WOMEN IN THE NEW MILLENNIUM: THE PROMISES OF THE PAST ARE NOW THE PROBLEMS FOR THE MILLENNIUM

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As we approach the millennium, women's roles are becoming more complex, but the issues are treated as if the roles are becoming more simplistic. Even though a substantial number of women have entered the work force, they remain the predominate caretakers for children. Moreover, society's expectations for women are increasingly more of an accepted dual role rather than a shared one. Since the early eighties, some have alleged that women have come a long way because they "bring home the bacon," and take care of the home and their men. Women fought to become respectable members of the workforce, yet the role of caretaker for the children, the home, the husband, and the father continued. Accordingly, women became "super-women" because they could maintain a career and a household and never let men forget that they were women. As referenced by a Virginia slim cigarette commercial, "we [came] a long way "baby."[1]

But what did "we" get or receive? There are substantial health issues with women today, some of which are due in large part to our participation in the workforce. We suffer from heart disease, high blood pressure, strokes and cancer at the same or higher rates then men, yet women continue to maintain the jobs of caretaker and homemaker. One could easily respond, "women wanted it all and they got it." Did we want it all and what did we get? Or what did "they" give us? Why were we placed in a position for others to decide what we should get or receive? Why couldn't we decide that for ourselves? Or did we decide for ourselves? What did we decide and why?

In this Article, I will explore the roles of women and the expectations that society maintains for them in the past and the expectations for the present and future. As we enter the millennium, the courts appear to administer the law in the same way as laws were administered prior to the women's rights movement. Judges

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[1] "Baby" being a term that was frequently used to identify a woman.

appear to implement notions of equal rights while society attaches the notions of the "difference group"[2] without any special treatment for the dual roles. Something interesting appears to be happening to the dual roles of women. There is one standard stating that women must work, and yet another standard suggesting that women are to be caregivers following the traditional notions of caring and nurturing their youth, even though the work standard has pushed them out of the home. What is a woman to do?

Part I of this Article focuses on how the laws have adapted to the differing perspectives of women's roles that were launched within the feminist movement. I will also present the promises that women were given by society. Part II of the Article examines the problems facing women as we enter the millennium. Finally, Part III considers various recommendations to address these problems. It is my contention that the problems women are facing will persist, if they are not remedied, in part, from the promises presented during the feminist movement. Three dominant themes: culture, sameness (the equality principle), and dominance, emerged during the feminist movement. Newly enacted statutes, rules of law, and judicial opinions focused on one of those themes, the equality principle. Supreme Court decisions resting on the equality principle have often involved men as plaintiffs or men as injured parties rather than women. The equality principle, however, did not enhance the status of women but actually hindered women and enhanced the status of men.[3]

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[2] Cultural feminist perspective is discussed in material referenced, *infra* note 18.

[3] There have been cases where males used the intermediate scrutiny analysis to acquire benefits or status. *See* Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (holding that it is unconstitutional to restrict a state university nursing program to females only). There are, however, examples where such attempts have not worked, *see, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (holding male-only draft registration constitutional); Michael M. v. Sonoma County Superior Court, 450 U.S. 454 (1981) (holding male only statutory rape statute constitutional) but in a substantial number of cases, males used the intermediate scrutiny test to their advantage. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (stating that a similar statutory system for worker's compensation death benefits are unconstitutional); Orr v. Orr, 440 U.S. 268 (1979) (holding a statute restricting alimony awards solely to females unconstitutional-no-male-only pay rules); Caban v. Mohammed, 441 U.S. 380 (1979) (stating that its unconstitutional to restrict, by statute, the right to block adoption to unwed mothers only, unwed fathers must be extended an opportunity to do so as well); Califano v. Goldfarb, 430 U.S. 199 (1977) (holding it unconstitutional to impose a dependence test on widows for social security survivor benefits when none was required for widowers); Craig v. Boren, 429 U.S. 190 (1976) (holding it unconstitutional to establish different ages for the right to purchase 3.2% beer based on gender; statute required males to be 21 years old and females 18 years old with a result that both males and females could make purchases at the age of 18); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (stating that it is unconstitutional not to extend survivor benefits under social security to widowers with dependant children; widows received such benefits; Frontiero v. Richardson, 411 U.S. 677 (1973) (asserting that it is unconstitutional to not characterize male spouses of female members of the armed forces as automatic

I. THE PROMISES

To begin a dialogue on the promises, it is necessary to recall the various perspectives that were launched during the feminist movement. There was once an underlying notion that women were empowered to set the stage for the future of other women. During the feminist movement, women may have had this disillusion because they believed society was listening to their concerns and therefore, women felt empowered. However, the reality was that times and society were changing, women were needed in the workforce, and their placement next to men meant that their voices had to be acknowledged, at least in the public sphere. Accordingly, the public sphere had to change. Additionally, women had to get paid for their employment and find someone else to take care of the children. With salaries came issues of pay rates and economic strength. But was there actual empowerment?

A. Various Feminist Perspectives

In the 1960s, identifiable women's groups began to emerge and their emergence actively and openly challenged the status of women. More women began working for wages outside the home and women became openly engaged in various movements such as antiwar protests and civil rights activities. During the 1970s and 1980s, women identified as feminists, began consciousness raising activities which focused on how to elevate the status of women.[4] Out of such consciousness raising came the theme "the personal is the political."[5] In essence,

> [t]he analysis that the personal is the political . . . [had] four interconnected facets[:] [(1)] women as a group are dominated by men as a group, and therefore as individuals[;] [(2)] women are subordinated in society, not by personal nature or biology[;] [(3)] the gender division . . . pervades and determines even women's personal feelings in relationships[;] [and] [(4)] since a woman's problems are not hers individually but

dependents; female spouses of male members of the armed forces received automatic dependant status; it is arguable that this benefitted female members of the armed forces, but the reality is that the benefits run to the male spouse). There are also examples of the court rejecting obvious gender based equal protection claims by women. *See* Personnel Adm'r of Massachusetts v. Feeny, 442 U.S. 256 (1979) (giving lifetime veterans benefits for state employment that benefitted 98% of males held constitutional.).

4 *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 84 (1989).

5 *Id.* at 95.

> those of women as a whole, they cannot be addressed except as a whole."[6]

Some suggest that because the analysis of gender is a non-natural characteristic of a division of power, it exemplifies one of the ways in which the personal indeed, becomes the political.[7] Thus, because the role of feminism involves the way in which a woman's consciousness is related to her life situation, it underscores "being shaped in the image of one's oppression, yet struggling against it."[8] From a woman's perspective, feminism, through consciousness raising, incorporates the effects of growing up female in a male-dominated society, which Catherine MacKinnon, a prominent feminist author, suggests "can be understood as a distortion of self."[9]

Not only did women's groups begin to set the stage for advancing their goal of elevating the status of women, these groups actually began the work necessary to achieve that goal. Various perspectives were forwarded from the differing views of the groups. Although it is difficult to label the various views, the generally accepted ones include: liberal/equality/sameness, cultural/difference, and dominance perspectives.[10] Critiques of the perspectives also arose during consciousness-raising sessions. These critiques were discussed under theories of essentialism and heterosexism/heterosexualism.

1. Liberal Feminists/Sameness

Feminists espousing the equality principle recognize biological differences existing between men and women in relation to reproduction.[11] They assert that the differences have been used to justify sex-based legal and cultural limitations on human potential that do not reflect any real difference between men and women, and that difference enforces the inferiority of women and the dom-

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[6] *Id.* The author also notes "Women learn they are defined in terms of subordinate roles; failing to challenge these roles confirms male supremacy in a way it needs." *Id.* at 101. Consciousness "constitutes a lived knowing of the social reality of being female." *Id.* at 90. With consciousness-raising "it becomes difficult to take seriously accounts of women's roles or personal qualities based on nature or biology, except as authoritative appeals that have shaped women according to them." *Id.*

[7] *See id.* at 95.

[8] *Id.* at 102. "In so doing, women struggle against the world in themselves as well as toward a future." *Id.*

[9] *Id.* at 103.

[10] *See* Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775 (1990).

[11] *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984), in which the author states "[P]regnancy, abortion, reproduction, and creation of another human being are special—very special. Women have these experiences. Men do not." *Id.* at 1007.

inance of men.[12] Whether the differences between men and women are perceived or real, and whether they are biologically or socially based, they should not detriment the actual equality of men and women.[13] Rather, the differences between men and women must be "costless relative to each other."[14] The sameness group promoted equality between the sexes. Could treating women equal to men be the same as treating women the same as men? Therein lies the problem. If we treat women equal to men, then it suggests that equality could mean that women need more in order to be equal to men. It does not necessarily follow that if men and women are both given "x" that there is equality, because in order for women to be equal to men, women may need "y" plus x, while men only need x. Men already "have," so if they are given the same rights and freedoms as women, it is adding to what they already have. For indeed, there is an imbalance of power between men and women and thus, giving equal rights to both genders does not alleviate this distortion. But why does maleness provide an original entitlement?

What the sameness standard fails to notice is that men's differences from women are equal to women's differences from men.[15] There is an equality there. However, the sexes are not equally situated in society.[16] It must be noted that their relative differences are related to society's power structure. Although there is an equality, in terms of differences, there are also inequalities in differences produced by the hierarchy of power.[17]

Liberal feminists believe that defining women in relation to their differences from men will present problems in insuring equality between men and women. Women are not men and thus

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12 *See id.* at 1008. ("[S]crutiny on sex-based classifications is intended to ensure that there are important governmental reasons for treating men and women differently when they are in all relevant respects the same.") *Id.* The author notes however that:

> Affirmative action programs using explicit sex . . . based classifications are justifiable in relation to the reality of historic oppression and the need for transitional measures to make equality of opportunity possible. Laws governing sex-specific physical characteristics, however, raise different issues. Special benefits for pregnant women . . . ought to be analyzed in relation to the special needs of pregnant women, rather than as a means of providing compensation for past discrimination against women generally or pregnant women in particular.

Id. at 1012-13.

13 *See* Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1979) (setting forward equality as acceptance).

14 *Id.* at 1285.

15 *See* MACKINNON, *supra* note 4, at 225.

16 *See id.* at 224-25 (chapter on Difference and Dominance: Feminism Unmodified: Discourses on Life and Law, on Sex Discrimination).

17 *See id.*

entitlements should not be based on what men get rather than what women ought to have.

2. Cultural/Difference Theory

Women are biologically different from men. However, women and men are not simply different based on biology. It thus becomes important to consider whether, absent biology, there are differences between the genders such that laws should be enacted according to these differences. Among the ways women are different from men is in how they view the world. For example, women view the world personally in terms of relationships rather than in terms of people standing alone.[18] Thus, a woman's view of the world involves human connection rather than systems of rules.[19] In contrast, men view the world impersonally through systems of logic and law.[20]

Author Carol Gilligan wrote of a study conducted on two young children, Amy and Jake, which focused on the question of whether different responses to the same question are gender-related.[21] The difference in views between men and women was clearly demonstrated in the respective responses of Amy and Jake to a question concerning the morality of stealing a pharmaceutical drug. The children were asked to decide whether a husband should steal a drug from a pharmacy for his seriously ill wife.[22] Jake contended that the husband should steal the drug, while Amy replied "Well, I don't think so."[23] Amy's response, which is relational, is unlike Jake's, which is one of logic and law. Amy does not see the dilemma as a math problem that happens to involve humans, but as a narrative of relationships that extend over time.[24]

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18 *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

19 *See id.*

20 *See id.*

21 *See id.* at 113.

22 *See id.*

23 *Id.* at 113-114.

24 *See id.* The dilemma that Amy and Jake had to resolve involved a man named Heinz who had to consider whether to steal a drug which he could not afford to buy. Heinz needed to steal the drug in order to save his wife's life. Jake, using logic and the law, responded

> [F]or one thing, a human life is worth more than money, and if the druggist only makes $1000, he is still going to live, but if Heinz doesn't steal the drug, his wife is going to die. Because the druggist can get a thousand dollars later from rich people with cancer, but Heinz can't get his wife again. Because people are all different and so you couldn't get Heinz's wife again.

Id. When questioned about the fact that stealing is against the law, Jake responded that "the laws have mistakes, and you can't go writing up a law for everything that you can imagine." *Id.* Jake considered the moral dilemma to be "sort of like a math problem with humans." *Id.* He was deemed to have arrived at a rational solution through logic, math,

Critics, however, suggest that Jake actually answered the question, while Amy failed to give a definite answer.[25] Conversely, cultural or difference feminists state that Amy did answer the question, but simply answered in a different voice.[26]

Another group, hedonic feminists, foster the notion that "[w]omen's subjective, hedonic lives are different from men's."[27] This feminist group states that the quality of their suffering is different from that of men's, as is the nature of their joy.[28] Women suffer more than men.[29] The difference in suffering is explained by the inclination that "women often find painful the same objective event or condition that men find pleasurable."[30] Thus, hedonic feminists suggest/assert that enlisting the aid of the larger legal culture requires describing "our gender-specific pain . . . before we can ever hope to communicate its magnitude."[31] This group believes that the larger culture has not been enlightened because feminists have been unable to describe the pain and pleasure of women, and how the pains and pleasures distinguish women from men.[32] Hedonic feminists attribute the failure to describe women's subjective, hedonic lives to several factors: (1) linguistics; (2) psychological consideration; (3) political factors and (4) the emergence of feminist legal theory.[33]

A problem presented by linguistics is the difficulty women experience in talking about their pain and pleasure because lan-

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and law, while Amy's response was deemed not an answer because it was not logical. Amy responded to the question whether Heinz should steal the drug was

> [W]ell, I don't think so. I think there might be other ways besides stealing it, like if he could borrow the money or make a loan or something, but he really shouldn't steal the drug—but his wife shouldn't die either .... If he steals the drug, he might save his wife then, but if he [does] he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So, they should really just talk it out and find some other way to make the money.

Id.

25 *See id.*

26 *See id.* at 47-48.

27 Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 82 (1987).

28 *See id.* at 81.

29 *See id.*

30 *Id.* The converse is true, that men tend to view childbirth as solely a painful event whereas women realize bringing a life into the world *is* a remarkable gift. *See also* Lundy Langston, *No Penetration, And It's Still Rape*, 26 PEPP. L. REV. 1 (1998) (recognizing that rape is not sex, sexual relations are defined from a woman's perspective that is protected from unwelcome intrusions, what's pleasurable from a woman's perspective does not necessarily include male-type conduct).

31 West, *supra* note 27, at 85.

32 *See id.*

33 *See id.* at 86.

guage is simply inadequate for such a task.[34] Psychologically, woman must convince themselves in order to convince others of the seriousness of their injuries and "[s]o long as others are unconvinced, to some extent, [women] will be as well."[35] In the political arena the audience is, as Robin West, a legal scholar explains, "unwilling and resistant."[36] The normative significance of women's pain and suffering will permit women to denote pain as pain and not transform pain into something else.[37] Professor West noted that:

> An injury . . . sustained by a disempowered group will lack a name, a history . . . [will be trivialized] . . . and [women] diminish [themselves] in response to injuries we perceive as trivial; we reconstruct our pasts in response to injuries we perceive as subconsciously desired; we negate our inner selves in response to injuries we perceive as consensual and we constrain our potentiality in response to injuries we perceive as inevitable.[38]

In order for women to affirm difference when difference means dominance, what is required is affirming the question and characteristics of powerlessness.[39] When one is powerless, the problem is not simply that of speaking differently.[40] Instead, the powerless person simply does not speak.[41] "Your speech is not just differently articulated, it is silenced. Eliminated, gone."[42] Skepticism arises out of affirming difference because difference has not been defined by women. Affirming what women have been is not necessarily what women are, rather it is what women have been allowed to be.[43] "Women value care because men have valued us according to the care we give them . . . [w]omen think in relational terms because our existence is defined in relation to men."[44] Framing the issue in terms of difference will permit the notion of

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34 *See id.*

35 *Id.*

36 *Id.* "The inadequacy of language and the problem of 'false consciousness' are but reflections" of an audience (male) that is unwilling and resistant. It is the resistant and unwilling audience, refusing consideration of the very nature of gender-specific pain, which is at the core of the problem.

37 *See id.* at 87.

38 *Id.* at 85.

39 *See* MACKINNON *supra* note 4, at 219. ("Difference is the velvet glove on the iron fist of domination. The problem then is not that differences are not valued, the problem is that they are defined by power.").

40 *See id.*

41 *See id.*

42 *Id.*

43 *See id.*

44 *Id.* at 233.

equality to have the appearance that women are asking for too much, that women are asking to have it both ways.

> [T]he same when women are the same, different when [women] are different. [Although] this is the way men have it . . . [women cannot]. [They have it] the same as women when they are the same and want it, and different from women when they are different and want to be . . . [e]qual and different too would only be parity. [U]nder male supremacy, while being told we get it both ways, both — the specialness of the pedestal and an even chance at the race, the ability to be a woman and a person, too — few women get much benefit of either . . . .[45]

There has been the suggestion that different treatment should be limited to the discrete episode of pregnancy.[46]

> [E]pisodic analysis recognizes that biological reproductive sex difference exist, but confines their legal significance to the brief period during which they are utilized. . . . At the moment of conception, sperm and egg play equally important roles. Following childbirth . . . equal responsibility for childrearing [is placed] on men and women who are parents. But . . . during the episode of pregnancy itself the woman's body functions in a unique way. We must recognize that unique function in order to prevent penalizing the woman who exercises it. If confined in this way, the recognition of pregnancy as 'unique' will enable the law to treat women differently than . . . those of men as a way of ensuring that women will be equal to men with respect to their overall employment opportunities.[47]

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45 *Id.*

46 *See* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 22 (1985). The author notes:

> [People take into] account biological reproductive sex differences and treat them as legally significant only when they are being utilized for reproductive purposes. Biological reproductive sex differences should be recognized as a functional attribute, rather than an inherent characteristic, of sexual identity, and as one that may or may not be exercised. A woman may be distinguished from a man by her capacity for pregnancy, childbirth, and lactations; but she may choose never to utilize that capacity. Is she any less female?

Id.

47 *Id.* at 33-34. *But see* Katharine Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CAL. L. REV. 1532-33 (1974), warning of the danger to working women posed by treating pregnancy as a unique condition; one should carefully scrutinize stereotypical assumptions that often accompany such characterizations. *See also* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986), in which the author notes "[t]he special treatment/equal treatment debate reflects the limiting focus of equality analysis . . . . Essentially, the debate is between two strands of traditional liberal equality theory — formal versus substantive equality, or equal opportunity versus equal outcomes." *Id.* at 1143-44.

> Formal equality [i]s the doctrinal model that would treat likes alike; [s]ubstantive equality [is] the doctrinal model which acknowledges that parceling out goods such as workplace benefits according to egalitarian distributive

The equal treatment position, which emphasizes sameness, is used to avoid discrimination based on the ways in which women are different from men in the male dominated and defined workplace. In contrast, the special treatment position recognizes the disadvantage of emphasizing sameness, which by recreating the occurrence of instances of discrimination, highlights the fact that the standards of the workplace are not determined based on the needs and perspectives of women. This leads to the realization that being treated as if you were the same as the norm, when in fact, you differ in significant ways, "is just as discriminatory as being penalized directly for your difference."[48]

Beginning with the premise that women are different from men is problematic because women are women. Women should be defined in terms of being women, not in terms of being men. What makes us women is the fact that we are women rather than we are women because we are different from men.

3. Dominance/Radical Feminists

Dominance/Radical feminists discuss problems between the sexes in terms of dominance and power. Gender is a question of power, of "male supremacy and female subordination."[49] Power constructs social perception and reality.[50] "Sexuality is the social process through which social relations of gender are created, organized, expressed and directed, creating the social beings we know as women and men, as their relations create society."[51] Many of the ways in which women are suppressed, intruded on and violated are recognized as what sex is for women and as the meaning and content of femininity.[52] This group promotes an exchange of power. The Dominance/Radical feminists believe that the only way that the status of women would change, (i.e., for the better), would require an exchange of power between the sexes. Women had to take over the power that men had/have. The radicals believed that because of the social construction of the genders, men

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principles may not result in people's positions coming out equal in the end. Individual needs and positions may have to be taken into account in any particular situation in order to achieve equality of outcome.

Id. at 1144. Finley also stated that the equality analysis is troubling because of its indeterminacy and its ideal of homogenous assimilation. Homogenous assimilation promotes difference as undesirable. *See id.* at 1152-53.

48 Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1154 (1986).

49 MACKINNON, *supra* note 4, at 4-6.

50 *See id.*

51 *Id.* at 3.

52 *See id.* at 5-8.

are incapable of seeing things from a woman's perspective or recognizing what the plights of women are. In the book *Toward a Feminist Theory of the State,* Catharine MacKinnon noted:

> Because the inequality of the sexes is socially defined as the enjoyment of sexuality itself, gender inequality appears consensual. This helps explain the peculiar durability of male supremacy as a system of hegemony as well as its imperviousness to change once it exists. It also helps explain some of the otherwise more bewildering modes of female collaboration.[53]

Radical/dominance feminists assume that there "exists a correlation between people's objective equality and subjective happiness, or well-being. On this assumption, radicals seek to maximize not our subjective happiness, but our objective equality."[54] Although radicals, like liberals, are concerned about subjective well-being, because of their underlying politics, neither group aims directly for achieving the happiness or well-being of women.[55] Radicals seek to maximize women's subjective equality rather than subjective happiness.[56] The focus then, from the radical's perspective, is that elevating the status of women should not be measured from what men have and therefore what women are entitled to, but rather the elevation of the status of women should be based on what women ought to have.

The Dominance group believes that focusing on difference means an affirmation of powerlessness. They believe that if men are in power and women are defined in terms of how women are different from men, then it is a question of powerlessness. If men are in power and women are different from men, then women have no power.

B. The Perspective Followed

The equality principal emerged as the guide for resolving problems created by the historical separateness of men and women, which played a role with the inferiority of women to men. In practicality, the notion that men and women are to be treated equally simply means that men will not be discriminated against because they are different from women. The United States Supreme Court stated that an intermediate standard should be

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53 *Id.* at 13.
54 West, *supra* note 27, at 88.
55 *See id.* at 87.
56 *See id.* at 88.

used when enacting laws that are gender based.[57] Although discrimination based on gender is prohibited, such policies have been upheld if there is a showing of some important governmental interest.[58] In addressing various issues dealing with gender, the Court eliminated sex-specific statutes from state and federal codes. In order to overcome an equal protection allegation, the code must serve some important governmental objectives and it must be substantially related to the achievement of those objectives. Feminists had sought a higher standard of review, i.e., strict scrutiny. They sought the same standard that was used in cases involving discrimination based on race. At least four justices in *Frontiero v. Richardson*[59] voted for a strict scrutiny standard. The justices believed that the highest standard was necessary because of the long history of sex discrimination in this country.[60]

In addition to the various United States Supreme court cases that molded the political and public perspectives related to discrimination based on sex, Congress also enacted statutes in an ef-

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[57] *See* Reed v. Reed, 404 U.S. 677 (1973).

[58] *See id.* at 76-77 ("To give a mandatory preference to members of either 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 of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex — struck statute creating preference for men as estate executors." *Id.*). *See also* Frontiero v. Richardson, 411 U.S. 677 (1973) (deciding not to extend strict scrutiny in gender case brought by a married female officer in the Air Force alleging an equal protection violation because spousal benefits were automatically granted to married men but denied to married women; absent a showing that the wife provided more than half the husband's support, the court struck a rule giving spouses of men in the Air Force benefits not automatically available to women); Geduldig v. Aiello, 471 U.S. 484 (1974) (upholding a rule that denied disability coverage under a California statute that excluded pregnancy as a physical condition from the list of compensable disability; the court stated that although it is true that only women can become pregnant, it does not follow that every legislative classification concerning a pregnancy is a sex-based classification; therefore, the court upheld pregnancy discrimination in the state disability plan but not gender discrimination); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (stating that an employer did not discriminate on the basis of sex under Title VII when medical benefits did not include cost associated with pregnancy. Congress enacted the Pregnancy Discrimination Act which prohibits discrimination based on pregnancy, childbirth, or related medical conditions); *Geduldig* was affirmed by the Court as the law in constitutional cases. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), Craig v. Boren, 429 U.S. 190 (1976) (holding that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (stating that when a statute that is gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately diverse, a twofold inquiry is appropriate — 1) whether the statutory classification neutral in the sense that it is not gender-based; and 2) has the party shown that a gender-based discriminatory purpose, has, at least in some measure, shaped the Massachusetts veterans' preference legislation; the Court determined that preference for veterans in state employment not sex discrimination).

[59] *Frontiero*, 411 U.S. at 677.

[60] *See id.*

fort to overcome traditional notions of sex/gender based discrimination.[61]

Even though the Court and Congress offered women some protections from discriminatory practices, the intermediate level of review made feminists uneasy because there was still room for discrimination to occur without consequence. Perhaps the Court's rulings coupled with the actions of Congress played a roll in the equality/sameness theory being supported and accepted as the remedial measure for elevating the status of women. The dilemma of pushing forth an equality principal, using men as the measuring rod, stemmed from the feminist movement being reactionary.[62] "Feminist legal theory has been primarily reactive, responding to the development of legal racial equality theory."[63] What became an apparent flaw with the analysis of equating legal treatment of sex to race was to "deny that there are in fact significant natural differences between women and men, in other words, to consider the two sexes symmetrically located with regard to any issue, norm, or rule."[64]

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61 Pregnancy Discrimination Act, [hereinafter PDA], Pub. L. No. 95-555, 92 Stat. 2076 (1978). (PDA defines discrimination to include distinctions based on pregnancy, childbirth, or related medical condition); 42 USC § 2000e(k), "Title VII".

62 *See* Littleton, *supra* note 13, at 1279.

63 *Id.* at 1291.

64 *Id.* at 1291-92. Littleton terms symmetrical approach as one which "classifies asymmetries as illusions, overbroad generalizations or temporary glitches that will disappear with a little behavior modification. A competing response, asymmetrical approach, accepts that women and men are or may be different and that women and men are often asymmetrically located in society . . . the asymmetrical approach, rejects the notion that all gender differences are likely to disappear, or even that they should." *Id.* There are two types of symmetrical visions — 1) assimilation and 2) androgyny. Assimilation, "the most accepted model . . . posits that women, given the chance, really are or should be just like men." Androgyny posits that women and men are, or at least could be, very much like each other, but argues that equality requires institutions to pick some golden mean between the two and treat both sexes as androgynous persons would be treated." *Id.* at 1292. For discussions on race and feminism, *see* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (claiming that sexist expectations and racist assumptions combined to create a distinct set of issues confronting black women); PAULA GIDDINGS, WHEN AND WHERE I ENTER — THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal History*, 42 STAN. L. REV. 581 (1990) (arguing that with gender essentialism some voices are silenced in order to privilege others but most troublesome is the fact that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice . . . the voices of black women.); BELL HOOKS, AIN'T I A WOMAN — BLACK WOMEN AND FEMINISM (1991); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989). *See also* Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & Feminism 217 (1993). *But see* Linda J. Lacey, *Mimicking The Words, But Missing The Message: The Misuse of Cultural Feminist Themes in Religion And Family Law Jurisprudence*, 35 B.C. L. REV. 1, 40 (1993) The author asserts that she is more convinced than ever (partly due to her mothering both a girl and a boy, who like most children of all races and classes, watch television and Disney features and observe the display of pink clothes for girls and blue for boys in stores ranging from K-Mart to Bloomingdales) that cultural femi-

C. Perhaps Sojourner Truth Says It Best

"More than a hundred years have passed since the day Sojourner Truth stood before an assembled body of white women and men at an anti-slavery rally in Indiana and bared her breasts to prove that she was indeed a woman."[65] Responding to a white male's statement against the idea of equal rights for women where he based his argument on the notion that women were too weak to perform their share of manual labor, and that they were innately physically inferior to men, Sojourner stated:

> But what's all dis here talkin' 'bout? Dat man ober dar say dat women needs to be helped into carriages, and lifted ober ditches, and to have de best places. . . and ain't I a woman? Look at me! Look at my arm! . . . I have plowed, and planted, and gathered into barns, and no man could head me — and ain't I a woman? I could work as much as any man (when I could get it), and bear de lash as well — and ain't I a woman? I have borne five children and I seen 'em mos all sold off into slavery, and when I cried out with a mother's grief, none but Jesus hear — and ain't I a woman?[66]

Even though Sojourner Truth has been accredited with putting forth the voice of Black women in the feminist arena, what seems to be lost is the fact that Sojourner's voice was the voice of women in general. There have been substantial discussions within the legal community on essentialism and whether white women can voice the concerns of all women. Consistently the response has been no. Sojourner raises the point that she has proven the physical equality to men but she also demonstrates that she is a woman, signifying that there is something special and different about that physical attribute that does not devalue her equality to men. She can do all that men do and still maintain that she is a woman.

Sojourner, as simple as she tried to make it, was stating to the audience that we can do all those things mentioned but we are women. Her point defines women in terms of who we are and what we do, rather than in terms of what we do in relation to men.

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nism's "most important theme remains the insight that gender-based cultural expectations and mores for girls and boys . . . produce significant differences in many men and women, and that all the consciousness raising in the world can never completely eradicate these differences." *Id.*

65 HOOKS, *supra* note 64, at 159.

66 *Id.* at 160. bell hooks notes that Sojourner bared her breasts during a speech to prove she was in fact a woman. Sojourner wished to demonstrate that although she did a "man's" work, she was still a woman, and this fact did not make her inferior to a man. She further wished to emphasize that she was not seeking a power exchange with men, but rather equality.

II. The Problems of Motherhood

The problems that belied all three feminist perspectives is the comparison of women to men. All three themes defined women in relation to men. A women's entitlement should be based on the fact that she is a woman rather than defining her in terms of how she relates to a man. Under all three principles, the focus was to give women what men have. Even though the dominance group focused on what women should have, the group defined the power based on the power that men had. They too defined women in men's terms.[67]

As we face the millennium, we have more women in the workforce. With such increased numbers, there are more women's voices in the public sphere to trumpet the problems faced by women in the private sphere. Although we have not yet broken the presidency barrier,[68] there are now women judges and lawyers and significant numbers of women legislators within the executive, legislative and judiciary branches. Have our abilities to break the barriers given us the power to implement change, or have we compromised the movement to the detriment of women?

The trend has been an application of the equality principle, that women should be treated the same as men. This equality principle has created substantial problems for women because the application of the equality principle does not take into account the special needs of women which exist because women are different than men in both the public and private spheres. The equality principle has for example, resolved custody disputes for fathers against mothers when mothers have had the equality laws to force the public sector to recognize her as an equal in the workplace, thereby removing her from the private sphere of caretaker. Although the biological mother/woman loses custody, the new caretaker, although a surrogate, is still generally, a woman.

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67 During a presentation at a faculty colloquy, I stepped out of the woman's voice in an effort to make sure the audience understood my premise. This is unfortunate because it is the same critique that I had of the three feminist theories, i.e., speaking for women but being forced to use a man's voice. I assumed that the audience could not understand and therefore did not hear me so I used an analogy with mammals. I posited for the group that both dolphins and whales are mammals. I noted that one does not say that a whale is a whale because it is different from a dolphin. One defines whales in terms of a whale and dolphins in terms of dolphin. But yet, in elevating the status of women, recognizing that men and women are humans, we define entitlements of women in men's terms.

68 Geraldine Ferraro made a bid for the 1984 democratic vice presidency. Ferraro has recently written a book "Framing a Life: A Family Memoir." *See* Bangor, Daily News, March 22, 1999, at 4 ("I think the Nation is ready for its first woman president. The country is a different place than when I ran. We helped open the door by showing a woman can run," asserts Ferraro); Thomas Ferraro, *Dole's Candidacy A Boost For Women in Politics*, Buffalo News, March 21, 1999.

At common law, under the doctrine of necessaries, a husband was responsible for the medical services rendered to his wife but the wife had no responsibility for her husband's medical expenses.[69] Today, the doctrine of necessaries, like most laws, is applied on the basis of gender neutrality and either spouse, without regard to gender, is equally responsible for the medial expenses of the other.[70]

The problem with the equality principle is that women are faced with the phenomenon called "double shift" or "double bind."[71]

> The issues in women's work are shaped by the structural disparities of the gender system. Women do not enter the labor market — be it formal or informal — on the same basis as men, nor do they operate within it on equal terms. The social and economic roles allotted to men and women limit women's access to the means of production . . . and the pressure on their time from their unpaid domestic activities, mean that women everywhere are working longer hours than men for considerably less income, and with less control over the decision-making processes that affect their lives and work.[72]

Issues concerning women and the work force can be found internationally. In Africa, women make up seventy percent of the agricultural workforce.[73] "[T]he extent of a family's productivity depended largely on the number of females available for work."[74]

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69 *See, e.g.*, Bowen v. Daugherty, 84 S.E. 265 (N.C. 1915); Presbyterian Hospital v. McCartha, 310 S.E.2d 409 (N.C. App. 1984).

70 *See, e.g.*, North Carolina Baptist Hospitals, Inc. v. Harris, 354 S.E.2d 471 (N.C. 1987); Forsyth Memorial Hospital, Inc. v. Chisholm, 452 S.E.2d 323, 324 (N.C. App. 1995) (holding that the wife is responsible for the medical expenses incurred by her husband prior to his death, even if the wife did not request the husband's admission to the hospital, did not anticipate that the husband would be admitted to hospital and did not agree to pay for the services). The doctrine of necessaries is limited to "situations in which the husband and the wife live together or, if separated because of the fault of the spouse on whom the creditor seeks to impose liability." *Id.* at 324.

71 SUSAN BULLOCK, WOMEN AND WORK 30 (1994) ("Whether or not women are in paid employment, whether or not they are working in farms, other family enterprises or their own businesses, they are still responsible for the management of the home. The entry of women onto the labor market has not yet had the effect of relieving them of a share of housework and child care — either through an increase in public or company provision, or through men taking more responsibility. Women simply work longer hours in order to fit all their work in." *Id.*).

72 *Id.* at 33. "We work approximately 16 hours a day inside and outside the house. I work with the cubuya (the dried inner fibers of cactus) like a man, combing it, spinning it, and cutting it down. Then I can 'rest.' I do the things that need to be done in the house. That's what they call our 'rest.' We leave one job to do another." *Id.* at 41.

73 *See id.* at 41.

74 *Id.* The author notes that the official statistics on the participation of women in fixed and agricultural production are scarce," a study in Zambia found a relationship between productivity and the number of females available for work.

Unlike Africa where generally, the roles of men and women are complimentary and oftentimes the same,[75] in East and Southeast Asia, particularly in the agricultural workplace, "men's and women's tasks are distinct."[76] "[L]ess possibility exists for women to exercise even limited control over certain crops or plots of land."[77] "In Latin America, the culture of the male breadwinner is so strong that almost by definition only men's economic activities count as work. Women and men alike tend to categorize women's work, including sowing and harvesting, as housework because it is *unpaid*."[78] Even though women share globally stereotypical notions about women, "rural women are not . . . a homogenous group. The pressures on and the ambitions of a woman farmer in Ghana are quite different from those of the 'untouchable' landless labourer in India, and from those of the grandmother who heads the marketing committee of her village co-operative in China."[79] Women in both the U.S. and the international areas, however, share the following characteristics: they work longer hours than men, most of their work is unpaid, and their share of household income and decision making is not in proportion with their labor.[80]

Even though the equality principal focuses on treating women and men as equals, the problems that are so apparent in the reproduction arena are issues that arise subsequent to reproduction. In this arena, it is clear that men and women are different and the principal of equality is not always practical. For example, the Pregnancy Discrimination Act ("PDA") permits expectant parents to be

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75 *See id.* ("Men clear the land at the outset of a cultivation cycle, but otherwise women frequently do the planting, weeding, harvesting and processing of food crops with little or no male intervention.").

76 *Id.* at 41.

77 *Id.*

78 *Id.* at 42. "Women in Guatemala, for example, reported that they were simply 'helping their husbands when they raised and sold small animals." *Id.*

79 *Id.* at 43.

80 *See id.* Another issue that arises is racism and homemaking.

> Migrant workers may be seen as a convenient reserve of labour . . . structures that divide working people are fed by myths and stereotypes, among them the idea that migrant and immigrant women are culturally bound to the home, make no effort to adapt to the 'host' country and its work patterns, do not speak the language — so they prefer homeworking. The reality is that they are forced into the home by the same structured factors as other women, with the additional oppression of discrimination on the basis of race.

Id. at 64-65. During the colonial period in the US, in the agricultural arena, women and men often had different chores. Women produced necessities which were consumed by families, such as making cloth, clothing, candles, soap, growing food in the garden, raising chickens for eggs and meat, and preserving and preparing food. *See* TERESA L. ABBOTT and JULIE A. MATTHAEL, RACE, GENDER AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 295 (1991).

treated equally when employers are considering maternity leave.[81] Although the Act is consistent, the non-discriminatory protections in Title VII and the recognition of both men's and women's fundamental rights to procreate includes or gives either gender the choice of becoming parents.[82]

The problem lies in the perspective taken regarding each parent — the woman is an expecting parent, while the man is an expectant parent. In a situation where both the infants' and expecting parents' due dates are the same, someone has to decide which individual gets the time off — the expectant woman or the expectant man. It is simply not practical to suggest that equality reins and therefore, the employer must decide the tie based on something other than the fact that they are both soon to be parents. The expecting mother encounters a physical ordeal and the father does not. Equality then cannot be the deciding factor. The deciding factor must be the fact that an expecting mother is different from an expectant father and therefore, she must be awarded the time off based on that difference.

Also problematic is the underlying fact that post-birth, women become responsible for the well-being of the child. After the birth of the child, the woman has to make decisions about the care of the child.[83] Generally, in the event the parents separate or divorce and the father is awarded custody, the father's partner, the non-biological mother, assumes the role of caretaker.[84] It is this area of

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81 The PDA of 1978 provides that discrimination on the basis of sex which is prohibited under Title VII, includes discrimination based on pregnancy, childbirth, or related medical conditions. 42 U.S.C.A. § 2000e(k) (1978). *But see* California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987); the Supreme Court upheld a California statute (California Government Code § 12945(b)(2)) that required employers to provide leave for childbirth but not for other temporary disabilities. The Court held that § 12945(b)(2) was not preempted by the PDA because the legislative history of the PDA indicated congressional intent to prohibit discrimination against pregnancy but not to prohibit states from giving preferential treatment to pregnant workers, and that the California legislation promoted equal employment opportunity.

82 *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

83 *See* FLA STAT. CH. § 63.032(14) (1997) provides that "abandoned" means a situation in which a parent makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. Although the statute provides a gender-neutral rational for abandonment, mothers have to make provisions for their children after birth; fathers are economically responsible but are not otherwise responsible for any nurturing of the child unless the father was married to the mother. In FLA. STAT. CH. § 63.032(14) (1997) there is also a provision for the court to "consider the conduct of a father towards the child's mother during her pregnancy," but there are no cases that demonstrate that the court will determine an unwed father to have abandoned his child because he ended the relationship with the mother during pregnancy.

84 *See* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995). States have gone so far as to enact statutes imposing the responsibility of caretaker on women. *See also* FLA. STAT. ANN. § 63.042(3) which prohibits

motherhood that has been greatly impacted. The equality principle has had a great impact on treating men and women as equals and using an intermediate standard of review for determining discrimination based on gender. Issues should be resolved in terms of who we are as women — rather than in terms of how close we come to or how far we fall from being men.

A. The Mom with the Nanny

Eight-month-old Matthew Eappen was rushed to Children's Hospital in Boston with a severe head injury.[85] Five days later doctors removed the life support from Matthew and the doctors pronounced him dead.[86] Louise Woodward was subsequently charged with the murder of Matthew.[87] Ms. Woodward had been employed, for approximately six months, as an au pair by Matthew's parents. On the morning of February 4, 1997, after Matthew's mother, Nancy Eappen, left for work, Matthew was in the sole care and custody of Louise Woodward.[88] On March 5, 1997, Ms. Woodward was indicted by the grand jury for the murder of Matthew Eappen.[89] She was ordered held without bail.[90] After the presentation of evidence at trial, the judge instructed the jury on murder in the first and second degrees.[91] Ms. Woodward declined an offer by the trial judge for an instruction to the jury on manslaughter.[92] The jury returned a verdict of guilty and Ms. Woodward was sentenced to life imprisonment.[93] After hearing argument on Woodward's motion for post judgment relief, the judge reduced the

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gays and lesbians from adopting. Even though the statutes, on their face, promote anti-gay morals, the statutes promote pro-female nurturing responsibility. Lesbian women can give birth, thereby becoming parents and the anti-gay statute does not apply. Gay men, on the other hand, cannot give birth and become parents and are prohibited from becoming parents under the statute.

85 *See* Commonwealth v. Woodward, 694 N.E.2d 1277 (Mass. 1998).

86 On February 4, 1997, Matthew was rushed to hospital and five days later he died as a result of serious head injuries. *See id.*

87 *See id.* at 1281.

88 *See id.*

89 *See id.* Matthew died from massive intra-cranial bleeding. Experts for the Commonwealth attributed Matthew's injuries to a combination of extraordinarily violent shaking and overpowering contact with a hard flat surface, all occurring some time on February 4th. Ms. Woodward's defense experts asserted that if any shaking took place, the shaking caused a "re-bleed" in a clot that was formed three weeks prior to February 4th. The Commonwealth's evidence was that Matthew was normal earlier in the day, and Ms. Woodward's admission to police that she had been "rough" with Matthew on the 4th. Ms. Woodward stated that she had been rough with Matthew when she put him on a bed, when she bathed him and when she placed him on the bathroom floor.

90 *See id.*

91 *See id.*

92 *See id.*

93 *See id.*

jury's verdict from murder to involuntary manslaughter and vacated her life sentence, sentencing her to time served.[94]

Although Louise Woodward was on trial for the death of eight-month-old Matthew Eappen, Dr. Deborah Eappen, Matthew's mother, faced a public tribunal (both in and out of court) because of her absence from the home and the fact that she left Matthew in the care of a nanny. There were no allegations that Dr. Eappen caused Matthew's death but during the trial, she faced grueling questions in the courtroom concerning why she left Matthew in Ms. Woodward's care.[95] Dr. Eappen has also faced unsympathetic comments from the public about her absence from the home and leaving Matthew with a nanny.[96] Throughout the trial, Matthew's mother was bombarded with statements which insinuated that if she were a good mother, she would have been at home and her baby would be alive.[97] Even though little Matthew lived with both his mother and his father and despite the fact that his father was a medical doctor who worked outside the home, the public outcry as well as the courtroom drama, did not address the father's absence(s) from the home.

B. The College Mom-Custody of Maranda, Jennifer Ireland v. Steven Smith

On April 22, 1991, Jennifer Ireland gave birth to a daughter, Maranda.[98] Maranda was conceived by Jennifer and Steven Smith, both teenagers.[99] The teen parents did not marry and continued living with their parents while they completed high school.[100] Maranda lived with her mother, her grandmother and her aunt, Jennifer's younger sister, all of whom helped raise Maranda and became the family which provided nearly all necessary support for her.[101] In January 1993, Jennifer filed an action to obtain child-

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94 *See id.*

95 Interview by Terry McCarthy with Deborah Eappen where Ms. Eappen responded to a question on her feelings about the case. "I just feel like, how did Louise become the hero and I become the villain? What is the real issue here? It is child abuse and child murder. I strive in a lot of different directions in life, and now suddenly that striving to be good seems to be bad." Terry McCarthy, *One Mother's Story, How Did Louise Become the Hero and I Become the Villain?*, NATION, November 24, 1997. Dr. Eappen demonstrates the flaws within the feminist — the issue of equality espoused by feminist which was practically a demand that women assert themselves if their voices are to become valuable and heard.

96 *See id.*

97 *See* Ellen Goodman, *Who Gets Blamed Next for Matthew's Death? Working mother, of course . . .*, BOSTON GLOBE, October 26, 1997 at E07.

98 *See* Ireland v. Smith, 542 N.W.2d 344 (Mich. App. 1996).

99 *See id.*

100 *See id.*

101 *See id.* at 359. At some point, Steven began visiting Maranda and provided a few items for her care.

support from Steven and simultaneously obtained an ex parte order providing her with continued custody of Maranda.[102] Steven subsequently petitioned for custody.[103] During the fall semester of 1993, Jennifer enrolled as a scholarship student at the University of Michigan in Ann Arbor, where she and Maranda lived in the University's family housing unit.[104]

The trial court conducted an evidentiary hearing and ordered that Steven be given custody of Maranda.[105] The court posited its custody decision on the best interests of the minor. Michigan requires a consideration of the following factors in determining custody:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child; (b) the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any; (c) the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs; (d) the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity; (e) the permanence, as a family unit, of the existing or proposed custodial home or homes; (f) the moral fitness of the parties involved; (g) the mental and physical health of the parties involved; (h) the home, school, and community record of the child; (i) the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference; (j) the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents; (k) domestic violence, regardless of whether the violence was directed against or witnessed by the child; (l) any other factor considered by the court to be relevant to a particular child custody dispute.[106]

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102 *See id.*

103 *See id.* at 344.

104 *See id.* at 347. Steven remained at his mother's residence.

105 *See id.*

106 M.C.I. § 722.23; M.S.A. § 25.312(3); *see also Ireland*, 547 N.W.2d at 348-51. As to the factors the trial court found:

> (a) the child has a strong attachment to both parents and that both parents now exhibit a strong degree of love and affection for the child; (b) neither parent demonstrated significant parenting ability during the child's early life. Since shortly after high school graduation . . . [Jennifer] has demonstrated a 'new maturity and determination' . . . [and] Steven has shown himself to be 'very capable' in caring for the child during visitation; (c) the day to day costs of raising the child [has] been paid by the maternal grandmother . . . and that

The trial judge found both parents equal for custodial purposes with respect to all but one of the factors, subsection (e).[107] With respect to subsection (e), which deals with permanency as a family unit, Judge Raymond Cashen awarded custody to the father believing it was in the best interest of the child to be placed in care of her father who resided with his parents, rather than to be placed in daycare.[108] The court weighed the permanence factor in Steven's favor even though it found the University day care arrangements to be appropriate; it concluded that Steven's plan to have his mother baby-sit was better for the child because she was a "blood relative" rather than a "stranger."[109]

The Michigan Court of Appeals held that there was no support in the record to justify or sustain the trial court's ruling.[110] The court stated that the trial court's ruling with respect to subsection (e) was based on speculation.[111] Judge Gribbs of the Michigan Court of Appeals wrote that "there is no way that a single parent, attending an academic program at an institution as prestigious as the University of Michigan can do justice to their studies and to [the] raising of an infant child."[112]

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the grandparents' contributions to expenses did not weight in favor of either party . . . [finding] 'that these child-parents are in no position to adequately support their baby;' (d) the child has lived virtually all her life with Jennifer, most of the time in Jennifer's family home . . . [and that] with Jennifer's maturity [and presently] living independent of her mother [corrected problems that were made via Steven's derogatory comments about Jennifer's home environment]; and; *(e) acknowledged Steven's unclear plans about his future education, housing or employment but the court nonetheless concluded that Steven's "home, with his parents, was a 'regular home and a regular program,' and therefore preferable to [Jennifer's] university life style*"; (f) both parties were apparently 'sexually indiscriminate' during high school, [therefore] neither one . . . deserve any medals for their youthful activities; (g) the parties appear to be youthfully healthy and at this time have a good mental outlook on their future; (h) the child is too young to have a significant school and community record; (i) after seeing the child [court concluded] 'it was apparent that due to the infant's youth that no meaningful preference could be ascertained;' (j) both parties have contributed to the 'considerable discord;' and (k) 'the issue of domestic violence was not pertinent' even though evidence of violence, between the parties, was presented at the hearing.

Id. (emphasis added).

107 *See Ireland*, 542 N.W.2d at 348.

108 *See* Janet Naylor, *In Macomb County: 5 Year Old Says She's Afraid for Her Mother*, THE DETROIT NEWS, September 18, 1996; Elizabeth Kastor, *The Maranda Decision: It was an Ordinary Custody Fight, Until Day Care Tipped the Scales of Justice*, WASHINGTON POST, July 30, 1994.

109 *Ireland*, 542 N.W.2d at 349.

110 *See id.*

111 *See id.*

112 *Id.* at 349. The Court of Appeals, citing Fletcher v. Fletcher, 504 N.W.2d 684 (Mich. App. 1993) found "that the trial court committed clear legal error in considering the acceptability of the parties' home and child care arrangements." [U]nder this factor [(e)][the court was] directed to the permanence as a family unit [rather than acceptability]."

The court however, found trial court's error harmless because the custody determination was based on acceptability of the custodial home which was held not to be determinative by the Michigan Supreme Court which was handed down after the trial judge granted custody to Steven based on acceptability rather than whether the family unit will remain intact, a permanence criteria.[113] It remanded for reconsideration of the permanence factor previously used by the court in *Fletcher v. Fletcher*.[114]

The court affirmed the trial court's finding that there was an established custodial environment with Jennifer and that the parties were equal with regard to eleven of the twelve statutory factors.[115] The court, however, found no support in the record for the trial court's finding that the factors favored Steven.[116] It ruled that "because there was an established custodial environment in this case, the trial court [was] prohibited from changing custody unless clear and convincing evidence demonstrate[d] that a change in custody would be in the child's best interest."[117]

The Michigan Supreme Court affirmed the Court of Appeals' decision as modified and remanded and held that subsection (e) of the Michigan Code requires an evaluation of permanence as a family unit and not acceptability of the custodial home.[118] Although the Michigan Supreme Court left intact the Court of Appeals' ruling that Maranda should be returned to Jennifer's custody, it ruled that the trial court had to review the entire question of custody on remand and was restricted to only review evidence that post dated the trial and not evidence that predated the trial.[119] The court stated that "[w]hile a child can benefit from reasonable mobility and a degree of parental flexibility regarding residence, the Legislature has determined that 'permanence, as a family unit, of the existing or proposed custodial home or homes' is a value to be given weight in the custodial determination."[120] The court, therefore, held that on remand the trial court, in weighing factor (e), had to consider all the facts that bore on whether Jennifer or Steven could best provide Maranda with a family unit marked by permanence.[121] Although the Michigan Supreme Court held that

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113 *See Ireland*, 542 N.W.2d at 352.
114 *See id.* citing Fletcher v. Fletcher, 504 N.W.2d 684 (Mich. App. 1993).
115 *See Ireland*, 542 N.W.2d at 351.
116 *See id.*
117 *Id.* at 348.
118 *See* Ireland v. Smith, 547 N.W.2d 686 (Mich. 1996).
119 *See id.* at 692.
120 *Id.* at 690.
121 *See id.* at 691. Although the Court makes reference to the 61 amici curiae briefs that were filed in support of custody with Jennifer, it stated that custody decisions are to be

Maranda was in the custody of Jennifer, it left open the possibility of ruling that Jennifer's quest for a college education could lead to a loss of custody of her minor child. The Court of Appeals, in weighing subsection (e), the permanence of a stable family unit, could find that Jennifer's pursuit of a college education, which results in the need of placing a child in day care, may prove to be grounds for removal of custody, if Steven could show a more stable unit by living with the minor's grandparent.

In this particular situation, the court removes custody from a parent and places the child, in effect, with the grandparent which is contrary to established law. Generally, grandparents are not considered unless the other parent is deemed unfit.[122]

The effect of Michigan's ruling can place a child with a grandparent rather than a parent. Jennifer and Steven settled the custody dispute and it is unclear what the focus or the determinative factor would have been on remand. However, it is clear that women face a possible loss of custody upon enrolling in a boarding post educational institution. Although acceptability is not the focus in determining the permanency of the home environment, the Court resisted deciding custody based on the suitability of daycare and what constitutes acceptable child care in society.[123]

Although Jennifer is not grieving over the loss of her daughter, she is grieving nonetheless because she was judged from a higher standard of "motherhood" than as "parent." Jennifer had to assume responsibility from the date of Maranda's birth and although she contemplated giving up her child for adoption, she determined that she would care for her baby. In contrast, Steven did not decide on the extent of his involvement until Maranda, although still very young, was manageable. More importantly,

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made in the best interests of the minor and "it requires no stretch of imagination to produce hypothetical situations in which a parent's unwise choices . . . would reflect poorly on the parent's judgment." *Id.* at 691. The Court further stated that "[i]n some respects, [Steven's] proposed custodial home appears more stable." *Id.* at 690. The Court stated that Steven's "stability may be chimerical," and since there is the possibility that Steven will not live with his parents forever, it is difficult to ascertain how stable a home Steven can provide. *Id.* at 691. Conceding that it would be ironic if even with a finding of Steven's uncertain plans that the trial court could decide factor (e) in favor of him.

122 *See* Elizabeth Simpson, *More Grandparents Battle for Custody Census: 1.3 Million Children Live Solely with Grandparents*, 1999 WL 8128408, March 21, 1999 (grandparents have few rights in situations where both birth parents have given up rights to a child). Grandparents Rights Center has been established four years ago in Orange, California. *See id. See also Seniors: Grandparents Have No Legal Right To See Grandchildren But That Might Be Changing*, DETROIT NEWS, March 18, 1999 at C6, available in 1999 WL 3919072. *Grandparents Must Not Be Permitted To Trample Rights of Blameless Parents*, THE TAMPA TRIBUNE, February 16, 1999, at p. 12, *available in* 1999 WL 4644112.

123 *See* Janet Naylor, *In Macomb County: 5 Year Old Says She's Afraid of Her Mother*, THE DETROIT NEWS, September 18, 1996.

"manageable" refers to the fact that she was not totally dependent on another individual for her every need; she was not an infant; she was walking, talking, and not at the infancy stage where the child simply lies around, cries for food but does not really interact with the parent. It was only at the point that the child could engage in activities with Steven that he began to assume some responsibility. This fact was coupled with the fact that while Steven was residing with his parents, Jennifer was attempting to make a better life for herself and her baby and was continuing to assume responsibility for the care of her child. This demonstrates a higher standard for mothers as parents than fathers.[124]

In *In Re Renee B.*,[125] a New York court granted a similar ruling when Renee B.'s unemployed husband was given sole custody of eleven year old Rebecca after the judge ruled that the unemployed father was better able to care for Rebecca than the mother, who was in an office all day while the father could be home with Rebecca.[126]

C. Moms on Welfare

It is rather interesting that *Ireland v. Smith* and *Commonwealth v. Woodward* occured at the same time President Clinton implemented the "welfare to work program," officially known as The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Act").[127] Under the Act, states have the affirmative duty to reduce the number of people[128] receiving governmental assistance or risk losing federal funds.[129] In implementing the Act, and there-

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124 *See generally* Susan Beth Jacobs, Note and Comment, *The Hidden Gender Bias Behind "The Best Interest of The Child" Standards in Custody Decisions*, 13 GA. ST. U.L. REV. 845 (1997).

125 *See In re* Renee B, 611 N.Y.S.2d 831 (N.Y. App. Div. 1996).

126 *See id.*

127 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

128 Although the goal is to reduce the number of people receiving governmental assistance, "it is critical that we all understand that it is the backs of women who receive public assistance to help feed and care for their children." Pamela Bridgewater, *Connectedness and Closeted Questions: The Use of History in Developing Feminist Legal Theory*, 11 WIS. WOMEN'S L.J. 351, 361 (1997).

129 *See* Rebecca E. Zietlow, *Two Wrongs Don't Add Up To Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111 (1996) (the old welfare system has been replaced with a system of federal entitlements based on block grants to be administered by state governments). Block grants increase the flexibility of states in operating their programs. *See* Personal Responsibility and Work Opportunity Reconciliation of 1996, § 401, Pub. L. No. 104-193, 110 Stat. 2105. The state has to "conduct a program, designed to serve all political subdivisions in the State" ("not necessarily in a uniform manner.") Personal Responsibility and work Opportunity Reconciliation of 1996, § 402(A)(I), Pub L. No. 104-193, 110 Stat. 2105. Under the old program states had to conduct hearings in order to ensure there were no due process violations when benefits were denied. Zietlow states that under the Act, a hearing is not required and if benefits are

fore assigning the affirmative duty, Congress found substantial problems facing families in the United States. Congress believed that many of the problems were attributed to the fact that some individuals receive public assistance programs for a lifetime. Congress made the following findings relating to the need of enacting the Personal Responsibility and Work Opportunity Reconciliation act:

> 1) marriage is the foundation of a successful society; 2) marriage is an essential institution of a successful society which promotes the interests of children; 3) promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children; 4) in 1992, only 54% of single-parent families with children had a child support order established and, of that 54% only about half received the full amount due. Of the cases enforced through the public child support enforcement system, only 18% of the caseload has a collection; 5) the number of individuals receiving aid to families with dependent children has more than tripled since 1965. More than 2/3 of these recipients are children. Eighty nine% of children receiving AFDC benefits now live in homes in which no father is present; 6) the increase of out-of-wedlock pregnancies and births is well documented; 7) an effective strategy to combat teen pregnancy must address the issue of male responsibility, including statutory rape culpability and prevention. The increase of teenage pregnancies among the youngest girls is particularly severe and is linked to predatory sexual practices by men who are significantly older; 8) the negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society are well documented; 9) currently 35% of children in single-parent homes were born out-of-wedlock, nearly the same percentage as that of children in single-parent homes whose parents are divorced (37%). While many parents find themselves, through divorce or tragic circumstances beyond their control, facing the difficult task of raising children alone, nevertheless, the negative consequences of raising children in single-parent homes are well documented as having a significant number of children below the national poverty level, receiving AFDC, a cycle that is repeated by the children, that the mothers are very young, which presents problems of high rates of school dropouts, children born to young mothers have low birth rates, lower cognitive scores; and Congress concluded 10) in light of this demonstration of the crisis in our Nation, it is the sense of the

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cut and there are no due process protections that women who receive governmental assistance benefits, in particular women in poverty and of color will be greatly burdened.

> Congress that prevention of out-of-wedlock births is a very important Government interest.[130]

In dealing with the important governmental interests stated in the Act, do states have the affirmative duty of reducing the number of single mothers from the welfare roll and the duty of placing them on the workforce role or does the Act require states to reduce the number of teenage pregnancies? It appears that because Congress concluded that this crisis relates to the number of out-of-wedlock pregnancies, the solutions should be centered around preventing the number of such pregnancies. The solution that is currently being considered is withholding governmental/public assistance from mothers who have babies born out-of-wedlock. If the goal is to reduce the number of births, why is the solution based on denying or withholding benefits?

What the Act does is change public assistance from a long-term entitlement program to a short-term assistance program that emphasizes work and personal responsibility.[131] Families are faced with a sixty month period of receiving public assistance under the Act.[132] Another restriction placed on recipients involves the "family cap" program. Under the family cap program, if a woman bears a child while her family is receiving benefits from Aid to Families with Dependent Children ("AFDC"), the family will not receive any increase in governmental support.[133] For example, if a woman has one child when she begins to receive AFDC benefits and she subsequently has a second child, and later a third, she is only entitled to receive benefits for the one child she had at the time of her initial

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130 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2110, 2111. *But see* Sylvia A. Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 479 (1997) (reviewing various books discussing welfare reform) Law discusses the disparity between the rhetoric surrounding the personal responsibility work opportunity reconciliation act which includes actions taken by individual states and the actual lifestyles of welfare recipients. She concludes that data from the various books indicate that stereotypes associated with recipients of welfare programs do not reflect reality. The data suggests that generational welfare is a myth, that a large number of welfare recipients look for and find jobs, that women on welfare have to subsidize AFDC benefits in order to pay the rent, the food bill, utilities and other basic necessities (women work off the books, receive in-kind assistance, rely on other family members for assistance), and that welfare does not encourage women to have children in order to increase the size of their grant (on average, women who receive AFDC benefits have less than 2 children)). "Cuts aimed at welfare recipients will have a profound effect on the working poor." *Id.* at 479.

131 *See* Lindsay Mara Schoen, Note, *Working Welfare Recipients: A Comparison of the Family Support Act and The Personal Responsibility and Work Opportunity Reconciliation Act*, 24 FORDHAM URB. L.J. 635 (1997).

132 *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

133 *See id.*; *see also* Laura M. Friedman, Comment, *Family Cap and The Unconstitutional Conditions Doctrine: Scrutinizing A Welfare Woman's Right To Bear Children*, 56 OHIO ST. L.J. 637, 638 (1995).

application. If she eventually has five children, she is still only entitled to receive benefits for the child she had at the time of the initial application. On the other hand, if the woman had five children at the time of her initial application, she is entitled to benefits for all five. The purpose of the family cap program is to eliminate any incremental benefits which, in theory, would be in line with and serve the goals of the Personal Responsibility Work Opportunity Reconciliation Act of preventing future out-of-wedlock pregnancies.[134]

An integral purpose of the Act is to get women off of welfare and find them jobs. At the end of the two year period, women are to enter into the workforce. The problem is that there exists little, if any, preparation for women to enter the workforce. For those who enter, there are also problems concerning whether their salaries will be equal to or greater than the benefits they received and whether their employment creates problems with daycare. A substantial number of women receiving welfare benefits, as recognized in the Act, are uneducated[135] and therefore are in need of job training skills in order to become employed. As early as 1994 and prior to the enactment of the Act, Congress recognized the need for training and preparing welfare recipients for jobs.[136] The Family Support Act was passed with the goal of requiring recipients of AFDC benefits to participate in mandatory work/training programs.[137] Welfare recipients are placed in jobs that no one else

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134 *See* Laura M. Friedman, Comment, *Family Cap and The Unconstitutional Conditions Doctrine: Scrutinizing A Welfare Woman's Right To Bear Children*, 56 OHIO ST. L.J. 637 (1995) (discussing various states' "Family Cap" programs).

135 *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 finding under § 101(8)(D) of the Act indicate that children born out-of-wedlock were more likely to have lower cognitive scores, lower educational aspirations and under § (9)(E) the act states that the younger the mother, the less likely she is to finish high school; (9)(l) children of teenage single parents have lower cognitive scores, lower educational aspirations.

136 *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 101(7), Pub. L. No. 104-193, 110 Stat. 2105.

137 *See* Joanna K. Weinberg, *The Dilemma of Welfare Reform: "Workfare" Programs and Poor Women*, 26 NEW ENG. L. REV. 415 (1991). Recipients of AFDC are required to participate in workfare mandatory work that are imposed as a condition of receiving public assistance payments. Some states have workfare programs that force potential recipients of AFDC to work in programs prior to receiving benefits.

Initially single mothers were given assistance for the care of their children by the state, via Aid to Families with Dependent Children [hereinafter AFDC], to encourage them to care for their children in their homes. *See* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions From Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 733 (1998). This monetary funding valued mothers by compensating them for labor beneficial to society, providing members for the workforce by raising and caring for children. *See id.* In the late 1960s, AFDC was subsequently amended to provide incentives for mothers receiving aid to work. *See id.* at 734. Therefore the concept of putting welfare recipients into the workforce is not novel, what makes it different today than in the 60s and

wants, they are "hired to fill jobs that once belonged to unionized local workers earning twice the pay" and they are worked as if they are "on the chain gang or in prison."[138] Even if we assume that employment is desirable for welfare recipients, there are grave concerns about whether the available assistance programs are effective at reducing poverty.[139]

The 1996 Act went into effect as late as September 1996. The two year limitation has run and women who received AFDC benefits are now required to seek employment. They have not, however, been trained or prepared for employment.[140]

Under the Act, there is the presumption that mothers caring for children have equal access to work opportunities, since a presumption of equality governs laws related to public benefits for poor mothers.[141] These assumptions are misplaced and harm women.[142] The fact is that the gender and role of a mother as care-

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70s is the political rhetoric that mothers should spend more time working than caring for their children. *See id.* The push for women to enter the workforce today stems from the equality principal spearheaded by feminists and the adaptation by courts that women should be treated equal to men, which means women are equally responsible for the financial conditions of their families. Also the typical welfare recipient today is a family trapped into the system and therefore is the cause of many social problems.

138 Craig L. Briskin and Kimberly A. Thomas, Note, *The Waging Of Welfare: All Work and No Pay?*, 33 HAR. C.R.-C.L. L. REV. 559, 560 (1998). "Acting on the prevalent view that the entitlement to federal benefits has produced a dysfuntional underclass with a poor work ethic . . . [s]tates now must put qualifying recipients in workfare or other qualifying activities within twenty-four months of their receipt of benefits and must terminate federal aid to most recipients who have received benefits for a collective total of five years." *Id.*

139 *See* Schoen, *supra* note 131, at 656.

140 In North Carolina for example, prior to receiving benefits, potential recipients are required to complete an employment application at the local employment agency, return a stamped form indicating completing the application to the department of social services which serves as a "pass" for the individual to complete an application for benefits. The workfare program is destined to fail because there are no "real" job searches. The women, however, did not completely understand that at the end of the two year period, they could no longer receive benefits and could only rely on the possibility of receiving employment via the stamped application. The two year period is now up and the women are off welfare and currently unemployed. Although the media presents an individual who is now off the welfare payroll as an indication that the Act works, we do not see the ones who do not have jobs and we have no indication of how many there are and what they will now do.

Florida had begun a pilot program (Work and Gain Economic Self Sufficiency) prior to the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act. On October 1, 1998 more than 900 recipients statewide were at the end of the time limit for them to receive welfare cash. *See* Sally Kestin, *We Expected Too Much, Too Soon*, SUN-SENTINEL, October 4, 1998, at 1A. Under the Florida law, recipients were given two years to get a job, some long term recipients had three years but all are limited to a lifetime maximum of four years to receive welfare cash benefits. *See id.* The Work and Gain Economic Self Sufficiency Act presents problems that are twofold — those welfare recipients who can work aren't making enough money to support their families and others are unable to find work because they were sent into the workforce without job skills or the education to land jobs. *See id.* at 22A.

141 *See* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions From Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 723 (1998).

142 *See id.*

taker disadvantages her in the workplace.[143] As studies indicate, women sacrifice their own career advancement for parental responsibilities, and additionally mothers, not fathers, opt for the "mommy track" which removes them from the open-ended availability for most high paying, demanding jobs.[144] The underlying problem is that once women enter into the workplace, other women become caretakers of their children. Should we place these women in the workforce and place their child's rearing needs in the hands of others? If the goal is responsible parenting, the workfare programs are in effect removing mothers from caring for their children and quite possibly placing the children in environments where they can be abused or, as in the Louise Woodward case, killed.

Equality as applied is used to give men an advantage in areas that were traditionally held out to be areas designated for women. Because men are given the same benefits as women, it is men who receive special treatment and not women. In areas where equality is at issue for women, namely in the workplace, recognizing women as people and not providing them with any special benefits is the real concern that must be addressed. Mothers in the workforce are often scrutinized more closely than fathers.[145] As noted by Susan Jacobs in her Note, *The Hidden Gender Bias Behind "The Best Interests of the Child" Standards in Custody Decisions*:

> Some courts penalize mothers who have limited financial resources and who have stayed home to care for their children . . . [while] other courts penalize women who use daycare to work full-time to support their children because they spend less time with their children. This places mothers in an impossible situation: "if they do not work, courts question their ability to support their children; yet, if they do, courts question their commitment to their children. In contrast, courts rarely address the issue that fathers who receive custody also need child care for their children while they work."[146]

Another issue of concern is whether the goals of the Act present a class question. Society wants Nancy Eappen, the doctor who is also the doctor's wife, to be a "stay at home" mom since she doesn't really need the money; the corporate mom to compete

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143 *See id.*

144 *See id.* at 723, 724. *See also* Santiago Esparza, *Athlete has Custody Setback: Agency Recommends Daughter of ex-WNBA star Should Remain with Child's Father*, THE DETROIT NEWS, June 6, 1999 at D5.

145 *See* Jacobs, *supra* note 124, at 863.

146 *Id.* at 865.

equally but not work too many hours for she must remember that she is a mom; the professional female basketball player to play the sport retain her stay-home mom status. We also want Jennifer Ireland to get an education but not at the expense of being a mom and we certainly want welfare moms to leave the home and go to work so that the state no longer has the responsibility of supporting their children. The problem is, however, that women only have two hands and what we want on one or the other cannot be divided among three or four. Yet, women are still expected to fill all roles simultaneously.

D. The Corporate Lawyer Mom

An overview of criminal law reveals that mothers are responsible for the well being of the child before birth[147] and/or from the time of birth.[148] Fathers are responsible for the care of a child only if they choose such responsibility. The only role that is forced upon the father is one of assisting financially, that is, if he can afford to do so. After the birth of the child, the mother must determine whether the child goes home with her, is placed in foster care, is put up for adoption, or lives with a relative. If the mother simply leaves the hospital, she may be charged with abandonment. Fathers, many of whom are absent at the time of birth and at the time of the child's discharge from the hospital, do not carry that same burden of criminal abandonment.

As we enter the millennium, what does society want? Society seems to want to return to the family structure which holds mothers solely responsible for the care of children while the economic infrastructure of most families require both parents to be in the workforce. Society also seems to insist that parents work, forcing mothers out of the home, while utilizing the best interest test

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147 *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). *See also* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Bechtel v. Oklahoma, 840 P.2d 1 (Okla. Crim. App. 1992). *But see* Roe v. Wade, 410 U.S. 113 (1973) (stating that the mother has a privacy interest in choosing abortion, a choice that a father cannot override).

148 *See* State v. Grossberg, No. 9611007818, 1998 WL 278391 (Del. Super. Ct. 1998). Recently, there has been a tremendous amount of media coverage on cases involving teen moms killing their babies. *See also* Steven Pinker, *What Makes Some Mothers Kill Their Newborns*, THE SACRAMENTO BEE, November 6, 1997 (1997 WL 15805306) (recognizing that in addition to Grossberg, Melissa Drexler gave birth to a boy in a bathroom stall during her high school prom, leaving the boy for dead in a garbage can; she was subsequently indicted for murder). Other teen moms are abandoning children, although not killing them. *See also* Karina Bland, *Scared Moms Leave Infants Behind*, ARIZONA REPUBLIC, November 11, 1997 (1997 WL 8406651) (describing one woman who left her newborn daughter on the step of a day-care center, while another left hers in a trash dumpster among empty bean boxes, milk cartons and rotting foods; these two mothers were not found).

to benefit the father if the father desires to engage in the care of his child as was the case in *Price v. Howard.*[149] In *Price,* a mother gave birth to her daughter in 1986 and moved out of her home in 1989 leaving the child with the then-named father. Price subsequently sought custody, and Howard, the mother, denied that Price was the father. Blood tests were ordered and it was determined that Price was not the father. The court, after determining that both parents were fit, awarded custody to Price. The North Carolina Supreme Court, in upholding the decision, held that a fit biological mother may not necessarily be entitled to a parental preference in a custody dispute.[150]

If Howard wanted to relinquish custody to Price, he would have to say "yes" prior to any such award, while a mother is deprived of the same entitlement. In other words, if Howard left the child with Price, charges of abandonment could have been brought by the state against her under these same circumstances, and Price, not being the father, did not have any obligation or responsibility unless he wanted it. But custody decisions treat the parties as if they are equal. Are mothers and fathers truly equal partners, with equal responsibilities and rights? The parties are not equal if our laws allow fathers the option of parenting. The laws are not fair if mothers are placed at a higher standard of parental care than fathers. The law appears to force mothers to parent, find alternatives, or lose custody of their child, while placing no such burden on fathers.

In *In Re Marriage of Hoover,*[151] a father sought a restraining order to prevent his son's mother, Mary Ann, from removing their child from California to Pennsylvania where Mary Ann had accepted a job with a law firm.[152] After Mary Ann divorced the father, she remarried. She and her husband had two boys and they decided to move to Pennsylvania, because of economic considerations.[153] The court held that Mary Ann held the burden of convincing the court that it was in the child's best interest to move to

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149 484 S.E.2d 528 (N.C. 1997).

150 *See id.* at 534-535.

151 46 Cal. Rptr. 2d 737 (Cal. App. 1995). This is a decision by the Court of Appeal, First District, Division 4. Review was denied in the Supreme Court and the Supreme Court ordered that the opinion not be officially published. *See* footnote at 737 in 46 Cal. Rptr. 2d 737.

152 *See id.* at 738.

153 *See id.* at 739. After remarriage and birth of two boys, Mary Ann worked part time as a contract attorney and her husband worked full-time as an associate attorney until he was laid off. Mary Ann's husband accepted a new position in Pennsylvania where families of both Mary Ann and her husband resided. Johnny's father sought a restraining order to prohibit Mary Ann from removing Johnny from California.

Pennsylvania, upholding the trial court's modification of custody which gave the father physical custody of the child in California.[154] Mary Ann alleged that the court's determination of custody in the best interest of the child countered § 7501 of the California code which permits a custodial parent the right to change the child's residence.[155] The court responded that § 7501 had:

> been on the books in one form or another for more than a century . . . [and] [i]t must be harmonized with and read in light of the more recent legislative determination that frequent and continuing contact with both parents is in the child's best interests (§ 3020) and the companion statute empowering family courts to require notice to the non-custodial parent of an intent to change residence (§ 3024). The obvious purpose behind these statutory changes is to insure that every reasonable effort . . . will be made to preserve the child's relationship with both parents.[156]

The court's ruling was based in part on the fact that Johnny's parents had joint legal and physical custody.[157] The court ruled that, in evaluating the best interest of the child, it must consider "the health, safety and welfare of the child as well as the nature and amount of contact with both parents."[158] As the court reasoned, there is no "iron-clad rule" that a primary caretaker is favored over the "lesser" caretaker.[159] Reference to the non-custodial parent as the lesser caretaker seems inconsistent with the court changing custody from the primary to the lesser on the basis of a shared custodial arrangement. In *Hoover*, the court seemed to give great weight to the joint custody maintained by the parties, even though

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154 *See id.*

155 *See id.* at 740.

156 *Id.* at 741. The court also stated that a non-custodial parent seeking a restraining order does not have an affirmative burden to prove that a move would be detrimental to the child in order to obtain a restraining order. *See id.*

157 *See id.* at 738. "Mother and father shared joint legal and physical custody of Johnny under a 60 (time with mother) -40 (time with father) time-share arrangement . . . ." *Id.*

158 *Id.* at 7440. The court did not agree with the mother that controlling weight should be given to her status as primary caretaker. *See id.* at 741. The court acknowledged its statement in the earlier decision of *In re* Marriage of Selzer, 34 Cal. Rptr. 2d 824 (Cal. Ct. App. 1994) that "[a]s a practical matter, the best interests of the child will often parallel those of the primary caretaker, because the interests of the child in continuity and permanency of custodial placement with the primary caretaker may otherwise be defeated." *Hoover*, 46 Cal. Rptr. 2d at 741-742. Although it recognized its statement in *Selzer*, the court stated that Selzer "makes the generalization that often the child's welfare is best preserved in maintaining custodial continuity." *Id.* at 742. The court further pointed out that *Hoover* is distinguished from *Selzer* because even though Mary Ann is the primary caretaker, both parents have joint physical custody and the mother's more custodial time is a matter of "degree only." *Id.*

159 *Hoover*, 46 Cal. Rptr. 2d at 742.

the mother was the primary caretaker and Johnny had other siblings. But what is also problematic here and not discussed by the court, is the impact on the mother's fundamental right to marry and any entitlement that the child's siblings had in relation to their best interests.[160]

A very disturbing decision in Florida concerning a custody battle was handed down in the case of *Young v. Hector*.[161] Alice Hector, the mother of three, employed at one of Florida's largest law firms and in a shareholder's position, earned over $300,000 per year.[162] However, she recently lost custody of her children at the trial level to her former husband who was unemployed at the time of trial.[163] The father was capable of working but did not have the tools of his trade; he was an architect but did not receive computer education in the architecture field.[164] There were local institutions which could have provided the father with the necessary tools but, for unknown reasons, he chose not to enroll in any of the programs.[165] Further, he chose to cash in on his former wife's blood, sweat and tears that were exhausted to get to where she is today.

What is so disheartening about the ruling in this case is the fact that this decision was decided approximately two months before thousands of low income women were dropped from welfare and forced to find jobs, to find funds to supplement their low salary rates—that is if they could find jobs—to place their children in daycare. The father in *Hector* was awarded custody largely because of his unemployment. which placed him in a better position to accompany the children to soccer games, movies, the zoo and to lead a Brownie troop.[166] The court also awarded the husband $4000 for four months as rehabilitative alimony.[167] The appellate court initially determined that the trial court erred in awarding the mother primary residential custody because the trial court failed to base its decision "on preserving and continuing the caretaking roles that the parties had established."[168] However, upon an en

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160 *See In re* S.R., 599 A.2d 364 (Vt. 1991) (asserting that termination proceeding must evaluate interrelationship and interaction with siblings when determining best interest). Although Hoover was not a termination proceeding the court seemed to think that a move with the mother was a termination of the relationship with the father. *See id.*

161 740 So. 2d 1153 (Fla. Dist. Ct. App. 1999).

162 *See id.*

163 *See id.*

164 *See id.*

165 "The architecture [father] testified that both University of Miami and Florida International University have a two-year masters programs that will teach the necessary computer skills." *Id.* at 1155.

166 *See id.*

167 *See id.* at 1156.

168 *Id.* at 1158.

banc rehearing, the appellate court examined the caretaking roles as presented at trial which demonstrated that the trial court was correct in awarding the mother primary residential custodian and the father short-term rehabilitative alimony.[169]

The evidence presented stated that the children, from birth, had either a live-in nanny, au pair, or housekeeper who has helped to care for them.[170] At the time of the children's births, both parents were involved in employment outside the home; the father was involved in several business ventures and was very successful until the stock market crashed in October 1987.[171] In addition, the mother, employed as an attorney, had varying incomes between $30,000 to approximately $100,000.[172]

Subsequently, the parties relocated to Miami; the father agreed to such a move if the mother, his wife, could find a job; which she did.[173] After the offer of employment in Miami, in 1989, the mother and the children relocated to Miami.[174] The father remained in New Mexico for six months to "finish projects and to sell the parties' home."[175] After his move to Miami, the father returned to New Mexico in 1992 for over a year.[176] The children remained with their mother in Miami while their father was in New Mexico.[177] During the period of time that the father was in New Mexico, the children visited him approximately every five weeks.[178] When the father finally returned to the family home in Miami, the parties continued to live in the marital home but were living separate and apart.[179]

Upon his return to Miami, the father was unemployed but living with the mother of his children, while the mother became financially responsible, not only of the children, but also of the

169 *See generally* Young v. Hector, 740 So. 2d 1153 (Fla. Dist. Ct. App. 1999).

170 *See id.* at 1154. The parties were residing in New Mexico at the time of the marriage and the cost of caretaker was much less than in other parts of the country and significantly less than the cost of day care and caretakers today.

171 *See id.*

172 It's interesting how the court placed a monetary figure on the mother's income but simply noted that the father was very successful. It seems that the father's "very successful" income figures could impact on what the father should be entitled to today.

173 *See Young*, 740 So. 2d at 1154.

174 *See id.*

175 *Id.*

176 *See id.*

177 *See id.*

178 The court fails to state the period of time the children were in New Mexico with their father. They could have visited with their father nine times out of a 52 week period and the visitation could have been for weekend visits. If the children were enrolled in school it would have been difficult for them to spend substantial periods of time during the period of time that school was in session. The court also fails to state who was the financial backer of the trips. One would assume the mother, since the father was unemployed.

179 *See id.*

father. The appellate court held that the trial court should have attempted to preserve caretaking roles the parties had established, despite the fact that the mother, a litigation attorney, worked approximately 12 to 14 hours per day, six to seven days per week during times when she was involved in trial work and 45 to 50 hours per week when she was not so involved.[180] Although the mother was granted caretaker status from the trial court, the appellate court determined that the father was the true caretaker because he was available to the children after school, took them to doctor's appointments and participated in their school activities.[181] Why, then, is this father not expected to work when low income mothers across the country are forced to find employment? Why is there a different standard? One could argue that the low income women are being subsidized by the government and this father is being subsidized by his wife; this first situation being unacceptable and the second being acceptable.

If Alice Hector was an at-home mom and the parties divorced, she would be expected to seek employment as thousands of women have been forced to do across the country. This father, however, would not be held to the same standard.[182] The appellate court determined that the trial court should have awarded primary custodianship to the father with the mother supporting the father's custodial care of the children.[183] The court stated that, "the fact that

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180 *See id.* at 1155.

181 *See id.* at 1156. "One mother testified that she once saw Ms. Hector read law books while attending a school performance." Melody Petersen, *The Short End of Long Hours: A Female Lawyer's Job Puts Child Custody at Risk*, NEW YORK TIMES, July 18, 1998, at D1. Ms. Hector responded that although she may have taken a lawbook so that she could bill hours and attend her daughter's performance, she "did not read while her child was on stage." *Id.* I remember attending a baseball game with my son, his brothers and his father—we wanted to be part of the Mark McGwire homerun record, and during the game—when a fan seated in front of us turned around and asked me how I could read a book during a historical game. I was preparing for the class the next day and I did not read while McGwire was at bat. Although he wasn't necessarily commenting on my failure to be in total participation with my son, his comment, I think, was "genderized" in the sense that women just don't get sports.

182 *See* FLA. STAT. § 61.13(3)(c) (West 1999).

183 *See Young*, 740 So. 2d at 1157-58. "[O]n remand, the trial court should grant the attorney liberal and frequent access to the children . . . the award of alimony to architect was inadequate in light of the rehabilitative plan presented by the architect and the lifestyle established during the parties marriage." The award was four months of rehabilitative alimony at $2000 per month. That amount seems to be an adequate amount to sustain the father until he seeks employment. The lifestyle that the court makes mention of is also puzzling. What was the lifestyle that the court was referring to? While in New Mexico the children had caretakers so that both parties could work outside the home. Did the court take into consideration the cost of such caretakers in New Mexico. Also if the father is given custody on the premise that he provided more hands on care, outside the home, than the mother, is the court awarding him financially so that he can employ a custodian to take over his duties? The lifestyle that the court mentions is the lifestyle established by the mother for herself and her children. After the parties relocated to Miami, the father

the architect has been 'away from the home for substantial periods of time . . . prior to the separation should not be a 'determinative factor' where the father [was] continually the primary caretaker since the fall of 1993."[184] The father was unemployed and living in the family home and asserted that he was the primary caretaker during the day.[185] The mother had become a successful, career attorney and even though she was financially responsible for the home, she was the dominant caretaker on weekends.[186] In fact, both parties assumed the role of weekend caretaker during the period of time when the father was employed, and yet there was no such penalization imposed. The court failed to take into consideration that the home environment of the children included their mother. This result repeated the responsibilities imposed on mothers as opposed to fathers. The mother had to provide a home for the children while the father was away, the same as the mother having to assume responsibility after giving birth. The father is held to a standard of care only when he chooses to become a responsible parent. If the father had remained in New Mexico, the court would not have forced him to assist in the parenting with the mother. Here, however, the mother is being penalized because she had to work to maintain the home while he was off in another state.

The most troubling aspect of the case is that the court's reasoning has now become the trend. Indeed, it is the trend to weigh the benefits received by women using the thrust of the equality principle against women. Today, women now have the right to be

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spent most of that time away from the lifestyle that she had established. When he returned to the home, the marriage was over and they lived separately. There was no such lifestyle established by the parties that would allow father to receive benefits for. He did nothing, according to facts as stated by the appellate court, to contribute to any such lifestyle. He became a freeloader and another mouth for the mother to feed. When the father was duly employed, so was the mother. The mother had always contributed and/or was financially responsible for the home and the court is forcing her to continue supporting her children's father with no incentive for him to seek employment or to provide for himself and his children. The court also determined that the $10,000 award of attorney's fees was insufficient. The court failed to state the total amount of attorney fees and did not set any amount that the mother was obligated to pay. A determination by the appellate court also included that the trial court had to revisit issues of the distribution of the parties' assets and liabilities, stating that award was inequitable. The court further instructed the trial court to revisit the issue of child support, especially in light of the court's disposition as to primary residential custody. *See id.*

184 *Id.* at 1158.

185 *See id.* at 1161. Ms. Hector asserts that the court basically rewarded a deadbeat dad. *See also* Susan Stiger, *Working Mom vs. Stay-at-Home Dad*, ALBUQUERQUE JOURNAL, Oct. 4, 1998, p.8. Young reveals that Hector wanted him to seek employment, he states "I can't tell you quite honestly right when she demanded I have a job." *Id.* Given this the court deemed him to be an at-home parent when both Hector and Young knew that theirs was a two working-parent household. *See id.*

186 *See Young*, 740 So. 2d at 1159.

employed without regard to gender and yet they are held to a higher standard in the workforce. Women must continuously prove that they can do the job for which they were hired, which often requires working double shifts to constantly demonstrate that they are just as good as men. In the legal profession, in particular, a good attorney is generally one who is unemotional. Yet, this same characteristic was used against Alice Hector. She was described by the court as an extremely successful attorney and, by the guardian ad litem, as "somewhat cooler . . . but consistently spends time with the children and makes a point out of doing things with them on weekends and when [she] is available on evenings."[187]

Ms. Hector was subsequently awarded primary custody of the children.[188] Although the appellate court awarded custody to the mother, the numerous concurring opinions, including one special concurring opinion, indicated the court's need to reassure the public that it did not turn a deaf ear to the notions of equality in determining custody between fathers and mothers.[189]

E. And There Are More Cases

Keith Stafford filed an action seeking custody of his 4 year old daughter, Imani. Imani's mother, Pamela McGee, prior to the custody hearing, had physical custody. Stafford filed the change of custody believing that "[i]t's an issue of what's best for Imani."[190] What makes this particular case intriguing is that Pamela McGee is a professional basketball player with the Los Angeles Sparks, within the newly established Women's National Basketball Association.[191] Stafford, Imani's biological father, raised the issue of a change in custody because "[i]t's an issue of what's the most stable environment [for Imani] and not about Pamela's career."[192] Although Stafford made the statement that the request for change in custody

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187 *Id.* at 1165. (stating in a later response to such claims, Mrs. Hector stated "I'm really a very warm, cuddly, hold-hands and kiss-a-lot kind of person. But I'm also very clear-headed.") *See also* Susan Stiger, *Working Mom vs. Stay-at-Home Dad*, ALBUQUERQUE JOURNAL, October 4, 1998 at p.8.

188 *See Young*, 740 So. 2d at 1164. Appellate Court also stated that the trial court should grant the father liberal and frequent access to the children. The court noted that "the award of alimony to the father was inadequate in light of his rehabilitative plan presented to the court and the lifestyle established during the parties' marriage. Moreover, the distribution of the parties' assets and liabilities were inequitable and the award of attorney's fees to the father's lawyer was insufficient." *Id.* The monetary awards were reversed and the case was remanded so the trial court could re-determine the award to the father. *See id.*

189 *See id.* (examining Judge Levi's special concurring opinion and other concurring opinions).

190 Steve Pardo, *Dad Speaks out in Custody Case: WNBA Star's Ex-Husband Says Basketball Isn't The Issue, What's Best For the Child Is*, DETROIT NEWS, September 22, 1998, at p. D5.

191 *See id.*

192 *Id.*

had nothing to do with Pamela's basketball career, his attorney Peter Lucido, reported that Pamela's "basketball career, which required a lot of travel, would make it difficult for her to provide a stable environment."[193] There was concern from the father that "Imani missed her first day of preschool because [her mother] delayed return[ing] her to [the child's father]."[194] McGee is an ex-US Olympic basketball player who left the sport and returned as a career player only after her divorce was final.[195] The case demonstrates blatant differential treatment aspect to mothers who are professional athletes because throughout Michael Jordan's career, for example, there was never an issue concerning whether his children were in a stable environment because he traveled throughout the world.[196] Perhaps Michael's time with his children had not been raised as a significant issue because they were at home with their mom. In addition, McGee is the mother of two children. If she isn't a good parent for Imani, how can she be a good parent for the other child?

Judge Maceroni, who presided over Imani's custody, ruled that Stafford would continue to have temporary custody of Imani pending an investigation by a Friend of the Court which is currently under way.[197] McGee is confident that she will regain custody of Imani. In an appeal requesting the court to take into account that women's career choices are for the benefit of their families, McGee stated, "[m]y voice echoes the cries of the plight of the many parents who have been violated by the present judicial system. The courts must recognize that women make career choices for the benefit of their families. I pray that my daughter will be returned to me."[198]

An equally interesting fact about this case is that the jurisdiction is the same as the Jennifer Ireland case. This means that the court must consider the twelve factors in deciding placement in

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193 *Id.* What is also interesting is the women's league only runs for a three month period. *See Judge Orders WNBA Player To Turn Daughter Over to Ex-Husband in Custody Case*, JET MAGAZINE, October 5, 1998 at 51 Sparks spokeswoman, Stacey Terrien said: "I'm not sure how you couldn't be in a stable environment when the WNBA season's only three months out of the year. Also, half the games are at home."

194 Pardo, *supra* note 189. ("This child cannot be on the road with a parent. It's totally against any good parenting skills.")

195 *See id.*

196 Issues with respect to male members of national sports' teams has surrounded child support rather custody. It's almost understood that when a divorce occurs with these nationally known individuals, the mom gets the child and the father attempts to lower his child support obligations as much as possible, but the issue of custody generally does not arise.

197 *See* Pardo, *supra* note 189.

198 *Id.*

the best interests of the minor. Moreover, the Michigan Supreme Court's guidelines for evaluation of the permanency factor may be extremely problematic for McGee. Although the court recognized the benefits from reasonable mobility and parental flexibility with regard to residence, it stated that since the legislature enacted the statute with specific reference to permanence as a factor to be considered, the lower court is therefore required to consider all the factors to decide who can best provide the minor with a family unit marked by permanence.[199]

The court had to recognize the mobility of parenting because such a ruling could unduly impact men and women who serve in the armed forces. However, the court was careful and crafty in maintaining the equality between the sexes when an issue of custody existed. Again, such concerns are without any regard for making fathers equally responsible for the care and nurturing of the child immediately after the birth of the child. What also seems interesting about this case is that Mr. Stafford is actually Rev. Stafford, a minister of the Morningstar Baptist Church.[200] Nevertheless Mr. Stafford stated that the issue of change of custody "is not an issue of moral fitness . . . [and he] applaud[s] Pamela in whatever career choices she makes."[201] Earlier this year the Southern Baptist Association adopted a resolution that women are required to submit to their husbands.[202] Perhaps that too, is just a coincidence.

Sharon Prost, a high powered attorney in Washington, DC, lost custody of her children to her husband.[203] She was not awarded custody because the judge found her "more devoted to her career than her children."[204] "It's stereotypical assumptions about men and women," says Ms. Hector, the high powered Miami attorney who also lost custody of her children.[205] "It's not like you just put your feet up and waited for someone to bring you a glass when you got home. And the other stereotypical assumption is that men who stayed home must be doing something."[206] A woman attorney frightened by the trend stated that there is no pro-

199 *See* Ireland v. Smith, 542 N.W.2d 344 (Mich. App. 1995).
200 *See* Pardo, *supra* note 189.
201 *Id.*
202 *See* Gustav Niebur, *Southern Baptist Declare Wife Should Submit to Her Husband*, SUN SENTINEL, June 10, 1998, at 1.
203 *See* Colleen D. Ball, *Ally, Real Life Has No Commercial Breaks*, USA TODAY, November 4, 1998, at p. 27A.
204 *Id.*
205 Susan Stiger, *Working Mom vs. Stay-at-Home Dad*, ALBUQUERQUE JOURNAL, October 4, 1998, at p.8.
206 *Id.*

gress in replacing old stereotypes about working dads with new stereotypes about working moms."[207] She, like many women, does not believe that having a professional career is an indication that one can not raise her kids.[208]

Mothers giving birth to babies addicted to crack have been prosecuted for delivering a controlled substance to a person.[209] Although moms are prosecuted and significant research has been done on how much and when the drug passes, upon delivery, there is very little if any research done on the drug habits and addictions of the child's father, and whether a controlled substance passes in the sperm. The mothers are prosecuted on the theory that the mother delivered the controlled substance to the fetus prior to giving birth.[210] For example, in Florida, a fetus has to be born in order to be a person capable of having a controlled substance delivered to him/her.[211] However, in South Carolina the Court has deemed a fetus to be a person, and therefore, the mothers can effectively be charged with delivering a controlled substance to a person.[212]

III. Violence Against Women

States have labeled domestic violence as a significant problem that desperately needs to be addressed. However, incidences of domestic violence have steadily increased.[213] The major problems attributed to the increase of domestic violence are: (1) the lack of sincerity in dealing with these issues and (2) the goal, during war, of impregnating women for the purpose of destroying ethnic identities.

A. The Domestic Front

Various states have enacted specific policies for dealing with domestic violence issues. For example, some states have set specific statutes discussing how domestic violence issues should be handled. In particular, the state of Florida statutorily permits *ex*

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207 *Id.*

208 *See id.* Although another practicing attorney notes that being a lawyer and being a mom are two distinctive roles—being a great attorney, means "you aren't a famous mom." *Id.* Not being famous a mom should not mean that a woman is not a good mom.

209 *See* Johnson v. Florida, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991); Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. Ct. 1857 (1998).

210 *See* Johnson v. Florida, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991); Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. Ct. 1857 (1998).

211 *See Johnson*, 578 So. 2d at 419.

212 *See Whitner*, 492 S.E.2d at 779-81.

213 *See generally Whitner*, 492 S.E.2d 777.

parte injunctions for victims of domestic violence.[214] *Ex-parte* injunctions provide a mechanism that ensures women an avenue of immediate recourse to protect them from the violent acts of household members.[215]

The problem with the *ex parte* tool is that although a woman is permitted to seek an injunction with little more than stating that they are physically abused, in the interest of the woman's safety she is permitted to omit her name on the petition.[216] The batterer's name is revealed, which allows the batterer to appear with counsel at the hearing which is held 15 days following the issuance of the injunction.[217] At the hearing, the batterer appears with counsel while the victim often lacks the knowledge that attorney representation may be necessary. The use and enjoyment of the homestead, and custody and child support are considered and subject to judgment. The victim could very well be disadvantaged because this may be the first instance in which she has confronted the accused and felt safe to make certain statements; which could be therapeutic for her. She may appear irrational and he on the other hand could, in fact, be deemed the more rational of the two and subsequently there could be an award of custody to him. The woman's outbursts, in particular statements that could demonstrate that she would prevent the child from having contact with the abusive father could in effect permit the judge to award custody to the father, the alleged batterer.[218] Although issues of domestic violence are taken into consideration, violence is a factor to be considered, rather than a decisive factor for determining custody. In effect, the *ex parte* proceeding which results in an injunction and which is supposedly designed to provide immediate relief for women could in fact operate against women due to their responses to men who batter them.

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214 *See* FLA. STAT. ANN. § 741.30(5)(a) (West 1999).

215 *See* Judge Linda Dakis, *Injunctions for Protection*, 68 FLA. B.J. 48 (1994).

216 *See* FLA. STAT. ANN. § 741.30(b)(a) (West 1999).

217 Extension hearings generally last 5-15 minutes in duration and during this time the judge could decide custody. *See* Tomczak v. Tomczak, 659 So. 2d 400 (Fla. Dist. Ct. App. 1995). Due process mandates that the accused be afforded a hearing within 2 weeks after an ex parte injunction is issued. The hearing in Florida is seemed an extension hearing, i.e. an extension from the ex parte petition two weeks prior.

218 In Florida, for example, there is statutory support that permits judges to place the children in the custody of the parent who is most likely to foster a relationship with the noncustodial parent. *See* FLA. STAT. ANN. § 61.13(3)(j) (West 1999).

B. International Issues of Violence Against Women

Rape is the new weapon of choice during war.[219] The rape of women in Bosnia was used as a "means of male communication and as a tool to harm the enemy."[220] The enemy, the Serbs, knew that the rape of Muslim women would be equivalent to soiling, tainting and devaluing the women who they believed were the property of the enemy, the Muslim community, in particular, the men.[221] Women were used as the "vehicles for communicating the dominance of particular male groups to their enemies."[222] These beliefs and conduct render women indefensible on all fronts. There was little or no protection from the atrocities because of their gender status.[223] "[T]he husband . . . will often blame her . . . [and he] will . . . feel . . . disgraced for being unable to protect [his property]."[224] The threat of rape and rape itself has caused individuals to flee their homeland, thereby effectively utilizing ethnic cleansing as a mechanism to further the power of the invading force.[225]

In addition to demoralizing women by raping them, women are also forcibly impregnated as a way of eradicating the woman's culture by promoting interracial birthing. The interracial births, in particular for Muslim women, would in effect "break down national, cultural and religious identities."[226]

The onslaught of war in Kosovo includes almost the same atrocities, with the exception that women do not appear to be raped for the purposes of impregnating, but rather, for elimination of Albanians altogether.[227] During the onslaught of the Tutsis in Rwanda, there was not an apparent mission to impregnate women for purposes of contaminating the bloodline. Instead, the atrocity of rape was used to demoralize prior to killing.[228] Eradica-

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219 *See* Darren Anne Nebesar, *Gender Based Violence As A Weapon of War*, 4 U.C. DAVIS J. INT'L L. & POL'Y 147 (1998).

220 *Id.* at 151.

221 *See id.*

222 *Id.*

223 *See id.*

224 *Id.*

225 *See id.* at 152.

226 *Id.* at 155. The women were detained beyond the point that they could abort the fetus conceived during the rape. Contaminating the bloodline would in effect cause the woman to be isolated, rejected, or killed by family members, in particular the husband. *See id.* at 156. *See also* Adriana Kovalovska, *Rape of Muslim Women in Wartime Bosnia*, 3 ILSA J. INT'L & COMP. L. 931 (1997).

227 *See* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. & POL'Y 379 (1999).

228 *See* Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201 (1999).

tion of the Tutsis appeared to be the mission similar to the goal in Kosovo.[229]

On whatever front and for whatever reason, violence against women is the weapon of war as we enter the millennium. Women now serve in armed forces in various countries and although women have been recognized as being capable of serving in the armed forces, the unique use of women as weapons is utilized in the same way on both ends. Accordingly, numerous critics argued that women should not be sent to the front because of the potential of being raped, notwithstanding that men could also be raped.[230] However, the rape of women is obviously more problematic because of potential impregnation and the likelihood of bearing a child for the enemy.

If the possibilities of rape and impregnation are considered significant issues then there should be greater protection for women in times of war. However, no such protection exists. The potential for protection appears to be in the protocols additions to the Geneva Convention.[231] Violence against women as a weapon during war is an additional indication that the status of women must be viewed from a woman's perspective. Domestically and internationally, in an effort to promote the valuing as opposed to the devaluing of women, the female gender is deemed to be treated in the same way as men, no special treatment or protections. The problem is that both men and women can be tortured and raped but only women are raped with the intent to break down national, cultural and religious identities. The intent is accomplished through forced impregnation and a temporary hostage state for the sole purpose of preventing the potential or possibility of aborting the conceived fetus. This cannot happen to men.

IV. RESOLUTIONS

Proclaiming that feminists are at the root of the problem is part of an age old phenomenon of blaming women. All three feminist themes focus on comparing women to men in determining the rights/entitlements of women. It is true that women are not

229 *See id.*

230 *See generally* Nebesar, *supra* note 219.

231 *See* Protocol I, i.e. Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts which provides for the protection of women against rape during international armed conflicts, Protocol II, i.e. The Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts which prohibits rape. *See also* Nebesar, *supra* note 218, at 166-67. In 1993 the United Nations Security Council established an international criminal tribunal to try human rights abuses. *Id.*

men; women are women. It is also true that women should not be characterized or defined as women in terms of their being different from men. Women should be defined in terms of women, not in terms of men. The difference between the feminist characteristics of women and the defining characteristics of men set the stage for determining women's entitlements based on comparisons to men. Rather than focusing on comparing women to men, the focus should have been on defining what women are entitled to and who women are defined as in women's terms.

A. Equality should not be equated to "the same as"

The equality principle has not necessarily been used to elevate the status of women but rather to ensure that both women and men are treated equally. Treating men and women equally has the effect of permitting men to maintain what they already have and ensure that whatever men presently have women would also be entitled to. Determining what women are entitled to should be done on the basis of who women are. Thus, for example, if women give birth, then women ought to have certain entitlements because of it.

In the workforce, characterizations should not be discussed in terms of equality, comparing women to men, rather, the entitlements should be based on what women need. For example, since we know that women are predominantly responsible for the care and nurturing of children, then women ought to have certain entitlements in the workplace that would allow them to properly care for their children. These entitlements should not be based on what men have or what men should equally be entitled to, rather the entitlements should be based on what women need and what women do. Equality may be a solution but only if equality does not mean the "same as." The principle of equality can only be a solution when both sides of the equation are determined based on what they are.

B. Reward women for nurturing and working

As previously discussed, women's entitlements should be based on what women do, nurturing children while working in the workplace, which may, in fact, include the home. The entitlements should not be defined in terms of the differences from men. Rather, they should be determined based on women's roles in society. The laws have focused on treating women in light of the treatment of men or what men have had. That is not what women

need. Women need entitlements based on what they do because they are women. Perhaps during this second millennium, society's role of women will not be caretakers. Presently, however, women are the caretakers, in the home, in the schools, and in the public forum. As a result of the nurturing women provide, society holds them out for this responsibility and women should therefore receive entitlements based on the nature of what women do.

Even when women work, they return home to care for the children. When men divorce women, the men generally remarry. The second wife usually cares for any children from her husband's first marriage. The United States Supreme Court sought to elevate the status of women by disallowing laws that would place women in stereotypical positions but the justices forgot that society places women in certain stereotypical categories. As a result, in some instances women are left without adequate, if any, protections. Society treats her as a woman but she cannot receive benefits based on the fact that she is a woman because that would be unequal treatment to men. However, she should receive benefits because she is a woman and because society treats her as such. Elevating the status of women does not necessarily mean removing the stereotypical stigma attached to women for their nurturing and working. Rather, elevating the status of women would include their working and nurturing. Working and nurturing should be deemed as positive characteristics for women.

V. CONCLUSION

During these changing times, and times are indeed changing[232] what roles will women play? Who will decide these roles?

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232 The "Welcome Wagon" has retired after 70 years of service. Welcome Wagon is an organization that brought care packages to residents who recently moved into new neighborhoods, more specifically into the suburbs. Women delivered baskets of goods, ranging from coupons from businesses to various items that were donated and could be used in the home. A significant factor in the decision to no longer make home visits included the fact that "most women are at work these days." *See* Thomas Fields Meyer, John T. Slania, and Liza Hamm, *The Last House Call As the Welcome Wagon Goes Into Mothballs, Greater Gretchen Wollerman Marks the End of An Era*, PEOPLE MAGAZINE, Dec. 21, 1998. Ending the 70 year service was partly due to the fact that women were no longer at home. Unlike the past, when they knocked on doors today, no one was at home, everyone was working. *See id. See also* Guy Keeler, *The Welcome Mat is Still Out for Valley Newcomers*, THE FRESNO BEE, January 5, 1999 at E5. Again the appearance is that women are in the workforce and that's a good thing but the reality is that some women have been forced into the workforce and forced into the roles of full time caretaker, homemaker, and an equal employee opportunist. *See* Gloria M. Walton, editorial, *Welcome These Citizens*, PITTSBURGH POST-GAZETTE, December 6, 1998 where a resident of suburban community was greeted by Welcome Wagon and notes that low income families, regardless of ethnic background, have been prejudged to be bad neighbors. The writer notes that she would much rather see time, money and human resources spent in the development of a coalition interested in the political, educational,

What voice will women have in determining these roles? Women must demand to be treated as women and not as individuals who are different from men.

The voices of women should be diverse because women are diverse. Women must no longer argue amongst themselves about the need to be treated according to entitlements of men because they are not men. Women, however, should permit all women to be women and not devalue women who do not measure up to standards set for men or set with men as the measuring rod. Women's standards should be set based on their womanhood rather than their being equal to or the same as men or that the standards should be lessened because women's capabilities are less than men's. The characterization of and the responsibility of women should be based on what and who women are. As we enter the millennium the focus of women should be to legislate laws based on the status of being women and womanhood. Laws should circumvent the direct and indirect consequences, characterizations, and notions of society. Women should understand that characterizations of womanhood are not negative or lessened because those characterizations may not necessarily include characterizations attached to men. Accordingly, women should desist from lessening the value of other women because they do not measure up to men.

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social, civic and religious areas to facilitate a smooth transition for "these families into their respective communities." *Id.* *See* Profile: *Welcome Wagon's Dee Struluwich and Sheryl Melinchuk Talk About The Welcome Wagon Program, How It Started and Now Its End,* (NBC television broadcast, December 14, 1998). In addition to the loss of women in the home, the loss of the home visits means the loss of jobs to significant numbers of women because the Welcome Wagon "reps were almost all women." *Id.* Only 2% were men. *See also* Rick Hampson, *Welcome Wagon At Door No More,* USA TODAY, December 28, 1998.