, Cognitive Bias, and Stereotypes**

A significant proportion of Black boys begin school hampered by the context of poverty and its ongoing effects on their development. “Socioeconomic status (SES) differences in children's reading and educational outcomes are ubiquitous, stubbornly persistent, and well documented. Economically disadvantaged children acquire language skills more slowly, exhibit delayed letter recognition and phonological sensitivity, and are at risk for reading difficulties.” Poor communities have the risk of “low quality child care, poor and distressed schools, and economically depressed neighborhoods.” Instead of psychosocial competence, based on self-regulation and resources from family and peers, which can be used to manage stress, Black boys experience barriers, not supports, in the school environment that exacerbate the effects of poverty.

Added to the effects of developmental hurdles already placed in their path is the likelihood that Black boys will be subject to significant stereotyping and cognitive bias from teachers and other school personnel once they begin school. This results in differential and declining school achievement, disproportionate diagnosis for learning disabilities that exclude them from mainstream education, and *84 disproportionate discipline that excludes them from school (by suspension or expulsion).

Black boys confront strong negative stereotypes at school. One of the strongest stereotypes about Black men is that they are dangerous, associated with evil and threat, and likely to be criminals. These stereotypes are triggered by Black boys when they begin to grow from toddlers to young boys. Stereotypes function in a dual way: they directly impact children as well as serve as the foundation for implicit bias exercised by others toward them. Claude Steele's work on stereotype threat is particularly helpful to understand the impact of stereotyping on children's growth, and how it confounds their achievement in school; in particular, Steele
focuses on the impact of stereotypes on their objects. As Steele points out, competence is not something that simply is, but emerges from social relations and the sense of one's ability. Competence is fragile:

[Intellectual competence is not just something inside a person's head. Rather it is quite literally the product of real or imagined interactions with others. How a student construes the way he or she is viewed and treated by others matters a lot: how welcomed or excluded, how respected, how tuned in to others' difficulties and triumphs--these perceptions can exert a profound influence on intellectual competence, on motivation, and ultimately upon a student's academic self-concept. Competence is fragile, then, because it is transacted within a web of social relations.

Stereotypes impact academic performance, engagement, and self-concept because of the impact of stereotypes on the perception of the target as well as teachers, parents, and peers.

When a negative stereotype about a group that one is part of becomes personally relevant, usually as an interpretation of one's behavior or an experience one is having, stereotype threat is the resulting sense that one can then be judged or treated in terms of the stereotype or that one might do something that would inadvertently confirm it.

Stereotype threat (the worry that one will conform to a stereotype) creates pressure on students not to fail; yet, ironically, stereotype threat undermines performance. So, for example, the classic experiment of Steele and Joshua Aronson compared white and Black college students with matched SAT scores taking the same test, but in two different scenarios. In one, students were told the test measured intellectual ability; in the other, that it was simply a lab test. The intellectual ability information triggered stereotype threat for the Black students of conforming to stereotypes of inferiority--and the Black students underperformed. On the other hand, in the lab test scenario, with no stereotype threat trigger, Black students performed as well as equally skilled whites.

This effect has been replicated with privileged groups, including white males at top universities, in experiments by Steele and his colleagues. As Steele explains, all of us have social identities. Some cue lets us know one of our identities may trigger a negative in that setting, and that feels threatening, affecting our experience in that setting. According to Steele, “There are two primary triggers that can turn the performance of challenging cognitive tasks into a stereotype-threatening situation--ability evaluation, and the salience of a social identity that is stereotyped as inferior in the ability domain.” Such threat is felt strongly by those who care about doing well and those with strong racial/ethnic identity. Steele and his colleagues conclude that stereotype threat is a major factor in the achievement gap when other factors are held constant (for example, differences in SES, schools, and the quality of teachers).

Steele's analysis, with experiments done primarily on college students, puts into perspective the tricky interpretation of data about achievement, between reinforcing the conclusion of damage, deficit, and blame, as opposed to seeing the pattern as one of damage but resilience--the ability to resist the threat, and the implementation of means to counter threat. Steele emphasizes that African Americans have not been passive victims of stereotype threat; to the contrary, he characterizes their response as one of “resilience and creativity.” Stereotype threats can be counteracted with
specific strategies, so the positive message of Steele's work is that things can change, rejecting the notion of permanent deviance/defect as the takeaway of his work.  

Stereotypes are not only a challenge for the objects of the stereotype, but are also the basis for implicit bias. Cognitive bias/implicit discrimination is the subject of a deep body of literature, demonstrating how discrimination functions, and how it is possible to hold egalitarian views but also to discriminate. More recently, research on implicit racial favoritism has added to this understanding. In addition to negative bias, positive bias favoring whites operates simultaneously. Neuroscience has added to this body of work, and reinforcing that bias is learned and malleable, not hard wired. The pervasiveness of discrimination is well established.

Jerry Kang, one of the most prolific and powerful writers about cognitive bias, advocates specific strategies for dismantling cognitive bias but stresses that implicit bias is a problem that can be resolved. As Kang notes, strategies must correlate with the deep and strong extent of the problem:

(1) [T]he magnitude of implicit bias toward members of outgroups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias, and (4) self, situational, or broader cultural interventions can correct systemic and consensually shared implicit bias. Kang identifies “racial mechanics” as “the ways in which race alters intrapersonal, interpersonal, and intergroup interactions .... They seriously challenge current understandings of our ‘rational’ selves and our interrelations.”

Most of us have bias linked to stereotypes and negative attitudes, but we do not acknowledge them because we lack the insight to be aware of our bias. This is the interplay of mapping, schemas, and triggers, all constructed and malleable, and therefore mechanisms that presently reinforce biases, according to Kang but which could be used to change implicit thinking. Others as well emphasize that empathy and same-race identification of greater empathy is a learned behavior, not an inevitable cognitive turn.

Stereotypes and implicit cognitive bias render competent children and youth less competent, their potential for achievement undermined by their processing of how they are viewed by others as well as bias in how they are treated by teachers and others. This has a significant impact on their educational experience, and as they mature and separate more from their parents, or encounter more of their community and the broader world, it creates a major identity challenge in adolescence, as well as the threat of harm from others, that creates an adolescence full of risk. Scholars in both of these areas have identified strategies to deal with stereotypes and cognitive bias, emphasizing that these realities are constructed, not innate, and their operation to undermine equality similarly can be confronted and addressed.

Racism (whether overt bias or implicit/cognitive bias that drives behavior) also has a powerful impact on mental health. Surprisingly little has been done to study the impact of discrimination upon children's development. The overall impact of racism is underestimated, understudied, and unacknowledged. The available research indicates that the impact of racism on mental health and well-being is deep, chronic, and potentially debilitating. Resistance requires powerful resources when marshaled by adults; this resilience is far more difficult to muster by children. African American boys are likely to underuse mental health services if they seek help at all. While all children have inadequate
mental health access, and less access if they are poor, masculinity norms of denying and avoiding mental health issues further diminish the likelihood of seeking treatment. 235

Racism correlates with stress, depression, and the lack of a healthy sense of self and well-being. 236 “The psychological cost of striving to *90 maintain a positive sense of self while facing frequent exposure to discriminatory experiences can tax youths' coping resources, resulting in disillusionment, depression, and anxiety.” 237 Higher SES children and youth of color may be more stressed because of their greater exposure to racism and need to be prepared to deal with it. 238 Racism acts as a chronic stress, with severe challenges for well-being:

Racism can traumatize, hurt, humiliate, enrage, confuse, and ultimately prevent optimal growth and functioning of individuals and communities. While, within the context of racism, there have always been abundant examples of resilience, strength of character, capacity for love and giving, joy, fulfillment, and success, there remain far too many examples of despair, dysfunction, isolation, hopelessness, destructiveness, and spiritual depletion. 239

Stress emerges from “episodic stress ..., daily hassles ..., and chronic strain.” 240

In terms of mental health and psychological behavior, much of the research on Black boys, and children more generally, has focused on externalizing responses versus internal reactions. 241 These hidden, internal reactions tend to be ignored, and that omission renders what is happening to kids more invisible. This is particularly true about depression. Depression in children generally was rarely studied before the 1970s, based on the assumption that children do not get depressed; but modern studies show a significant correlation between depression and race discrimination, 242 as well as indicate that depression is common among adolescents. 243 Anxiety is also a neglected area of study for African American children but is related to interaction with *91 stress and racial socialization. 244 Boys are more likely to report depression than girls, and the symptoms increase over time and link to academic deficits. 245

Stereotypes, cognitive bias, and mental health impacts occur dominantly, although not exclusively, at school. 246 Policies that structure academic achievement, codes of conduct and discipline, teacher education, and concepts of what each child is entitled to from public education, currently permit the continued functioning of challenging, even crippling, educational systems to function to the detriment of Black boys--accepting their failure and criminalization as normative. This undermining of developmental success from state-created structures and policies is further heightened in adolescence, exacerbating the foundational problems created earlier.

C. Adolescence and Racial Identity

Adolescence is a critical developmental phase for children, for different though equally complex reasons as early childhood. The core task of adolescence is the development of identity and separation from one's parents. 247 This occurs amidst physical changes and neurological maturation that is a work in progress, not completed until early adulthood. 248 Often this is a period of intense experimentation, not always well thought out, characterized by bad judgment and strong peer influence. For boys, due to the influence of masculinities, it carries the risk of hypermasculinity
and hypervulnerability. For Black boys, it is even more volatile because they are most at risk for being perceived as dangerous just as they adopt an identity, including a racial identity, which is critical to their success.

"Adolescents not only ‘make bad decisions,’ they ‘make decisions badly.’” Indeed, it is common to have an antisocial/aggressive period into young adulthood. This is normative in late teens, peaking at age seventeen, after which teens desist from this behavior by early adulthood. The relationship between inward emotions and outward violence is often not what it seems. Much of the research on adolescents focuses on white males and externalizing behavior; far less research focuses on kids of color, and if they are studied, it is almost exclusively in low-income urban settings. Masculinities have a huge impact on all male adolescents, as young men adopt the identity of being a man. Aggressiveness is often a sign of hypervulnerability. The combination of race and gender factors makes masculinity especially risky for Black males. “Being Black and male is surreal. You are desired and you are despised.” As one scholar notes, one response to this perception is “reactive coping”: “Being missed, dissed, and pissed presents the struggle of constructing identity within a quicksand of false Black male images and is as vulnerable as one can get .... Racial profiling of Black males while they drive, walk, shop, talk, stand, and gather in groups has reached epidemic proportions.” This extraordinarily difficult context makes nearly every identity move dangerous. Bravado is particularly the response in high risk neighborhoods for self-protection. This makes masculinity and development distinctive for Black boys. It also is a complex identity, bicultural in the sense that identity is framed differently in the community and in the dominant culture.

The link between masculinity and violence is strong, but as the work of James Garbarino argues, violence is the predictable outcome of risk factors that make boys feel shame. The “lost boys” whom Garbarino writes about, boys who have killed, are predominantly Black. As he points out, “Sociologists have long recognized that the experience of racial discrimination provokes feelings of rage and shame, which play a potent role in stimulating violence.” Shame is the key emotion in his analysis.

Violence is present for Black adolescents in several ways, linked first because of the likelihood that a significant number are growing up in poor neighborhoods. Violence is present in poor neighborhoods and is directed at Black boys. Violence per se has a strong negative impact on development because it triggers aggression in response, and that triggers both peer and state violence. Violence is also a reaction to Black youth as themselves. This has been played out all too persistently and publicly since the death of Trayvon Martin, although it was always present but less public. In numerous killings of young Black men, it is because they are perceived as dangerous, but often found without weapons, or killed with a level of violence that far exceeds any actual or perceived threat. So the role of violence connects to the structural conditions of poverty but also the cultural norms and stereotypes attached in particular to Black boys and men.

Within this context, even outside of poor communities, the adolescent task of constructing identity requires another essential task for Black boys: constructing a racial identity, an entirely unique developmental task and one fraught with peril. President Barack Obama's memoir of his early life is a high profile example of this critical construction of identity. The importance of racial identity is due to several factors. First, it is the universal developmental piece of adolescence to create one's identity. Second, coexistent with the difficulty of this task is the affirmative story of racial identity. Racial identity, grounded in a strong identity of valuing culture and community, provides resilience.
is a strength. This is a distinctive factor in the lives of Black boys and invites comparisons with the generating of racial identity among white boys. Constructing identity is reactive coping in one sense, but involves pride also. Racial identity also is diverse and creative; it is not singular or confined to an ideal. There is no one meaning to being a Black man. Racial identity is plural. Finally, and ironically, racial identity is important because racial identity may trigger danger. So, one's very strength triggers challenges.

Racial identity is not an integral part of child development theory-- it is only studied for children of color--so the developmental piece of racial identity has been marginalized. The process of constructing racial identity begins in middle childhood, and is linked to racial awareness, which emerges in early childhood. Racial awareness begins as early as six, and by middle childhood, children have an awareness of both racial identity and its consequences. Early middle childhood, roughly second to fourth or fifth grade, “is an active period for meaning-making as children [describe] ethnic identity to include ideas such as language, physical appearance, pride, relative social position, and culture.” At this developmental stage, abstract thought capability emerges, so children clearly understand social identities.

One group of scholars identify three aspects to racial identity: connection to one's racial group, awareness of racism and negative attitudes, and awareness of whether one's group succeeds. Phinney breaks down ethnic identity into “self-identification, sense of belonging, and pride in one's group.” According to her, it is a gradual process of unfolding.

Racial identity is positively correlated to school achievement, providing resilience to discrimination experienced in school. There is little scholarship on exactly how this works. Racial pride contributes to a feeling of control and ability to accomplish, as well as self-acceptance. It is protective, especially for so-called “at risk” youth and contributes to their positive coping and behavior. Interestingly, in low SES neighborhoods, high racial pride is associated with high GPA; in more advantaged neighborhoods, one study found that high pride correlates with lower GPA. Having a strong identity can be motivating and can act as a buffer, but in suburban neighborhoods, where Black boys may have only token representation, the interface of identity with the racial context of school is different.

Making it through the tricky phase of adolescence, difficult for any child, is thus an enormously more complex and risky, even life-threatening, developmental phase for Black boys and young men. The risks they face arise from a complex array of systems created and operated by the state, particularly the continued inequalities of the educational system, the persistence of the effects of poverty, and the combined impact of policing their behavior in school and on the streets. In addition, they are likely to come into contact with the juvenile justice system at this stage, by school referral or in relation to behavior out of school. Just as they are exploring identity by functioning beyond their families and communities, they are subject to interactions with police at school and on the streets that increasingly translate fear and threat into system constraint and incarceration. Adolescents as a group commonly engage in behavior that violates the law, but many, if not most, are never arrested, or if they are, are diverted from serious consequences. Black boys, on the other hand, are disproportionately system-involved and disproportionately likely to face increasingly severe consequences, including incarceration at the deepest end of the system. They are disproportionately referred to the adult criminal justice system for crimes committed as minors, a system which makes no effort at rehabilitation. The failure of the juvenile system to insure public safety or the well-being and rehabilitation of a substantial portion of children committed to its care, disproportionately Black boys, means that this system powerfully arrests development and imposes long-term consequences for adult opportunities due to direct and collateral consequences.
Finally, Black boys as adolescents face the potential that they will be a victim of violence. We have a litany of death that keeps adding new tragedies from private or public violence: Trayvon Martin, Laquan McDonald, Freddie Grey, Jordan Davis, and Tamir Rice are only a few. \(^{289}\) Black teenagers' risk of death is higher than any other demographic group. \(^{290}\) No matter what the range of teenage behavior is, this group distinctively risks never living beyond their teenage years. No piece of data could more graphically illustrate the stacked developmental deck. And if they survive their adolescent years, the possibility of significant developmental strikes against them--lack of education, criminal justice involvement, and lack of opportunity--is very high, resulting from the very identity that ultimately can be their strength, if they survive.

**D. Resistance and Resilience**

The challenges to development and negative correlations of Black boys' context are cumulative and daunting. But, the racial identity \(^{99}\) research exposes resistance and positive outcomes, as well, that have been under-researched and poorly understood. One illuminating piece of data given the challenges to identity is that contrary to the prediction of low self-esteem levels for Black boys, and for Black children and youth in general, their self-esteem levels when measured are quite high. \(^{291}\) Self-esteem is developmentally important as it reflects past experience and has an impact on future success. \(^{292}\) Not only do African American children not suffer from low self-esteem, but research shows they have higher self-esteem than other racial groups \(^{293}\) and, among African American children, boys have higher self-esteem than girls. \(^{294}\) According to scholars, several factors that contribute to high self-esteem are racial socialization and development of a strong racial identity. \(^{295}\) Segregated schools and communities also have a positive impact by generating a feeling of belonging and support, and group identity. \(^{296}\)

Racial socialization is critical, and families are the core of providing this support. Racial socialization is protective for anxiety and stress, and positively affects school achievement. \(^{297}\) Family is an important factor in studies on the factors that correlate with successful Black boys. \(^{298}\) A particular form of family is not critical but rather the presence of a strong family. \(^{299}\) Parents are important in a distinctive way \(^{100}\) in the development of all African American children because they must prepare their children for a world still framed and pervaded by racism. The literature recognizes this additional and challenging parenting task. \(^{300}\) Yet, racial socialization sometimes is blamed or criticized for socializing kids in a defensive way that then is argued to negatively affect kids in school and the greater society. \(^{301}\)

Although developmental responses of opposition or resistance are normative for adolescents, the exacerbated challenges of Black boys can create patterns of resistance and rebellion that are frequently misconstrued, used to blame Black boys for their subordination. One of the enduring contributions to the racial identity literature, but perhaps the least well understood, is the concept of oppositional culture, sometimes called the burden of acting white, frequently interpreted as rejection of majority culture and behavior necessary to succeed because it is racially identified as white. \(^{302}\)

\(^{101}\) Signithia Fordham and John Ogbu's classic work argues that subordinating context generates collective responses to oppression that are not “oppositional” in the sense of a recalcitrant child, but rather are in opposition to dehumanization. \(^{303}\) Important to their analysis is the concept of collective identity, which “refers to people's sense of who they are, their 'we-feeling' or ‘belonging.’” \(^{304}\) “Collective identity usually develops because of people's collective experience or series of collective experiences.” \(^{305}\) It is historically grounded in slavery and post-slavery construction of Black Americans as separate--generating collective identity tied to oppression and exploitation. \(^{306}\) Labeling behavior as “oppositional” ignores the construction of the category and the context that creates the response; labeling it resistance
to oppression reframes it and should generate both a focus on the frame that generates the reaction as well as question whether a single culture or set of standards is required. 307

Fordham describes identity as complex and oppositional in a variety of ways. 308 For her, the “burden of acting white” is the necessity *102 to comply with, as well as resist, white norms; to act white in order to succeed as defined in white terms; and also to remain true to one's community: “[I]n exchange for what is conventionally identified as success, racially defined Black bodies are compelled to perform a White identity by mimicking the cultural, linguistic, and economic practices historically affiliated with the hegemonic rule of Euro-Americans.” 309 At the same time, this challenges identity within one's community:

> [E]very American of African ancestry who opts to perform Whiteness, even episodically, is forced to fight to retain citizenship in the Black community while concurrently seeking acceptance by the hegemonic White society. This compulsory dual citizenship, with one segment being the site of privilege and the other a sign of stigma, produces the phenomenon I defined as acting White. 310

In her work, Fordham “found that all Black students were alienated by the mismatch between the culture of their community and that of the school.” 311 They saw their choices as the option to resist and fail, or to comply and lose their voice. 312 Each path requires loss; each imposes burdens.

Duality of identity is important to recognize because it links to a final important framing of the developmental pathway of Black boys. It is easy, and dangerous, to let a single piece of their developmental pattern lead either to determinism (Black boys are so harmed, broken, or scarred as to be unsalvageable) or to seize on positive identity as an easy solution (support Black boys' development of strong racial identity and that will be sufficient for them to withstand developmental challenges and succeed). Racial identity is tempting to see as the “cure” or an affirmative factor that belies any need to address developmental inequality. Care must be taken to recognize and acknowledge strength and empowerment in the face of adversity without providing an apology or justification for inaction. 313 Racial identity in fact points to structural factors that make such identity critical, as well as illuminating family and community strengths.

*103 In summary, Black boys' cognitive, physical, and emotional development occurs within a context of challenge and threat undermining their sense of competency, self, future, and hope. Their trajectory from birth is one of exacerbated challenges and outright barriers. What is normal in early childhood and adolescence is made more difficult, and separation and subordination begins very early. A huge piece of this is grounded in poverty, and the link between race and poverty. Interwoven with that, but also separate from it, and driving it all, is racism. From a developmental perspective informed by developmental equality, the research exposes the individual cost of racism, and because racism is focused on Black boys as a group, the collective outcome of sustained hierarchy and blocked opportunity. The likely outcome of failure for Black boys is insured by infusing the institutions that most strongly affect their lives with principles and players that make those systems hostile and constricting, not facilitating and supportive. The developmental equality lens focuses our attention on these structural and cultural barriers that largely construct the developmental pathways for many Black boys.

III. THE WAY FORWARD: USING THE DEVELOPMENTAL EQUALITY MODEL
A. Structural and Cultural Inequality

The developmental data and patterns of Black boys tell us that race and gender matter in their development; the developmental equality model points us to the key structural and cultural components that drive that negative, inequalitarian trajectory. The list of risks likely to be encountered by Black boys is a list of state-created, reinforced, and recognized risks. Moreover, the systems of risk interact not only to thwart development, but to generate the predictable outcome of this intersection of developmental challenges and barriers as involvement or incarceration in the juvenile and then adult criminal justice systems.

African American men figure so prominently in the correctional system that the number of African American 4-year-old males can be used to model the number of people who will be incarcerated 15-20 years in the future .... Of the approximately six hundred thousand 4-year-old African American males growing up in the United States in 2008, prisons are being planned to house 28,134 of them by 2029. 314

*104 Three structural factors--the state's creation of, response to, and perpetuation of poverty; the public educational system; and the state juvenile justice system--particularly function to create developmental hurdles for Black boys. 315 The evidence of this is starkly apparent in the developmental scholarship on Black boys summarized above. It is captured succinctly in three pieces of data that describe, for Black boys as a group, their outcomes within these systems. At birth:

- One in three will be born in poverty. 316

- One in two will not graduate from high school. 317

- One in three will be incarcerated in their lifetime, 318 and if they are born into the lower end of socio-economic circumstances, their risk of incarceration doubles. 319

Cultural factors--biased actors within those systems and bias in the structure of systems, as well as broad societal bias and discrimination that is tolerated, ignored, or facilitated by the state--powerfully impact Black boys on an individual, familial, and community level. 320 State policies and practices that permit and arguably support the perpetuation of those cultural norms translate into state complicity in a culture of denigration, fear, and subordination. 321

Using the developmental equality model, the first system that impacts their lives is the poverty system, as over one-third of all Black children are born into poverty. 322 Any policy regarding poverty, ignoring poverty, or perpetuating poverty (income support, housing, employment) has a significant impact on the Black community as a whole because such a large proportion of the community is affected, infringing on the *105 life course of the individual, their family, and the community as a whole. 323 In addition, historically the perpetuation of Black subordination has been, and continues to be, economic. Slavery connects to Jim Crow connects to current inequalities in wealth, work, housing, and...
community resources. Poverty undermines full participation in citizenship, and thus the opportunity to effect change and influence policies, structures, and culture.

Poverty policy and systems do little to help children, and much to reinforce the impact of poverty and sustain its effects. Welfare is limited and inadequate to lift a child's family into even marginal ability to sustain basic life needs. Poverty links to poor housing, inadequate schools, high crime rates, lack of basic safety and security, and disproportionate police presence that infuses everyday life with the risk of criminal justice consequences. Poverty stresses families, triggering child welfare interventions at a disproportionate rate for Black families, even when taking their rate of poverty into account. Theoretically designed to help children escape from abuse and neglect, the child welfare system frequently makes matters worse instead of better, due to an inadequate foster care system and policies that ignore evidence-based practices that would suggest a far better outcome for children if they remained with their families or better yet, if affirmative interventions proactively provided support to their families before they are deemed in crisis. A poor child welfare system disproportionately disserves Black children.

The subordination imposed by poverty might, potentially, be outweighed by the education system. Education might provide a means to mobility and opportunity, and a leveling of economic inequality. To the contrary, however, education perpetuates the separation of children by class. Indeed, some researchers argue that class is even more powerful a determinant of opportunity than race. While this might be the case generally, it does not capture the unique pattern of Black boys and school. School is where discrimination that combines race and gender emerges: in the pattern of low achievement, high rates of discipline, high rates of exclusion through suspension and expulsion, and high rates of tracking by intellectual and emotional disability occur. Overall, Black children enter school, and preschool, at a disadvantage, and the achievement gap widens once they get in school. In other words, school makes matters worse.

As Pedro Noguera writes, the negative outcomes for Black boys in school are so pervasive that they are normative. By middle school the disciplinary rates skyrocket, and by high school high rates of dropping out occur, leading to their low rate of completion of high school. They have high rates of suspension and expulsion, magnifying the possibility that they will not complete high school. The high school graduation rate is abysmal, and shockingly low and disproportionate for Black boys. School is constructed by systems of financing, curriculum, and policies legally created and enforced. The differential resources and outcomes are a persistent, well recognized outcome of this system. As a system, education fails to serve Black children at a very high rate; race disadvantage is compounded with gender disadvantage for Black boys, however, as they stand out negatively on parameters of achievement and discipline. They also stand out as more likely to be assigned to special classes that exclude them from mainstream education. Finally, school does not simply fail to educate them; it sends disproportionate numbers of them into a system sure to guarantee and exacerbate failure, the juvenile justice system.

The poverty and education system interaction is geometrically reinforced yet again by the structure, policies, and outcomes of the juvenile justice system. School discipline issues are treated as delinquency, and pipelined to the courts. On the streets, Black boys are disproportionately targeted and implicated by the system, heavily influenced also by disproportionate policing patterns that put them in the cross-hairs of the system. Black boys are disproportionately represented at every stage of the juvenile justice system, and the rate of disproportion increases as the consequences become more serious. Juvenile justice system involvement and its consequences are not insignificant events, but have lifetime consequences, as well as being a strong predictor of adult criminal justice involvement. Mass incarceration...
does not begin at adulthood; the groundwork for this pernicious and harmful practice begins much earlier, in the juvenile justice system. Finally, policing brings into play another system, intertwined with the education and juvenile justice systems, that does not function fairly or equally, that does not protect from harm, and in the worst cases, is a threat to the very existence of Black boys. Training, field policies, and practices all contribute to this, as does the failure to address bias in policing. This is a state-funded, state-created, legally-defined system just as are the poverty, educational, and juvenile justice systems.

These structural components—the poverty system, the educational system, and the juvenile justice system—have a powerful impact on the lives of Black boys, by collectively erecting significant barriers to their normative development. The impact of the state on families and communities impacts the ability of those ecological components to provide needed support, by compromising the ability to provide “normal” developmental supports, while at the same time demanding of those families and communities extraordinary measures to counteract the hurdles faced by children and youth. The state plays an enormous role in the creation and sustaining of those obstacles. The law perpetuates this role of the state. Not only are Black boys disserved, but this systemic subordination also elevates others and reinforces hegemony based on race, gender, and class.

The level of subordination, and the intersecting structural forms of inequality, are so stark that it suggests comparisons with facial, blatant examples of discrimination: anti-Semitic ghettos and extermination, South African apartheid, misogynist subordination of women and girls, heterosexist homophobic actions, anti-Asian separation and internment. The role of the state in all those cases is unmistakable. The responsibility of the state to dismantle the architecture of developmental inequality should be similarly inescapable. Adopting a developmental equality model is critical to expose the state’s role in creating developmental challenges and subordinating some children while privileging others. Each of the systems identified here that produces such disproportionate negative outcomes for Black boys is state created and sustained, with knowledge of the patterns that it creates and perpetuates.

B. Legal Strategies

The developmental equality model exposes the role of the state in fostering layers of inequalities: individual, systemic, and cultural. This is demonstrated by the evidence of the contemporary developmental arc from birth to eighteen of Black boys and the role of structural inequalities in generating developmental challenges triggered by race and gender. State-supported developmental inequality is just as harmful as facial segregation; it insures that a significant proportion of Black boys, and other subordinated groups, will not succeed.

So where might a developmental equality model take us? I briefly sketch here several strategic possibilities that might flow from using this model, among a range of strategies to be explored in depth in future work. The strategies include, first, sustained collection of data and articulating metrics to implement change; second, using the developmental equality model in statutory or constitutional litigation strategies; and third, pursuing policy initiatives to support the developmental equality of all children.

Collecting data relevant to constructing and sustaining policies and structures that achieve developmental equality is critical. By this, I mean using data to concretely achieve goals, not collecting data to simply keep identifying and re-identifying the problem, or what has been called, in the juvenile justice context, endless “adoration of the question.” Similar to the data and studies collected in this Article, and extending further to encompass the identified structural and cultural challenges that block development currently triggered by or related to identities, data collection is essential to crafting litigation and policy, and monitoring outcomes. A model for robust data used might be found in several
instruments developed by the United Nations Children's Fund ("UNICEF") for its campaign, "A Fair Chance for Every Child." It is notable for its focus, bringing together comprehensive identity factors, structural impacts, and dynamic impacts rather than a snapshot. "It: (a) selects the child as the unit of analysis; (b) adopts a life-cycle approach; (c) applies a whole-child oriented approach; (d) measures monetary poverty and multidimensional deprivations simultaneously for each child; and (e) enriches knowledge from sector-based approaches." A second UNICEF tool, Monitoring Results for Equity System ("MoRES"), is designed to identify action that needs to be taken and how well actions work.

MoRES analyzes "the key factors or bottlenecks that are constraining results for the most disadvantaged children, finding and implementing solutions, and regularly tracking progress toward results." This puts the most marginalized children at the center, a key component of the developmental equality model, rather than a neutral child. The UNICEF frameworks are sophisticated, ecologically focused, and inclusive of issues of social exclusion in addition to metrics focused on poverty. Nevertheless, it is acknowledged that there is an under-inclusion of data on identity factors based on race and ethnicity, although some inclusion of gender. A developmental equality approach would require additional focus on identities and intersectionality, in combination with poverty, as well a focus on identities standing alone (absent poverty).

The goal of metrics is holding systems accountable, by requiring the dismantling of systems that create barriers to development for some or all children, and evaluating the outcomes of new developmental supports. The gathering of data is not for the purpose of simply gathering information. Rather, it is central to both litigation and policy strategies. In litigation, statistics are critical to establish disparate impact, pattern and practices, and causal links. System outcomes are important for making the case for system change. Social science data is essential to undermine assumptions that can drive invalid conclusions and assumed responsibilities or outcomes, or to demonstrate how stereotypes and bias functions. Similarly, and perhaps even more importantly, positive legislative change, including dismantling inequalitarian systems or aspects of systems, or establishing affirmative supports for developmental equality, must be grounded in evidence-based solutions that continue to measure outcomes to insure equality goals. The importance of data does not counsel delay in implementing the developmental equality model but does underscore its significance lest the model be domesticated, ignored, or hijacked.

Second, the principle of developmental equality might be used for a litigation strategy grounded in existing statutory mechanisms to dismantle developmental barriers and build supportive systems. One suggestive litigation strategy is the lawsuit brought by the Public Counsel Law Center against the Compton School District in mid-2015. The Compton lawsuit, a class action brought on behalf of students and teachers in Compton, California, uses data and studies from neuroscience and developmental research arising from the Adverse Childhood Experiences ("ACEs") study. Brought under disability statutes, the Americans with Disabilities Act, and section 504 of the Rehabilitation Act, the lawsuit alleges that the characteristics of the school district, a high poverty neighborhood with all the associated ills of high concentrations of poverty, generate a disproportionate number of students' trauma or complex trauma. Based on the ACEs research, trauma generates short and long term responses that interfere with learning, and therefore it is alleged to constitute a disability under the terms of the statutes. The suit claims that the conditions present in the district and their known impact on children require that the district accommodate these widespread disabilities by engaging in trauma-informed practices system-wide, K-12, including training all teachers and staff in the use of such methods,
in order to provide students with the education they deserve by fostering resilience rather than causing and exacerbating harm.\textsuperscript{368}

This is an innovative and groundbreaking lawsuit that seeks help and support for students harmed by a web of systemic factors exacerbated by the structural policies and practices of the school system. This litigation may begin the process of dismantling developmental barriers by attempting system-wide institutional and policy changes. Its strongest potential might be to generate changes in other school districts who wish to avoid litigation, perhaps generating funding requests that lead to legislative change. Nevertheless, as innovative and radical as the Compton suit is, the lawsuit is limited. The litigators have used what is available to remedy the problems faced by these students, which secondarily traumatizes teachers. While the remedy sought is indeed important to address the stresses and harm to the development of the children in the district, it does not target the harms themselves or the extent to which state action (or inaction) creates those harms. It is limited, even if ultimately most successful, to structural change in the school system that at best is reactive rather than proactive, as it does not reach other structures or systems. It also carries the downside of labelling kids as “disabled,” which too easily can lead to marginalizing and blaming the kids themselves, their parents, or their communities for school difficulties or failure.\textsuperscript{369} Whether these negatives of the Compton lawsuit outweigh the positives of its potential to generate structural change in the school district is a difficult question.\textsuperscript{370}

A more challenging litigation strategy might consider constitutional litigation. The blatant and radically negative role of the state (federal, state, and local government) with respect to Black boys, and other groups of children, is so profound that it suggests an argument that the state violates basic constitutional rights by placing developmental\textsuperscript{3113} hurdles in the way of identifiable groups of children. Dismantling barriers to developmental equality might be articulated under a theory of children's rights under equal protection, substantive due process, or both. The potential for a robust children's rights analysis exists without the necessity of challenging entrenched doctrine, although the recognition of new fundamental rights or equality rights would doubtless generate resistance similar to that faced by any reframing or changed understanding of constitutional interpretation.\textsuperscript{371} Children's rights are uncharted and undeveloped territory in constitutional law, but that very nebulousness, combined with threads of recognition of a doctrine of children's rights, including some sensitivity to developmental factors, may suggest room for doctrinal development.\textsuperscript{372} To the extent this suggests positive rights, beyond dismantling barriers and challenges, this is likely to generate resistance as well, given the view by many that our Constitution is only one of negative rights.\textsuperscript{373} Yet, the meaning of equality for children, and their special dependency on the systems of society to achieve their developmental potential, arguably generates such obligations, parallel to those recognized internationally by other countries under the U.N. Convention on the Rights of the Child.\textsuperscript{374}

Alternatively, developmental equality might require a challenge to the inadequacies of constitutional equality doctrine under equal protection. Such a challenge might be based on incorporating the robust scholarship on implicit cognitive bias and stereotyping to reframe the definition of intent; recognizing discrimination based on patterns of disparate impact as essential to achieve the constitutional design and meaning of equality; and disavowing the principle of color blindness,\textsuperscript{375} which so often has only reinforced white privilege, in favor of embracing color consciousness and the value of racial diversity as the hallmarks of equality.\textsuperscript{375} Such a constitutional strategy seems daunting, which may counsel against it. But, it may be useful to remind ourselves that alternative constitutional interpretations that recognize precisely such interpretations of equal protection, exist in robust constitutional dissents that outline a very different constitutional conception of equality.\textsuperscript{376} In addition, it might be argued that the recent Obergefell v. Hodges\textsuperscript{377} decision suggests the possibility of a doctrinal opening to positive rights.\textsuperscript{378} Reframed equality analysis could bring a vast range of law
and policy under scrutiny. It might be argued that, indeed, it is time for exactly that to happen and to start with children and youth.

Finally, litigation may not be the preferable, or the only, route to developmental equality. Given systemic structural and cultural elements exposed by the developmental equality model, new policy approaches may be more fruitful than any litigation strategy. The theoretical orientation of any proposed new policies will be critical. Among the theoretical possibilities, two of the most promising are the combination of vulnerability theory and identities theories. Vulnerability theory argues for the universality of vulnerability, and requires the state not only be responsive, but fair, in providing necessary support to its citizens and in not creating unfair barriers among its citizens. Martha Fineman, the foremost advocate for vulnerability theory, argues that equality is best served by attending to vulnerability, particularly considering the limitations of contemporary equality analysis in constitutional law. Identities theories, including critical race theory, multidimensional masculinities theory, and feminist theory, sustain our focus on race, gender, and class on intersectionality and the necessity of a structural and cultural focus. I remain convinced that paying attention to identities are central to inequalities and to achieving equality. Recent work by Frank Rudy Cooper articulates this position as well. While acknowledging the value of vulnerability theory, Cooper is skeptical about using vulnerability analysis alone, concerned that it could sustain subordination rather than dismantle it. Cooper argues that identity is unavoidable: “[I]dentities, while socially constructed, are materially crucial.” Consistent with scholars who have identified white favoritism as co-constitutive with anti-Black bias, Cooper argues that the conferral of privilege along identity lines must be incorporated with vulnerability analysis. The interaction of vulnerability and identities theories are promising theoretical frameworks for the conceptualization and implementation of developmental equality policies. I mean here not to foreclose other important theoretical insights but to emphasize the importance of theory to policy and identify these two frameworks as ones I see as particularly attuned to the lens of developmental equality.

Beyond the importance of theoretical underpinnings is the need for innovative policies. This is particularly important given the history of the state acting in a heavy-handed, intrusive, and subordinating manner in communities of color and poor communities. One example of a different kind of approach might be to borrow from the teachings of social investment and social determinants. In health care work by Rachel Rebouché and Scott Burris, social determinants analysis identifies the importance of social conditions and resources to health outcomes—a more powerful factor than genetic makeup or individual choices. Solutions or policies focus on changing the social determinants in a way that supports health care, and healthy lives, for all. Law plays a vital role in this approach, constructing the focus of policy (on social determinants rather than on individuals, families, or communities), and including all complex systems in play. Similarly, such an approach would define different consequences when developmental equality analysis exposes the complicit or primary role of the state in sustaining social determinants that yield inequalities. It would require not only elimination of the barrier where it manifests as state involvement in replicating inequality and creating developmental hurdles but also facilitating positive support. By identifying the social determinants of inequality, it might attend to more effective ways to reverse those outcomes and sustain the focus on structural change. Monitoring such policies might function much like performance criteria in health care, in addition to providing resources to those who can control and use those resources. Community-based, bottom-up strategies of empowerment to take advantage of familial and community strengths are more likely to be a part of a social determinants approach. Considering innovative policies does not stop with this approach but suggests rather that others should be considered as well, including those suggested by comparative analysis.
Every child should be supported in achieving their maximum and positive development because of the inherent value of children (and their dependence on adults). Well-functioning individuals confer social and economic benefits for everyone, and the equality of all is inextricably linked to the equality of each one. The developmental equality model is a place to start, a foundation for strategy, among many needed to move toward the vision of racial and gender equality that is our unrealized promise to all.

Footnotes

a1 Professor and David Levin Chair in Family Law, University of Florida Levin College of Law. This Article was the basis for the 2016 Hofstra Distinguished Family Law Lecture. I thank the dean, faculty, students, and staff for their warm welcome and insightful dialogue shared during the lecture and in many communications after the lecture. I deeply appreciate critical feedback from Stephanie Bornstein, Frank Rudy Cooper, Joanna Grossman, Vinay Harpalani, Shani King, Ann McGinley, Kenneth Nunn, Rachel Rebouché, Katheryn Russell-Brown, Barbara Stark, and Barbara Bennett Woodhouse. I also benefitted from the insights of participants in the 2015 Duke University Civil Rights Conference; the 2015 UNCRC Conference on Article 3 held in Edinburgh, Scotland; the University of Florida Faculty Workshop Series; and the 2016 AALS Section on Human Rights program. Kevin Paule, J.D. 2016, University of Florida, provided outstanding research assistance.


2 Id.

3 See id. at 75-77.

4 Id.

5 Id. at 11.

6 See infra Parts I-III.

7 See infra Part III.

8 See infra Part III.

9 See infra Part III.


11 Kimberlé Williams Crenshaw has powerfully argued that the challenges facing Black girls and women must not be rendered invisible. See KIMBERLÉ WILLIAMS CRENSHAW ET AL., AFRICAN AMERICAN POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf.


16 See infra Part I.

17 See infra Part I.B.3.


19 See infra Part II.

20 See infra Part III.


24 This approach is epitomized by Justice Kagan's majority opinion in Miller v. Alabama: Our [prior] decisions rested not only on common sense--on what “any parent knows”--but on science and social science as well. In Roper, we cited studies showing that “[o]nly a relatively small proportion of adolescents” who engage in illegal activity “‘develop entrenched patterns of problem behavior.’” And in Graham, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”--for example, in “parts of the brain involved in behavior control.” We reasoned that those findings--of transient rashness, proclivity for risk, and inability
to assess consequences—both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “‘deficiencies will be reformed.”

_Roper_ and _Graham_ emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.


Justice Sotomayor, concurring in those dispositions, restated the importance of developmental considerations and meaningful developmental inquiry by the courts:

This Court explained in _Miller v. Alabama_ that a sentencer is “require[d] ... to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Children are “constitutionally different from adults for purposes of sentencing” in light of their lack of maturity and underdeveloped sense of responsibility, their susceptibility to negative influences and outside pressure, and their less well-formed character traits. Failing to consider these constitutionally significant differences, we explained, “poses too great a risk of disproportionate punishment.” In the context of life without parole, we stated that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”

_Tatum_, slip op. at 1 (Sotomayor, J., concurring) (citations omitted) (quoting _Miller_, 132 S. Ct. at 2464, 2469).

25 _Miller_, 132 S. Ct. at 2464-68 (citing cases in which the U.S. Supreme Court applied developmental arguments to reframe juvenile justice); _see also_ _Safford Unified Sch. Dist. No. 1 v. Redding_, 557 U.S. 364, 375-79 (2009) (accounting for developmental issues in finding school strip search unreasonable, although no liability based on qualified immunity).


29 BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 38-40 (2010).

The Florida custody statute includes developmental considerations as a factor to craft parenting plans. FLA. STAT. § 61.13(3)(a)-(m) (2006).

For example, the Oregon courts provide plans that accounts for the difference in needs of children of all ages. See Sample Parenting Schedules, OR. JUD. DEPT, http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/familylaw/allsampleschedules-whatisbestformychild.pdf (last visited Nov. 26, 2016).

In addition to change over time that must be a part of many parenting plans, divorcing parents also deal with the impact of the divorce on their children, which varies by age in terms of immediate impact as well as long term implications for development and socialization. See Joan B. Kelly & Michael E. Lamb, Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children, 38 FAM. & CONCILIATION CTS. REV. 297, 300-01 (2000).

Common developmental stages and indicators are used to evaluate children and to provide guidance to parents. See, e.g., Developmental Milestones, CDC, http://www.cdc.gov/ncbddd/actearly/milestones (last visited Nov. 26, 2016).


44 See Mark Fondacaro, Why Should We Treat Juvenile Offenders Differently Than Adults? It's Not Because the Pie Isn't Fully Baked, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, supra note 26, at 29, 30.


46 For a discussion on the competency of minors, see Rebouché, supra note 28, at 186-89.

47 See Injury Prevention & Control: Division of Violence Prevention, supra note 42.

48 See Grant et al., supra note 42, at 625-26; Gump, supra note 42, at 48-49; Hill & Madhere, supra note 42, at 27-28; Hunt et al., supra note 42, at 365; Mitchell et al., supra note 42, at 5944; Peters & Massey, supra note 42, at 196-98, 210-11; Triffleman & Pole, supra note 42, at 491.

49 See supra note 24 and accompanying text.


51 Id.

52 Id.

53 Id. at 2455.

54 Id. at 2469.

55 Id.

56 Id. at 2462.


Id. at 1134.

See id. at 1132-34.

See supra notes 60-61.

See Gibbs, supra note 59, at 57-58. This is not to say urban settings or geography in general are not relevant but rather that the label “urban youth” frequently means youth of color.

See id. at 79 (suggesting future studies focus on resilient African American youths).


Quintana et al., supra note 61, at 1133-36.

Id. at 1131-32.

For example, one scholar notes Freudian theory centers on white, Eurocentric perspectives drawn from Freud's experiences, particularly his Jewish heritage. His view of family relationships, she notes, has a tendency to over-pathologize, minimize strengths, and misinterpret the behavior and motivations of African American families and individuals. See Harriet Curtis-Boles, The Application of Psychoanalytic Theory and Practice to African Americans, in CAL. SCH. OF PROF'L PSYCHOLOGY, HANDBOOK OF MULTICULTURAL EDUCATION, RESEARCH, INTERVENTION, AND TRAINING 193, 193-200 (Elizabeth Davis-Russell ed., 2002). Similarly, she notes modern theory on relationships, especially the role of parents, tends to focus on mothers and their responsibility for raising well-adjusted children, but ignores the social context of racism for Black parents. Id. at 200-04.

Id. at 193 (citations omitted); see also Lauren H. Supplee et al., Emotion Regulation Strategies and Later Externalizing Behavior Among European American and African American Children, 21 DEV. & PSYCHOPATHOLOGY 393, 393-96 (2009); Laura A. Rainville, Fighting to Grow: A Developmental Approach to Aggression Among Inner City, African American Adolescent Boys 11-14 (2011) (unpublished Ph.D. dissertation, California Institute of Integral Studies) (on file with the California Institute of Integral Studies).

See supra notes 58-72 and accompanying text.

Uncovering how privilege is constructed and reaffirmed is as important as understanding subordination. See supra note 13 and accompanying text. For a discussion of white racial favoritism, see infra notes 210-18, 222 and accompanying text.


Spencer's model relies on but differs from that offered by Bronfenbrenner. Spencer et al., Understanding Hypermasculinity, supra note 78, at 231.

Id. at 230 (emphasis added).


Spencer et al., Understanding Hypermasculinity, supra note 78, at 233.

Id. at 232-33.

Id. at 233.


Id. at 1151.


Spencer et al., Understanding Hypermasculinity, supra note 78, at 232.

Spencer et al., A Theoretical and Empirical Examination, supra note 78, at 182; Spencer et al., Understanding Hypermasculinity, supra note 78, at 230.

Spencer et al., Understanding Hypermasculinity, supra note 78, at 232-33.

See id. at 232-33, 242.

See Spencer et al., A Theoretical and Empirical Examination, supra note 78, at 182; Spencer et al., Understanding Hypermasculinity, supra note 78, at 233.
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94 See Spencer et al., Understanding Hypermasculinity, supra note 78, at 239; Swanson et al., supra note 93, at 618-19.


96 See infra notes 247-90.

97 Swanson et al., supra note 93, at 618.

98 Margaret Beale Spencer, Resilience and Fragility Factors Associated with the Contextual Experiences of Low Resource Urban African American Male Youth and Families, in DOES IT TAKE A VILLAGE?: COMMUNITY EFFECTS ON CHILDREN, ADOLESCENTS, AND FAMILIES 51, 53 (Alan Booth & Ann C. Crouter eds., 2001); see also Spencer et al., African American Adolescents, supra note 78, at 121-25; Spencer & Markstrom-Adams, supra note 78, at 301-05.

99 Spencer et al., Understanding Hypermasculinity, supra note 78, at 234.

100 See id. at 235-41.

101 Id. at 236 (citations omitted).

102 Id. at 239; see also Gregory Seaton, Toward a Theoretical Understanding of Hypermasculine Coping Among Urban Black Adolescent Males, 15 J. HUM. BEHAV. SOC. ENV’T 367, 371 (2007).

103 See, e.g., Swanson et al., supra note 93, at 613.


105 Id. at 103.

106 Swanson et al., supra note 93, at 618.

107 See id. For a discussion on the exacerbation of normative developmental challenges at the adolescence stage, see Spencer et al., A Theoretical and Empirical Examination, supra note 78, at 182-83.

108 Swanson et al., supra note 93, at 619.

109 Spencer et al., A Theoretical and Empirical Examination, supra note 78, at 187.

110 Swanson et al., supra note 93, at 626.


112 See García Coll et al., supra note 111, at 1893-95.
How this context plays out varies by the age and stage of children. For example, García Coll's research has considered the implications of her model for middle childhood, defined as ages six to twelve, when children have their first experience of interaction with institutions beyond their families and neighborhoods. García Coll & Szalacha, supra note 111, at 82; see García Coll & Magnuson, supra note 111, at 99. Specifically, García Coll has noted:

It is during this period that children develop a sense of competence, forming ideas about their abilities, the domains of accomplishment they value, and the likelihood that they will do well in these domains. [D]evelopment of positive attitudes toward school, academic achievement, and aspirations for the future can have major implications for children's success as adults.

It is also a time when children experience the direct impact of majority culture: children for the first time may “experience exclusion, devaluation, invisibility, discrimination, and racism, and these may become important potential sources of influence on their interactions and reactions to ‘mainstream’ society.” García Coll & Szalacha, supra note 111, at 82. Majority culture impacts schools, neighborhood, media, and other institutions that affect the family. See id. at 84. A different set of systemic factors impacts children from birth to age three. García Coll, supra note 111, at 270. At this stage, García Coll argues the most relevant factors to the child's development are cultural beliefs, caregiving practices, health care practices, family structure and characteristics, socioeconomic factors, and biological factors. Id. at 271.
A 2015 study released by the American Sociological Association measuring whether adolescents and young adults thought it was likely that they would reach age thirty-five found only half of Blacks thought they would reach thirty-five compared to sixty-six percent of whites. The expectations were even lower for second generation Mexican Americans (forty-six percent) and for foreign-born Mexicans (thirty-eight percent). See Tara D. Warner & Raymond R. Swisher, Adolescent Survival Expectations: Variations by Race, Ethnicity, and Nativity, 56 J. HEALTH & SOC. BEHAV. 478, 486-91 (2015). The sharp differential between whites and Blacks ages twelve through twenty-five in this study illustrates their read of the developmental context and what awaits them as adults.


See generally A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, supra note 26; JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, supra note 26.

See Joseph C. Gagnon & Brian R. Barber, Preventing Incarceration Through Special Education and Mental Health Collaboration for Students with Emotional and Behavioral Disorders, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, supra note 26, at 82, 83-86.


See supra notes 58-75 and accompanying text.

See infra Part II.A.

See infra Part II.B.

See infra Part II.C.

See infra Part II.D.


For data on birth (and pre-birth) to age three, see Early Development & Well-Being, ZERO TO THREE, www.zerotothree.org/early-development (last visited Nov. 26, 2016). For a discussion on the importance of the context for development, see generally BRONFENBRENNER, supra note 36.

See Early Development & Well-Being, supra note 144.


For a fuller discussion, see supra note 42 and accompanying text on the ACEs project, which details the impact of high trauma environments and ways to build resilience.
For a discussion on work in the field of neuroscience, see supra note 42 and accompanying text.

There are few post-traumatic stress disorder (“PTSD”) studies on African American adults or children. See Hunt et al., supra note 42, at 365; see also Stopford, supra note 42, at 229-33; Hill et al., supra note 42, at 408-12. One scholar has argued that racism has an impact inter-generationally, in collective memory, as well as presently. See Gump, supra note 42, at 46-49.

See Tamar R. Birckhead, Delinquent by Reason of Poverty, 38 WASH. U. J. L. & POL’Y 53, 58-59 (2012). As of 2013, the poverty rate for African American children was 38.3%, holding steady even as overall poverty rates for children had dropped somewhat, to 20%. Eileen Pattan & Jens Manual Krogstad, Black Child Poverty Rate Holds Steady, Even as Other Groups See Decline, PEW RES. CTR. (July 14, 2015), http://www.pewresearch.org/fact-tank/2015/07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines. In the United States, the rate of child poverty is high and runs deep. See id. (presenting comprehensive data on child poverty from 1976 to the latest data released in 2013).


See Jonathan R. H. Tudge et al., A Window into Different Cultural Worlds: Young Children's Everyday Activities in the United States, Brazil, and Kenya, 77 CHILD DEV. 1446, 1464 (2006). In other words, parents are preparing their children for one or more cultures; parents of minority children are preparing them both for the dominant culture but also for their place within the affirmative values of their cultural group. See id.

See Dexter et al., supra note 155, at 631. It is important to note here that although race and SES are often related, race and SES function differently and independently in children's development. Hillary N. Fouts et al., Infant Social Interactions with Multiple Caregivers: The Importance of Ethnicity and Socioeconomic Status, 43 J. CROSS-CULTURAL PSYCHOL. 328, 342-43 (2012).


*Id.* at 514.

Without that readiness, by kindergarten, under existing systems, the gaps widen. *See id.* at 516.


*EDIN & NELSON, supra note 151, at 125-29.*


*See Vonnie C. McLoyd, The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioemotional Development, 61 CHILD DEV. 311, 311 (1990) (“[P]overty and economic loss diminish the capacity for supportive, consistent and involved parenting and render parents more vulnerable to the debilitating effects of negative life events … [; generate] psychological distress deriving from an excess of negative life events, undesirable chronic conditions, and the absence and disruption of marital bonds, [and] ... adversely affects children's socioemotional functioning in part through its impact on the parent's behavior toward the child.”).*


*See Margaret R. Burchinal et al., Early Intervention and Mediating Processes in Cognitive Performance of Children of Low-Income African American Families, 68 CHILD DEV. 935, 950 (1997). One of the ironies of advances in neonatal care is an increased survival rate of low birth rate babies but a higher number of infants with impairment. Agnes Perenyi et al., Neurodevelopmental Outcome and Risk Factors for Impaired Development of African American Infants in an Underserved Urban Population: A Population-Based Study, 22 J. HEALTH CARE POOR & UNDERSERVED 983, 991 (2011).*

Burchinal et al., *supra* note 171, at 951.

*Id.* at 935.


Burchinal et al., *supra* note 171, at 935 (emphasis added) (citations omitted). For cognitive deficits, in addition to socio-emotional functioning, and the connections between the two, see Oscar Barbarin et al., Development of Social-Emotional Competence in Boys of Color: A Cross-Sectional Cohort Analysis from Pre-K to Second Grade, 83 AM. J. ORTHOPSYCHIATRY 145, 145-46 (2013).

Burchinal et al., *supra* note 171, at 935.
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178 Brown et al., supra note 177, at 183.

179 See id.

180 Id.

181 See Scott et al., supra note 177, at 186.

182 Supplee et al., supra note 72, at 395.

183 Brown et al., supra note 177, at 183.

184 Margaret Burchinal et al., Examining the Black-White Achievement Gap Among Low-Income Children Using the NICHD Study of Early Child Care and Youth Development, 82 CHILD DEV. 1404, 1405-06 (2011).

185 See id. at 1416-17.

186 Pre-kindergarten is equally important to development, across race and class. William T. Gormley Jr. et al., The Effects of Universal Pre-K on Cognitive Development, 41 DEV. PSYCHOL. 872, 881 (2005).


190 Id. at 534.

191 Id. at 535.

192 Id. at 533.

193 Caughy et al., supra note 188, at 1220.

194 Id. at 1220-21.


196 For a discussion on stereotype threat that includes numerous studies done on college campuses, see infra notes 218-21 and accompanying text. Class privilege does not insulate Black boys from racial profiling or police bias. In the wake of the scrutiny of the Chicago police over the shooting of Laquan McDonald, a second video was released of the tasering of Philip Coleman, a thirty-eight-year-old University of Chicago political science graduate, who subsequently died. Stacy St. Clair et al., Video Shows Taser Used on Philip Coleman in Chicago Police Custody, CHI. TRIB. (Dec. 8, 2015, 8:47 PM), http://www.chicagotribune.com/news/ct-chicago-police-philip-coleman-taser-death-20151207-story.html. The brutal and inhuman treatment of Coleman in no way reflected any class privilege. Additionally, the son of Charles Blow, a prominent New York
Times columnist, was detained at gunpoint, after leaving the library at Yale, by a college police officer. Scott Jaszik, Yale Police Aim Gun at Columnist's Son, Turn Spotlight on Racial Profiling on Campus, PBS NEWSHOUR (Jan. 26, 2015, 1:22 PM), http://www.pbs.org/newshour/rundown/yale-police-point-gun-columnists-son-bring-spotlight-back-racial-profiling-campus.


Nikki L. Aikens & Oscar Barbarin, Socioeconomic Differences in Reading Trajectories: The Contribution of Family, Neighborhood, and School Contexts, 100 J. EDUC. PSYCHOL. 235, 235 (2008) (citations omitted); see also Robin L. Jarrett, Resilience Among Low-Income African American Youth: An Ethnographic Perspective, 25 ETHOS 218, 224-25 (2007). This in turn links to less books at home, parents being less involved with their children's education, children being less likely to be read to by parents, and having less resources to draw upon in schools and communities. Aikens & Barbarin, supra, at 236.

Joan W. Howarth, Representing Black Male Innocence, 1 J. GENDER RACE & JUST. 97, 102-08 (1997). Comparing Emmett Till and Trayvon Martin, Elijah Anderson notes the persistence of negative racial stereotypes linked to concentrations of Blacks, along with greater integration of Blacks into the middle class. The stereotype, he argues, is what he calls the “iconic ghetto,” a definition that is linked to all Blacks in public and when they are “out of place.” Elijah Anderson, Emmett and Trayvon: How Racial Prejudice in America Has Changed in the Last Sixty Years, WASH. MONTHLY, Jan.-Feb. 2013, at 31, 31-33. Professor James Forman, Jr., argues that class is a huge factor in identifying what portion of the Black community and other communities of color are affected by stigma. James Forman, Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow, 87 N.Y.U. L. REV. 21, 52-58 (2012).

See TOM RUDD, KIRWAN INST., RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE: IMPLICIT BIAS IS HEAVILY IMPLICATED 2 (2014), http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-
disproportionality-schools-02.pdf ("Research suggests that Black students as young as five are routinely suspended and expelled from schools for minor infractions like talking back to teachers or writing on their desks.").

Media is particularly powerful in the creation and perpetuation of the stereotypes about Black men. DENNIS ROME, BLACK DEMONS: THE MEDIA'S DEPICTION OF THE AFRICAN AMERICAN MALE CRIMINAL STEREOTYPE 72-75 (2004). Dennis Rome argues that social cognition research on implicit bias should be applied to Federal Communications Commission ("FCC") regulation of media that feeds or reproduces bias; ignoring this means structures/institutions create individual and group support for structures/institutions that recreate racist hierarchy. His concrete solutions utilize information on implicit bias to ground legal policy-making that would shift from bias to equality. See id. at 121-22. His project seeks to change thinking by using the science to change policy and law in a way that forces institutional change to the extent that is possible. See id.


Id. at 437 (citation omitted).

Id. at 438-40.


Aronson & Steele, supra note 206, at 440-41.

Steele & Aronson, supra note 209, at 799.

Id.

Id. at 801, 805-06.

Id. at 801.

Aronson & Steele, supra note 206, at 443.

Id. at 447.

Id. at 447-48.


Claude M. Steele, Kenneth B. Clark's Context and Mine: Toward a Context-Based Theory of Social Identity Threat, in RACIAL IDENTITY IN CONTEXT: THE LEGACY OF KENNETH B. CLARK 61, 66-75 (Gina Philogène ed., 2004). He uses the example of the doll studies of Kenneth and Mamie Clark, famously used to justify the decision in Brown v. Board of Education. See id. at 62. The studies were used to argue that segregation damaged Black children. Id. at 62-63. Other social scientists, however, saw more harm from integration, but for a long while the deficit model prevailed. Id. at 63.

Id. at 65.

For a recent review of implicit bias and cognitive bias, see L. Song Richardson & Philip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 120-24 (2014); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2962-66 (2015). Included in this work is the social psychology research on white racial favoritism: that the absence of negative bias toward Blacks does not mean race neutrality. Also operating is positive bias associated with the favored racial group, whites. See id.


Kang, supra note 225, at 1493.

See id. at 1505-14.

See id. For an application of implicit bias research to reframing affirmative action, see Kang & Banaji, supra note 226, at 1090-1101.


232 Williams and Morris identify three effects of racism:
First, racism in societal institutions can lead to truncated socioeconomic mobility, differential access to desirable resources, and poor living conditions that can adversely affect mental health. Second, experiences of discrimination can induce physiological and psychological reactions that can lead to adverse changes in mental health status. Third, in race-conscious societies, the acceptance of negative cultural stereotypes can lead to unfavorable self-evaluations that have deleterious effects on psychological well-being.

233 There are mental health issues for all children, and a completely inadequate mental health system that is least likely to be used by children of color. See David Katner, Delinquency, Due Process, and Mental Health: Presuming Youth Incompetency, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, supra note 26, at 104, 105-07, 113-15.


236 Fisher et al., supra note 231, at 690-93; Robert D. Latzman et al., Racial Differences in Symptoms of Anxiety and Depression Among Three Cohorts of Students in the Southern United States, 74 PSYCHIATRY 332, 333-34 (2011); see also Ronald L. Simons et al., Discrimination, Crime, Ethnic Identity, and Parenting as Correlates of Depressive Symptoms Among African American Children: A Multilevel Analysis, 14 DEV. & PSYCHOPATHOLOGY 371, 387 (2002).


240 Id. at 45; see also Russell K. Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093, 1126-27, 1133-35 (2008).

241 Grant et al., supra note 42, at 615 (“[T]here has been no published investigation of occurrence and courrence of a broad range of internalizing problems ... in a sample of low-income urban adolescents and little investigation of the associations between internalizing problems and externalizing problems in this population.”).

242 Simons et al., supra note 237, at 385-87.


247 *See* Kroger, supra note 45, at 60-61, 71.


249 *See* Dowd, supra note 235, at 75-85, 91-100.


254 Grant et al., supra note 42, at 614.


257 *Id.* at 61.
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263  See Peter B. Edelman & Joyce Ladner, Introduction to ADOLESCENCE AND POVERTY: CHALLENGE FOR THE 1990S, at 1, 1 (Peter B. Edelman & Joyce Ladner eds., 1991) (“[T]he journey has become mission impossible--resulting in problems and outcomes so devastating that recovery into adulthood of self-sufficiency and marriage, let alone any broader societal participation, is out of question .... [This promotes] a culture of disengagement.” (emphasis added)).

264  A recent example is the death of Laquan McDonald in Chicago, shot sixteen times as he was walking in the middle of a street, with no apparent aggressive move toward police and armed only with a knife. Steve Mills et al., Laquan McDonald Police Reports Differ Dramatically from Video, CHI. TRIB. (Dec. 5, 2015, 1:25 AM), http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-chicago-police-reports-met-20151204-story.html; see also Cooper, supra note 22, at 1347-55; Ann C. McGinley, Policing and the Clash of Masculinities, 59 HOW. L.J. 221, 227-37 (2015).

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The challenge of being able to move through this volatile and risk-laden phase comes with the additional challenges posed for Black boys by race, gender and, for low income boys, class. See Pahl & Way, supra note 250, at 1404-06, 1411-13; see also JANET MANCINI BILLS0N, PATHWAYS TO MANHOOD: YOUNG BLACK MALES STRUGGLE FOR IDENTITY 228-30 (2d ed. 1996); Ashley B. Evans et al., Academic Self-Concept in Black Adolescents: Do Race and Gender Stereotypes Matter?, 10 SELF & IDENTITY 263, 272-75 (2011); Diane M. Hall et al., Acting “Tough” in a “Tough” World: An Examination of Fear Among Urban African American Adolescents, 34 J. BLACK PSYCHOL. 381, 382-83 (2008).


Id.


Id. at 103-06.

Altschul et al., supra note 271, at 1156; see also Thomas et al., supra note 250, at 218-19.

McMahon & Watts, supra note 250, at 413.


Sheretta T. Butler-Barnes et al., African American Adolescents’ Academic Persistence: A Strengths-Based Approach, 42 J. YOUTH ADOLESCENCE 1443, 1446 (2013); see also Deborah Rivas-Drake et al., Ethnic and Racial Identity in Adolescence: Implications for Psychosocial, Academic, and Health Outcomes, 85 CHILD DEV. 40, 46-48 (2014) (reviewing the existing literature on race/ethnic identity and positive impact); Christian A. Friend et al., Parental Racial Socialization and the Academic Achievement of African American Children: A Cultural-Ecological Approach, 15 J. AFR. AM. STUD. 40, 44-45 (2011) (surveying the literature on how bias affects academic achievement); Ciara Smalls et al., Racial Ideological Beliefs and

See Butler-Barnes et al., supra note 278, at 1443 (“Unfortunately, relatively little scholarship explores how African American adolescents draw on personal and cultural assets to persist and thrive in the face of discriminatory experiences.”); Pahl & Way, supra note 250, at 1404.


Id. at 556.

Id. at 557; see also Rebecca J. Bulotsky-Shearer et al., Peer Play Interactions and Readiness to Learn: A Protective Influence for African American Preschool Children from Low-Income Households, 6 CHILD DEV. PERSP. 225, 228-29 (2012) (finding that racial pride is still a protective factor for suburban African American boys).


Id. at 3-4.

Id.


See Dowd, supra note 22, at 46.


Gray-Little & Hafdahl, supra note 291, at 40.

See id. at 29, 34, 42; see also Dwight L. Greene, Naughty by Nurture: Black Male Joyriding--Is Everything Gonna be Alright?, 4 COLUM. J. GENDER & L. 73, 77-111 (1994); Brenda Major et al., Perceiving Personal Discrimination: The Role of Group
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See Gray-Little & Hafdahl, supra note 291, at 28, 41.

García Coll & Szalacha, supra note 111, at 84-85 (finding that there is stronger identity and better school outcomes for children of color in schools where they are dominant versus schools where they are a minority).


Banerjee et al., supra note 297, at 602-03; McCabe et al., supra note 297, at 146-47.

In one study, mothers were found to be especially significant for Black boys. FREEMAN A. HRABOWSKI III ET AL., BEATING THE ODDS: RAISING ACADEMICALLY SUCCESSFUL AFRICAN AMERICAN MALES 190 (1998).

This is the case for all children, but not all parents are functioning in the same context of support (or lack of it) for themselves and their community and culture. Numerous studies that focus on parents either state the obvious, that bad parenting is a risk factor, or that good parenting is a resilience factor, or that family is critical both in early childhood and adolescence for different developmental reasons. See, e.g., Calonie M. K. Gray et al., Anxiety Symptoms in African American Children: Relations with Ethnic Pride, Anxiety Sensitivity, and Parenting, 20 J. CHILD & FAM. STUD. 205, 211-12 (2011) (linking parenting with ethnic pride); Erik M. Hines & Cheryl Holcomb-McCoy, Parental Characteristics, Ecological Factors, and the Academic Achievement of African American Males, 91 J. COUNSELING & DEV. 68, 74 (2013) (linking parenting impact on outcomes for children); Alexander T. Vazsonyi et al., Growing Up in a Dangerous Developmental Milieu: The Effects of Parenting Processes on Adjustment in Inner-City African American Adolescents, 34 J. COMMUNITY PSYCHOL. 47, 67 (2006) (finding that parenting is a resilience factor).

There are studies that try to identify parenting factors or structures apart from racial socialization, and those studies find that two parents are better than one; that having an involved father is helpful and that warm nurturing parenting is better than the opposite. The assumptions of such work is that a solution or cause can be found in the Black family, which ignores the context in which families operate.


Id.

See id. at 8.

See id. at 9-11. Living in two worlds began in slavery and continues. Id. at 9-18. It involves accepting the necessity of adopting white ways of talking and behavior in order to succeed in school and jobs. But, this creates a dilemma: this is the burden of acting white, to come up with a coping strategy for this situation (adopting the ways of a group that subordinates you). Id. at 21-22; see also DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA 33-35 (2013). Other strategies include assimilation, accommodation without assimilation, living in two worlds at different times, ambivalence, resistance/opposition, and encapsulation. Ogbu, supra note 304, at 21-23.


Id. at 234.

Id. at 231.

Id. at 243.

See id.


Oscar A. Barbarin, Halting African American Boys' Progression from Pre-K to Prison: What Families, Schools, and Communities Can Do!, 80 AM. J. ORTHOPSYCHIATRY 81, 81 (2010).

See Dowd, supra note 22, at 45-48; Dowd, supra note 153, at 1212-17, 1222-26.

Dowd, supra note 22, at 45. The most recent figures are even higher at thirty-eight percent. See supra note 144 and accompanying text.

See Dowd, supra note 22, at 45.

Id.

See supra note 144 and accompanying text.

See Patten & Krogstad, supra note 150.


Dowd, supra note 22, at 47-48.


Id. at 99-100; Dowd, supra note 22, at 47-48.

See Dowd, supra note 22, at 47-48; Dowd, supra note 153, at 1217-19.

335  
336  *Id.*


338  Dowd, supra note 22, at 45, 47-48.

339  NOGUERA, supra note 334, at xvii.


342  *See JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 3-9, 13 (2008); RIOS, supra note 258, at 34-40.*


344  The rate of juvenile incarceration in the United States is the highest in the world, far higher than any other country. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 3 fig.1 (2011).

345  *See Cooper, supra note 265, at 1189-1202; Frank Rudy Cooper, ‘‘Who's the Man?’’: Masculinities Studies, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 687-92, 698-701 (2009); Richardson, supra note 222, at 2963-66.*

346  *See Editorial, Affordable Housing, Racial Isolation, N.Y. TIMES, June 29, 2015, at A18.*

347  The complexity is painstakingly described in a book authored by Kathryn Edin and Timothy J. Nelson. See EDIN & NELSON, supra note 151, at 213-16; *see also* HUNTINGTON, supra note 151, at 55-68.

348  While these are unique and broad ranging patterns, the similarity, I would argue, is in the acceptance of inequality as normative rather than as a contradiction of basic principles.

349  BELL & RIDOLFI, supra note 342, at 15-16.


351  *Id.* at 32.

352  *Id.*

353  *Id.* at 32-33.

354  *Id.* at 32.

355  *See id.* at 8 (“Even in the midst of plenty, discrimination, exclusion and intergenerational disadvantage continue to draw these children into the vicious cycle of inequity .... Looking only at the end results, however, misses the crucial role played by inequitable initial opportunities.”).

356  *Id.* at 27.
Data on social exclusion and discrimination is less available. See id. at 24 (“Nevertheless, qualitative research, reports to national human rights institutions and country-level statistics reflect the ongoing pervasiveness of such discrimination, as well as how its consequences are exacerbated among the poorest.”).

The role of data is therefore similar to the statistical analysis critical to disparate impact or pattern and practice litigation in employment discrimination settings, as well as the role of data to establish and monitor remedies, in employment cases as well as school desegregation cases.

See, e.g., Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977) (“Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”); NAACP v. Town of Harrison, 940 F.2d 792, 798 (3d Cir. 1991) (“In order to establish a prima facie case of disparate impact discrimination, a plaintiff is required to demonstrate that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern.”); Brock v. Int'l Union of Operating Eng'rs, Local 542 Dist. 1, 140 F. Supp. 3d 432, 438 (E.D. Pa. 2105) (dismissing a claim of discrimination in part because plaintiffs failed to provide “meaningful comparison data or information comparing skill sets of white and non-white union members, or comparative availability for work”).


For example, plaintiffs challenging California's Proposition 8, prohibiting same-sex marriage, proffered Michael Lamb as an expert witness to testify that “children raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents.” Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010). The District Court held that the state's interest in promoting opposite-sex parenting over same-sex parenting was not compelling. Id. at 1000 (“The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes.”).


P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126 (C.D. Cal. 2015); see also Home, supra note 21. A motion to dismiss the case was denied on September 29, 2015. Compton Unified Sch. Dist., 135 F. Supp. 3d at 1126. For my extended analysis of the Compton case and a critical look at the ACEs framework, see Dowd, supra note 15 (manuscript at 23-28).

Compton Unified Sch. Dist., 135 F. Supp. 3d at 1130-32; see also Dowd, supra note 15 (manuscript at 23-28); Home, supra note 21.


Compton Unified Sch. Dist., 135 F. Supp. 3d at 1130-32.

See id.

On imperfect support of disabled children, see Yael Cannon et al., A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Children with Social, Emotional, and Behavioral Challenges, 41 FORDHAM URB. L.J. 403, 412-25 (2013); Alex J. Hurder, Left Behind with No “IDEA”: Children with Disabilities Without Means, 34 B.C. J.L. & SOC. JUST. 283,
Another use of existing statutory mechanisms might be to utilize developmental equality as a principle for the distribution of federal funds. So, for example, federal funding for key structural frameworks (welfare, education, and juvenile justice) might be tied to implementation of developmental equality goals. We might reorient systems based on the funneling of funding to achieve developmental equality and demand outcomes that achieve positive outcomes based on developmental equality metrics.

Dismantling existing developmental barriers within the educational system, for example, would depend upon an argument that leaving them in place violates the core principles of Palmore and Brown that equality requires that the state not reinforce or produce inequality. See supra note 132 and accompanying text. Challenging the juvenile justice system and policing practices might use a developmental equality argument to expand developmental principles that have emerged in juvenile justice cases.

For example, the recognition of developmental principles in a range of cases is one of those threads. See supra notes 20-27 and accompanying text.


See, e.g., Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And, so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”).


378 See id. at 2620 (Roberts, J., dissenting); id. at 2640-43 (Alito, J., dissenting).

379 See Washington, 426 U.S. at 248 (“A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average Black than to the more affluent white.”).


381 See Fineman, supra note 22, at 12-15, 19-22.

382 Id. at 8-9, 21.

383 Dowd, supra note 22, at 40-44, 59-61.

384 Id. at 59-61.

385 See Cooper, supra note 22, at 1369-70, 1375.

386 Id. at 1363-67.

387 Id. at 1347.

388 Id. at 1374-78.

389 ROBERTS, supra note 328.


391 Id. at 13 (“Evidence demonstrates that social determinants of health are more important than access to medical care or even one's genetic makeup.”).

392 See id. at 9-13.

393 Id. at 6-9.

394 See, e.g., About CMS, CMS.GOV, https://www.cms.gov/about-cms/about-cms.html (last visited Nov. 26, 2016); About NCQA, NCQA, http://www.ncqa.org/about-ncqa (last visited Nov. 26, 2016); Facts About Joint Commission Standards, JOINT COMM’N (Mar. 25, 2016), https://www.jointcommission.org/facts_about_joint_commission_accreditation_standards. Licensing, accreditation, standards of care by area of practice, professional standards, and region are all collectively used to measure the quality of care and quality of outcomes. Although not without their imperfections, these standards serve the goal of positive outcomes for patients, and that only a well performing system deserves support.

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FATHERHOOD AND EQUALITY: RECONFIGURING MASCULINITIES

I. Introduction

Work-family policy debate in the United States has focused on work and the workplace, and has presumed its primary beneficiaries are women. Women's increased participation in the workplace brought the conflict between work and family sharply into view, and generated solutions geared toward assisting women. An underlying assumption has been that men would change at home by taking on a fair share of family work and care, consistent with norms of equality and gender neutrality. Consistent with these norms, if equality were defined as co-equal shared parenting to balance dual wage-earning, equality would generate a revolutionary shift in fatherhood.

Recalibration toward equality, however, has not taken place. Women continue to not only do wage work but also do a “second shift” of household and family work. Most men are not coequal caregivers; at best, they are secondary caregivers, at worst, uninvolved with their children. "New census data on family living arrangements suggest that fewer fathers may be participating in their children's lives than in any period since the United States began keeping reliable statistics." The persistence of inequality is linked to the minimal scope of the United States' work-family policy as well as ongoing employment discrimination against women despite their increased presence in the workplace. Beyond the lack of supportive policy and persistent discrimination, however, is the slow pace of change at home. The dramatic change in the position of women with respect to wage work--albeit still unequal to men--has not been matched by a similar change in men's role and work at home. While the ideal of care has changed, the reality has shifted only slightly.

What is the reason for this asymmetric pattern? The answer, I suggest, lies in the construction of masculinities. If we want to achieve a different reality of men's care, then we must reconstruct masculinities. In order to have a better father, you must have a better man.

I argue that the primary barriers to increased child care by men--what I call “father care”--that are grounded in masculinities are: (1) the male breadwinner norm, which constructs wage work as excluding care; (2) the requirement that men avoid all things deemed feminine or associated with women, which includes care-giving; and (3) the pervasiveness of hierarchy, which translates into the lack of a norm of collaborative relationships, both between men and women, and among men. In this essay, I explore each of these barriers.

Masculinities analysis suggests that to address these barriers, the need is not only for structural support, but also for cultural change. Both of these components must be inclusive of all fathers. Cultural change that shifts the balance of child
care between mothers and fathers is challenging because cultural change requires consensus about men's role in care that may or may not exist. This by no means is an issue unique to the United States. Cross-cultural evidence suggests that fathers' use of available benefits, entitlements, and policies to engage in care is low. To significantly change fathers' engagement in care, we must recast masculinity norms. I suggest that we must explore more precisely what affirmative elements must be present to encourage care-giving. On the basis of that analysis, I argue we should embark on a public-health approach to fostering father care. This would mean supporting a change in norms grounded in knowledge of conditions that will facilitate and encourage more care by men, as well as using what we know about risk and protective factors to support such care, and engaging in primary, secondary, and tertiary interventions.

I use vulnerability analysis to explore how this might be accomplished, by changing men's relationship to their own vulnerability as foundational to their caring for others. Vulnerability analysis is grounded in the recognition that all of us are vulnerable; vulnerability is an attribute of the human condition. The resources that we bring to confront our vulnerability include physical, human, and social assets; the strength of those assets is powerfully affected by state policies, laws, and institutions that affect asset building, and therefore individual resilience in the face of vulnerability. The patterns of state action are therefore critical to social justice and equality. The state may foster or inhibit, or distribute equally or unequally, asset-building resources. Vulnerability analysis uncovers the patterns of state support, or lack of support, and questions whether state support, and the support of some but not others, can be justified.

Children are vulnerable because they need care. Those who provide care are vulnerable because their care may diminish their economic self-sufficiency and the ability to support their children. Dependency thus creates vulnerability both directly and derivatively. The existing asymmetric pattern of care between women and men makes the vulnerability of caregivers highly gendered. I suggest in this essay an additional aspect of vulnerability that is implicated in the asymmetry of care. Vulnerability is a positive characteristic of human development that is essential to care-giving. I argue that it is particularly important to foster this vulnerability in men in order to surmount the cultural barriers to father care rooted in masculinities. This requires building human and social assets for men. My focus in this article is on that process, as a critical component of work-family policy in addition to efforts to challenge and reshape state responses to provide better balance between work and family for all those who provide care.

The article unfolds as follows. First, I explore the patterns and trends of fatherhood, men, and care. Second, I use masculinities scholarship to discuss three barriers to father care: the breadwinner norm, the avoidance of doing things associated with girls and women, and the centrality of hierarchy (men over women, and men in relation to other men). Third, I evaluate the United States' current policy in light of masculinities analysis. Finally, I suggest a direction for future policy, focusing on the need for policies that promote cultural change. In particular, I suggest the need to develop foundational capability for care by supporting boys and men in developing their own healthy vulnerability. This reconfigured masculinity is essential to expanding the number of men who are significantly engaged in the care of children.

II. Patterns and Trends: Men and Care

Fatherhood trends expose the connection between fathers, work, and care. The overall pattern is modification, but persistence, of the traditional configuration of breadwinner fathers who engage in significantly less care of children than do mothers. Modification is linked to an emerging ideal of a “new father” who is significantly more engaged in care, ideally coequal with the mother. Men have increased their time doing unpaid family work, as well as the amount
of time that they take from work for personal or family reasons. In addition, there are higher numbers of stay-at-home fathers and fathers who are primary parents. These increases, while important, nevertheless remain a minority trend. For example, fathers constitute slightly less than twenty percent of the caregivers for preschool children, a smaller percentage than grandparents. What continues as the dominant caretaking pattern is mothers performing a significant disproportion of care work. So while some fathers reflect the coequal caregiver ideal of the “new father,” or are moving in that direction, most do not. Most commonly, they are secondary caregivers, although their degree of engagement can vary considerably.

The gendered nature of care and household work is apparent from virtually all data. It begins with marriage or cohabitation, even without children. “Upon marriage or cohabitation, the average woman increases her household work by 4.2 hours, while the average man decreases his household work by 3.6 hours.” Although men do more than their fathers with respect to child care and housework, women still do a disproportionate share. Not only do women do more, but they also take care of a broad range of responsibilities, as well as physical tasks. As Naomi Cahn has pointed out, the gendered division of family work is supported by practices rooted in history, socialization, and individual self-image; additionally, it preserves a domain of power for women. The pattern of family work is the opposite of the pattern of wage work. A 2008 Bureau of Labor Statistics report found that of a sample of married parents with children under eighteen, almost twice as many fathers as mothers worked full-time, and fathers on average worked an hour longer per day than did mothers. Child care was nearly the reverse: seventy-one percent of mothers provided care on a daily basis as compared to fifty-four percent of fathers, but mothers provided nearly three times the care of fathers, measured by time. Men spend less time in sole charge of children, of the time that they do provide care. Even when both parents are employed full time, mothers do twice the amount of housework.

The impact of children on the differentiation of family work is significant. Andrea Doucet calls the birth or adoption of children an event of “gender magnification,” an event that can set or reinforce gender differentiation and asymmetrical parenting as the norm. Doucet focuses on the importance of the first year of a child’s life to parenting patterns. Using the concept of embodiment, Doucet examines the experience of fathers as compared to mothers during the first year of the child’s life, using her empirical work with fathers. She notes how differently mothers and fathers see themselves, are seen by society, and act or “perform” as parents with respect to six dimensions: (1) connection to pregnancy and birth; (2) the relationship between mothers and infants; (3) play; (4) community networks; (5) “habitus” (the taken-for-granted way of behaving); and (6) the relationship between fathers and infants. In each of these domains, there is a strong sense of difference, that men and women are not interchangeable: “[F]athers and mothers are embodied subjects who move through domestic and community spaces with intersubjective, relational, ‘moral,’ and normative dimensions framing those movements.” The result is that many fathers believe in the primacy of the mother-child bond and have a more difficult time establishing their relationship with the child, especially as an infant, in comparison to taking greater comfort in being a support to the mother or to an older child. Doucet argues it is essential to recognize these differences in a model of equal parenting; that is, if there is to be equality, it will be grounded in difference. She also concludes that it is critical to involve fathers from the outset in significant care of children.

In addition to their gendered, asymmetric pattern of care when they engage in care, men’s parenting generally is serial instead of linear. Many fathers disconnect with their children when they do not cohabit with their children. They parent the children with whom they live, rather than continuously parenting their children over the life course. Because of the importance of cohabitation—and of men’s relationship to the mother— to men’s parenting, family trends are
a critical factor in the father care pattern. Those trends include more cohabitation, less marriage, high rates of divorce, more nonmarital childbearing, and the predominance of mother care when mothers and fathers do not cohabit. 44

While unmarried fathers' connection with their children generally declines dramatically when they stop living with the mother, 45 recent research indicates a more nuanced picture in at least two respects. 46 First, the pattern may be one of both disengagement and reengagement, as the father or the mother begins another relationship. The father may be disengaging with children in one household while establishing and strengthening his engagement in another. The mother may also engage in a new relationship, and discourage the father while encouraging her new partner. Second, the pattern of continued connection is higher for African-American fathers than for fathers of other races. They remain engaged by negotiating with the mother of their children even when they do not co-reside. 47 For low-income fathers who do co-reside with their children, higher involvement is linked to higher motivation and sometimes also to the father's own unemployment that forces him into a greater caretaking role. 48

Marriage is a factor that generally positively affects the amount of time fathers engage in care. For example, married fathers of preschoolers were more likely to engage in caring for their children as compared to unmarried fathers. 49 Conversely, divorced fathers exhibit a pattern of disconnection similar to unmarried fathers who stop cohabiting with the mothers of their children. A substantial majority of divorced fathers sustain only minimal contact with their children. 50 Two years after divorce, many children see their fathers very infrequently. 51

Cumulatively, the patterns of fatherhood suggest that co-equal caring is the exception, not the rule. Increases in equality may have come as much, ironically, from women's reduction in family time as from men's increase in their contribution. When women work longer hours, they reduce the hours spent on household work and care. 52 Greater equality is the result of reducing women's contribution, not increasing men's contribution. In addition, to the extent economic factors drive patterns of care, the persistence of income inequality may undermine men's care. 53 If men can earn more than women, then they may spend more time working, and have less time for care. And if higher wages are equated with less responsibility for doing care, then even if men's hours are not disproportionate, their higher wages will translate into less care. 54

Indeed, most fathers engage in work differently than mothers, generally earning more, working longer hours (including more overtime), and less frequently working part-time or taking time away from work in order to engage in child care. 55 Fathers are more likely to care for children when they are unemployed. 56

The work-family patterns of fathers seem to indicate that economic breadwinning contributes to men's patterns, along with men's superior opportunities and pay for engaging in wage work. But more precisely, how breadwinning is constructed for men may be the issue. 57 Breadwinning for men traditionally has been defined as care for one's family: care is bringing in resources. 58 In this role, care defined as hands-on parenting as well as intellectual and social engagement in the life of children, is not included. Breadwinning as practiced by men may excuse men from care or prevent men from engaging in care. Indeed, engaging in the nurture of children might even be viewed as gender betrayal and be deemed unmanly. 59 Men who stay home to care for a sick child are often asked why their wife is not the one to stay home. 60 Breadwinning, so defined, makes wage work essential, definitive, and primary. Ironically, being the breadwinner privileges, but it also subordinates.
This definition of male breadwinning is constructed. An alternative definition is present in the conduct of women, as well as the expectations and stereotypes of female breadwinning. Plenty of women are breadwinners and perform care in conjunction with breadwinning. The labor and household work statistics make this clear. At the same time, the expectation that women will do care often underlies discrimination against women in wage work. Thus, breadwinning is affirmatively defined by, and negatively defined for, women. But linking women's practice and discriminatory stereotypes is the combination of wage work with care. It is possible to find within the lived example of women's wage work and care, an essential balance of work and family that redefines the very concept of breadwinner. The difference in the construct of breadwinning for women and men suggests that its meaning for masculinity is critical.

In the next section, I explore more fully the argument that beyond the definition of breadwinner, the very construction of what it means to be a man contributes significantly to the persistence of a disappointing level of father care. In the section that follows, I consider how barriers rooted in the construction of masculinities are reinforced by the incorporation of masculinities in structural discrimination and cultural expectations.

III. Masculinities Norms: Being a Man and (Not) Doing Care

Masculinities are a complex interaction of qualities, norms, and characteristics that define not only the dominant norm for men--hegemonic masculinity--but also shape alternative masculinities, even resilient-revolutionary masculinities. Distilled from the work of masculinities scholars, there are a number of critical characteristics of masculinity, which I have described in my prior work. Most significant for fathers and work-family policy are three core characteristics of manhood: the breadwinner norm; the negative definition of manhood which requires neither being nor doing things defined as feminine or associated with women; and the hierarchical imperative of masculinity to subordinate women as well as to dominate other men. These three characteristics create a cultural matrix that has an enormous impact on men in their role as fathers. These characteristics are reinforced and sustained by the United States' existing work-family policy.

Masculinities scholarship exposes how the shape of manhood includes both privilege and subordination, so that frequently, privilege comes with a price. Nowhere is this more evident than with respect to the breadwinner norm. The breadwinner norm defines men's identity, and their success or failure, by their wage work. This refers to the ability to support a family, to be a “family man,” as well as to excel in work that is valued as men's work. A “family man” historically is one who has a partner and children, and can provide for his family without assistance; he is the singular or primary economic support for the family. Unlike prior historical periods where a man's position was dictated by birth, the family man gains his status from being a breadwinner, a status conferred by work and therefore inherently unstable. The privilege conferred by the breadwinner norm is reflected in the construction of the workplace to support that norm, in a way that elevates men's work over women's work by defining particular work as male and more highly compensated, and by defining expectations in a way that requires a primary devotion to work over family. This serves the capitalist system by providing a reliable workforce committed to work first, supported by the unwaged family work of spouses who also care for any children. The primacy of the work orientation, however, subordinates men while privileging them: men must subordinate their families and their relationship with their families as the price for breadwinner privilege. Their family contribution is money, not nurture. “Breadwinner” is defined in a way that excludes care as a part of their lives and thus requires no accommodation in the workplace. For fathers, care is more typically constructed as voluntary and optional, rather than integral to being a man. Men therefore may choose not to engage in an equal amount of housework and child care because they can; their identity as men permits it. At the same
time, those men who would choose to care more, to engage more with their families, may worry about the perception that they are not serious or devoted to work, or that their interest in care makes them less manly (and by definition, less of an ideal worker). 74

There is no doubt that the breadwinner norm powerfully infuses the structure and culture of the workplace. 75 It just as strongly affects how men function at home, as partners and fathers. Particularly as fathers, it both releases them from doing care, and creates boundaries for doing care. Nowhere is this more clear than in the literature on stay-at-home fathers, who articulate the challenge of not doing wage work at all or the need to do some wage work, lest they lose their identity. 76 The breadwinner norm of masculinity, in sum, defines *1063 fatherhood as economic, and affects both fathers and mothers in the gendered construction of work and family. 77 It may explain why we always put “work” first in the work-family equation.

A second characteristic of masculinities that impacts men's ability to care and their actions of care is the powerful negative command of masculinity: to be a man means not doing, being, or being taken as, a girl or a woman. 78 “[O]ne categorical imperative outranks all the others: [D]on't be a girl.” 79 To throw like a girl, to cry like a girl, to be emotional like a girl, to dress like a girl—all of these things are insults, instantly recognizable as transgressing what constitutes manhood. This command is further reinforced by the requirement that men not be gay. 80 Calling a boy or man “gay” is less an accusation of sexual orientation than a parallel means to limit boys and men, to confine them to masculine norms. 81 Caring and nurturing are deemed quintessential female actions. Doing care, therefore, violates this fundamental command of what it means to be a man. To care or do care is perceived as soft, vulnerable, weak—all characteristics associated with women and again, to be rejected, at whatever cost by men. 82 The primary cost for boys and men is in the content of their emotional lives, and in their relationships. The limitations generated by this factor are very strong. While the image and expectations of fatherhood have changed, so that the current generation of young men expects to do more hands-on-care, the data on actual care suggest this conflict with masculinity norms persists. While men are equally capable of care work, many men do so not by choice but only when they are forced into becoming a caregiver because of divorce, unemployment, or the death of a spouse. 83 Data also indicates that men feel more comfortable doing certain kinds of care, particularly play, rather than other kinds of care, like emotional care or planning activities. 84 Some *1064 studies indicate it is important for men to “masculinize” care in order to feel more comfortable doing care. 85 Masculinizing care means differentiating particular actions of care in a way that makes them distinctive when men do the same task as women. It also means adding value to the task when it is “male.” For instance, men's care is characteristically more active, and permits more risk taking by the child. 86 Distinguishing men's care as more “rough,” “challenging,” or “active” suggests that they do care differently because of some inherent “male” way of being. This style or difference in care may be valued because it is male, because it encourages male-associated characteristics like bravery or strength that are valued, and/or because male care is still not normative. 87

This is a tricky space in reconceptualizing fatherhood: masculinization of care could encourage more fathers to do care, because it is “manly.” When men do more care, men's practice might be the basis to reframe and change the meaning of masculinity. Nevertheless, masculinization might be a way to sustain difference, with difference being essential to hierarchy. It might sustain men's privilege and dominant role in the gender hierarchy by maintaining their separation from care as practiced by women, and father care also might be seen as better than mother care. The difference in the treatment and perception of women doing what men do, as opposed to men doing what women do, is quite striking. 88

By way of illustration, women's increasing engagement in wage work, in what historically was thought of as men's sphere, has been largely perceived as women's embrace of something valuable: becoming as good as men, doing men's work, and
becoming equals. Doing women's work of care-giving, on the other hand, has been perceived either as strange and diminishing, as disempowering men, or as an extraordinary sacrifice. Aversion or discomfort is more common than embrace. Embracing something identified as female is devaluing, triggering the need to reject doing care or to recast care by framing or transforming what is being done as “male,” distinctive and not transgressive of the boundaries of masculinities. The underlying resistance to care work could remain, as well as the sustaining of male hegemony, by valuing masculinized care over mother care.

A third aspect of masculinities' construction of identity that affects father care is the importance of hierarchy. By definition, men are privileged in relation to women, which relates to the prior core command not to become or behave like a woman and thereby be demoted in the hierarchy. But in addition, masculinity is defined by each man's relationship to other men. Indeed, many masculinities scholars would argue that each man's position in relation to other men is most critical, more important than a man's relationship to women. Significantly, each man's position in relation to other men is never secure, and it must be proved constantly. The definition of masculinity as thinking and functioning hierarchically, while at the same time never achieving the stability of manhood, but always having to prove manhood, radically undermines collaborative parenting between fathers and mothers, and between men who might collectively care for children (but who are not partners), such as an ex-husband and a stepfather.

Co-parenting is not about hierarchy; it is about sharing and equally valuing a role. Connection, negotiation, and sharing of parenting all are values that recognize the value of care as well as the value and equality of the caregivers. Masculinities' hierarchical orientation undermines those possibilities. The increasing likelihood of a scenario where a child might have multiple parents is a challenge to our notion that every child has only two parents. How multiple parenthood might function is particularly complicated by the hierarchy norm of masculinities.

In its most extreme form, the hierarchical orientation of masculinities is expressed in the association between masculinity and violence. One's place is gained or sustained by force. The persistence and pervasiveness of intimate violence is an ongoing challenge to men's nurture of children because such violence impacts both partners and children. Nearly one in four women in the United States reports experiencing domestic violence in her lifetime. Women constitute eighty-four percent of the victims of violence from spouses and partners; roughly three-quarters of batterers are male. A significant rate of domestic violence occurs during pregnancy. Violence between partners undermines collaborative parenting during and after the relationship between partners. Witnessing violence or being a direct target seriously harms children.

The association of masculinities with violence also affects men's ability to co-partner with other men, as demonstrated by the triggering of extreme acts of violence when women become involved with another man after leaving an abusive relationship. This is not to deny that women commit acts of violence or that violence exists between same-sex partners. Rather, it is to recognize the association between masculinities and violence, its connection to the importance of hierarchy to masculinities, and the barrier this creates to nurture and care by fathers.

These three elements of masculinities--the breadwinner norm, the avoidance of things female in order to be a man, and the importance of hierarchy to manhood--generate significant barriers to men engaging in the nurture and care of children. In the following section, I describe existing work-family policy in the United States, and suggest how that policy structurally incorporates masculinities norms that undermine significant father care.

Work-family policy in the United States is insufficient and unsupportive of all parents. For fathers, one could argue either that it is counter-productive and counter-intuitive, or that it makes complete sense as an expression of traditional masculinities norms. Extreme among industrialized nations, United States' policy provides for only limited and mostly unpaid family leave; no maternity leave or health care support for pregnancy; no universal child care or preschool infrastructure; limited support for child care expenses; no leave to provide care for illness unless it is for a sick or seriously ill child, as well as no leave entitlement for the worker's own sickness or disability; no universal health care; and no universal family support benefits. The United States' system is a patchwork of federal and state laws, thus leading to differentials dependent on location rather than universal benefits.

The United States provides only limited parental leave related to birth, adoption, and the serious illness of a child under the federal Family and Medical Leave Act (FMLA). Under the FMLA, leave is limited to twelve weeks annually, unpaid, and covers only roughly half of all workers. The statute limits coverage to employers with fifty or more employees, does not cover part-time workers, and requires that employees have worked for the statutory period to qualify for leave. Some states provide greater leave entitlement under state law, but only three states--California, Washington and New Jersey--provide paid leave. Similarly, there is no universal child care support or provision of child care services, and only limited tax benefits that take into account some child care expenses for people below a certain income threshold. Preschool is voluntary, as opposed to an entitlement of all children. Sick leave and disability leave are not federally required, and vary considerably by state. Unless an employer voluntarily adopts a policy permitting parents to use sick leave to care for an ill child, parents have no entitlement to stay home to care for children during normal childhood illnesses, but only for seriously ill children under the limited leave available under the FMLA. Tax policy continues to disproportionately impact secondary incomes in two-income households, in effect penalizing the lower-income spouse, typically the wife.

The common critique of this federal policy, minimal as it is, is that it reinforces gendered patterns of care. Ongoing wage discrimination coupled with the lack of paid benefits transforms gender-neutral policies into gendered ones that predictably result in more women taking leave and for longer periods than men. Failure to cover all workers forces similar economic calculations that affect the allocation of family work and care, as does lack of coverage for part-time workers, who are disproportionately female. Existing policy also has a class impact, because the lack of wage replacement especially undermines the ability of low-wage workers and single parents to take leave.

Paid leave might change the gendered pattern of parental leave. The experience of other countries, however, suggests change in leave patterns is a more complex matter. After finding that leave available to mothers and fathers was overwhelmingly taken by mothers, a number of European countries began to provide gender-specific benefits to encourage fathers to take leave. Dutch fathers have been attracted by part-time schedules in a tight labor market, so that one in three men either works part time or works full time in four days, with the weekly “daddy day” becoming a norm. In Sweden, the number of daddy days is now sixty days, and couples can take more leave if fathers use leave benefits. The result has been that eighty percent of fathers take some leave, for a total of twenty-five percent of all leave days. The high participation is interesting, but the persistence of gender asymmetry even in these
high use patterns also is striking. 124 Julie C. Suk argues that gender-specific benefits might be a policy to consider and questions whether gender neutrality is the road to equality. 125 Michael Selmi, however, emphasizes that the barriers are not exclusively structural, as the European examples demonstrate. 126 Selmi points out that no empirical data support the common explanations for lack of father involvement in care or leave. These explanations include the demands on men to bring in income, and that employers discourage or penalize leave taking. 127 Rather, Selmi argues, it is the strength of cultural norms that explains the lack of change, even when policies confer benefits on men. 128 This explanation is supported by Ann McGinley's work on the reinforcement of traditional masculinities norms at the workplace in ways that limit men's ability to do care-giving and to do work other than according to prescribed norms. 129

Consistent with Selmi's observation is the workplace norm of the “ideal worker.” Joan Williams has detailed this norm in depth, persuasively arguing that the hallmark of the workplace is a system of domesticity, peopled by ideal workers who have three core characteristics: the ideal worker does not have family commitments; the ideal worker is male; and family work, and the primary family worker (typically women) are devalued. 130 In her most recent work, Williams calls the workplace a primary gender factory. 131 The workplace is dominated by masculine norms, she argues, that limit men to be *1071* breadwinners and disproportionately disadvantage women because by definition they are presumed to be unable to meet the (unencumbered) male norm. Williams's goal is reform of the workplace toward a norm of balanced work and family commitments. 132 She envisions a mix of policies including public supports (child care, paid parental leave, national health insurance) and workers' rights (vacation time, proportional pay, and benefits for part-time work, and the right to request flexible schedules). 133 Williams's analysis is consistent with the view that masculinities are at the core of achieving greater father care. Her vision of a redefined ideal worker is much like the argument of a redefined concept of a breadwinner: a de-gendered norm. That norm, I would argue, requires both the concrete structural changes she suggests, as well as policies to deal with the cultural change that Selmi identifies as critical.

Achieving structural and cultural change cannot be limited to work law. Family law, in significant ways, continues to frame fathers as breadwinners, emphasizing the importance of their economic role but not their care role. 134 Support of the social relationship between fathers and their children would seem to be advanced by family law norms of shared parenting. Yet in practice this is formal equality only. The asymmetry of father care by nonmarital, noncohabiting fathers and divorced fathers is a complex subject. 135 Both fathers and mothers accuse the system of bias. 136 The pattern of predominant mother custody and the decline in father connection with children is troubling, linked to the overwhelming concentration on economic fatherhood, and the lack of policies and supports for collaborative, egalitarian parental care, and for men's integration with mothers' subsequent partners. 137 Nonmarital fathers, while formally equal to divorced fathers, remain even less supported in reality. Indeed, as one scholar has pointed out, nonmarital fathers are pursued for purposes of child support on the basis of biology alone, while being required to meet a higher standard of “biology plus” (some level of social parenting) to claim fatherhood status and to be entitled to parenting time to care for their child. 138

*1072* Support for care is also linked to notions of fatherhood as a singular, biological role (and preferably a marital father). Social fatherhood, which may or may not coexist with biological fatherhood, is not strongly valued within the family law system. 139 Moreover, there is little recognition of the possibility of multiple fathers co-parenting, despite the reality of cohabitation, divorce, and stepparenthood. 140 With the increased likelihood of stepparents and cohabitants, collaboration also requires male-male collaboration, not simply male-female.
The most visible policy with respect to fatherhood is not shared parenting, but the pursuit of child support, locking in a definition of fatherhood as economic support. Although formally gender neutral, child support is understood as a legal structure primarily aimed at men. Parentility establishment--and disestablishment--feeds this norm of economic fatherhood, because the goal is identifying who has financial responsibility for children. Child support is particularly targeted at low-income men. Federal programs aimed at low-income fathers are intended to assist fathers in finding work so that they can pay for support; there are no equivalent programs to encourage or support care-giving. Low-income fathers, contrary to popular mythology, engage in significant care. They do so in spite of, not because of, existing policy. In addition, welfare policy may discourage cohabitation because of its impact on how family income is calculated, thus discouraging paternal involvement.

The pursuit of child support has both a disproportionate class impact and a disproportionate racial impact due to the racial configuration of low-income families. Many African-American fathers nevertheless sustain a strong connection to their children. Their maintenance of connection suggests more nuance in the patterns of fatherhood that particularly challenge the myth of “hit and run” fatherhood that characterizes the stereotype of low-income Black fatherhood.

Domestic violence law, as a subset of family law, is the final area that should be considered in the work-family equation. The continuing high rate of domestic violence warps efforts to support nurturing fatherhood. While responses to domestic violence have dramatically improved, they remain inadequate. Continued high rates of violence impinge on any changed policy toward work-family issues. A next step forward would require dismantling the violence norm of masculinity and the link to hierarchy as integral to manhood. Little attention to the subject of domestic violence is evident in debates on work-family policy.

In sum, formal work-family policy in the United States expressed in employment law and family law has done little to confront masculinities or recognize how strongly they permeate existing law. To the contrary, domestic policy reinforces stereotypes that limit or undermine father care. Stereotypes function at an individual level, but also at a social/cultural and structural level. This affects how individual fathers are perceived and self regulate, through norms of masculinities that infuse and are created by social and cultural beliefs, but it also affect things structurally. Stereotypes function as limitation, repression, and harm because the individual is treated by a group trait rather than as an individual. “Naming a gender stereotype and identifying its harm is critical to its eradication.” Current law and policy at best functions to support fathers as breadwinners, and at worst fails to confront men's violence. Law and policy also reinforces hierarchies among fathers, particularly by class and race, and between men when they co-parent. Prevailing legal standards have fueled fathers' rights groups by articulating a norm of gender-neutral equality, but ironically have not led to greater father care.

The state has an affirmative duty both to eliminate stereotypes present in its laws, and to affirmatively enact laws to overcome or remedy pervasive social stereotypes. What is needed is a public-health approach toward cultural change in our norms of masculinities. Such an approach would treat the absence of father care as a public-health issue that affects children, fathers, and mothers, and identify the need for change as both structural and cultural. In addition, any new approach must include all fathers, not just some fathers. In the next section I explore these two needed changes.

V. Policy Suggestions: Inclusive Fatherhood and Cultural Change
Structural support to better facilitate the balance of work and family, and to encourage greater father care, is critical. Structural support alone, however, is not enough. Two other changes that are needed in United States' policy in order to increase father care, driven by a recognition of the impact of masculinities norms on care, are first, an inclusive policy that considers the impact of policy on all men, and rejects hierarchies among fathers; and second, an affirmative focus on cultural change, enacting policies geared to foster reshaping fatherhood to make care central.

The first critical change, creating an inclusive policy, means a focus on several factors. First, it requires shifting from the assumption of marital fatherhood as the focus of policy, to including nonmarital fathers, cohabiting fathers, and both noncohabiting and divorced fathers. Remaining wedded to a marital norm of fatherhood as an assumption of policy means ignoring the life realities of a significant proportion of fathers, and of their children. It is also important to recognize some fathers are not marital or biological fathers, but they, nevertheless, are caring for children as social fathers. Connected to this broader focus is the necessity of resolving and articulating a vision of multiple, collaborative fatherhood. Sustaining parental bonds generally is better for children than disrupting bonds. New relationships, however, can positively contribute to their lives as well. Conceptualizing and supporting fathers in both roles is worth exploring from the perspective of children's best interests.

Finally, an inclusive policy must focus more affirmatively and realistically on low-income fathers. It is nothing short of startling, and indeed disturbing, that the strong caring patterns of low-income fathers are ignored in place of stereotypes that feed class and race assumptions. At the same time, the pattern of serial fathers for children, as a response to the existing structure, requires unpacking and evaluating the meaning of this pattern for low-income children, just as society has been concerned with this pattern for middle- and upper-income children. Policy must be sensitive to differences among fathers, especially the fathers who are part of the most fragile families, low-income families.

The means to achieve inclusiveness might come from a variety of methods. Attentiveness might be increased by explicitly bringing the margin to the center. This would mean making it an articulated policy norm to consider at the center of policy construction the needs of the most disadvantaged fathers, those with the greatest challenges to achieving an ethic and practice of care. Instead of policy being driven by the privileged, this would ensure that policy includes and assists those at the margin.

A second critical piece of policy is cultural change. To re-envision fatherhood, we must re-envision manhood. This requires an affirmative policy of cultural change, similar to the shift in womanhood that has accelerated during the past several decades. A comparable shift in manhood is needed, in order for father care to be an integral, embraced part of masculinities. To accomplish this cultural change, we need to explore what is needed in order for men to engage in care and understand what blocks such care. I argue here that a critical piece of this understanding is allowing, and supporting, men to be vulnerable. Vulnerability is an essential component of the ability to care, yet it is a characteristic that is strongly suppressed by the construction of masculinities. Cultural change, I argue, should aim to reverse existing masculinities norms about vulnerability, as a foundation to encouraging men's engagement in care.

The relationship of masculinity to care is to reject care because of its connection with femininity. According to masculinities research, shaming boys and men to achieve identity is critical to defining and policing masculinity. In contrast to the expansion of boundaries for girls, boys continue to be limited by the negative definition of gender identity. The gender tags of “girl,” “female,” “woman,” “gay,” or “fag” identify and limit what boys and men can do and be. Hierarchy gives them position and value for gendered choices. Fundamental to this limitation process is shame.
Shame as a means of imposing limits on boys and men is particularly linked to vulnerability, and vulnerability must be suppressed at all costs. 158 Vulnerability, as I am using it here, is not the state of being susceptible to economic or physical harm, but rather is the name for the emotional and psychological state of uncertainty, risk, and fragility. In this sense, vulnerability is critical to, and a positive foundation for, love, care, and connection. How men, and masculinities, currently conceptualize vulnerability requires rigid suppression and denial. This creates a barrier to connection, and to care. Reframing vulnerability is critical to reframing masculinities.

*B1077 Brené Brown's work offers important insights on the role of vulnerability to psychological health. 159 Her work links shame, vulnerability, wholeheartedness, and connection. Each step of her analysis is helpful to understanding the fundamental barrier that masculinities as currently constructed poses for care, and particularly the link between vulnerability, connection, and care.

Brown defines shame as “the intensely painful feeling or experience of believing we are flawed and therefore unworthy of acceptance and belonging.” 160 According to Brown, shame is a core emotion, which everyone experiences. Shame is therefore unavoidable. What drives shame is expectations, and those expectations are organized by gender. 161

What we do with shame, however, differs. According to Brown, shame is linked to “the fear of disconnection.” 162 We are wired for connection; that which disconnects us, then, is what does us harm. 163 Brown theorizes that what is needed for connection is not avoiding shame, but rather allowing for “excruciating vulnerability,” that is, allowing for the discomfort by accepting and allowing oneself to be seen as one's real, imperfect self. The key to the exposure of self, what she calls authenticity, is to confront shame with resilience. 164 Brown links fostering resilience to vulnerability.

What fosters resilience in this context is empathy, courage and compassion. 165 Brown's work explores the characteristics shared by those who have a sense of belonging, connection to others, and self-worth, versus those who continue to think that they are not good enough. The shared characteristic of those who have a sense of belonging is what she calls “wholeheartedness.” 166 She identifies the elements of wholeheartedness as courage and vulnerability. Courage is linked to authenticity: the courage to be who you really are and accept yourself, as a precondition to connection with others. Vulnerability is necessary to connection. Instead of shutting down, hiding, or denying vulnerability, Brown argues, it must be embraced, as this embrace is fundamental to connection. Suppressing vulnerability leads to disconnection and self-harm. 167

This understanding of the links between, and definition of, courage, vulnerability, and connection is profoundly different from masculinities' *B1078 definition of courage and vulnerability. Under Brown's definition, courage is not defined as a denial of weakness or imperfection; vulnerability is not defined as something to be avoided. Rather, courage is about being your real self; vulnerability is the foundation of connection. And connection is about equality, valuing relationships, and accepting both ourselves and those for whom we care and provide care, as well as other caregivers. Connection is fundamental to care.

Masculinities researchers confirm the connection between masculinities and shame, and between masculinities and invulnerability. This is not an affirming, positive connection. 168 Moreover, a core piece of masculinities is the constant need to prove oneself and to compare oneself to other men. Both of these factors foster the view of vulnerability as a negative. The male definition of courage fosters disconnection and shame instead of connection and care. 169
One of the definitions of weakness articulated by one of Brown's male research subjects was “when people think you're soft. It's degrading and shaming to be seen as anything but tough.” 170 Another was “[o]ur worst fear is being criticized or ridiculed--either one of these is extremely shaming.” 171 These definitions bode ill for men and care. A redefinition of masculinities requires a different kind of courage than that traditionally associated with masculinity. 172

Brown's work suggests the importance of driving down to the heart of the beliefs that create barriers to care, and the need to restructure those beliefs, not because of an ideological norm, but because of their importance to individual self-worth, as well as to foster the care and connection that children need. Her work is not necessarily the only work that is insightful to this process, but it exposes how gender norms function on a very personal, individual level. How to translate this into policy is challenging but not impossible.

One way is suggested by the work that has begun by various scholars around the concept of vulnerabilities. Martha Fineman, among others, has argued that thinking in terms of vulnerabilities is a better way to analyze structural and substantive equality and the role of the state. 173 As Fineman notes, vulnerability traditionally has been viewed negatively. “Vulnerability is typically associated with victimhood, deprivation, dependency, or pathology.” 174 Her goal is to tease out a more nuanced and affirmative meaning. 175 “I want to claim the term ‘vulnerable’ for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.” 176 Fineman's concept, "understood as a state of constant possibility of harm,” 177 focuses on shared vulnerability as a defining, universal characteristic of the human condition, and examines the state's and society's response to our vulnerabilities.

While vulnerability is universal, it is by no means experienced similarly either by different people or over the life course, and the capability to respond to vulnerability varies. It is linked to embodiment, that is, to our bodies and their vulnerability, which makes it a shared condition; but everyone is individual in his or her vulnerabilities. 178 It is also critically affected by the assets that we bring to bear on vulnerability, which allow us at best to respond with resilience. 179 Those assets are strongly affected by the state's and society's impact on asset-building. Fineman divides assets into three types: physical (wealth and material goods), human (innate or developed human capital), and social (networks and relationships providing support). 180 State institutions, policies, and laws may facilitate asset-building that supports resilience in the face of vulnerability. 181 Conversely, the lack of state action may intensify vulnerability, or negative policies may exacerbate or create more intense vulnerability. How the state responds to vulnerabilities is the core inquiry, as well as whether state institutions act fairly and equitably.

Because vulnerability is universal, it suggests both the potential for alliances across identity characteristics such as race, class, and gender, and the promise of reaching more deeply into social and economic inequalities that persist under classic discrimination analysis. It focuses on where the state provides assistance to increase resilience. In addition, as Fineman points out, it requires evaluating the systems “of power and privilege” that create inequalities with respect to vulnerabilities. The responsive state responds to vulnerabilities with egalitarian support or has compelling reasons to treat persons differently. “[I]f the state confers privilege or advantage, it has an affirmative obligation either to justify the disparate circumstances or remedy them.” 182

Fineman's primary focus is shared vulnerability in the sense of conditions requiring support from a more responsive state, as well as exposing the inequities in current state policy that result in persistent, and worsening, social inequalities. Using Brown's work emphasizes the value of vulnerability as a positive emotional or psychological characteristic that is critical to self-development. It is an asset that fits within both human and social asset categories, building self-development
essential to connection with and care for others. It develops human capital and provides a basis for family and social networking that supports children and their caregivers. This positive vulnerability, if supported as essential to care, is like assets of education and employment that contribute to the development of human potential. The state supports the individual in a way that benefits individuals and society.

Incorporating Brown's vulnerability analysis into Fineman's model underscores the link between structural reforms and cultural change. Structurally, we have to support care with policies that make it possible to do care work, that value care, and that enable and promote care without gender, race, or class divisions. Culturally, we have to support an ethic of care by fostering affirmative models and tackling stereotypic ways of thinking as well as envisioning a new norm. We have examples of this connection between structural and cultural change. Workplace antidiscrimination statutes that reframed the structure of work have also linked with affirmative action, diversity training, and sexual-harassment training to reorient work culture.

*1081 Reframing the legal response to domestic violence has included both structural change and public education about the realities and unacceptability of intimate violence. Public health issues such as smoking, drunk driving, school violence, and bullying have coupled stronger consequences with affirmative efforts to educate and change the culture. These examples, and many more, combine rights or consequences of acts with proactive encouragement and new models of thinking and behavior.

VI. Conclusion

Just as we have opened, reoriented, and expanded women's sense of self by policies as diverse as fostering women's place in education and sports, domestic violence reforms, and employment discrimination laws, so too we must foster the emotional health and vulnerability of men as a foundation to a norm of fathers as caregivers. This cultural shift, inclusive of all fathers, is essential to change the patterns of fatherhood, and achieve work-family equality. In combination with structural reform, it will contribute to the revolution in fatherhood that promises so much to children, men, and women.

Footnotes

a1 Professor and David H. Levin Chair in Family Law, and Director, Center on Children and Families, University of Florida Levin College of Law. I am grateful to Nancy Levit, Ann McGinley, Rachel Rebouche, and Barbara Bennett Woodhouse for reviewing and commenting on multiple drafts of this article. It was an honor to deliver a Donahue Lecture during the 2011-2012 lecture series, and I especially want to thank the students of the Suffolk University Law Review, Dean Camille Nelson, and Associate Dean Karen Blum.


3 See Nevada Dep't. of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003). The impact of the discrimination targeted by the FMLA is significant. Congress determined: “Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.” Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id. (quoting The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 99th Cong., 2d Sess. 100 (1986)). Congress's goals were evident in the findings of the FMLA. Congress believed that the FMLA was a valid exercise of its Section 5 authority. It announced that the purpose of the FMLA was

1. to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
2. to entitle employees to take reasonable leave for ... the care of a child, spouse, or parent who has a serious health condition; ....
3. to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for ... compelling family reasons, on a gender-neutral basis; and
4. to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Post & Siegel, supra note 2, at 1948.

4 Arlie Hochschild & Anne Machung, The Second Shift 2-10 (1999). More recent data confirms the inequality identified by Hochschild and Machung. According to one study, when both husband and wife worked full-time jobs, the wife did twice as much household work as the husband, and regardless of work status, the wife did five times as much child care. Lisa Belkin, When Mom and Dad Share It All, N.Y. Times Mag., (June 15, 2008), http://www.nytimes.com/2008/06/15/magazine/15parenting-t.html.

5 “[O]n average, mothers spend much longer than fathers in absolute time caring for children, whether that time is calculated as a primary activity, as either a primary or a secondary activity, or as all time in the company of children.” Lyn Craig, Does Father Care Mean Fathers Share?: A Comparison of How Mothers and Fathers in Intact Families Spend Time with Children, 20 Gender & Soc'y 259, 269-70 (2006). Craig found that mothers spent double or more the time with children compared to fathers; that mothers spent nearly one-third of their time as the sole parent, whereas fathers only did so thirteen percent of the time; and mothers spent four times as much time on communication and travel related to children, as compared to fathers. Id. at 271-74. Data from this Australian study are consistent, with some variation, with data from other studies throughout the world. The variations indicate differences in the amount of increases of family work, but the persistence of inequality in the share of household work, averaging two-thirds of the work done by women, one-third of the work done by men, whether married or not. Jennifer L. Hook, Care in Context: Men's Unpaid Work in 20 Countries, 1965-2003, 71 Am. Soc. Rev. 639, 639, 645, 649 (2006); see also Ariane Pailhé & Anne Solaz, Time with Children: Do Fathers and Mothers Replace Each Other When One Parent Is Unemployed?, 24 Eur. J. Population 211, 222-223 (2006).


7 For full-time, year-round workers in 2010, women's median annual earnings were 77.4% of men's annual earnings. Ariane Hegewisch, Claudia Williams & Anlan Zhang, The Gender Wage Gap: 2011, Inst. for Women's Pol'y Res. (Mar. 2012), http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2011; see also Statistical Overview of Women in the
Workplace, Catalyst (June 2012), http://www.catalyst.org/publication/219/statistical-overview-of-women-in-the-workplace. Discrimination is particularly harsh for mothers. See generally Shelley Correll et al., Getting a Job: Is There a Motherhood Penalty?, 112 Am. J. Soc. 1297 (2007). For a recent example of this, in a case involving a claim of class-based sex discrimination, the following comment was made in response to a female employee's news that she was pregnant: “[k]ill it!” and regarding women who took maternity leave, “[g]et rid of these pregnant bitches.” The head of global human resources stated that mothers “belong at home” and “women do not really have a place in the workforce.” Joan Williams, Bloomberg Case: Open Season to Discriminate Against Mothers?, Huffington Post (Aug. 26, 2011, 12:07 PM) http://www.huffingtonpost.com/joan-williams/bloomberg-case-open-seaso_b_934232.html. In her study of the patterns of men's unpaid family work, Jennifer Hook found both a “stalled revolution” and some convergence of men and women's work-family patterns. That is, a significant increase has occurred in men's participation in unpaid family work over the forty years covered by her study. At the same time, in no country has men's share of family work gone past thirty-seven percent. She links this to the pattern of parental leave (taken largely by women) and women's participation in part-time work. Hook, supra note 5, at 654-55; see also Emp't Mkt. Analysis & Research, International Review of Leave Policies and Related Research 2010, (Peter Moss ed., 2010) [hereinafter EMAR, International Review], available at http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2010_annual_review.pdf. This comprehensive review of policies puts the United States at the bottom of available benefit structures. Sheila B. Kamerman & Jane Waldfogel, United States, in EMAR, International Review, supra at 240-43. On the importance of supportive policies, and the lack of U.S. policy, see Jane Waldfogel, What Children Need (2006).


See Dowd, The Man Question, supra note 9, at 57-65 (analyzing core characteristics of masculinities scholarship).


Recent fatherhood work concerns the low rate of take-up of father benefits. See Barbara Hobson & David Morgan, Introduction: Making Men into Fathers, in Making Men into Fathers: Men, Masculinities and the Social Politics of
Fatherhood 1-21 (Barbara Hobson ed., 2002); Hook, supra note 5, at 639. See generally EMAR, International Review, supra note 7.

13 For a comprehensive treatment of fathers and how we might support them, see The Role of the Father in Child Development (Michael Lamb ed., 5th ed. 2010). Primary interventions are preventive and universal; secondary interventions focus more narrowly on at-risk individuals; and tertiary interventions focus on situations of negative outcomes and seek to prevent future harm or worsening of the circumstances.


15 See Fineman, Anchoring Equality, supra note 14, at 1.

16 Id. at 13-14.

17 Id. at 15.


20 See infra notes 173-183 and accompanying text for discussion of vulnerability.

21 See Dowd, Redefining Fatherhood, supra note 8, at 21-33.


25 Despite the increases, this remains a small proportion of all care. Stay-at-home fathers are 2.7% of stay-at-home parents; triple the number ten years prior. Katherine Shaver, Stay-at-Home Dads Forge New Identities, Roles, Wash. Post, June 17, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/16/AR2007061601289.html. Fathers that provide primary care have been little studied and might increase these figures, but there is not accurate data. See Berkstrand-Reid, supra note 11, at 666-68. With respect to the division of household work, men's share has been increasing, but is not equal. Hook, supra note 5, at 639.
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26 Q. & A. About Child Care, supra note 24, at 3.
27 Cahn, supra note 11, at 181-84.
28 Dowd, Redefining Fatherhood, supra note 8; Dowd, The Man Question, supra note 9, at 106-07.
30 Cahn, supra note 11, at 181-82.
31 Id. at 182.
32 Id.
33 Id. at 189-99.
35 Id.
36 Q. & A. About Fathers, supra note 23, at 1.
37 Use of Time Summary, supra note 34. The distribution of housework, as one researcher points out, does not fit a model of economic bargaining, but instead seems to reflect the embeddedness of gender norms, and for men, the strong deterrent to gender nonconformativity or deviance. Thébaud, supra note 29, at 349-50.
38 Andrea Doucet, Dad and Baby in the First Year: Gendered Responsibilities and Embodiment, 624 Annals Am. Acad. Pol. & Soc. Sci. 78, 93 (2009) [hereinafter Doucet, Dad and Baby]; see also Andrea Doucet, Do Men Mother?: Fathering, Care, and Domestic Responsibility (2006) [hereinafter Doucet, Do Men Mother?].
39 Doucet, Dad and Baby, supra note 38, at 84-91.
40 Id. at 91.
41 See id.
42 See id. at 92-93.
44 One-quarter to one-third of families globally are headed by single mothers; the United States has the highest percentage of single-parent families (thirty-four percent in 1998), a dramatic increase beginning in the 1960s. The largest group of

45 Carol Bruce & Greer Litton Fox, Accounting for Patterns of Father Involvement: Age of Child, Father-Child Coresidence, and Father Role Salience, 69 Soc. Inquiry 458, 460-61, 470-71 (1999); Laura Tach, Ronald Mincy & Kathryn Edin, Parenting as a “Package Deal”: Relationships, Fertility, and Non-Resident Father Involvement Among Unmarried Parents, 47 Demography 181, 197-202 (2010) (adding nuances to drop-off pattern).


47 See generally Edin, Tach, & Mincy, supra note 46.

48 See generally Waller, Family Man, supra note 46; Waller, Viewing Low-Income Fathers, supra note 46. This also is linked to issues of criminal justice involvement, disproportionate by race. See generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

49 Q. & A. About Child Care, supra note 24.

In 2009, median income of full-time, year-round workers was $36,278 for women and $47,127 for men, for a ratio of 0.77. Majority Staff of Joint Econ. Comm., 111th Cong., Invest in Women, Invest in America: A Comprehensive Review of Women in the U.S. Economy 9 (2010), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=9118a9ef-0771-4777-9c1f-8232fe70a45c. While men as a group continue to earn more than women as a group, shifts and trends suggest that this is changing. The most recent data would indicate that, in general, the wage gap is reduced, particularly for younger workers, and workers without children. That is, young men and women are closer to wage equality. Parenthood differentially affects women and men; motherhood triggers a significant wage penalty for women, but fatherhood does not trigger a similar wage penalty for men. Overall employment data, however, also indicate that men have higher unemployment than women, and have suffered greater job loss in the recession, because job cuts have been greatest in male dominated jobs. Katharine B. Silbaugh, Deliverable Male, 34 Seattle U. L. Rev. 733, 736-37 (2011). Overall wages for male-dominated jobs continue to be higher than overall wages for female-dominated jobs. Id.


The origin of the word is an interesting piece of this construction. The word is of British origin, and first came into use between 1810 and 1820 in the United Kingdom. It combined bread, literally meaning food to eat, with win, in the sense of obtaining food. It was used also to mean the “skill or art by which one makes a living.” Breadwinner Definition, Dictionary.com, http://dictionary.reference.com/browse/breadwinner (last visited Sept. 14, 2012). It is notable also that “bread” as slang for money is not used until the 1940s. “In Old English bread was not the standard term for the familiar food. That was loaf, which has since become restricted to a lump of bread. Bread was such an important part of the diet in the past that it came to stand for food in general. That is why the old translation of the Lord's Prayer says 'give us this day our daily bread'. It also lies behind the word breadwinner for the person whose income feeds the family ....” Julia Cresswell, Bread Definition, Oxford Dictionary of Word Origins, in Oxford Reference Online, http://www.oxfordreference.com/view/10.1093/acref/9780199547920.001.0001/acrof-9780199547920-e-685?rskey=MXAIrI&result=677&q= (last visited Sept. 14, 2012). For examples on the use of the word, see Bread Definition, Oxford Eng. Dictionary, http://oed.com/view/Entry/22888 (last visited Sept. 14, 2012).


See Silbaugh, supra note 53, at 736-40. Silbaugh points to this successful, even if imperfect, pattern of women combining work and family, and the closing of the wage gap among younger women and men who do not have children. She attributes the closing of the wage gap to women's overachievements in education and skills development, and their success in a different pattern of work and family to the decline in male dominated sectors of the economy. All data indicate that women continue to do care work even when they do wage work. In 2007, 26% of wives in dual-income households earned more than their husbands, (up from 17.8% 20 years ago). Alison Linn, Rising Number of Women Earn More than Mates, NBCNews.com

62 See supra notes 21-56 and accompanying text.

63 See Williams & Segal, supra note 1, at 77-78. Joan Williams has developed the concept of the “maternal wall”: that discrimination is strongest when directed toward working mothers. Id. “Motherhood is one of the key triggers for gender stereotyping.” Joan C. Williams, Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases, 763 PLI/Lit 333, 354 (2007); see also Susan E. Hult et al., Looking Forward and Back: Using the Pregnancy Discrimination Act and Discriminatory Gender/Pregnancy Stereotyping to Challenge Discrimination Against New Mothers, 7 Emp. Rts. & Emp. Pol’y J. 303, 306 (2003). See generally Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (2000) (hereinafter Williams, Unbending Gender); Joan C. Williams, Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination, 7 Emp. Rts. & Emp. Pol’y J. 287 (2003).


See generally Dowd, The Man Question, supra note 9; Dowd, Asking the Man Question, supra note 9; Dowd, Masculinities, supra note 9.

For a discussion of the core insights of masculinities scholarship, see Dowd, The Man Question, supra note 9, at 57-65.

Id. at 58.

One researcher calls this “the full package”: marriage, fatherhood, and work, with work being sufficient to support the family on the man's income alone. See Nicholas W. Townsend, The Package Deal: Marriage, Work and Fatherhood in Men's Lives 30-31 (2002). The erosion of men's wages has required many wives to work to maintain or increase family income, forcing some modification of the family man definition. “Family wage” is a term still used to dignify a wage capable of singularly supporting a family, and still seems to have a gender specific connotation, that is, a wage sufficient for a man to support the family. See, e.g., Stephanie Coontz, Cohabitation Doesn't Cause Bad Parenting, N.Y. Times, July 13, 2012, http://www.nytimes.com/roomfordebate/2011/08/30/shotgun-weddings-vs-cohabitating-parents/cohabitation-doesnt-cause-bad-parenting.

But of course we should be concerned about the number of children whose parents cycle in and out of relationships. Several things might help lower that number: available, affordable contraception and education to help young people delay childbirth until they have a reliable partner and/or the educational, emotional and social resources to raise a child; a revival of family-wage jobs for less-educated individuals, to increase the pool of marriageable men and decrease the number of women who feel compelled financially to stay with an unreliable man; and relationship counseling both before and after young people enter cohabiting relationships.

Id.

Williams, Unbending Gender, supra note 63, at 25.

Id. at 65; Joan C. Williams, Reshaping the Work-Family Debate: Why Men and Class Matter 77-108 (2010) [hereinafter Williams, Reshaping].

I am indebted to Ann McGinley for suggesting the link between capitalism and masculinities. She is the foremost scholar on masculinities as expressed at work. See Ann C. McGinley, Masculinities and the Law at Work: Interpreting Employment Discrimination Law (forthcoming 2013). The essential support of workers with a flow of family work has been developed by Joan Williams. Williams, Unbending Gender, supra note 633, at 31.

Dowd, The Man Question, supra note 9, at 106-10. This is consistent with the breadwinner emphasis on the economic role of husbands and fathers:

The good-provider role, as it came to be shaped ... was thus restricted in what it was called upon to provide. Emotional expressivity was not included in the role. One of the things a parent might say about a man to persuade a daughter to marry him, or a daughter might say to explain to her parents why she wanted to, was not that he was a gentle, loving, or tender man but that he was a good provider. He might have many other qualities, good or bad, but if a man was a good provider, everything else was either gravy or the price one had to pay for a good provider.
... Loving attention and emotional involvement in the family were not part of a woman's implicit bargain with the good provider.

....

.... To be a man one had to be not only a provider but a good provider. Success in the good-provider role came in time to define masculinity itself. The good provider had to achieve, to win, to succeed, to dominate. He was a breadwinner.... The good provider became a player in the male competitive macho game. What one man provided for his family in the way of luxury and display had to be equaled or topped by what another could provide.... The psychic costs could be high.

Bernard, supra note 58, at 3-4. Even in more egalitarian times, research shows greater marital satisfaction when a man is a superior provider. See W. Bradford Wilcox & Steven L. Nock, What's Love Got to Do with It?: Equality, Equity, Commitment and Women's Marital Quality, 84 Soc. Forces 1321, 1322 (2006).


Doucet, Do Men Mother?, supra note 38, at 122; see also Randall, supra note 11.

McGinley, supra note 71; Williams, Reshaping, supra note 70.

See Andrea Doucet, “It's Almost Like I Have a Job, But I Don't Get Paid”: Fathers at Home Reconfiguring Work, Care, and Masculinity, 2 Fathering 277, 278 (2004). “As a man you have no status at all if you don't work.” Id. Men, nevertheless, benefit from being home with their children, and many shift in their perception of fatherhood and their interaction with their partners. Chesley, supra note 56, at 661-63. By contrast, when women leave wage work, this is constructed as a positive choice that is strongly reinforced:

The idea that women are autonomous, unsituated actors fully responsible for their secondary position in the workforce has also received a great deal of recent attention in the media. Lisa Belkin reported in the New York Times Magazine in 2003 that highly educated women are part of an “Opt-Out Revolution”: “Why don't women run the world? ... [B]ecause they don't want to.” According to the article, women's relative absence in senior positions in corporations and law firms is explained by their preferences for motherhood and homemaking. Similarly, in late 2005, a front-page New York Times story reported that sixty percent of female students at Yale planned to retreat from promising careers and become stay-at-home mothers once they had children. Even former Harvard University President Lawrence Summers suggested last year that women prefer motherhood over the demands of “high-powered intense work.” These popular depictions of women construct the glass ceiling and pink ghetto as the product of women's personal choices.


Dowd, From Genes, supra note 8, at 81-82.

See Dowd, The Man Question, supra note 9, at 62.


See Dan Kindlon & Michael Thompson, Raising Cain: Protecting the Emotional Life of Boys 80-82 (1999). This is particularly strongly enforced at adolescence. Id.


See Dowd, The Man Question, supra note 9 at 105; see also John M. Kang, The Burdens of Manliness, 33 Harv. J.L. & Gender 477, 486-88 (2010). David Leverenz calls the avoidance of humiliation the core command of masculinity. David Leverenz, Manhood, Humiliation, and Public Life: Some Stories, 71 Southwest Rev. 442, 442-62 (1986). Joseph Pleck argues that men are constantly dealing with gender role strain, that is, conforming their conduct to prescribed gender roles, and any nonconformity

83 Dowd, The Man Question, supra note 9, at 62-64.
84 Id. at 108-09; see also Doucet, Do Men Mother?, supra note 38 at 122; Cahn, supra note 11, at 181-86.
86 Dowd, The Man Question, supra note 9, at 113-14.
87 This links to seeing men's parenting as distinctive, not as men mothering. See Doucet, Do Men Mother?, supra note 38, at 122.
88 See Berkstrand-Reid, supra note 11, at 664-65. “Fathers are portrayed as heroes for being at home, while women are dropouts or even, in their own words, traitors for turning their backs on the feminist revolution that enabled them to work in the first place.” Id. As she notes, however, these media portrayals may also include masculinity concerns, that is, if these are still “real” men. Id. at 670-71.
89 Both reports and scholarship that herald women's achievements and those that caution that equality has not yet been achieved see wage-work as valuable, and that achieving success in those spheres where men have been better paid or the only occupants of jobs is necessary to equality. See, e.g., Inst. for Women's Pol'y Res., http://www.iwpr.org/initiatives (last visited Sept. 14, 2012); Women & Work, http://womenandwork.org/ (last visited Sept. 14, 2012); Ctr. for Women & Work, http://smlr.rutgers.edu/cww/ (last visited Sept. 14, 2012).
90 Joan Williams has argued men are slow to change because they cannot afford it and more importantly, it is so tied to their identity. Williams, Unbending Gender, supra note 63, at 59-60. She gives the following example of how difficult it is to change or “bend” gender: “Picture a man in a skirt. One sees them in gay rights parades but never on the bus, for a simple reason: They would stand in serious danger of getting beaten up. This is a simple but pointed example of gender pressures on men.” Id. at 245. Recent stories suggest alarm over men's declining place in the workplace. Silbaugh, supra note 53, at 746-48; Andrew Romano & Tony Dokoupil, Men's Lib, Newsweek, Sept. 20, 2010, http://www.thedailybeast.com/newsweek/2010/09/20/why-we-need-to-reimagine-masculinity.html; Hanna Rosin, The End of Men, The Atlantic, July/Aug 2010, http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135/.
91 Silbaugh suggests that changes in men's labor force patterns, particularly in the recession, combined with continued calls for greater engagement in family work, lead to the potential for change in masculinities that might go in two directions that echo the sameness-difference debate in feminism. Silbaugh, supra note 53, at 741. That is, one route would be “a cultural component aimed at helping men invent a wider range of masculinities.” Williams, Reshaping, supra note 70, at 91. Silbaugh characterizes this as:
92 Dowd, The Man Question, supra note 9, at 57, 62-63.
“[A]lthough men may be in power everywhere one cares to look, individual men are not ‘in power,’ and they do not feel powerful.” Kimmel, supra note 64, at 93. R.W. Connell identifies the benefit men receive from their dominance over women as the patriarchal dividend, but also notes that few men achieve the actual benefit of men's dominance. Connell, Masculinities, supra note 64, at 77. Manhood is seen as something difficult to attain and continually tested. David D. Gilmore, Manhood in the Making: Cultural Concepts of Masculinity 77 (1990). Most importantly, it is measured and achieved in relation to other men. Kimmel, Homophobia, supra note 64, at 223.

Dowd, The Man Question, supra note 9, at 31.

Given family patterns, such a configuration is quite common. See supra note 44.


On men and violence, see James W. Messerschmidt, Masculinities and Crime: Critique and Reconceptualization of Theory (1993); Prison Masculinities 3-6 (Don Sabo et al. eds., 2001); James W. Messerschmidt, Masculinities, Crime, and Prison, in Prison Masculinities supra, at 67-68; James W. Messerschmidt, Men Victimizing Men: The Case of Lynching, 1865-1900, in Masculinities and Violence 125 (Lee H. Bowker ed., 1998).


Get the Facts, supra note 98.


Two psychologists have described two patterns of male batterers: “pit bulls” who act aggressively to defend themselves against others who threaten “their” women, and “cobras” who in effect are sociopaths who feed on control. Pit bulls in particular strike out both at partners (or former partners) and new relationships. The quintessential case involved O.J. Simpson. Neil Jacobsen & John Gottsman, When Men Batter Women: New Insights into Ending Abusive Relationships (1998). The commonness of batterers being triggered by post-separation relationships makes this part of the list of risks after a victim leaves her batterer. See, e.g., Domestic Violence: Post-Separation Violence, AbuseWatch.net, http://www.abusewatch.net/DV_post.php (last visited Sept. 14, 2012).


For overviews of work-family policy, or the lack of it, in the U.S., see Waldfogel, supra note 7; Williams, Reshaping, supra note 70; Nancy E. Dowd, Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policy, 73 U. Cin.


See Dowd, Envisioning, supra note 104, at 315. For discussion of child care policy, see Dinner, supra note 2, at 457-64. For a broader look at tax policy and equality issues, focused primarily on women, see generally Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional Choices, 96 Colum. L. Rev. 2001 (1996).

See generally James E. Ryan, A Constitutional Right to Preschool?, 94 Cal. L. Rev. 49 (2006). Ryan states twenty-five percent of children ages 3-5 attend public preschool, twenty-five percent attend private preschool, and fifty percent do not attend preschool. Id. at 49.

See Suk, supra note 105, at 9-11. Suk outlines the development of pregnancy discrimination litigation designed to treat pregnancy as a disability to be covered the same as sick leave or disability leave. Id. But as Suk notes, neither form of leave is universally mandated. Id. Efforts to expand parental or maternity leave have suffered, she argues, from this connection to a more universal approach, and fears of the cost of universal entitlement. Id.


See generally Williams, Reshaping, supra note 70; Dowd, Envisioning, supra note 104; Suk, supra note 105.


124 Bennhold, supra note 122.

125 See Suk, supra note 105, at 60-63; see also Jessica A. Clarke, Beyond Equality?: Against the Universal Turn in Workplace Protections, 86 Ind. L.J. 1219, 1234-37 (2011). For another comparison to other countries, see generally Making Men into Fathers: Men, Masculinities and the Social Politics of Fatherhood (Barbara Hobson ed., 2002).


127 Id. at 586-95.

128 Id. at 573-98.

129 Ann C. McGinley, Work, Caregiving, and Masculinities, 34 Seattle U. L. Rev. 703 (2011); see also McGinley, supra note 71.

130 Williams, Unbending Gender, supra note 63.

131 Williams, Reshaping, supra note 70, at 1-2.

132 32. Id. at 106-07.

133 Id. at 2.

134 Dowd, Redefining Fatherhood, supra note 8; Dowd, From Genes, supra note 8.

135 Dowd, Redefining Fatherhood, supra note 8, at 58-65; Richard Collier & Sally Sheldon, Fathers' Rights, Fatherhood and Law Reform-- International Perspectives, in Fathers' Rights Activism and Law Reform in Comparative Perspective 1-27 (Richard Collier & Sally Sheldon eds., 2006).

136 See Dowd, Redefining Fatherhood, supra note 8, at 136.

137 See generally Insabella et al., supra note 50; Mabry, supra note 50; Maldonado, supra note 50; Graeme B. Wilson, The Non-Resident Parental Role for Separated Fathers: A Review, 20 Int'l J.L. Pol'y & Fam. 286 (2006).

See Dowd, Redefining Fatherhood, supra note 8, at 173-80; see also Dowd, Fathers and the Supreme Court, supra note 8.

See supra note 44 and accompanying text.


See Parness, supra note 138, at 60 n.1, 61.

See Waller, Family Man, supra note 46, at 161, 166, 170; Waller, Viewing Low-Income Fathers, supra note 46, at 112-13.

See Waller, Family Man, supra note 46, at 171-73.


See Waller, Viewing Low-Income Fathers, supra note 46, at 110, 113.

Id.

See generally Rebecca J. Cook & Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives (2010).

See id. at 9.

Id. at 3.

See id. at 36-37.

Numerous models exist based on the policies and experience of other countries, on both gender neutral work-family policies and specific policies geared to fathers. See generally Waldfogel, supra note 7; Shirley Gatenio Gabel & Sheila B. Kamerman, Investing in Children: Public Commitment in Twenty-One Industrialized Countries, 80 Soc. Serv. Rev. 239 (2006).

See Dowd, supra note 96, at 232; Melanie B. Jacobs, Why Just Two?: Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents, 9 J.L. & Fam. Stud. 309, 339 (2007). An alternative would be a vision of serial fatherhood for children, that is, their “father” would be the man who has a social relationship with them and their mother. Serial fatherhood, however, remains unsupported empirically as being in the best interests of children. That is, it has not been demonstrated that successive fathers are preferable for children. A serial-fatherhood model would mean supporting the father who is present in the lives of children. A traditional-father model would mean supporting the identified, sole father, preferably biological and marital, but at a minimum biological. Currently, family law predominantly supports a traditional-
family model, modified to include nonmarital fathers, but does so primarily to achieve economic support of children. At the same time, social fathers are not legally supported at all unless they attain the status of legal fathers under paternity laws.

One recent example of the potential for positive, multiple, nontraditional concepts of fatherhood is present in the lives of children conceived prior to the tragedies on September 11, 2001 who lost their fathers in that tragedy. In some of those families, a stepparent has joined the family and serves as the only parent known to the child, while at the same time their biological parent is remembered and honored within the family. In some of these families, older siblings have a social and experiential relationship with their father who perished in the tragedy of September 11th, and with their stepfather. These stories capture some of the possibilities of fatherhood. See Elizabeth McNeil, Legacy of Love: The Children of 9/11, People Mag., September 12, 2011, at 63, 63-77.

See Kimmel, Homophobia, supra note 64; Matthew Jakupcak et al., Masculinity, Shame, and Fear of Emotions as Predictors of Men's Expressions of Anger and Hostility, 6 Psychol. Men & Masculinity 275, 275-76 (2005). Pollack points out that this process begins very young:

Researchers have found that at birth, and for several months afterward, male infants are actually more emotionally expressive than female babies. But by the time boys reach elementary school much of their emotional expressiveness has been lost or has gone underground....

Recent research points to two primary causes for this change ... [t]he first reason is the use of shame in the toughening-up process by which it's assumed boys need to be raised. Little boys are made to feel ashamed of their feelings, guilty especially about feelings of weakness, vulnerability, fear, and despair.

....

The use of shame to "control" boys is pervasive ....


See generally Pascoe, supra note 81.

This is particularly critical when vulnerability is linked with fear, and might be identified as cowardice.

If the quintessential virtue of manliness is physical courage, as I have claimed, then soldiers in combat are best suited to afford testimony about its meaning. What they reveal is a uncannily paradoxical view of manliness where courage, the defining male virtue, is often impelled by the feminine vice of cowardice....

....

Not every man cares about being manly, nor does every man who wishes to be manly believe that he is so, at least not all of the time. But every man knows that he lives in a world where he is expected to adhere to an ideal of manliness in which courage is the foremost virtue. I have suggested, however, that there is a paradox that underlies and complicates this expectation. Men often behave with manifest valor because they are terrified of seeming afraid. Cowardice, a feminine vice, thus often tends to propel the manly virtue of courage.

John Kang, Manliness' Paradox, in Masculinities and the Law, supra note 9, at 140, 144 (internal citations omitted). Kang collects many examples both historical and current of how this paradoxical interconnection functions. See also John M. Kang, Manliness and the Constitution, 32 Harv. J.L. & Pub. Pol'y 261 (2009). One very “public” example is the use of public humiliation during World War I in Great Britain, through the use of the White Feather Campaign. When the military was an all-volunteer army, women were encouraged to confront young men who failed to do their duty by presenting them--publicly--with a white feather. This public shaming proved very effective. See Peter J. Hart, The White Feather Campaign: A Struggle with Masculinity During World War I, Student Pulse, (2010), http://www.studentpulse.com/articles/151/the-white-feather-campaign-a-struggle-with-masculinity-during-world-war-i#. Another place where shame functions strongly for men is in the interaction of honor and shame. David Levernz, Honor, in Men and Masculinities: A Social, Cultural, and Historical Encyclopedia 398-400 (Michael Kimmel & Amy Aronson eds., 2003).

See generally Brené Brown, I Thought It Was Just Me (But It Isn't): Telling the Truth about Perfectionism, Inadequacy, and Power (2007).
160  Id. at 5.
161  Id. at 18.
162  Id. at 20.
163  Brown, supra note 159, at 268-269.
164  Id. at 31.
165  Id. at 42.
167  See id.
169  See Jakupcak, supra note 156, at 275-76.
Men may come to fear tender or vulnerable emotional states, in part because of masculine gender norms that prohibit this aspect of emotionality.... Thus, boys and men may come to associate their masculine identity with extreme stoicism, such that experiences of strong emotions may cause men to feel intense shame.
... “Rather than being able to tolerate and modulate shame states, males are likely to react with avoidance, compensatory behaviors, and primitive fight-flight responses.” These primitive fight-or-flight responses have been observed in men prone to violence....
The shame men might experience in response to their own emotional reactions can lead to a fear and avoidance of emotionality. Id. Frank Cooper has analyzed how vulnerability and hierarchy function in police stops to escalate outcomes. See generally Frank Rudy Cooper, Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian, 11 Nev. L.J. 1 (2010); Frank Rudy Cooper, “Who's the Man?”: Masculinities Studies, Terry Stops, and Policy Training, 18 Colum. J. Gender & Law 671 (2009). The consequences of shame for masculinities norms also contribute to domestic violence. For an overview of this complex subject, see generally Linda G. Mills, Shame and Intimate Abuse: The Critical Missing Link Between Cause and Cure, 30 Child. & Youth Services Rev. 631 (2008).
170  Brown, supra note 159, at 280.
171  Id. at 280-81.
172  Id. at 285.
174  Fineman, Responsive State, supra note 14, at 269-73.
175  Id. at 167-68.
176  Id. at 8-9.
177  Id. at 12.
178 Fineman, Anchoring Equality, supra note 14; Fineman, Responsive State, supra note 14.

179 Fineman, Anchoring Equality, supra note 14, at 13-16.

180 Id. at 13-15.

181 Id. at 14.


183 Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 253 (codified at 42 USC § 2000e) (2006). As a result of court cases under Title VII, employers have engaged in sexual harassment training and diversity training, as well as affirmative action in hiring and promotion, as ways to proactively avoid liability under the statute and achieve a more diverse workplace and equitable workplace culture. Similar affirmative efforts have occurred as the result of the prohibition against gender discrimination in educational institutions, revolutionizing women's opportunities in sports and addressing sexual harassment. See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 373 (codified at 20 U.S.C. § 1681) (2006); see also 34 C.F.R. § 106 (2006) (promulgating regulations according to Title IX).

184 Domestic violence has shifted from being an ignored, privatized harm to a civil rights and public health issue that has generated significant legal and social change. See generally Office on Violence Against Women, U.S. Dep't of Justice, http://www.ovw.usdoj.gov/ (last visited Sept. 14, 2012).


45 SFKULR 1047
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. 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. 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.

Public rhetoric in the United States has always strongly supported families. Our policies, however, have not. In the area of work/family policy, the United States continues to lag behind every other advanced industrialized country, as well as many developing countries, in the degree to which we provide affirmative support for families. Limited family leave and child-care support are halting steps toward a policy that affirmatively supports families.

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. Thus, children struggle because their families struggle. 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 put in place. 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, 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. 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. Race is the central issue that must be addressed within the presumed gender focus of work/family issues. In the context of ongoing racial inequality, 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 work and caregiving roles, advocates must envision deracialized gender equality and design policies to achieve it.

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. 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. 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. While remaining attentive to context and multiple intersecting systems of subordination, 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. In addition to its significance as a critical component in the methodology of antiessentialist feminist legal theory, race should be centered in feminist analysis because it is the core inequality with which gender intersects. 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.

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. 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 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. 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-
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

*229 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  *230 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 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 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 *233 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 *234 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 *235 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 *236* 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 *237* 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.

*238 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. The structure of child-care also is raced. Middle-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 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.

*241 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. *242 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.

*243 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 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- 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, 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. 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 would not be to eliminate gender roles, but rather to equally support gender roles.

The consequences of choosing any of these models are significant. We begin from a context that supports a traditional allocation of gender roles. 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.

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 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. 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.

*248 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 *249 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.

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 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.

Footnotes

1 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.


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).


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
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 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 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.
- 1 in 1,056 will be killed by guns before age 20.


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).
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.

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.


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).


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).

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

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).


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


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.


In Defense, supra note 30, at 18-20. See also supra note 8.

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

See Restructuring the Workplace, supra note 26, at 451-68.

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

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

See supra note 13.

See supra note 13.

See supra note 13.

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.

Id. at 1.

Id. at 2 fig. 1.

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

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).

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


Family Policies, supra note 45.

Id.


Id.

Id.
Id.

Id.


McGlynn, supra note 50.

Id.

Gornick & Meyers, supra note 49.

Id. at 24 n.14.

Id.

Id.

Id. at 28.


Id. at 180.

Id.

Id.


Id.


Id.

Wiseman, supra note 68, at 219-22.


Id.

Id.

Id.
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.

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 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.

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).

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.

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).

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

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.

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).

In Defense, supra note 30.


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

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
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. McCaffrey, 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).


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


This is an approach that mirrors the analysis of Fineman, supra note 94.


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