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MOTHERHOOD V. EQUAL TREATMENT

By Mary Ann Mason*

I. INTRODUCTION

In 1908 the United States Supreme Court in Muller v. Oregon, upheld an Oregon law limiting a factory woman's labor to ten hours a day on the following grounds:

That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her . . . as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.¹

By contrast, in 1984 the National Organization for Women and the National Women’s Political Caucus, among others, filed an amicus

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¹ 208 U.S. 412, 421 (1908) (upholding Lochner v. N.Y., 198 U.S. 45 (1905). This ruling was influenced by a brief presented by Louis Brandeis as attorney for several women's organizations in which he contended that as potential mothers women needed special legislation to protect them from jobs or occupational situations that could be injurious to their health.
This amicus brief supported the Savings and Loan's challenge to a California statute mandating four months unpaid maternity leave with a right to return to the same or equivalent job. The brief argued that men were not equally protected and asked the court to treat maternity as any other disability which could be experienced by men. The Ninth Circuit court defended the maternity statute and the matter was appealed to the Supreme Court. The highest Court's reasoning will be discussed below.

Maternity and motherhood are seen as treacherous topics by those seeking equal rights for women. They believe that to recognize the biological and social condition of childbearing and childrearing as a feminine characteristic is to open the door to classifying women for separate, unequal treatment under the law.
Historically, there is no doubt that women often have been treated in a separate and severely restricted manner, in large part to secure and promote their role as mothers and homemakers. Throughout much of the eighteenth and nineteenth centuries married women were unable to sign contracts; they lacked title to the wages they earned and to property, even when owned by them before marriage. In the event of legal separation the father assumed custody of the children. In an alleged spirit of kind paternalism the individual rights of women were unfairly curtailed.8

Early feminists railed against this differential legislation and helped to push legislation which gave women the right to own property and to control their own wages. However, most feminists viewed early twentieth century labor legislation that gave women protections not available to men as quite a different matter. Increasing numbers of women were working in factories where the conditions often would shock our modern notions of workplace. Twelve hour and fourteen hour shifts in seriously unsafe and unsanitary environments made legislation to improve the working conditions for women a high priority for feminists of the time.9 In fact, the majority of feminists during the 20's and 30's consistently opposed the ERA and Alice Paul's National Woman's Party. They believed the Party was made up of professional women who had no concern for the plight of the poor working women who would lose protective legislation as a consequence of the ERA.10

Protective legislation may have put women at some competitive disadvantage with men, but it also made their lives tolerable. By contrast, the courts at that time regularly struck down any state laws

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9 Banner, supra note 8, at 101, 102.
10 The major women's organizations worked together to persuade two-thirds of the states to approve women's suffrage in 1920. The groups split sharply over the introduction in Congress of the Equal Rights Amendment in 1923. The amendment was sponsored by Alice Paul and the National Women's Party, which was primarily composed of professional and upper or upper middle-class women. It was strongly opposed by social reformers as represented by Florence Kelley and the National Consumer's League, a coalition of progressive and union feminists. During the 1930s the National Association of Women Lawyers and the National Federation of Business and Professional Women sponsored the ERA, but it still received strong opposition from Labor. For a thorough discussion of the history of the ERA, see Mansbridge, Why We Lost the ERA, 8-19 (1986).
which would ameliorate the ghastly conditions under which men worked on the ground that it would interfere with the freedom of contract between employer and employee.\textsuperscript{11} Thus, the "special" treatment given to women regarding working conditions protected them to some extent from the dismal work life to which they would otherwise be subject.

The current effort to reject special consideration and to treat maternity as a short term disability\textsuperscript{12} may be a case of literally throwing the baby out with the bath. The historical justification for preferential treatment toward women was not only to put them aside as weaker, and therefore lesser, it was also, in the language of the Supreme Court in \textit{Muller v. Oregon}, "essential to vigorous offspring."\textsuperscript{13} The Supreme Court was also considering the potential effect on children in evaluating the punishing physical conditions of labor for women.

By asking to treat maternity as a disability like any other, proponents of this view do not consider the need of the newborn baby to be with his or her mother for a longer period than is normally given for a disability. Such treatment sets the model for a workplace in which the needs of children are rarely considered or even mentioned.

At home, the so-called "revolution" in family law has meant a sharp turning away from the special treatment accorded mothers and children to an individualistic model where husband and wife are considered equally capable of taking care of themselves following divorce and fathers are viewed as interchangeable with mothers in custody disputes. The interests of the children are considered only secondarily within this new framework.\textsuperscript{14}

\textsuperscript{11} Three years before \textit{Muller v. Oregon}, 208 U.S. 412 (1908), the Court had ruled in \textit{Lochner v. New York}, 198 U.S. 45 (1905), that maximum hour legislation covering men as well as women was contrary to an individual's constitutionally guaranteed freedom to enter into contracts.

\textsuperscript{12} \textit{See supra} note 5 and accompanying text.

\textsuperscript{13} \textit{Muller}, 208 U.S. at 421.

\textsuperscript{14} Children's "rights" have generally remained a moral, and not a legal, duty of parents, essentially because the law cannot impose such broad affirmative obligations on parents. Hafen, \textit{The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests}, 81 MICH. L. REV. 463, 473 (1983). While minors are not guaranteed what Hafen terms "choice rights"—rights representing "legal authority to make affirmative binding decisions of lasting consequence," such as marriage, contracting, and voting, they are guaranteed "protection rights." Protection rights include rights to property, rights to physical protection, and the right not to be imprisoned without due process, and no minimum capacity is required to claim those rights. \textit{Id.} at 511-12.
The pregnancy/maternity issue is at the crux of most controversies regarding equal versus special treatment for women, but it is only the most obvious manifestation of the critical role that children play in the lives of most women. The needs of children greatly influence the role of women in the workplace and control the experience of women at home in an intact marriage and following a divorce. Yet the thrust of the law and policy for more than two decades has been to systematically treat women as it already treats men and to give no consideration to the role of motherhood or to the needs of children. Equal treatment should not be the focus when a third party is involved.

Equal treatment proponents claim that children are the equal responsibility of mother and father, that true equality between the sexes will occur when the burden is shared and that this will work out well for the children. This position belies the fact that after twenty years of efforts in that direction, women still bear the major responsibility for children in two-parent households, and that one quarter of all children live with mothers as the single parent. It also fails to address the shortcomings of a model of equality in the workplace where the needs of children are not considered.

The lives of modern women are significantly different than previous generations in two respects. They are more likely to become lifelong participants in the workforce and they are very likely to experience divorce. In both these areas the laws have turned dramatically toward equal treatment. With more than twenty years experience to

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16 In spite of the 20-year push for equal parenting, women are still the primary caretakers in the vast majority of families. See infra note 117. See also discussion on mother and father attachments infra notes 113, 114 and accompanying text.

16 Betty Friedan, in defining the second stage of the movement toward equality, observed: "In the current transition, 'women increasingly share the breadwinning role with men but retain most of the responsibility for the home.' In 'the as-yet-unrealized ideal,' the family will again become symmetrical, when 'both the financial support and physical maintenance of the family are equally shared between men and women.'" B. FRIEDAN, THE SECOND STAGE 112 (1981).

17 See infra note 117.

16 Civil Rights Commission Report, as quoted in Playing Both Father and Mother, NEWSWEEK, July 15, 1985, at 42, 46.

19 See infra notes 128-44 and accompanying text for discussion of limitations of equal rights strategy in the workplace.

20 Between 1940 and 1986 the percentage of women in the job market doubled to 56% of women under age 65. About two-thirds are now in the labor force. B. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 5 (1986).

21 Demographers predict that at least half of current American marriages will eventually end in divorce. L. WEITZMAN, THE DIVORCE REVOLUTION xvii (1985).
evaluate the impact of this change, it appears that this orientation has too often failed mothers and children.

This article will attempt to systematically analyze the shift toward equal treatment and its impact on mothers and children. It will also suggest a new framework which considers the reality of motherhood and the needs of children.

Part Two deals with the Supreme Court's struggle to support gender neutral laws and policies while still maintaining a concern for the needs of motherhood.

Part Three focuses on the radically changing laws in divorce and custody and their impact on mothers and children. The abolition of the maternal preference in custody legislation is particularly scrutinized.

Part Four examines the limits of Title VII with its male ideology in changing the structure of the workplace. The role of motherhood in determining work choices is examined and the value and limits of a comparable worth analysis in altering the wage gap are explored. Strategies to support mothers in the workplace, such as fully benefited part-time tracks, maternity leaves and other child-oriented tactics are examined.

II. THE SUPREME COURT AND MOTHERHOOD

The Supreme Court has struck an uneven course in reviewing legislation which treats men and women differently. Although it is difficult to pick out a completely consistent underlying theme, it may be argued that the Supreme Court's indecision about differential treatment for women is based on their sometimes unspoken concern for mothers and children. The issue of motherhood is prominent in two lines of cases: those involving sex discrimination and those involving a right to privacy.

A. Sex Discrimination Cases

The first case in which the Supreme Court tackled equal treatment in the modern spirit was *Reed v. Reed*. The Court overturned an Idaho statute which gave preference to men over women in the selection of estate administrators. Justice Burger, delivering the majority opinion, stated: "To give a mandatory preference to members of either

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\[\text{404 U.S. 71 (1971).}\]
sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection clause..."

The Supreme Court's next significant effort to define the rules governing when and if the state can make distinctions between men and women was *Frontiero v. Richardson*. This decision focused on a statute which provided dependent's benefits to the wife of a soldier without having to prove dependency, while the husband could claim dependency only if more than one-half of his support had been provided by his wife. The Court agreed eight to one that this was unconstitutional, but they agreed for different reasons. Four justices managed to agree on a strong line and claimed: "Classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect." This reasoning, by admittedly a minority of the Supreme Court, for a short time seemed to put sex in the same suspect classification as race, alienage, and national origin. This reasoning would subject any rules based on sex to strict scrutiny, justifying these rules only when a compelling state interest was at stake.

This equal footing between sex and race was short lived, however. It was reversed or at least turned back significantly in *Craig v. Boren*, where the issue was whether Oklahoma could require men to be twenty-one to buy 3.2 beer, while permitting women to buy it at age eighteen. Here the court announced a new standard: laws could distinguish between men and women, but "such laws must serve important governmental objectives and must be substantially related to achievement of those objectives."

Why did the Supreme Court give sex the mild "important governmental objectives" standard rather than the tough "compelling state interest" standard that is applied to racial and ethnic groups? In light of the subsequent line of cases, one could infer that a special consideration for motherhood may have been a critical, but unspoken factor in its choice of the weaker standard.

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23 *Id.* at 76.
25 *Id.* at 682.
26 429 U.S. 190 (1976).
27 *Id.* at 197.
28 *Id.*
In 1981, the Supreme Court offered yet a new standard of constitutional review in dealing with laws that treat men and women differently. In a pair of cases the Court ruled that women are in some circumstances "not similarly situated" with respect to the law, and can be accorded different treatment. In the first of the cases, Michael M. v. Superior Court of Sonoma County, California's statutory rape law was challenged on the grounds that the criminal violation applied only to men and not women. The Court first restated the holding in Craig v. Boren that gender classifications are not "inherently suspect" so as to be subject to so-called "strict scrutiny," but will be upheld if they bear a "fair and substantial relationship" to legitimate state ends. The Court then expanded this doctrine, declaring that "a statute will be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."

The factor that determines that the sexes are not similarly situated in this case is the possibility of pregnancy. The Court argued that "the statute protects women from sexual intercourse and pregnancy at any age when the physical, emotional, and psychological consequences are particularly severe." They agreed with the logic of the California Supreme Court which catalogued "the tragic costs of human pregnancies" including the large number of teenage abortions, the increased medical risk associated with teenage pregnancies, and the social consequences of teenage childbearing.

In Michael M., the Court not only expressed a protective interest in the unwanted pregnancy of a minor, but also in the condition of motherhood, and in the child that could be the product of the pregnancy. In determining that only the male would be held criminally liable, the Court implicitly upheld a now old-fashioned concept of sexuality which targets the male as the aggressor and responsible for the sexual event. It could have protected society from "the tragic costs of human pregnancies" by insisting that the law make females criminally

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30 Michael M., 450 U.S. at 469.
31 "Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe." Id. at 471-472.
32 Id. at 467.
liable as well. But clearly the Court felt that women bear the brunt of early, unwanted pregnancy and motherhood.\(^\text{33}\) and assigning responsibility to men to prevent this was not necessarily an equal, but rather an equitable solution.

Almost immediately following the *Michael M.* decision, the Court applied its newly developed standard of "not similarly situated" to a challenge of the Military Selective Service Act which excluded women from combat. The Court in *Rostker v. Goldberg* declared that "since men and women are excluded from combat service by statute or military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft, and Congress’ decision to authorize registration of men only, therefore, does not violate the Due Process Clause."\(^\text{34}\)

This decision, however, tells us little about the Court’s attitude about women in the military except that they are unwilling to challenge their exclusion. With extreme deference to Congress, the Court did not question the basis of Congressional policy which excluded women from combat, but claimed that Congress has held hearings in response to the President’s request to register women in 1980 and that its decision “was not the accidental by-product of a traditional way of thinking about females.”\(^\text{35}\)

The major case directly confronting the issue of women receiving preferential benefits for maternity did not invoke the “not similarly situated” analysis but was decided as a federal preemption issue. *California Federal Savings and Loan Association v. Guerra*, mentioned above, challenged a California law which allowed the mother to return to the same or similar job after an unpaid maternity leave of four months.\(^\text{36}\) The plaintiff claimed that under the Pregnancy Discrimination Act\(^\text{37}\) a pregnant woman must be given equal, not preferential, treatment over other workers.

\(^{32}\) "Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves roughly to 'equalize' the deterrent on the sexes." *Id.* at 473.

\(^{34}\) "Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft. . . . The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality." 453 U.S. at 78-79.

\(^{35}\) *Rostker*, 453 U.S. at 74.

\(^{36}\) 479 U.S. 272, 276 (1987) (upholding *CAL. GOVT. CODE*, § 12,945(b)(2) (West 1980)).

Without mentioning the word mother or baby, the Court struggled to uphold what it clearly believed to be a good law, in the face of two pieces of legislation that appear to mandate strict gender equality. Following the logic of the Ninth Circuit, the Court reasoned that the intent of Congress in passing the Pregnancy Discrimination Act, the 1978 amendment to Title VII of the Civil Rights Act of 1964 was to provide "'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"38

Marshall, writing for the majority, makes the critical connection between pregnancy leave and the role of motherhood. "By 'taking pregnancy into account,' California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs."39

Having delicately established that pregnancy is related to family, Marshall is quick to point out that this does not make it protective legislation in the bad sense of early protective labor laws. The statute is narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions. Accordingly, unlike the protective labor legislation prevalent earlier in this century, Sec. 12945(b)(2) does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers.40

B. Privacy Cases

Motherhood is a distinct issue in the line of privacy cases as well; the concern for motherhood is not just with reproductive rights, but also for the quality of life of mother and child after birth.

Griswold v. Connecticut41 established the constitutionally implied right of privacy in the marriage relationship. In this area, husband and wife presumably have equal rights of privacy. The Court expanded the

Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in Gilbert and to illustrate how discrimination against pregnancy is to be remedied. Cf. 462 U.S. at 678, n.14. . . . Accordingly, subject to certain limitations, we agree with the Court of Appeals' conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."

39 Id. at 289.
40 Id. at 290.
41 381 U.S. 479 (1965).
right of privacy to include single, unmarried persons and expanded the emphasis to the right to procreate in *Eisenstadt v. Baird.*\(^4\) "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\(^4\)\(^5\) Once again, men and women are given equal treatment in this decision.

Eight years after *Griswold,* *Roe v. Wade*\(^4\) introduced a potential third party consideration, the fetus. The nearly impossible dilemma of competing interests is resolved by *Roe v. Wade* in favor of the mother. This right is not unqualified, however; the developing fetus accrues more rights as the weeks pass and following the second trimester the state may protect the fetus' rights as a potential human life and ban abortion.\(^4\) In this triad of mother, fetus, and father, the father's rights are not mentioned.

Although considered by many to be an anti-motherhood decision, a concern for the burdens and obligations of motherhood is at the heart of *Roe.* In this difficult opinion, the Court clearly expressed its concern for the mother and for the child produced by an unwanted pregnancy. Blackmun stated for the majority:

\(^4\) 405 U.S. 438 (1972).
\(^3\) *Id.* at 453.
\(^4\) 410 U.S. 113 (1973).
\(^4\) *Id.* at 153, 154. "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154.

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

   (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

   (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

   (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even prescribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

*Id.* at 164-65.
Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.46

The first major challenge to this decision, Planned Parenthood of Missouri v. Danforth,47 raised the issue of the fathers' rights, ignored in Roe. At issue was a Missouri statute which dictated that before a woman could obtain an abortion, she must obtain the written consent of her husband. The Court invalidated the statute, claiming that "since the state cannot prohibit abortion during the first stage of pregnancy, the state cannot delegate the authority to any particular person, even the spouse, to prevent abortion during the same period."48 To date the Court has remained steadfast in its refusal to recognize fathers as having any rights when in conflict with the fundamental rights of women/mothers in procreation. In Paris Adult Theatre I v. Slaton,49 decided the same year as Roe, the Court in dicta clearly identified motherhood as a fundamental privacy right with no mention of fatherhood: "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."50

The Supreme Court, then, far from giving men and women strictly equal treatment, has left room for giving women special consideration as mothers. This is an uneasy, hesitant, and at times inconsistent accommodation,51 but the recognition that "the sexes are not similarly

46 Id. at 153.
48 Id. at 69.
50 Id. at 65. In this case, two Atlanta theater owners challenged a Georgia law that prohibited exhibition of obscene material. The Court held, in part, that the constitutional doctrine of privacy does not protect exhibition of obscene material in places of public accommodation. Id. at 66-67.
51 In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Court took a seemingly strong stand against special protection for mothers. The Court here overturned a provision of the Social Security Act that gave financial support to a woman, but not to a man who remained home to care for the children after the spouse had died. "A father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody and management' of 'the children he has sired and raised, [which] undeniably warrants deference, absent a powerful countervailing interest protection.' " Id. at 652 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). In this instance, however, it may be argued that what is at stake is not the issue of equal treatment
situated in certain circumstances”52 and the adoption of motherhood as a fundamental privacy right53 allow the Supreme Court to maintain an open-eyed wariness to the potential unfairness of gender-blind laws and practices.

III. FAMILY LAW AND MOTHERHOOD

While the Supreme Court has been unwilling to adopt a complete gender-blind policy and has exhibited some consideration for motherhood, state legislatures have been eager to abolish the special preference traditionally given to mothers in divorce and custody law. To a lesser extent, the state courts have concurred in this movement. These rapid and drastic changes in the state laws toward a gender-free standard have mostly failed to consider that women are not “similarly situated” to men in divorce and custody issues, nor have they given top priority to the needs of the child.

In what must be considered a revolution in family law, all states have fundamentally rewritten their divorce and custody laws since 1970.54 Two basic changes which have affected the protected status of motherhood were the shift to no-fault divorce and the abolition of maternal preference in custody law combined with a strong leaning toward joint custody.55

A. No-Fault Divorce

Following the lead of California’s revolutionary Family Law Act of 1969,56 all states by 1985 offered some form of no-fault divorce.57 In some states one disgruntled party may simply complain that the marriage has reached a point of “irretrievable breakdown” with no requirement of proof; in other states “incompatibility” or “irreconcilable differences” must be demonstrated if one party objects, but it is considered sufficient proof if one partner chooses to walk out and live separately for a specified period of time. In some states, living separate between men and women, but rather the welfare of the children. Thus construed, this decision enhances the position of all three parties.

53 Paris Adult Theatre I v. Slaton, 413 U.S. at 65.
57 See Family Law in the Fifty States, supra note 55, at 441.
and apart for a period of time (from six months to three years) is deemed adequate grounds for divorce. The result is that in every state either the husband or the wife can leave a marriage at will.

The idea behind no-fault divorce was to treat the marital partners as equal, autonomous adults with the ability to make their own decisions without messy court battles. The old list of grounds for divorce: adultery, physical cruelty, desertion, and mental cruelty, seemed quite out of date. No-fault was very much in keeping with judicial trends toward individual rights in decision making as expressed in the areas of privacy, the right to die, and the rights of the mentally ill to reject civil commitment. It was also in tune with the significant increase of women in the workforce and the misconception that women could now support themselves as well as men could.

The basic flaw in the no-fault model is that individuals are rarely on an equal economic footing in marriage when children enter the equation. Where there are children, one partner must drastically cut his or her participation in the workplace. That partner is most often the mother. She may continue to work but most often cannot compete for the highest paid jobs that require more than a forty hour regular work week. If she stays home with the children, her earning potential dissipates by the year.

No-fault divorce made divorce easier for both mothers and fathers, but it particularly favored fathers by taking away the bargaining chip that was the mother's greatest asset under the fault system. Most di-

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58 Id.
59 Fault grounds, however, still play an important role in divorce. "Divorce for fault still offers an immediate 'out' in states with waiting periods for no-fault divorce. In many states, depending on which basis the divorce is obtained, marital fault still may affect the economic consequences of divorce and sometimes even questions of custody. Even where fault grounds were retained, however, the traditional defenses and bars typically were eliminated or weakened." H. Krause, supra note 54, at 338.
60 The concept of a constitutionally protected right of privacy was initiated in 1965 with Griswold v. Connecticut, 381 U.S. 479 (1965).
62 California's Lanterman-Petris-Short Act, which severely limited the conditions under which a mentally disordered person could be civilly committed, was passed in 1969. CAL. WELF. & INST. CODE §§ 5000-5599 (West 1984).
63 See sources cited infra note 82.
65 Id. See infra notes 141-43 on entrance of women into workforce and maintenance of wage gap due to segregation in female occupations.
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Divorces under the fault system were not actually contested, but negotiated. To obtain freedom a man had to make a generous economic settlement for his wife and children.66 No-fault, as it developed, following the California model, gave the right of unilateral divorce, with no defense or power left to the dissenting partner.

Unilateral divorce, the no-fault model, may be fair for partners who have no children, but it often produces severe economic hardship for the economically weaker parent, most often the mother.67 This is true for mothers whose children are still at home, or mothers whose lives have been dedicated in large part to children who are now grown. Children who still live at home will often continue to live with the economically disadvantaged parent and will therefore be economically disadvantaged themselves.68

B. Post No-Fault Property Division

Theoretically, the egalitarian foundation of no-fault divorce does not have to apply to property division, spousal support or child support. There, social reality and common sense could dictate that fair rather than equal treatment would mitigate the adverse economic impact on mothers and children.

In fact, property division, spousal support and child support have all been severely curtailed in the no-fault era.69 This reflects a legislative and judicial movement away from fault, the bargaining chip of the previous era, but also a movement toward equal treatment, disregarding economic reality. California led the way by removing fault as a

66 H. Krause, supra note 54 at 291-92.
67 Within the first year after divorce, divorced men experience an average 42% rise in their standard of living, while the standard of living for divorced women and their dependent children declines an average 73%. L. Weitzman, supra note 21, at 323. H. Krause, supra note 54, at 333.
68 Since divorced women typically experience more severe economic changes than divorced men, and since child-care responsibilities most often fall on the mother, the sharp decline in the mother’s standard of living leads to many dramatic, and often traumatic, changes for the children. Frequently the family home must be sold in order to divide community property, and the child must move away from friends, and begin at a new school. Not only do the children “lose” one parent, but, as the mothers must begin working, or work more to juggle the demands of both job and single parenthood, they have less contact with the primary caretaker as well. All of this is in addition to cuts in the family budget. L. Weitzman, supra note 21, at 318-22.
69 When fault was the sole basis for divorce, “innocent” wives could bargain for an economic settlement that would provide for their needs in exchange for granting the divorce. As “no-fault” divorce became the rule, this bargaining power was taken away, and property division is governed by specific property law. H. Krause, supra note 54, at 374.
factor in property and support awards and by repudiating any gender-based differences in determining these issues.\textsuperscript{70}

Fault played an important role in property division under the pre-no-fault model. As the court stated in the 1946 California case, \textit{Arnold v. Arnold},\textsuperscript{71}

The rule drawn from cases hereinafter cited is that the greater the offense the larger the proportion of the community property that must be awarded to the innocent spouse . . . . It obviously follows that where the divorce is granted on the more heinous grounds of adultery as well as for extreme cruelty the amount awarded to the innocent party should be greater than if granted on the ground of cruelty alone.\textsuperscript{72}

The post-no-fault division in California is quite different. Adhering to the strict principle of equal division of property, the main property to be divided in most cases is the family home. In the five years following the introduction of no-fault divorce the number of court orders to sell the family home rose from one in ten to one in three.\textsuperscript{73}

The momentum in most states following the elimination of fault as the basis for divorce, is to eliminate it as a consideration in property division as well. Eighteen states lead this trend by expressly excluding no-fault from consideration in distributing property, while ten states are silent on the issue.\textsuperscript{74}

Following the elimination of fault as a rule in dividing property, the states had no clear standards to follow. There is a good deal of controversy among family law scholars as to whether a community property (equal division), or an equitable (according to standards of

\textsuperscript{70} Professor Herma Hill Kay describes the 1972 legislative hearings in California which were devoted to the subject of how to handle community property following the passage of no-fault divorce in 1969. She notes that the climate of opinion, including the drive to pass the ERA then ongoing in California, pushed for equality between the sexes. "In the light of these circumstances, it is not surprising that the proponents of equal management powers for wives based their arguments primarily on the principle of equality." Kay, \textit{An Appraisal of California's No-Fault Divorce Law}, 75 \textit{CALIF. L. REV.} 291, 302 (1987).

\textsuperscript{71} 76 Cal. App. 2d 877, 174 P.2d 674 (1946).

\textsuperscript{72} Id. at —, 174 P.2d at 676.

\textsuperscript{73} L. WEITZMAN, supra note 21, at 31.

\textsuperscript{74} \textit{Family Law in the Fifty States,} supra note 55, Table V at 462, 463. The states excluding fault from consideration in distributing property are: Alaska, Arizona, California, Colorado, Delaware, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Montana, Oregon, Washington, Virgin Islands. Those silent on the issue of fault in property distribution are: Arkansas, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Utah, Puerto Rico.
fairness) model produces the best results for mothers and children following divorce.\(^7\)

Although it may be abused by judicial indiscretion, an equitable distribution model cuts down the rigid mandate of equal division and allows the needs of mothers and children to be addressed. The Uniform Marriage and Divorce Act, offered by the National Conference of Commissioners on Uniform State Laws, sets forth in gender-free language, equitable factors that may be considered:

- the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provision, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income.\(^6\)

C. Post No-Fault Alimony and Child Support

It is with alimony and child support that the mothers and children have suffered the greatest economic consequences of no-fault legislation and its carry-over into judicial attitudes.

Alimony has never been legally restricted to mothers.\(^7\) Presumably a divorced wife with no children would have rights as well as divorced wives who were also mothers. Legislative and judicial guidelines, however, before and after no-fault, considered the existence of children, at least when they were small, as a factor inhibiting the mother's ability to support herself, over and above the issue of child support. Before no-fault, the presence of children in a marriage gave more credence to the concept of lifelong support.

\(^7\) Under the old law in California, that of equitable division, wives were typically awarded more than 50 percent of the property. Under no-fault divorce law, the property distribution tends to be more equal. However, it is not clear that "equal" distribution amounts to the same thing as fair distribution between the parties involved. The required equal division of property very often results in the sale of the family home and other assets, which may cause much disruption in the children's lives. (In contrast, the wife with custody of minor children was usually awarded the family home under the old law.) It would seem that the interests of the children are not taken into account. Under the equal division rule, the wife and children must share between themselves one-half of the marital assets, while the divorced man alone gets the other half completely for himself. L. Weitzman, supra note 21, at 104-09, Table 9 at 74. See also H. Foster and Freed, Commentary on Equitable Distribution, 26 N.Y.L. Sch. L. Rev. 1, 47-48 (1981).


\(^7\) Although alimony at one time was restricted to wives, it was never restricted solely to wives with children. H. Krause, supra note 54, at 346-47.
Following no-fault there has been a relentless trend toward no alimony at all or short-term alimony for "rehabilitative" purposes, as opposed to lifelong alimony. This trend does not consider whether the wife is raising small children.\(^7\)

Some states specify the uppermost length of alimony, usually one or two years, and a few states severely restrict the conditions under which it may be granted at all. Indiana, for instance, allows alimony only for a "physically or mentally handicapped spouse."\(^8\) Although most wives did not receive alimony prior to no-fault,\(^9\) the percentage had fallen to sixteen percent in 1981, according to the U.S. Census.\(^10\)

Judges too often take the unfair and inaccurate position that because the law is beginning to treat women equally, women can support themselves equally as well. This may be a fair assessment for couples with no children, but for marriages with children this does not reflect social and economic reality. In most marriages the mother must curtail or terminate her market activity to accommodate the needs of children. Following divorce she is given even more child rearing responsibilities as a single parent. Compared with her husband, she is not likely to make up the economic ground she has lost.\(^11\)

Child support awards have also suffered from the erroneous assumption that mothers can support themselves as well as fathers following a divorce. Between 1978 and 1981 child support awards nationally dropped 16%, between 1983 and 1985 they dropped another 12.4%.\(^12\)

On the positive side, there has been a concerted national legislative effort\(^13\) to legally pursue nonpaying fathers, who make up more than half of all divorced fathers.\(^14\) This has been assumed not simply for the sake of aiding mothers and children injured by divorce, but to ease the

\(^{78}\) L. Weitzman, supra note 21, at 186.
\(^{79}\) Freed and Walker, Family Law in the Fifty States, supra note 55, at 386-87.
\(^{80}\) R. Eisler, DISSOLUTION 46 (1977).
\(^{81}\) L. Weitzman, supra note 21, at 168.
\(^{82}\) For a thorough discussion of the economic differential between men and women, caused mainly by motherhood, see supra note 67. See also Fuchs, Sex Differences in Economic Well-Being, 232 SCIENCE 459, April 1986.
\(^{85}\) Under federal law, state AFDC (Aid to Families with Dependent Children) agencies are required to cooperate with child support enforcement agencies in locating absent parents. Parent locator services search records such as internal revenue and social security records for information on the parents' whereabouts. After the parent is located, collection may be enforced through tax return and paycheck withholding. H. Krause, supra note 54, at 230-33.
burden on the government, which too often must provide basic support to victims of divorce.

D. Children First

The rapid rise in divorce and the resulting negative social consequences have stimulated many ideas for another round of divorce reforms. Few seem willing to roll back the no-fault laws and reintroduce fault as a factor in obtaining a divorce or in property division. A more attractive idea, which deals directly with the party hardest hit by divorce is a "children first" principle which considers first the continuity of lifestyle of the children in matters of property division and support.

The first step in implementing a “children first” principle would be to rethink our unitary concept of divorce and instead divide marriages which end in divorce into at least two categories: those in which there are children (at home or grown) and those with no children. Marriages with children from previous marriages will become a subset of marriages with children, with separate rules which recognize the variety of parental obligations involved.

Marriages with children will have distinctly different property and support arrangements, concerned primarily with maintaining the continuity of lifestyle and well-being of the children. In marriages where the children are grown, the partner who has provided the majority of caregiving and is in a weaker economic position will be equitably (not equally) compensated. This will most often be the mother.

The well-being of children is one of the factors considered in states which maintain an equitable division of property (not so in equal division, community property states), but it is not mandated as the first and primary factor. This leaves too much discretion to individual judges who can become caught up in the competing rights of the parents or the father's resources as the primary concern.

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86 Mary Ann Glendon, a leading proponent of the "children first" principle, states: "All property, no matter when or how acquired, would be subject to the duty to provide for the children. Nor would there be any question of 'spousal support' as distinct from what is allocated to the custodial spouse in his or her capacity as physical custodian. In cases where there is significant income and property left over after the children's needs have been met, the regular system of marital property division and spousal support law could be applied as a residual system." Glendon, Abortion and Divorce in Western Law 95 (1987).

87 Id.

88 Id.
A "children first" approach will work best for mothers as well as children since their interests are most often tied to the children, mothers becoming the custodial parent in about 90% of the divorce cases.89

E. Custody: The Abolition of Maternal Preference

The move toward no-fault divorce and property settlements was based on the assumption that women, even as mothers, are as capable of supporting themselves as men are; the move away from a maternal preference toward joint custody was based on the assumption that fathers are interchangeable with mothers in parenting. Both of these legal reforms were passed quickly, state by state, with little or no research regarding the potential effect on children. These models met the states' desired criteria of equal treatment under the law between a man and a woman, but they failed to consider that mothers and fathers are not "similarly situated" with regard to parenting and they failed to carefully consider the best interests of the third party, the child.

The maternal preference, or tender years doctrine, is an evidentiary presumption under the best interest principle. The best interest of the child is the rule in awarding custody, while the tender years presumption directs the court to assume that the child's best interests are served by remaining with the mother unless there is substantial evidence to the contrary.90 The age constituting "tender years" has been left to judicial discretion, with the teen years usually considered the upper limit. This presumption was adopted by courts in almost all jurisdictions by the end of the nineteenth century.91

In the 1970's and 1980's, on the heels of no-fault divorce legislation, most states rushed to eliminate the maternal preference presumption. Currently only seven states give mothers an automatic preference

89 L. Weitzman, supra note 21, at 232-37.


91 Id. Until this century, women did not possess equal parental rights in England and in most American jurisdictions. When mothers finally gained some of the same parental rights as fathers, the tender years doctrine began to be employed. Under the tender years doctrine, every custody dispute between parents begins with a presumption that the child would be better off in the mother's custody. In order for the father to gain custody, he must meet the prevailing standard of rebuttal and disprove the presumption. Id. at 341-42.
through case law.\textsuperscript{92} Many states rewrote their statutes regarding custody to present a gender neutral standard. In California, the law was changed in 1973 from a standard favoring maternal preference to custody “to either parent according to the best interests of the child.”\textsuperscript{93}

\textbf{F. Best Interests Standard}

For most states, the abolition of the presumption in favor of mothers as the best custodians for young children has left only the vague “best interests of the child” guideline. Our society lacks any clear-cut national consensus on what the “best interests” of the child are,\textsuperscript{94} and a judge must consider a confusing legislative laundry list of factors in reaching a decision.\textsuperscript{95} Not only does this make it difficult for the judge to decide, it encourages litigation, since the determination is unpredictable.

\textbf{G. Joint Custody Rule}

A solution to the problem of choosing between legally equal parents was pushed by newly formed fathers’ rights groups: a presumption in favor of joint custody.\textsuperscript{96} In 1980, California again amended its Family Law Act to create this presumption,\textsuperscript{97} giving it equal footing with sole custody. With this amendment came a push toward required mediation in any custody dispute\textsuperscript{98} and the rule that joint custody could be judicially imposed against the wish of one parent.\textsuperscript{99}

\textsuperscript{92} Atkinson, \textit{Criteria for Deciding Custody in the Trial and Appellate Courts}, 18 \textit{FAM. L.Q.} 1, 11 (1984). The seven states that give mothers an automatic preference over fathers by law are: Alabama, Florida, Kentucky, Louisiana, Mississippi, Utah, and Virginia. \textit{Id.}

\textsuperscript{93} \textit{CAL. CIV. CODE} § 4600 (b)(1) (West 1983).


\textsuperscript{95} The Uniform Marriage and Divorce Act, § 402, defines the child’s best interest as a composite of the following variables: “(1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school, and community; (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.” H. Krause, \textit{supra} note 54, at 249.

\textsuperscript{96} L. Weitzman, \textit{supra} note 21, at 231.

\textsuperscript{97} \textit{CAL. CIV. CODE}, § 4600 (West 1983).

\textsuperscript{98} \textit{CAL. CIV. CODE}, § 4607 (West Supp. 1988).

By 1988, thirty-five states followed California's lead, initiating some form of joint custody law, although not necessarily imposing it on one protesting party. The experience in California, however, fell short of expectations. Joint custody too often became a bargaining chip where the husband threatened to ask for joint custody unless the wife agreed to drop demands for spousal support, or some other property right. Where joint custody was imposed, the children most often lived with their mother while the father paid little or no child support. In 1989 it was demoted as a presumption in California, becoming just one option with the agreement of both parties.

H. Primary Caretaker Standard

While joint custody does not appear likely to become a widely accepted substitute for maternal preference in determining custody disputes, the concept of the primary caretaker is gaining many followers. The primary caretaker is the parent who has undertaken the majority of the everyday tasks of feeding, clothing, and general maintenance. As David Chambers, noted proponent of this theory has explained it, "[T]hey should define the primary caretaker as the parent, if there is one, who has performed a substantial majority of the caregiving tasks for the child that involve intimate interaction with the child."

The primary caretaker theory is appealing because it theoretically treats the parents equally, although in most cases the mother turns out to be the primary caretaker. It is so appealing that it has won the status of a legal presumption in at least two states, Minnesota and ...
West Virginia, where the court declared in Garska v. McCoy, "[w]here the primary caretaker parent achieves the minimum, objective standard of behavior which qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker parent."107

A study of appellate court decisions in 1982 showed that the idea of the primary caretaker has caught on in determining custody disputes. A preference for the primary caretaker was second only to a stable environment in the initial determination of custody. An automatic preference for the mother was a factor cited far less frequently than a preference for the primary caretaker.108

I. Mothers v. Fathers

A primary caretaker preference appears to be an attractive gender-free alternative to "maternal preference." Parenthood, however, is a situation in which men and women are clearly "not similarly situated" biologically.109 Nor are they "similarly situated" in terms of social reality.

Biologically, the indisputable fact is that mothers carry a child for nearly a year before giving birth. Whether mother and father are "similarly situated" following birth is disputed. Until recently, there was little disagreement among scientists that the mother-child bond in young children (under age five) was the focus of the young child's existence and that separation from the mother would cause severe negative effects in the way that separation from the father would not.110 Margaret Mead expressed the views of a generation of social scientists who looked at mothers and fathers across cultures:

[W]e should phrase the matter differently for men and women—that men have to learn to want to provide for others, and this behaviour, being learned, is fragile and can disappear rather easily under social conditions that no longer teach it effectively. Women may be said to be mothers unless they are taught to deny their child-bearing qualities. Society must distort their sense of themselves, pervert their inherent growth-patterns, perpetrate a series of learning-outrages upon them, before they will cease to want to provide, at

108 Atkinson, supra note 92, at 11.
109 See Michael M. v. Superior Court of Sonoma County, 450 U.S. 464. See supra notes 30-32 and accompanying text.
110 See infra notes 112-14 and accompanying text.
least for a few years, for the child they have already nourished for nine months within the safe circle of their own bodies.\textsuperscript{111}

In the spirit of critically examining long-held beliefs regarding differences between men and women, mother and father roles have received a great deal of attention in the past two decades. The thrust of the research which questions gender differences is not that the mother-child bond is the same as the father-child bond in our culture, but that, under different social circumstances, a father could take the role of the mother.\textsuperscript{112} Even among those researchers who believe fathers could act as mothers, few, if any, believe that there are no differences between fathers and mothers in their response to children.\textsuperscript{113} They disagree as to what those differences are, and how important they may be. This is by no means the opinion of all scientists, many of whom believe there are biological differences, hormonal and otherwise, which prepare women for giving birth and promote their strong interest in mothering.\textsuperscript{114}

This scientific controversy has certainly confused judges and added momentum to the drive for gender neutral laws. As the New York

\textsuperscript{111} M. MEAD, MALE AND FEMALE, 192 (1949).

\textsuperscript{112} One team of psychologists, Parke and Sawin, observed fathers feeding their three year olds. They observed that fathers respond to their infant's cues by adjusting the pace of feeding or the intensity of play—just as mothers do. They also observed that they rarely use this skill. When asked to demonstrate their competence for a researcher, fathers performed well, but under normal circumstances, most yield caretaking responsibility to their wives. R. Parke, D. Sawin, "The Family in Early Infancy," in F.A. PEDERSON (Ed.) THE FATHER-INFANT RELATIONSHIP (1980).

\textsuperscript{113} Very few, if any, researchers would claim there are no differences between the responses of mothers and fathers to children, even if these responses are considered minor, e.g., Michael Lamb found that fathers engaged infants in more rough-and-tumble play and invented new and unusual games. Mothers were more inclined to conventional games such as peek-a-boo and pat-a-cake. Lamb, Father-Infant and Mother-Infant—Interaction in the First Year of Life, 48 CHILD DEVELOPMENT 167-81 (1977). See also Berman, Are Women More Responsive Than Men to the Young? A Review of Developmental and Situational Variables, 88 PSYCHOLOGICAL BULL. 668. This article reviews almost sixty studies over twenty years. This research takes many forms including measuring the pulse rate of mothers and fathers in response to pictures and observations of real interactions between mothers, fathers and children.

\textsuperscript{114} For Freudian psychologists, the mother-infant attachment is still the most important relationship in the infant's life. Freud said, it is "unique, without parallel, established unalterably as the prototype of all later love relationships." S. FREUD, AN OUTLINE OF PSYCHOANALYSIS 48 (1949). Latter-day Freidians are strongly committed to mothers over fathers. Erik Erikson claimed that women have a "biological, psychological, and ethical commitment to take care of human infancy," Erikson, Inner Space and Outer Space: Reflections on Womanhood, 93 DAEDALUS 582, 586 (1964), and Margaret Mahler describes the primary experience of infancy as that of separation, individuation from the mother (5-36 months). See MAHLER, PINE, & BERGMAN, THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT (1975).
Family Court concluded in *Watts v. Watts*,116 "the simple fact of being a mother does not, by itself, indicate a willingness or capacity to render a quality of care different from that which the father can provide." Further, scientific studies show that the "essential experience for the child is that of mothering," regardless of who is performing the mothering function.116

But this scientific controversy is based on the supposition, "[i]f men were mothers," when in fact women already are mothers and in the great majority of households perform the mothering functions. Even when women work outside the home, as they do in increasing numbers, they still perform far more of the child care functions than do fathers.117

Regardless of the merits of the scientific argument that fathers can, in the right circumstances, be turned into mothers, the social reality is that mothers are *already* mothers. It is surely in the best interests of children to recognize this social reality and guarantee the continuity of care which will be most protective of young children.

The maternal preference has another significant advantage over a primary caretaker standard. In a society where most mothers work because a father's salary cannot support a family,118 and almost all mothers work following divorce in order to survive, the identity of the "primary caretaker" may not be clear. The actual physical caretaking of children may be, by necessity, largely in the hands of a paid caretaker, either inside or outside the home. Although, according to all studies, the mother still performs most of the caretaking tasks,119 this may not be immediately obvious to a judge.

There is, in fact, evidence that many judges are critical of working mothers120 who no longer play the full-time caretaker role. For instance, the father is likely to get more parenting credit for taking the child to music lessons or to the doctor's during the daytime than the

117 Id. at —, 350 N.Y.S.2d at 290.
119 350 N.Y.S.2d at 290.
119 See supra note 117.
mother is for performing all the other parenting functions if she does not spend the day with the child. In proportion to what is traditionally expected of mothers and fathers, the father has performed more caretaking duties and the mother fewer. With a primary caretaker standard this could lean the decision-maker unfairly toward the father.

There are, of course, cases where the father is indeed the primary caretaker and the more nurturing parent. However, a maternal preference is a rebuttable presumption that will give way to a preponderance of evidence demonstrating that the father has in fact been the primary caretaker and that it would be in the best interests of the child to continue this relationship. Presumably, only fathers who really function in this way will attempt to rebut the presumption, holding down the number of cases that are actually litigated.

J. Custody Blackmail

The abolition of the legal presumption in favor of mothers has had serious negative effects which are not immediately apparent in looking at custody statistics. With the application of no fault standards to property settlements, the resentments that used to be released in property disputes now too often find their vent in disputes regarding the custody of the children. According to family law experts Henry Foster and Doris Freed, "custody blackmail" has become all too common.

Under a standard which declares both parents equal, and offers the loose "best interest" guideline, the mother can realistically be threatened with the loss of custody of a small child by a father who has no real desire for custody, but uses the threat as a way to avoid property division, spousal support, or child support responsibilities. The frightened mother may agree to an unfair economic arrangement which

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121 Weitzman noted no significant difference in custody awards to mothers—about 90% four years after the abolition of the maternal preference presumption. L. Weitzman, supra note 21, at 232.


123 Weitzman reports that about one-third of divorced women reported that their husbands threatened to ask for custody as a ploy in negotiations. "Men see custody as part of a total package of divorce issues that are, to some extent, all up for grabs. Women, by contrast, draw a line when it comes to custody. They are more likely to consider custody on an altogether different level—it is something they simply cannot negotiate because it is too important—it is worth any price." L. Weitzman, supra note 21, at 310, 311.
will result in a lowered standard of living for herself and her children. This is certainly not protective of the rights of children.

The imposition of the fashionable "primary caretaker" preference will not solve this problem. Unlike the "maternal preference" which puts the burden of proof on the father to prove that he is indeed more fit, the "primary caretaker" preference forces the mother (and the father) to compete for the preference. Where judicial discretion is paramount, as it is in deciding between competing parties, the likelihood of litigation increases. Here also, as with a pure "best interest" standard, the threat of litigation can intimidate the mother, again leading to custody blackmail, which results in a lowered standard of living for mother and children.

K. Equal Protection

The Supreme Court has not ruled on the issue of whether a presumption of a "maternal preference" in custody disputes violates the equal protection clause of the fourteenth amendment. It seems likely, however, that a "maternal preference" would be allowed according to the standards of *Craig v. Boren* and *Michael M. v. Superior Ct. of Sonoma County* as previously discussed.

Applying the standards set by the Supreme Court in *Craig v. Boren*, it can be argued that a maternal preference does serve "important governmental objectives": first, by protection of the child, who is best served by continuing the primary parental bond; and second by reducing the amount of litigation, which is harmful to the child and burdensome to the state. The second part of the *Craig v. Boren* standard, "the laws must be substantially related to the achievement of those objectives," can also be met by a "maternal preference" presumption since, as discussed above, no other presumption, including joint custody and "primary caretaker," would both reduce litigation and provide the continuity of the primary parental bond.

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124 At least two states have found that the "tender years presumption" violates the equal protection clause. *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973) and *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981).
125 429 U.S. 190 (1976). For a discussion of the standards applied, see supra text accompanying notes 26-29.
127 429 U.S. at 197.
A maternal preference presumption should also meet the “not similarly situated” test put forth by the Court in *Michael M.*, since, as demonstrated, women and men are not biologically or socially similarly situated as parents.

But perhaps the best argument is one that has not yet been made by the Court. This is that custody is not an issue of equal treatment between a man and woman, but rather of the competing needs of three parties: man, woman and child. I believe that in this and in all areas of divorce where there are children, the needs of the child should come first. This is already expressed in most jurisdictions by a commitment to the “best interest of the child.” A re-introduction of the “maternal preference” presumption will best satisfy the child’s interest.

IV. THE MARKETPLACE AND MOTHERHOOD

A. The Limitations of Title VII and the EPA

Title VII of the Civil Rights Act of 1964 was not originally intended to include women, but rather to eliminate employment discrimination against Blacks and ethnic minorities. An amendment which included sex was added almost as an afterthought.\textsuperscript{128} Although Title VII and the Equal Pay Act of 1963\textsuperscript{129} represent the major legislative weapons in women’s fight for an equal position in the marketplace, it is clear twenty-five years later that they fall far short of that goal.\textsuperscript{130} These laws meet the strict scrutiny of equal protection, but they fail to take into account the realities of women’s work patterns. Except for the issues of pregnancy discrimination and maternity leave, the concept of motherhood, or even the words *children* or *family*, are very rarely, if ever, mentioned in judicial opinions or legislation relating to the workplace.

\textsuperscript{128} The House of Representatives did not amend the Title VII bill to prohibit sex discrimination until only two days before voting on it. Until then, the Title VII did not mention sex at all: “The intolerable practice of failing or refusing to hire a qualified job applicant or otherwise discriminating against an employee as to compensation, terms, conditions, and privileges of employment solely because of race, color, religion, or national origin . . . is wrong and must be made legally wrong.” H.R. 7152, 88th Cong., 2d Sess., 110 Cong. Rec. 2705, 2732-33, 2804-05 (1964).


\textsuperscript{130} See *supra* notes 141 and 142 for discussion of the persistent wage gap between men and women.
Title VII mandates that an individual's sex (gender is the more recent term), race, color, religion or national origin shall not be grounds for discrimination in hiring, discharge, compensation, and terms or conditions of employment.\textsuperscript{131} Basically, Title VII mandates that women and minorities be given equal opportunity to compete with white males in matters relating to employment, and the EPA directs that they receive the same compensation as white males when they perform equal tasks.\textsuperscript{132}

Until recently, the Supreme Court liberally interpreted Title VII challenges to the advantage of women and minorities. Although the law was narrowly written with no provision for affirmative action, the Court allowed, with restrictions, the development of this important tool.\textsuperscript{133} Even when the Court took a sharply conservative turn in 1989, they offered the notable exception of \textit{Price Waterhouse v. Hopkins}.\textsuperscript{134} which further expanded the effectiveness of Title VII by putting the burden in some cases on the employer to show that gender discrimination was not the cause of denying promotion.\textsuperscript{135}

This case was an exception, however, to a series of cases in 1989 that sharply curtail, rather than expand, the power of Title VII. In a

\textsuperscript{131} 42 U.S.C. § 2000e 2(a) (West 1988).
\textsuperscript{132} M.A. MASON, \textit{THE EQUALITY TRAP} (1988). In this book, I discuss the limitations of Title VII and the EPA in dealing with female-dominated occupations. These laws were enacted to force entry into male occupations, not to aid women who work in female occupations. In a sense these two pieces of legislation are conservative in nature since they require no structural changes in the workplace, such as pregnancy leaves or institutionalized part-time work, but simply permit women to compete in the existing structure. \textit{See generally} Chs. 1, 4, and 5.
\textsuperscript{133} \textit{See generally} Norton, \textit{Equal Employment Law: Crisis in Interpretation—Survival Against the Odds}, 62 Tul. L. Rev. 681 (1988). Title VII expressly states that "preferential treatment" is not required merely because of statistical imbalance with a group of employees compared to "the available work force." \textit{See also} Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (employer is under no obligation to hire a woman to balance the ratio between the sexes, nor to establish that the male hired is more qualified than the female not hired, nor to hire the female rather than an equally qualified male).
\textsuperscript{134} 109 S. Ct. 1775 (1989).
\textsuperscript{135} \textit{Id.} at 1790. The Court disagreed as to whether this shifting of the burden to the defendant was following precedent or taking a new turn. The plurality stated it was not a new interpretation, while Justice O'Connor, in a concurring opinion, stated: "\textit{McDonnell Douglas} and \textit{Burdine} assumed that the plaintiff would bear the burden of persuasion as to both these attacks, and we clearly depart from that framework today. Such a departure requires justification, and its outlines should be clearly drawn." \textit{Id.} at 1801 (O'Connor, J., concurring). Justice O'Connor went on to note that before the burden of proof could be shifted to the employer, "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of the plaintiff's protected status.'" \textit{Id.} at 1805 (O'Connor, J., concurring).
pair of cases dealing with affirmative action, the Court clearly curbed future affirmative action initiatives. In *Richmond v. Croson*,\(^1\) the Court declared unconstitutional a Richmond, Virginia ordinance setting aside thirty percent of public works contract spending for minority contracts, and in *Martin v. Wilks*,\(^2\) the Court agreed with the white firefighters of Birmingham, Alabama, that they should be allowed to challenge established consent decrees on the grounds that they may in fact be victims of reverse discrimination. Previously, consent decrees, which put forth a plan of hiring to remedy past discriminatory practices were considered settled and beyond challenge.

In *Wards Cove Packing Co. v. Atonio*,\(^3\) the Court cut back on an eighteen-year-old precedent and ruled that plaintiffs, not employers, have the burden of proving whether a job requirement that is shown statistically to screen out minorities or women is a "business necessity." This case seriously challenges the effectiveness of a disparate impact theory of discrimination which posits that facially neutral hiring practices can produce racial or gender stratification. This theory has been central to a comparable worth analysis as discussed below.\(^4\)

The recent abrupt turn away from twenty-five years of liberal interpretation does not bode well for the future of Title VII. This law, in both spirit and application, has provided some real successes for women who have entered male professions.\(^5\) Perhaps most importantly it has given women the courage to train for and tackle jobs that were previously almost entirely in the male domain, in the belief that the law was providing them a fair chance.

\(^{136}\) 109 S. Ct. 706 (1989). The Court found Richmond's ordinance unconstitutional because the city failed to show a compelling interest in apportioning contracts based on race and because the statute was not narrowly tailored to remedy prior discrimination. *Id.* at 727, 728-29.

\(^{137}\) 109 S. Ct. 2180 (1989). There, the Court held that firefighters who had not been parties to the consent decree could challenge the decree through litigation. "A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntary or otherwise, the conflicting claims of another group of employees who do not join in the agreement." *Id.* at 2188.

\(^{138}\) 109 S. Ct. 2115 (1989). Note: *Wards Cove* opinion does not reverse *Griggs*; dissent argues that majority has shifted burden.

\(^{139}\) See supra notes 149-178 and accompanying text.

\(^{140}\) United States Dept. of Commerce, Bureau of the Census, *Women in the American Economy* 15 (Nov. 1986). In 1980, 30% of law degrees were conferred on women compared to 5% in 1970; 23% of medical degrees in 1980 compared with 8% in 1970. Women are entering predominantly male managerial and professional specialty occupations (a 7.3% gain between 1970 and 1980), but are still overrepresented in clerical (85% in 1986) and service occupations (61% in 1986) and underrepresented in production, craft, labor occupations (9% in 1986). *Id.* at 23-24 [hereinafter *Women in the Economy*].
B. The Wage Gap and Female Occupations

The successes of Title VII mask the fact that women are still doing very poorly in the marketplace compared with men. In 1956, a full-time working woman earned sixty-three cents to every dollar earned by a man. In 1986 the figure was sixty-four cents.\textsuperscript{4} There have been slight fluctuations during these thirty years, but by and large the wage gap has proved stubbornly intractable.

The most important change in the workplace is not that women are entering male-dominated occupations, but that women are entering the workforce in unprecedented numbers,\textsuperscript{142} and that most of these women are working in female-dominated occupations. Employed women are clustered into four industry groups with almost seventy percent in services, retailing, and state and local government.\textsuperscript{143} As the economy shifts from a manufacturing to a service base, most of the newly created jobs have gone to women. What these jobs have in common is that they are generally lower paying and provide fewer benefits\textsuperscript{144} than jobs in the manufacturing sector. Therefore, the wage gap persists.

Title VII and the EPA have been fairly successful tools for breaking down the barriers to male professions and attaining equal pay and promotions once inside, but they have been nearly useless in dealing with the low pay inequities of female-dominated occupations. Title VII focuses on individual discrimination in hiring, not institutional inequities in setting pay. Employers do not often discriminate against women when they hire retail clerks, word processors, or nurses. They do, however, offer them lower pay than male-dominated occupations with similar skill. As discussed below, the courts have interpreted this wage setting as outside the range of protection of Title VII.\textsuperscript{145}


\textsuperscript{42} In 1960, 23 million women were in the workforce; in 1986, 52 million were participating.

B. BERGMANN, supra note 20, at 20.

\textsuperscript{43} See Note, Pay Equity or Pay Up, supra note 141, at 306-07 n.3.

\textsuperscript{144} WOMEN IN THE ECONOMY, supra note 140. Approximately one-half of all women work in only 19 of 503 occupational categories listed by the Department of Commerce. Id. at 18, Table 8. All except 3 of the 19 occupations in which women are concentrated are 60 percent or more female and 15 of the 19 predominantly female occupations pay in the bottom half of 421 ranked earnings. Id. at 23.

\textsuperscript{145} Infra notes 151-66 and accompanying text.
There are two prominent theories on how to tackle the problem of low pay in female-dominated occupations. The first is the integration theory. According to this theory, if the discrimination barriers to male occupations are removed, women will pour into male occupations. The consequent shortage of workers in female occupations will force the wages up, luring men into the jobs formerly held by women. With this free market approach, the distinctions between male and female occupations will fall naturally.¹⁴⁶

In spite of Title VII and its expansion into affirmative action, this has not occurred.¹⁴⁷ The great majority of women have not entered male occupations and remain rooted in the low paying female occupations. Although more women have entered male occupations, even larger numbers have entered female occupations and the occupational profile has changed little.

The second approach to solving the problem of persistent low wages of female occupations is to focus on elevating their low wage base rather than trying to equalize the gender make-up of the occupations. This theory has become known as comparable worth.

Title VII has made some inroads into integrating the work force, but there are strong reasons why most women still choose women's occupations. The largest increase of new recruits to the labor market since 1970 has been mothers. In 1970 only twenty-seven percent of women with children under the age of three were in the workforce; in 1985 the figure was more than fifty percent.¹⁴⁸

Female-dominated occupations provide some of the conditions that make the work lives of mothers (or fathers who are the primary caretakers) possible. For the most part they provide, as male-dominated occupations often do not, regular hours, little or no overtime, and the ability to leave and return to accommodate pregnancy or the needs of children.¹⁴⁹ There are more of these jobs closer to home and daycare.

Whether women cluster in these occupations by choice because of the demands of motherhood, or whether they remain there because

¹⁴⁶ See Note, Pay Equity or Pay Up, supra note 141, at 314.
¹⁴⁷ See supra note 130.
¹⁴⁸ B. BERGMANN, supra note 142, Table 2-3 at 25.
¹⁴⁹ There is a lively debate on this subject. See H. AARON & C. LOUGY, THE COMPARABLE WORTH CONTROVERSY 13-15 (1986), M.A. MASON, supra note 132, ch. 5.
they are excluded from male occupations, there is little debate that fe-
male-dominated occupations are generally lower-paying than male-
dominated occupations.¹⁵⁰

Comparable worth, or pay equity, the popular woman's issue of
the eighties, represents a serious shift away from the integrationist goal
of the seventies. It is based on a realization that, for whatever reasons
(certainly motherhood prominent among them), most women will con-
tinue to work in women's occupations rather than move into male occu-
pations. Therefore, these occupations must be forced to pay a fair
wage. The idea is technically complex, but the basic concept is that
employers can and should pay wages according to the intrinsic value of
a given job rather than market or other forces.

The Supreme Court, in City of Washington v. Gunther,¹⁵¹ defined
comparable worth as a theory "under which plaintiffs might claim in-
creased compensation on the basis of a comparison of the intrinsic
worth or difficulty of their job with that of other jobs in the same or-
ganization or community."¹⁵² This is a different theory than the EPA's
"substantially equal" work doctrine, which the Supreme Court inter-
preted in Corning Glass Works v. Brennan¹⁵³ as occurring when an
employer pays unequal wages to male and female employees for equal
or substantially equal work requiring equal skill, effort and responsibili-
ties under similar working conditions. The EPA, therefore, offers no
relief for adjusting wages between jobs that are very different in na-
ture. Comparing a maintenance person, for example, with a secretary is
beyond the legislative vision of the EPA.

¹⁵⁰ Comparable worth analysis varies depending on the economic model used. For a discus-
sion of neoclassical (I have called it the Integration Theory) and institutional theories, see S.
Evans & B. Nelson, Wage Justice 46-53 (1989)[hereinafter Wage Justice]. Briefly, the neo-
classical theory uses an individualistic model that assumes perfectly mobile workers, competitive
capitalists, and costless information. In this model, workers choose their occupations and competi-
tion among firms with equalized wages. Earnings differentials can be explained in part by discrim-
ination based on workers' individual characteristics, including schooling, training and previous
participation in the workforce. Id. at 47-49. The institutional approach, on the other hand, focuses
on the organizational and institutional forces involved. Two important premises of this model are
the difficulty of determining individual workers' contributions and the inequality of occupations
themselves. This model focuses on occupational segregation, its historical roots and how institu-
tional factors contribute to wage differentials. One conclusion is that the gender make-up of an
occupation is a key indicator of earnings. Id. at 50-52.


¹⁵² Id. at 166.

¹⁵³ Id. (citing 417 U.S. 188, 195 (1971)). To be actionable under the EPA, sex-based wage
discrimination must occur within a single establishment. 29 C.F.R. Sec. 800.110.
Title VII, a far broader enactment, for a while seemed to hold more promise to comparable worth advocates. There are two theories available to a plaintiff in proving a Title VII case: disparate treatment and disparate impact. Under a disparate treatment analysis, "the employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." Proof of a discriminatory motive or intent to discriminate is critical to a disparate treatment claim, although in some situations it may be inferred from the mere fact of differences in treatment. By contrast, the disparate impact theory is not concerned with an employer's intent, but focuses rather on the effects of an employer's practices. Disparate impact occurs when an employer relies on a facially neutral practice that has a disproportionately adverse impact on members of a particular protected group.

Thus far, attempts to force the courts to accept comparable worth as gender-based discrimination under the protective umbrella of Title VII have failed. The Supreme Court in the 1981 Gunther decision distinguished comparable worth claims from other claims of intentional discrimination which are actionable under Title VII and decided the case on other grounds. Justice Brennan particularly noted that the Court had not decided whether a comparable worth claim is sufficient to establish a prima facie case of sex discrimination. To date the Court still has not squarely addressed the issue, leaving it for the lower courts.

The lower federal courts have been distinctly unsympathetic to comparable worth. For a brief period a Washington State District Court judge gave hope to comparable worth proponents when he found that the existence of wage disparity, as evidenced by the job evaluation study of 15,500 male and female employees in Washington established

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185 Id.
186 See Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Griggs Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures that operate as 'headwinds' for minority groups." Id. at 432.
187 Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982). The Pouncy court stated: "This theory of recovery under Title VII is used to attach employment criteria that are facially neutral yet fall more harshly on a protected class of employees." Id. at 799.
188 County of Washington v. Gunther, 452 U.S. at 180-81.
189 Id. at 166 n.8.
a prima facie case of wage discrimination under either a disparate treatment or a disparate impact theory.\textsuperscript{160}

The Ninth Circuit Court of Appeals, however, overturned the district court’s ruling two years later. Though the reversal was on several grounds, the prominent theme that pervaded the decision was that wages that are set by the marketplace are not necessarily discriminatory on either a disparate treatment or a disparate impact theory.\textsuperscript{161} The court held: “Absent a showing of discriminatory motive, which has not been made here, the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington’s employees.”\textsuperscript{162}

Other federal courts have followed a similar line of reasoning; it is not enough to demonstrate that employees of different genders receive different compensation for comparable work of equal intrinsic value.\textsuperscript{163} Rather, a plaintiff must show that there was intentional discrimination in wage-setting.\textsuperscript{164} A showing of comparability accompanied by wage disparities is never enough unless accompanied by additional circumstantial evidence of the employer’s discriminatory conduct. One court ruled that female workers are permitted to seek employment in higher-paying job classifications and, therefore, wage disparities must reflect the relative market value of the jobs.\textsuperscript{165}

The courts are correct in their analysis that Title VII was not intended, nor can it be stretched, to cover the fundamental problem of

\begin{footnotes}
\textsuperscript{160} AFSCME v. Washington, 578 F. Supp. 846, 864 (S.D. Wash. 1983), \textit{rev’d}, 770 F.2d 1401 (9th Cir. 1985). The Court held that, under a disparate impact theory, the objective facially neutral practice was the defendant’s system of compensation. \textit{Id. at} 857. The Court found that “the evidence is overwhelming that there has been historical discrimination against women . . . and that discrimination has been, and is manifested by direct, overt, and institutionalized discrimination.” \textit{Id.}

\textsuperscript{161} AFSCME v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985). The Circuit Court of Appeals emphasized that “the decision [of the State of Washington] to base compensations on the competitive market, rather than on a theory of comparable worth involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for a disparate impact analysis.” \textit{Id. at} 1406 (citing Spaulding v. University of Washington, 740 F.2d 686, 708 (9th Cir. 1984)).

\textsuperscript{162} \textit{Id. at} 1408.

\textsuperscript{163} Colby v. J.C. Penney Co., 811 F.2d 1119, 1126 (7th Cir. 1987); American Nurses Ass’n v. Illinois, 783 F.2d 716, 726-27 (7th Cir. 1986).

\textsuperscript{164} American Nurses Ass’n v. Illinois, 783 F.2d at 726-27.

\textsuperscript{165} Colby v. J.C. Penney Co., 811 F.2d at 1126.
\end{footnotes}
persistently low wages in female-dominated occupations. In fact, as noted, it was not originally drafted to cover the problems of women.\textsuperscript{166}

Title VII is based on a free market model of individualistic liberty that presents the view that if the impediments of discrimination are knocked down, men and women (as well as minorities) will be able to compete on equal footing. This equal competition will promote job integration\textsuperscript{167} so that women and minorities will no longer be segregated into low paying, limited clusters of jobs. With fewer women available, the former occupations of women will be forced to pay higher wages, thereby attracting both men and women.

The concept of comparable worth is in direct opposition to the concept of individualistic liberty put forth by Title VII.\textsuperscript{168} Comparable worth offers a non-competitive model of fairness or equity, achieved not through competition with men in men’s occupations, but by elevating the depressed wages of women’s occupations. Implicit in the argument (although rarely mentioned) is the recognition that most women are not going to push to integrate male occupations.

The free market model of Title VII severely limits the ability of the courts both in finding discrimination as the basis of depressed female wages and in imposing changes in the wage structure. Unless intentional discrimination can be proved under a disparate treatment theory, the courts must recognize a free market wage setting defense. Even if intentional discrimination were found, the court, following the lead of Gunther, would be unlikely to generalize their finding to support an institution-wide reclassification system, but would most probably limit their ruling to adjusting that specific job classification.\textsuperscript{169}

Arguably, it is the role of the legislature, not the court, to initiate reforms which have a widespread effect on the marketplace. In fact,

\textsuperscript{166} See supra note 128.
\textsuperscript{167} See discussion of integration theory, supra notes 146, 147 and accompanying text.
\textsuperscript{168} Arguably, if one turned around the language of Title VII, comparable worth may be seen as reverse discrimination since the effect of reclassifying jobs has a disparate impact on men. It can also be argued that reclassification constitutes disparate treatment since the intention of reclassification is to boost low paying women’s jobs.
\textsuperscript{169} County of Washington v. Gunther, 452 U.S. 161 (1981). The County of Washington conducted internal and external studies which indicated that female prison guards should be paid 95% of the salary paid male correction officers, yet the county paid females 70% of their job’s value and the men 100%. Id. at 180-81. The court here decided that the county had violated its own salary survey and discriminated by treating men more advantageously than women. Id.
the idea of tampering with the so-called "free market" in order to achieve fairness is already prominent in our system. Historically Congress has intervened in the marketplace by setting the minimum wage, legislating child labor laws, guaranteeing collective bargaining, and passing such acts as the Fair Labor Standards Act.

In the case of comparable worth it is the appropriate role of Congress to rectify the severe limitations of Title VII and the EPA. Since 1982 the House of Representatives has compiled voluminous testimony and congressional representatives in both houses have introduced bills on the subject during every session. The Reagan administration, however, following the lead of the private sector opposition, became increasingly hostile to the concept. In 1985, the Reagan-appointed Civil Rights Commission voted to reject comparable worth as a remedy for sex bias in the workplace, and two months later the EEOC voted unanimously to reject "pure" comparable worth cases where there was no evidence of intentional discrimination.

In the absence of a congressional model, states have increasingly taken strong steps toward pay equity. By 1987, ten states had implemented some form of pay equity policies, and 28 states and 166 localities had begun comparable worth studies. A pay equity policy is defined as a compensation goal of equal pay for work of comparable value for state employees. These policies have been promoted by governors, legislatures, public employee unions and women's interests groups. Their enactment has sometimes come about through state or

170 Note, Pay Equity or Pay Up, supra note 141, at 315.


174 States with pay equity policies include Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Ohio, Oregon, Washington, Wisconsin. Note, Pay Equity or Pay Up, supra note 141, at 362 n.360. As of 1987, only Arkansas, Georgia and Idaho have taken no action at all on this issue at the state level. See S. Evans & B. Nelson, Wage Justice supra note 150, map 1.1, at 4.

175 The following states have pay equity studies: Arizona, California, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Note, Pay Equity or Pay Up, supra note 141, at 362 n.361 and accompanying text.
local legislation and sometimes through labor union negotiations.\textsuperscript{176} So far their reach has been limited to public sector jobs.

Minnesota has most completely adopted and implemented a comparable worth scheme for public employees.\textsuperscript{177} Its experience serves as a model to others. In 1984 it passed a State Employees Pay Equity Act and in 1985 a Local Government Pay Equity Act. The process clearly revealed the depth of the connections between jobs and gender. Ninety percent of the employees eligible for pay equity increases were working in thirteen occupations: secretaries, other clerical employees, teacher aides, other school aides, cooks, other food service employees, non-nursing medical employees, nurses (RN, LPN), social services employees, library employees, city clerks, clerk treasurers, and liquor store employees. The great majority of workers in these jobs were women.\textsuperscript{178}

Although some of these jobs received healthy boosts in pay following reclassification, the spectre of financial doom that had been predicted by comparable worth opponents did not materialize in Minnesota. There was some variation between counties, but the average cost of implementation was less than three percent of the county's payroll.\textsuperscript{179}

Comparable worth is a critical strategy in closing the wage gap between men and women workers. It addresses the real pattern of women's work lives. One of the major reasons that women continue to work in female occupations is that most women at some time must balance the duties of motherhood and work,\textsuperscript{180} and often choose jobs which make this balance easier. These choices are for the benefit of children as well as mothers. That employers have exploited this choice in the past and paid women less than a fair wage is also addressed. Title VII allowed this practice to continue since Title VII gives women an equal opportunity to compete for higher wages in men's occupations, but women are given no relief if they remain in women's occupations. Relief will be obtained only through strong new comparable worth leg-

\textsuperscript{176} Id. at 363 n.370. Of the ten states which have pay equity policies, seven were established by legislation, two by administrative policy and one by executive order.

\textsuperscript{177} For a complete discussion of Minnesota's experience in passing comparable worth laws, see S. Evans & B. Nelson, Wage Justice, supra note 150, at 69-91.

\textsuperscript{178} Id. at 159.

\textsuperscript{179} Id.

\textsuperscript{180} It is estimated that 85% of all working women will become pregnant during their working life. Dowd, Maternity Leave: Taking Sex Differences Into Account, 54 Fordham L. Rev. 701 (1986) [hereinafter Maternity Leave].
islation both at the federal and state level, eventually embracing both public and private sector jobs.

D. Part-Time Workers

The special demands of motherhood are most clearly evident among female part-time workers. The voluntary part-time workforce is made up largely of women, most of whom are primarily responsible for the care of their children. In 1983 the Department of Labor noted that the “general profile” of a part-time worker was that of a woman with school-age children who was married to a full-time worker. Approximately one-quarter of working women work part-time, but they represent about seventy percent of the part-time workforce.

In addition to the majority of part-time workers being women, at least two major other characteristics are shared. They are paid significantly less than full-time workers on a pro rata basis, and they are distinctly clustered in wholesale and retail trade and service sectors in which full-time workers tend to be poorly paid. Most often they represent female enclaves within female occupations, sharing the experience of depressed wages that is the product of sex-based occupational segregation. In addition to earning less, part-time workers within these female-dominated occupations tend to have even less status and receive fewer benefits than full-time workers. A 1982 study found that only 18.59% of part-time employees received health insurance, as compared to 74.3% of full-time employees.

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184 Id. at 92 n.27.
186 Chamallas, supra note 182, at 715 n.32.
187 See HANDBOOK ON WOMEN WORKERS, supra note 183, at 36-38.
188 Chamallas, supra note 182, at 718-19.
189 Hefferan, Employee Benefits, 1 FAM. ECO. REV. 6, 10 (1985).
If part-time women workers were taken into account, the wage gap between men and women would be significantly wider than it is now reported. However, while feminists and unions have recently devoted their attention to raising the wages of female dominated occupations through a comparable worth analysis, very little notice has been given to reforming the low wage, under-benefited structure of part-time work.

One of the explanations for the lack of attention to part-time work may be that part-time work for women is perceived as a second income, a "pin money" job for mothers. This perception, however, belies the economic reality of the changing wage structure, where a single wage very often can no longer support a family. It also does not take into account the reality of divorce, which means many part-time workers are single parents and sole breadwinners. For some women the inadequacy of childcare forces them to work part-time.

A second explanation is that only recently have feminists and unions moved away from the integrationist model of Title VII and realized that the solution for all women will not be to join male occupations. This acceptance should now extend to the concept of part-time work.

Title VII and the Equal Pay Act (EPA) present even more limitations for reforming the part-time wage structure than they do for raising the depressed wages of full-time women workers.

As discussed above, the EPA prohibits payment of lower wages to women who perform work "substantially equal" to work performed by men in the same establishment. Most part-time women workers are working in female-dominated occupations where it is far more likely that they are receiving proportionally lower wages for "substantially equal work" performed by other women working full time, not men. This is not actionable discrimination under the EPA.

190 In 1981 women constituted 89% of the part-time work force. Chamallas, supra note 182, at 714. The average part-time female worker is paid 51% of what the average full-time male worker is paid. Id. at 715, n.32.
191 See Levy, supra note 118.
192 Nearly half of all marriages entered into today are projected to end in divorce. L. Weitzman, supra note 21, at xvii.
193 For a discussion on comparable worth see supra notes 149-78 and accompanying text.
If, in fact, a woman can present a prima facie case for lower wages for “substantially equal work” performed by a man, she still must face the affirmative defenses on the part of the employer that are allowed by the EPA. These specify that unequal pay is authorized if the disparity is the result of (1) a seniority system, (2) a merit system, (3) a system measuring earnings by quantity or quality of production, or (4) if the disparity is based on any factor other than sex.\textsuperscript{186}

Under the fourth affirmative defense, the Department of Labor originally issued the following guidelines which presumptively excluded employees who work twenty or fewer hours from the protection of the EPA:

The payment of a different wage to employees who work only a few hours a day than to employees of the opposite sex who work a full day will not necessarily involve noncompliance with the equal pay provisions, even though both groups of workers are performing equal work in the same establishment. . . . However, if employees of one sex work 30 to 35 hours a week and employees of the other sex work 40 to 45 hours, a question would be raised as to whether the differential is not in fact based on sex since different rates for part-time work are usually for workweeks of 20 hours or less.\textsuperscript{197}

This fourth affirmative defense has been the subject of a great deal of controversy,\textsuperscript{188} particularly as to how the EPA is to be integrated into a broader Title VII claim. The most recent Supreme Court decision on this issue, \textit{County of Washington v. Gunther,} however, incorporates the four affirmative defenses of the EPA into Title VII.\textsuperscript{199} This leaves little

\textsuperscript{186} \textit{Id.} 29 C.F.R. § 1620.26 (1990) discusses the temporary reassignment of an employee at his or her regular pay rate to another job that has a different pay rate. The failure to pay a higher rate to an employee reassigned to a new position for longer than one month raises questions as to the temporary nature of the reassignment.

\textsuperscript{197} Chamallas, \textit{supra} note 182, at 740.

\textsuperscript{188} A new interpretation which would have deleted part-time and temporary defenses was proposed by the Carter Administration, but never adopted. Chamallas, \textit{supra} note 182, at 739 n.175, 740 n.176.


[I]ncorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII’s prohibition of discriminatory employment practices was intended to be broadly inclusive . . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination . . . . Although we do not decide . . . how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act, we consider it clear that the Bennett Amendment [to Title VII], under this interpretation, is not rendered superfluous.

\textit{Id.} at 170-71 (citations and footnote omitted).
hope for the part-time worker of fewer than twenty hours per week who hopes to establish a claim under the EPA or Title VII.

A comparable worth analysis under Title VII also presents particular problems for part-time workers. Traditional comparable worth analyses evaluate all full-time job classifications for both men and women workers in terms of factors such as knowledge, skill, mental and physical demands, and other related factors and compares them to the wage rates. Comparing the jobs of part-time workers with other part-time workers is unlikely to bring relief since the great majority will be other women workers in similarly wage depressed jobs. In order to bring relief, part-time workers must be considered a subset of the full-time job grouping in which they work. Even if this concept were established, part-time workers face the same rejection by the courts that full-time employees have experienced. Part-time workers thus have two obstacles to overcome on the road to equitable wages. First, they must seek wages and benefits proportionate to full-time workers in the same occupation. Traditional statutory remedies will not accomplish this because the existing wage discrepancy is not the obvious sex discrimination as defined by Title VII or the EPA since the full-time workers are most likely to be women as well. Second, part-time workers must seek a comparable worth analysis for the occupation of which they are a subset in order to establish an equitable wage for their female occupation compared with comparable male occupations.

On both of these fronts, the EPA and Title VII are not likely to bring relief through the courts. A better solution is legislation in which part-time work would be considered a discrete part of a pay equity law.

There is some legislative precedence for seeking equity with full-time workers. Congress has established pro-rated health benefit plans for federal employees, and in 1978 Congress passed the Federal Employees Part-time Career Employment Act of 1978. The Act required every federal agency to set annual goals and timetables for establishing part-time career employment positions within the federal

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200 S. EVANS & B. NELSON, WAGE JUSTICE, supra note 150, at 7-8.
201 See discussion on comparable worth and the courts, supra notes 151-70 and accompanying text.
civil service. In the eighties the interest and initiative in this issue has flagged, however, and little or no commentary appears on the subject.

Part-time work that is fairly paid and benefitted could provide an attractive solution for mothers, children, employers and society. Mothers benefit because it would allow them to earn a decent wage while better managing the obligations of family; relying less on the vicissitudes and expense of paid childcare. Children benefit because they would have more access to their mothers and society benefits because the children's welfare is being looked to. Employers could benefit also by having access to well-qualified employees who might otherwise stay out of the workforce entirely.

E. The Mommy Track

While the huge numbers of part-time women workers in female occupations have largely been ignored, there has been a growing interest in initiating a voluntary part-time track in male dominated occupations. Many women have come to realize that motherhood and the male career model are often not compatible. Rather than considering it their personal problem, women are now seeking a social solution to what is in fact a social problem. Proposals have been put forth for a reduced-load work week, combined with delayed or deferred career timetables. For a woman attorney, for instance, this could mean a thirty-hour (rather than a fifty-to-sixty-hour) work week, and an indefinitely deferred partnership decision. She would have the option of rejoining the fast track when her child-raising responsibilities diminish.

Many feminists fear this is walking straight back into the special preference trap. By acknowledging that women need special consideration to handle motherhood, opponents of the Mommy track feel that women unnecessarily take themselves out of the male competitive game. They become second-string players, not likely to reach the top of

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204 A great media controversy was generated upon the publication of Schwartz, Management Women and the New Facts of Life, HARV. BUS. REV., Jan.-Feb. 1989, at 65. Schwartz reviews the failure of management women to combine motherhood and career and suggests a reduced hour track, or "Mommy Track."

205 In California, the State Bar's Committee on Women in the Law has taken up the issue of part-time employment for women with children. In a survey of Los Angeles firms with more than twenty attorneys, eleven firms have women working half to three-quarters time. These were accommodations on an individual basis, not a general firm policy. The criterion was that the woman has previously been a valued employee or was considered to be someone very special. The Recorder, Apr. 25, 1986, at 1, col. 4.
their profession. There is also concern that employers will refuse to hire them at all since they require special arrangements and do not carry a "full load."206

For many women, however, the choice is not between getting to the top or working part-time. The choice is between working part-time or dropping out of the profession entirely. Once a player drops out of a professional, male-dominated occupation, such as law, medicine or academics, the chances of re-entry anywhere close to the same level are slim. Having the option, but not the compulsion to take a slower track can only enlarge the range of choices available for women, especially in the professions.

In the Mommy track controversy, as with others dealing with equal treatment versus special consideration, the well-being of the third party, the child, is rarely addressed. Surely it is better for a child if the mother works thirty rather than sixty hours during the week. Surely it is better for a society to acknowledge this and to encourage employers to create career tracks that are not simply to accommodate women's differences, but are to support families. Fathers could be eligible for these tracks as well, avoiding the equal protection issue. This is not an issue like custody where one must lose if the other wins. In fact, however, it is far more likely that women will take advantage of these tracks more often than men since women remain the primary caretakers.207

The creation of part-time career tracks in male-dominated professions will not come about through Title VII suits. Title VII in fact endorses the current male model of the workplace and offers relief only for those who are wrongfully barred from joining it. In the public sector, legislative initiatives such as the Federal Employees Part-time Career Employment Act of 1978208 may be expanded to include high level management. In the private sector it will require sustained efforts on the part of organized women and interested men to create and institutionalize career paths that work for mothers or fathers and their children.

207 The New York City Board of Education grants approximately two thousand maternity leaves each year. Men first became eligible for childcare leaves in September 1973. However, in the two years following such eligibility, only eight fathers took childcare leaves.
F. Maternity Leaves

The great majority of recent arguments which pit equal consideration against special consideration in the workplace have focused on the specific act of birth, not only because that is the one issue in which there is a clear-cut physical difference between men and women which has implications in the workplace, but because, according to many feminists, it is the only incidence in which men and women differ in the workplace. Equal treatment advocates attempt to minimize this difference by claiming that it is just another short-term disability.\footnote{Amicus brief by NOW and NWPC among others. \textit{See supra} note 3.} Congress has adopted the disability theory with the Pregnancy Discrimination Act of 1978.\footnote{Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988).} This law requires employers to make available to pregnant women only what they make available for men with short-term disabilities. This varies widely from state to state.

To treat pregnancy as a short-term disability is a mistake for both mother and child. First, as noted earlier, it takes no notice of the baby, which should have the right of access to its mother during its first weeks.\footnote{See supra notes 11, 13, 14 and accompanying text.} By refusing to consider the needs of children at birth as a workplace issue, the pattern becomes set to ignore the needs of children at all stages of their development. Childcare, flexible hours, and family sick leave become individual problems, not recognized social problems of the workplace.

Second, by reducing the significance of childbirth to a disability, the rights of the mother as well as the child are curtailed. Short-term disabilities are not handled in a manner that accommodates the effects of pregnancy. Benefits are usually for a few weeks in duration, and beyond that the right to return to the same or equivalent job is cancelled.\footnote{For a discussion of the right to return in \textit{Guerra}, 479 U.S. 272, \textit{see supra} notes 36-40 and accompanying text.} Childbirth requires an absence of several months for the well-being of both child and mother, but this is often only available at the expense of an assured level of income maintenance, which is also
needed. By reducing the motherhood issues in the workplace to a short period and defining it as a disability, the employer is freed from considering any other employment issues related to motherhood. Disability policies do not include family illness or family emergencies within their scope.

Considering pregnancy as a short-term disability is once again yielding to a male model of the workplace. This is surely to the employer's advantage since the cost of disability benefits are far less than those of a continuing family support program.

It is true that historically, employers used pregnancy as an excuse to keep women in low level jobs or to force them out of the workplace entirely. Less than thirty years ago many employers would not hire married women, or would not hire married women with children. If a woman became pregnant her choices were limited. Most often she was expected to quit, and if she did not, she was fired. Many states had mandatory leave policies that were unrelated to their ability to work. If a woman insisted upon returning to work after childbirth, her hospital costs were not covered by medical insurance, her maternity leave was not covered by disability insurance or sick leave and her job was not waiting for her when she returned. The job she returned to, if she were allowed to return at all, would often be one with less responsibility and few advancement possibilities since she was now considered an unreliable worker.

The Pregnancy Discrimination Act amendment to Title VII, offers an equal treatment solution which is a limited improvement over old policies. It requires that employers provide for women only the same disability policy that they already provide for men. Very few of these policies are adequate to meet the needs of pregnancy. Most women are entitled to no more than six to eight weeks of pre- and

213 Sweden provides a model of parental leave that includes substantial income maintenance. Each family is allowed a nine-month leave (to be taken by the mother or father, or split between them) at 90% pay, and an additional three months at a further reduced rate of pay. M.A. Mason, supra note 132, at 138.

214 This is the same approach as Title VII which allows women to compete with men on a male model. For discussion on Title VII limitations, see supra notes 128-44 and all accompanying text.


postnatal leave, some far less.\textsuperscript{218} This can force women to return to work prematurely in order to save their job, possibly endangering their health and the health of their child. With some employers, the woman may not be allowed continuing benefits, such as medical insurance during the time of the leave. Paid leave, when it is allowed, is rarely with full pay, and usually for less time than the total leave time. For women who are a major or sole contributor of family income, this may be an intolerable burden.\textsuperscript{219}

After two false starts in \textit{Geduldig v. Aiello}\textsuperscript{220} and \textit{General Electric Co. v. Gilbert,}\textsuperscript{221} the Supreme Court in \textit{Guerra} moved in the correct direction when it endorsed California's maternity leave legislation giving mothers significantly more leave time with job protection than standard disability allowed.\textsuperscript{222}

The Parental Leave Act, which has been building up support in Congress for several years, but at this writing has not yet passed,\textsuperscript{223} is a mixed blessing. It recognizes childbirth as an event entitled to special consideration, but it provides no form of wage support.\textsuperscript{224} An unpaid leave is a desperate burden for many mothers.

In addition, the Parental Leave Act, in its effort to be gender-neutral, ignores the primary role of the mother in childbirth. Pregnancy and childbirth are not events in which mother and father can participate equally. It is the mother who must recover from the fatigue of

\textsuperscript{218} Finley, \textit{supra} note 7 at 1125.
\textsuperscript{219} \textit{Id.} at 1126.
\textsuperscript{220} 417 U.S. 484 (1974). At issue in \textit{Geduldig} was California's disability insurance program for private employees who were temporarily disabled by an injury or illness not covered by workers' compensation. The plan was challenged on equal protection grounds because it excluded disabilities attributable to normal pregnancies. The Supreme Court upheld the plan's constitutionality, finding that "[t]here is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." \textit{Id.} at 496.
\textsuperscript{221} 429 U.S. 125 (1976). This case involved an insurance plan similar to the disability plan in \textit{Geduldig}, but the challenge was based on a claim of discrimination under Title VII. The Court held that \textit{Geduldig} was on point in holding that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." \textit{Id.} at 136. The plan withstood the Title VII challenge. \textit{Id.} at 145-46.
\textsuperscript{222} \textit{Guerra}, 479 U.S. at 289. For discussion of this decision see \textit{supra} notes 36-40 and accompanying text.
\textsuperscript{223} Parental Leave Act, S. 951, 100th Cong., 2d Sess. (1989).
\textsuperscript{224} In addition to the paid leave provided by the Swedish system (\textit{see supra note 213}), parents are allowed up to 60 days per year to stay with a sick child, and parents with children under 8 may work a 6-hour day at a corresponding reduction in pay. M.A. MASON, \textit{supra} note 132, at 138.
childbirth, and it is the mother who breastfeeds the baby, if anyone does. By ignoring the primacy of motherhood at its beginnings, the model is set for ignoring the problems of working mothers as the child grows.

Mothers still have primary responsibility for children most of the time. Unless the conflict of work and parenting is recognized as largely a women's issue, there can be no real understanding of, or solutions to the exploitive nature of female dominated occupations and part-time work. It is women who must lead the battle to restructure the workplace. It is possible to design changes in the structure of the workplace which will allow fathers to participate more fully in child raising, but this should be in addition to, not at the expense of, motherhood issues.

V. Conclusion

Equal treatment has not served mothers and children well. In an effort to abolish what they considered to be crippling stereotypes of dependent women, equal treatment proponents have pushed for gender-neutral laws which have too often made life needlessly difficult for mothers and children. Gender-neutral laws work to the disadvantage of women in two ways: they deny the biological and social reality of the importance of children in women's lives, and they hold mothers to a male model of competition when they are not in an equal position to compete. Today it is not sexual stereotyping that is keeping women in an inferior position in the marketplace, it is a refusal to recognize and push for conditions under which mothers can compete.

Proponents of equal treatment argue that fathers as well as mothers share responsibility for children, and therefore children should not be the issue. This argument fails for three reasons. First, following twenty years of pushing toward joint parenting, women still carry the major caretaking role, in addition to the burden of pregnancy and childbirth. Second, more than one-quarter of all children currently live in single parent families, and the single parent is the mother nine times out of ten. And third, gender-neutral laws adopt the male model of competition in the workplace, and are not, as exemplified by Title VII, responsive to the needs of mothers and children.

225 Most feminist theorists who tackle the problem of children resolve it as an equal burden between mother and father and therefore not an impediment to an equal rights approach. See B. FRIEDAN, supra note 16.

226 See supra note 18 and accompanying text.
A new approach to the controversy of equal treatment versus special treatment is proposed; a motherhood model which considers the needs of mothers and children, not from an outdated stereotypic view of feminine weakness or dependence, but from a realistic and pragmatic assessment of what will improve their condition. Not all gender issues are motherhood issues, there are many arenas, such as access to education, credit or private clubs, where an equal rights orientation may be correct. When motherhood is an issue, however, fair treatment, rather than equal treatment, may be the solution. This is what the Supreme Court has struggled to do in decisions that seem in conflict with equal treatment.

In family law, the no-fault divorce mentality must be turned around to recapture, if not fault, at least responsibility. Focusing on the economic well-being and continuity of lifestyle of the children, rather than an equal division between the spouses in matters of property division and support will produce fairer results for children and for mothers who are most often their custodians. Returning to a presumption in favor of mothers in custody disputes will also produce a fairer result. Parents are not "similarly situated" after divorce. In the vast majority of cases, a child needs the continuity of his or her mother's care without the threat of litigated custody disputes.

In the workplace, the most important demographic phenomenon of the past twenty years is the huge flood of mothers pouring into the workplace. Most mothers have not entered the high paying male dominated professions, but have primarily concentrated in the lower paying female occupations, or into part-time work. Title VII and the EPA, the twin pillars of the feminist push for equal opportunity in the workplace, are seriously inadequate to meet the needs of these mothers. Ti-

927 A motherhood stance assumes that the interests of mother and child are most often compatible, or at least not in conflict. I believe this is essentially true for issues of divorce, custody and the workplace which are covered in this article. I recognize, however, that there are situations, such as surrogate parenting or abortion in the last trimester where the interests of mother and child (or potential life, as in the last trimester of pregnancy) may be in conflict. When the interests of mother and child are in conflict, different standards may apply, e.g., whether to take baby by Caesarian from terminally ill mother, issues of privacy and consent vs. third trimester fetus' right to life. See, e.g., In re Baby M., 109 N.J. 396, 537 A.2d 1227 (1988). The court determined a surrogate mother had right of access to her child.


929 For a discussion on comparable worth and part-time work, see supra notes 200-03 and accompanying text.
Title VII permits women to compete with men in male dominated professions, but it provides little relief for women in female dominated occupations where direct discrimination is usually not the issue. Nor does Title VII, which accepts the male model of the workplace, allow for any special accommodation for the needs of mothers and children. The EPA provides relief only in the limited cases where men and women are performing the same job, not where women are performing tasks of comparable value.

A motherhood model would focus on making the workplace work for mothers and children. The persistent wage gap, caused in large part by the low wage structure of female occupations and part-time work, can be tackled by a combination of comparable worth legislation and old-fashioned collective bargaining. Working conditions can and should be altered to meet the needs of mothers, who are now a major factor in the workforce. Maternity leaves, family sickness leaves, flex-time and part-time tracks should become as accepted as the eight hour day.

Women's lives have changed dramatically in America in the past twenty years, but women still have children in the same proportion as they have throughout this century. Rather than being ignored, motherhood issues must be promoted.

Women are haunted by the spectre of old sexual stereotyping. Without doubt motherhood was used by employers to keep women out of the labor market or on its fringes, but women today make up close to half of the workforce and they are in a position to restructure the workplace to their advantage. Despite the number of women in the workforce, America lags far behind other industrialized countries in maternity leave, childcare, vacation time and family sick leave policy. Women also lag behind their European counterparts in wages compared to men. Rather than accepting a male model and trying to cope with their double burden, women are in a strong position to demand support systems which will benefit themselves, their children, and society.

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230 C. Degler, supra note 8, at 461.
231 Id. at 469-70 (discussing day care in other countries).
232 Id. at 426. The male-female wage gap has not narrowed in the United States over the last 20 years as much as it has in other industrial countries. For a discussion of the progress made in other countries, see S. Hewitt, A Lesser Life, 73 (1986).