DUDE, WHERE'S MY CHANGING TABLE?: THE FIGHT FOR FATHERS' RIGHTS IS IN THE RESTROOM

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TABLE OF CONTENTS

INTRODUCTION 617
I. BACKGROUND 622
II. HISTORICAL AND TRADITIONAL PERSPECTIVES ON DIVORCE, CHILD SUPPORT AND CUSTODY 624
A. Divorce 624
B. Child Support 626
C. Child Custody 627
III. THE CHALLENGE TODAY 629
IV. THE STATUS TODAY: SOME PROGRESS HAS BEEN MADE 630
V. CHANGING TABLES 632
A. Changing Tables: Passed and Defeated Legislation 636
1. San Francisco, California 636
2. Pittsburgh, Pennsylvania 637
3. Miami-Dade County, Florida 638
4. New York, New York 639
5. California 640
B. Proposed Draft Legislation 643
CONCLUSION 644

INTRODUCTION

There is no federal or state law in the United States that requires an establishment, holding itself open to the public, to install and maintain a child's diaper changing table or changing station on its premises.[1] The nonexistence of

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[1] A. Pawlowski, *Potty Parity: Dads Fight for Diaper-Changing Tables in Mens' Rooms*, TODAY (June 12, 2014), http://www.today.com/parents/potty-parity-dads-fight-diaper-changing-tables-mens-

such a law disproportionately affects men more than women, as many businesses choose to provide changing tables in women's restrooms.[2] The lack of changing tables accessible to men in places of public access leaves fathers, who are increasingly spending more time with their young children than ever before, to fend for themselves when changing their children in public. In the modern times, it is an especially important and pressing issue due to the evolution of what has been, and what is now considered to be, a family unit as well as society's views of what roles each gender should play in the rearing of children.

Just recently, famed and award winning actor Ashton Kutcher[3] took to Facebook to express his contempt at the lack of access for men to changing tables in public.[4] Mr. Kutcher first gained notoriety, in part, from his role in the film *Dude, Where's My Car?*, released in 2000.[5] Since then, Mr. Kutcher's stardom, notoriety, and net worth have grown exponentially.[6] Having a child with actress Mila Kunis,[7] Mr. Kutcher has been defying the traditional conceptions of a father's role and has evidently been spending time with his infant daughter.[8] He, too, laments the lack of access that men have to changing tables when out in public and he has brought a fair amount of attention to the issue.[9]

Roles in caring for children have changed significantly from their origins in English common law to today's modern society. Although societal views are changing, much of society's views as to gender roles stem from traditional notions developed in England even before the colonial era.[10] A manifestation of this is the extent to which divorce law, specifically the grounds upon which one could be

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rooms-2D79759305. While this is true for men's restrooms, women's restrooms and family or handicap accessible restrooms alike, this Note does not endeavor to comment on the status of restrooms held open for use by both sexes, i.e., "unisex" or "family" restrooms. The purpose of this Note is to analyze the effect that the absence of law in this regard has on men and women using restrooms specifically marked for use by their sex alone. Additionally, this Note uses the terms changing table and changing station interchangeably, and the terms should be read as synonymous for the arguments contained herein.

[2] Andrew Adam Newman, *Changin' in the Boys' Room*, N.Y. TIMES (Feb. 5, 2006), http://www.nytimes.com/2006/02/05/fashion/sundaystyles/25DIAPERS.html?pagewanted=all&_r=0.

[3] IMDB, http://www.imdb.com/name/nm0005110/awards?ref_=nm_awd (last visited Mar. 11, 2015).

[4] *Ashton Kutcher*, FACEBOOK (Mar. 8, 2015, 5:05 PM), https://www.facebook.com/Ashton?fref=nf.

[5] *Dude, Where's My Car?*, IMDB, http://www.imdb.com/title/tt0242423/ (last visited Mar. 11, 2015).

[6] *Ashton Kutcher*, IMDB, http://www.imdb.com/name/nm0005110/?ref_=tt_ov_st (last visited Mar. 11, 2015).

[7] Taryn Ryder, *Mila Kunis and Ashton Kutcher Welcome 'Beautiful' Baby Girl*, YAHOO (Oct. 1, 2014), https://celebrity.yahoo.com/blogs/celeb-news/mila-kunis-gives-birth-to-a-baby-girl-195850336.html.

[8] Caroline Bogna, *Ashton Kutcher Bemoans Lack of Diaper Changing Tables in Men's Room*, HUFFINGTON POST (Mar. 10, 2015), http://www.huffingtonpost.com/2015/03/10/ashton-kutcher-diaper-changing-tables_n_6838778.html; Ann Oldenburg, *Ashton Kutcher: More Public Changing Tables!*, USATODAY (Mar. 11, 2015), http://www.usatoday.com/story/life/people/2015/03/11/ashton-kutcher-wants-baby-changing-tables-in-mens-rooms/70137918/.

[9] Bogna, *supra* note 8; Oldenburg, *supra* note 8.

[10] Lawrence M. Friedman, *A History of American Law*, *in* FAMILY LAW: CASES AND MATERIALS 695 (Judith Areen et al. eds., 7th ed. 2012).

granted a divorce, has changed. Divorce was rarely granted in England.[11] When the idea of divorce came to America, a system of fault was developed so that the judiciary could, occasionally, grant divorces.[12] However, the ability to be granted a divorce was severely limited to specific causes of action.[13] It was not until 1969 that a no-fault divorce regime took hold in California and spread across the country,[14] the stigma of an "offending" spouse, usually the husband, remained with divorce and those who are divorced.

Child support and custody also have their roots in traditional legal doctrine.[15] Child support has long been considered to be a private obligation;[16] governments, both municipal and state, feared taking on the responsibility to support poor mothers and their children after a divorce was granted.[17] Traditionally, supporting one's child was viewed as a moral obligation, not a legal one.[18] Overtime, however, the common law of creditors established a legal obligation of child support.[19] Creditors of indigent mothers, instead of trying to collect from the mothers themselves—which they knew was a futile attempt—sued the father directly.[20] Having seen these creditor actions as successful, mothers began to sue the absconding fathers who were not meeting their moral obligation directly for paying child expenses.[21] Slowly, mothers began to be awarded money for expenses they had advanced, until it was ubiquitously held in common law that a father had the legal obligation to provide for the necessities of his child.[22]

While American custody decisions originally favored paternal custody (a paternal custody preference), that norm quickly changed as American society began to view childhood as a special time in one's life that should be guarded and protected.[23] This coincided with child labor movements and a growth in the economy that no longer required children to work long hours in unfavorable conditions.[24] As children worked less, courts increasingly granted custody to

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[11] *Id.*

[12] *Id.*

[13] *Id.* at 696.

[14] *Id.* at 719; CAL. FAM. CODE §§ 2310, 2311, 2333, 2334 (West 2015).

[15] JUDITH AREEN ET AL., FAMILY LAW: CASES AND MATERIALS 1115 (Judith Areen et al. eds., 7th ed. 2012).

[16] *Id.* ("child support in the United States from its origins has been a private obligation").

[17] Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1134 (1999) (citing JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 328 (1870); Jamil S. Zainaldina, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1831*, 71 NW. U. L. REV. 1038, 1053 (1979)).

[18] *Id.* at 1134.

[19] *See infra* Part II.A.2.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See infra* Part II.A.3.

[24] *Id.*

mothers for the purpose of instilling values and lessons in the child.[25] By the middle of the nineteenth century, the paternal custody preference had been reversed and the maternal preference was a cornerstone of custody decisions.[26]

A divorced father is perceived to have committed some wrong; this stems from historical notions of what it meant to be, and what was required to become divorced. As a result of the factual situations which precipitated a traditional divorce, coupled with a long-standing (yet changing) historical preference toward maternal custody for children, divorced fathers are still today viewed as having committed some wrong. These notions have been reaffirmed in society's mind with popular culture such as television shows and novels.

And yet, despite this conventional wisdom of what a family is and a father's role in that family, change has come to the historical and traditional view of families and fatherhood. First, the idea of what an American family looks like is rapidly changing. Second, the notion of who a "father" can be is ever expanding. Third, increasing divorce rates mean that more fathers play larger roles in their children's lives. Fourth, a new standard that takes into primary account the best interest of the child was promulgated.

The law has advanced in some regard to provide more custody and visitation rights to fathers; however, this Note argues that the law has not advanced far enough or quick enough. Individuals have challenged specific establishment's failure to provide men with access to changing tables and stations.[27] For the most part these actions have failed.[28] As such, there is a real and apparent need for specific legislation to provide for mandatory installation and maintenance of changing tables that men have access to as evidenced by unfavorable and inadequate holdings by courts to ensure equal access to facilities which allow fathers to care for their children while away from their home.[29]

Celebrities, such as Mr. Kushton, have brought this legal shortfall to the forefront of societal discourse and their stories have gained traction in the media.[30] While not one of the fifty states or federal government has enacted a law for mandatory installation and maintenance of changing tables in establishments that hold themselves out to the public, some counties and municipalities have accomplished this goal, and others have come close. San Francisco, Pittsburgh, and Miami-Dade County have all enacted laws mandating the provision and

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[25] *Id.*

[26] Hansen, *supra* note 17, at 1131 (citing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 242, 248 (1985)).

[27] *See infra* Part V.A (discussing Driscoll v. OSF Int'l Inc., No. A099229, 2003 WL 21359344 (Cal. Ct. App. June 12, 2003); Brynes v. Junior's Rest., Inc., No. B193936, 2007 WL 2800335 (Cal. Ct. App. Sept. 27, 2007)).

[28] *Id.*

[29] *Id.*

[30] Bogna, *supra* note 8; Oldenburg, *supra* note 8.

maintenance of changing stations.[31] New York City and the State of California were unable to enact such a provision into law, but not for lack of legislative effort.[32]

This Note argues that a uniform law, in the spirit of laws of San Francisco[33] and Miami-Date County,[34] as drafted and suggested in Part V should be adopted by every state—or, in the alternative, a federal statute should be enacted that would direct all businesses or buildings held open to the public to provide baby changing tables that are accessible equally to both men and women.

Part I of this Note explores the background of the rapidly changing structure of family, fathers' responsibility on a daily basis to their children, and how fathers are spending more time with their children than ever before. Part I also investigates why the lack of law in this area disproportionately affects and discriminates against men. Part II addresses the historical and traditional perspectives of the law's preference toward the mother for decisions relating to child rearing, with brief discussions on the history of granting divorce and the major trends of how courts have historically decided custody and child support issues. This Part also delineates the foundation of why it has been so hard for fathers to gain childcare rights in this area.

Part III of this Note discusses the challenge in modern time to changing the notion that fathers out of divorce have committed some wrong and are therefore less entitled or able to care for their children. Television has influenced popular culture to dictate what society views as a "normal" family.[35] Social attitudes towards professions and family roles of each gender are examined to show how gender roles dictate what a father's role in child rearing "could" and "should" be. Part IV discusses how fathers are generally viewed today regarding child rearing, how that is a departure from more traditional notion of a father's role and what positive steps there have been for fathers. And yet, as shown by Part V, despite these incremental changes, fathers generally are still treated by the law as less than their female counterparts on the issue of child rearing as well as providing equal protection and opportunity for fathers to care for their children as a mother is able to in public. There is a need for regulation to ensure fathers have the same opportunities to care for their children in public as mothers have.

Part V also reviews a statute that purports to provide childcare accommodations equally to men and women in establishments held open to the

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31 *See infra* Part V.A.1-3.

32 *See infra* Part V.A.4-5.

33 CAL. SAN FRANCISCO PLANNING CODE § 168(b) (2015) ("Baby Diaper-Changing Accommodations Required"), http://planning.sanfranciscocode.org/1.5/168/.

34 FLA. MIAMI-DADE COUNTY CODE § 8A-114 (2015).

35 Jackie Bolen, *TV's Effect on the Family*, BLOGSPOT.COM (Nov. 21, 2006), http://tvseffect.blogspot.com ("It seems obvious to most people today that TV has a huge impact upon our culture and more specifically the family.").

public,[36] and the case law interpreting that statute. In addition, this Part analyzes the legislation that has been enacted, proposed, and failed to mandate the provision of changing tables and changing stations for both sexes. Furthermore, this Part discusses some of the reasons bills have failed to become law in several states and municipalities. Finally, this Part V provides a comprehensive draft bill that could be enacted in order to adequately provide the means for fathers to stand on equal footing with mothers so that they may enjoy time in public with their children.

I. BACKGROUND

Changing diapers is both a cultural symbol and concrete factor in questions of primary caretaking. It is a fundamental expression of a parent caring and taking responsibility for his or her child. Which parent is allowed to, or *has* to, change the child's diaper is a reflection of the gender roles society assigns to a given parent based on their sex. The failure to provide a legal responsibility for businesses and establishments that hold itself out open to the public to provide clean and safe means for parents to change their children disproportionately affects men, as many businesses choose to provide changing tables only in women's restrooms.[37]

While many, if not most, establishments open to the public in this country have installed changing tables or changing stations in women's restrooms on their own initiative (i.e., not having been instructed to do so by law), the overwhelming trend has been for businesses to refrain from providing the same accommodation for men. This phenomenon leaves fathers, who increasingly are spending more time with their children than ever before, to fend for themselves when changing their children in public. It is a problem countless fathers face, regardless of their marital status, on a daily basis.

In fact, the problem is so pervasive, that even celebrities like Ashton Kutcher are taking notice.[38] Mr. Kutcher, famous for his roles in *That '70s Show*, *The Guardian*, and *Two and a Half Men*,[39] had a son with actress Mila Kunis in October 2014.[40] Having taken on a "non-traditional" parent role, Ashton is tired of having to change his son on everything *but* a changing table.[41] "There are NEVER diaper changing stations in men's public restrooms. The first public men's room

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[36] 1897 Unruh Civil Rights Act; 1897 Cal. Stat. ch. 108, § 1, at 137; Sande L. Buhai, *One Hundred Years of Equality: Saving California's Statutory Ban on Arbitrary Discrimination by Businesses*, 36 U.S.F. L. REV. 109, 149 (2001); Alison Rothi, *Changing Ideas About Changing Diapers*, 25 WHITTIER L. REV. 927 (2004) ("[A]ll citizens within the jurisdiction of this civil state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating-houses, barber shops, bath-houses, theaters, skating rinks, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.").

[37] Newman, *supra* note 2.

[38] Bogna, *supra* note 8; Oldenburg, *supra* note 8.

[39] IMDB, http://www.imdb.com/name/nm0005110/?ref_=tt_ov_st (last visited Mar. 11, 2015).

[40] Ryder, *supra* note 7.

[41] Bogna, *supra* note 8; Oldenburg, *supra* note 8.

that I go into that has one gets a free shout out on my FB page! #BeTheChange," wrote Ashton on his Facebook page.[42]

Traditionally, fathers have been made to support a former spouse and child as established by a *per se* rule.[43] Despite this obligation of fathers to support their children, mothers were given primary, or even sole, custody of the child, leaving the father with essentially no benefit of financially supporting the children,[44] besides the self-esteem of meeting a moral or altruistic obligation. This post-divorce system was an effort by the state to ensure that it would not be responsible for supporting mothers and children in the case of the absconding or indebted father; in other words, the state wanted to ensure that fathers would ultimately be responsible for supporting their former wives and children.[45]

This *per se* rule has fallen by the wayside in the last several decades. In the majority of jurisdictions, custody, alimony, or spousal maintenance is not awarded to the mother simply because she is a woman; a case-by-case "best interest of the child" standard emerged nationwide with regard to custody.[46] A similarly fact-driven approach has been adopted with regard to alimony and maintenance awards.[47] No longer is support awarded to a woman or mother just because she is a woman; several factors, including need and ability to pay[48] of each spouse, are taken into account and often are the contentious points of litigation.[49]

Although fathers have made significant progress with respect to securing visitation, custody and support rights over their children, the law has not advanced far enough, nor quickly enough, and more must be done through swift, comprehensive and uniform state legislation.

There is an ongoing marked increase in the number of fathers having custody of children, whether it is sole, primary, or temporary visitation. There, too, is a

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42 Bogna, *supra* note 8.

43 AREEN ET AL., *supra* note 15, at 1115; Hansen, *supra* note 17, at 1134 (citing Eitel v. Walter, 2 Bradf. 287 (N.Y. Sur. Ct. 1853)).

44 Hansen, *supra* note 17, at 1131; GROSSBERG, *supra* note 17; Zainaldina, *supra* note 17.

45 Hansen, *supra* note 17, at 1134.

46 The Uniform Marriage and Divorce Act has taken up the "best interest of the child standard" so as to represent various jurisdictions around the country and promote the standard nationally. This standard promulgated in Section 402 dictates that courts should considered several factors in making custody determination, including but not limited to the wishes of the child, the interaction and relationship the given child has with each parent, and the child's anticipated adjustment to a new home, school and community. UNIF. MARRIAGE AND DIVORCE ACT § 402 (UNIF. LAW COMM'N 1970).

47 AREEN ET AL., *supra* note 15, at 1020-21 ("treating a spouse's ability to pay as one of the primary considerations when the other spouse is in need of alimony" and ". . . courts attempting to do financial justice between parties may look to both tangible assets and future earnings as sources for accomplishing this objective").

48 *Id.* at 1020 ("treating a spouse's ability to pay as one of the primary considerations when the other spouse is in need of alimony").

49 UMDA section 307(a) requires courts to take into account a number of statutory factors in determining the most equitable allocation of property between spouses. This includes, but is not limited to, contribution of each spouse to that property, value of property set apart to each spouse, duration of marriage, and economic circumstances of each spouse at time of dissolution. UNIF. MARRIAGE AND DIVORCE ACT § 307(a).

shift toward a rebuttable presumption of shared custody,[50] increase in gay adoption,[51] growing acceptance of gay marriage, single male adoption of children, cohabitation instead of marriage, sexual revolution of females in the work place meaning that more woman than ever before are in the American workforce and not stay-at-home moms. For these reasons, many fathers are left with their children in public with no women to take the child away to a changing table that is usually located solely in a women's restroom. It is in this regard that until fathers have the same means and opportunities to care for their children, both at home and in public, that they will not be treated as equals. It is through regulation by uniform state law or a national statute that fathers can be put in the same position as women who are often provided the accommodation of a changing table in their restroom in a public establishment. The changing table, and access to it, is a manifestation of society's view of which sex is *supposed to* and is *able to* care for the child; but, society is changing and the law must change with it.

II. HISTORICAL AND TRADITIONAL PERSPECTIVES ON DIVORCE, CHILD SUPPORT AND CUSTODY

A. Divorce

Divorce law in the United States traces its roots to English common law where, traditionally, divorce was exceedingly difficult to obtain. Before 1857, England was largely a "divorceless society" as divorce could only be granted by Parliament.[52] "No court before 1857 had authority to grant a divorce."[53] In colonial America, this tradition remained, save occasional and exceptional divorce grants by courts and legislatures in New England.[54] Slowly, as the United States was winning the Revolutionary War, legislatures in the north began to pass divorce statutes that allowed courts to replace legislatures as the epicenter of divorce decrees.[55] Thirty-three of thirty-seven American jurisdictions had substituted judicial divorce for legislative divorce by 1867.[56] Divorce laws were being promulgated to facilitate the growing middle class' increased demand for divorce.[57]

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[51] Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES, June 13, 2011, http://www.nytimes.com/2011/06/14/us/14adoption.html?_r=0.

[52] Friedman, *supra* note 10, at 695.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Hansen, *supra* note 17, at 1123 n.19; Grossberg, *supra* note 17, at 251.

[57] Friedman, *supra* note 10, at 696.

"It became simpler to get a divorce than in the past; but divorce was not routine or automatic."[58]

Obtaining a divorce was unlike today; there were significant limits on who could file for divorce[59] as well as what they needed to prove. For instance, the defendant had to be at fault; meaning, there had to be legal grounds for the divorce.[60] That is, commonplace marital disharmony or private issues within the marriage such as a woman claiming she was not provided with enough spending money would not invoke the authority of courts to decide the issue.[61] These fault grounds varied, and still do vary by jurisdiction, but were by no means limited to adultery, desertion, and cruelty.[62] Often, the alleged wrongdoer would not want to be divorced, and had several defenses[63] available to him or her in order to attempt to stave off an order of divorce, such as recrimination,[64] connivance,[65] condonation,[66] collusion,[67] and insanity.[68]

This fault-based regime continued to be the gatekeeper to divorce until California adopted a no-fault divorce ground by enactment of the California Family Code in 1969.[69] California adopted the now well-established language of "irreconcilable differences" as legal jargon for no-fault divorce.[70] "California's reforms provided the impetus for the eventual adoption of no-fault grounds for divorce in every jurisdiction."[71] Ultimately, the Uniform Marriage and Divorce Act ("UMDA") adopted the language of "irretrievable" breakdown in marital

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58 *Id.*

59 *Id.* Women were not permitted to seek divorce in a vast majority of states. *Id.* For example, see Maryland which—despite passing a general divorce law in 1841—made women petition the legislature in order to attempt to secure a divorce from "odious or abusive husbands." *Id.*

60 *Id.*

61 McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953). This case illustrates the notion of a strong tradition of marital privacy in America. Courts were extremely reluctant to become involved in marital debates such as issues of finances, how money was being spent, or how children were being raised, unless there was a pending legal separation or action for divorce.

62 Friedman, *supra* note 10, at 697-99; AREEN ET AL., *supra* note 15, at 700-07.

63 AREEN ET AL., *supra* note 15, at 707.

64 *Id.* Recrimination means the other party. *Id.* Both spouses are at fault, they both have grounds for divorce. *Id.* Policy rationale includes the *clean hands doctrine*, the idea that divorce should be permitted only for an innocent spouse, preservation of marriage, and the need to provide economic protection for women by denying divorce in order to force husbands to continue to support wives. Criticism includes that this denies divorces that genuinely should end. *Id.*

65 *Id.* at 710. Consent to the defendant's wrongful conduct, limited to suits for adultery; one or both spouses plotted fault grounds and carried out plot. *See* Hollis v. Hollis, 427 S.E.2d 233 (Va. Ct. App. 1993).

66 AREEN ET AL., *supra* note 15, at 712. Willan v. Willan [1960] 2 All E.R. 463 (Eng.). Wife forced husband have to sex with him under threats and teasing; he acquiesced and had sex with her. *Id.* This condoned the alleged abuse. *Id.* Therefore, no grounds for divorce were found. *Id.*

67 AREEN ET AL., *supra* note 15, at 715. Collusion occurs when spouses agree or fabricate evidence that one partner commits a marital offense to provide grounds for divorce. *Id.*

68 *Id.* at 716. Insanity can serve as both a ground for divorce and a defense to a divorce suit. *Id.*; Anonymous v. Anonymous, 236 N.Y.S.2d 288 (Sup. Ct. N.Y. 1962).

69 AREEN ET AL., *supra* note 15, at 719; CAL. FAM. CODE §§ 2310, 2311, 2333, 2334 (West 2015).

70 CAL. FAM. CODE §§ 2311, 2333.

71 AREEN ET AL., *supra* note 15, at 720.

relations.[72] By 1985, this paradigm shift in recognized grounds for granting divorce was soon widely adopted by way of every state at least adding a no-fault provision to their current fault grounds for divorce.[73] Some states went so far as to fully replace its fault regime with no-fault grounds as the exclusive means of ending a marriage.[74]

For the majority of American history, it was exceedingly difficult to obtain a divorce. As a result, a divorce sought before 1969 had to be on fault grounds, by definition, meaning that when a divorce was granted during that time the defendant was at fault and therefore "caused" the breakdown of the marriage. Often that offending party was the husband, due to the nature of the fault grounds for divorce. A stigma against the offending party existed, which was most often the father and husband[75] by way of adultery or desertion.[76] It is in this way that the institutions of divorce and fatherhood have been linked via the notion of fault; this has and continues to affect men with regard to their legal rights and access to their children by the ongoing notion that divorced men had to have been at fault to instigate and receive the divorce.

B. Child Support

From its inception, child support in this country has been a private obligation.[77] The system of a private child support obligation has its roots in English law of the eighteenth and early nineteenth centuries, which held that parents had a duty to provide for their children in what was coined by Blackstone as a "principle of natural law."[78] The private obligation on a child's parents was created by judges *sua sponte* to protect the children and their mothers from the "danger of dependency . . . seen both as poverty and as dependency on the state . . ."[79] Simply put, no common law was interpreted to hold a parent to the obligation of supporting the child; it was simply a moral obligation as part of one's humanity.[80]

The moral notion that parents should provide for their minor children arrived in America shortly thereafter; however, in a slightly different form. American

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[72] *Id.* at 724-25; UNIF. MARRIAGE AND DIVORCE ACT §§ 302 (Dissolution of Marriage; Legal Separation), 305 (Irretrievable Breakdown) (UNIF. LAW COMM'N 1970).

[73] AREEN ET AL., *supra* note 15, at 719.

[74] *Id.* Nineteen states and the District of Columbia provide no fault grounds as exclusive grounds for divorce. *Id.*; *see also* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Looking at Interjursidictional Recognition*, 43 Fam. L.Q. 923, 796 fig. 4 (2010).

[75] Hansen, *supra* note 17, at 1128 (citing GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 79 (1991)).

[76] *Id.* at 1127 ("family desertion emerged as a major social problem, as wage-earning men who could not access the courts to obtain divorces simply left their wives").

[77] AREEN ET AL., *supra* note 15, at 1115 ("child support in the United States from its origins has been a private obligation").

[78] Hansen, *supra* note 17, at 1133.

[79] *Id.*

[80] *Id.*

courts, despite the absence of an English common law duty to support one's child, formulated a legal duty for fathers to support their children.[81] This duty was limited at first to "necessaries" so that the "law will imply a contract on [the father's] part, if he refuses or neglects to perform his natural duty to his offspring."[82] Again, holding a father to be responsible—even without his agreement to a legally enforceable contract—was justified on public policy grounds stemming from the state or municipality not to be liable to provide for those who could not provide for themselves, most usually divorced mothers and their children.[83] Similarly, the famous case of Van Valkinburgh is often cited for the proposition that a father is legally responsible to support the necessities of his children.[84] So as seen, the duty to support a child was that of the father alone by the middle of the nineteenth century.[85]

C. Child Custody

Throughout the same time, changes were occurring in the way American courts decided child custody. Taking its cues from English traditional conceptions of custody, early American custody decisions were made with preference toward paternal custody in the vast majority of cases.[86] However, this paternal preference began to erode rather quickly. As American society began to change in the early nineteenth century with respect to viewing childhood as a special time in one's life that should be protected and not merely used to produce additional income by way of child labor, judges making custody decisions were influenced to award custody of newly valued children increasingly to the mother.[87] By the middle of the nineteenth century, the paternal custody preference had been reversed and the maternal preference was a cornerstone of custody decisions.[88]

During this time, the early nineteenth century, as it was increasingly becoming a father's responsibility to provide for the necessities of his child and yet custody was being awarded more and more often to the mother, desertion by the father became exceedingly commonplace.[89] The system was overwhelmed.[90] The community that the mother lived in, therefore, had to step in to provide for

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81 Eitel v. Walter, 2 Bradf. 287 (N.Y. Sur. Ct. 1853).

82 *Id.* at 289.

83 Hansen, *supra* note 17, at 1134.

84 Van Valkinburgh v. Watson, 13 Johns 480 (N.Y. 1816) ("A parent is under a natural obligation to furnish necessaries for his infant children.").

85 AREEN ET AL., *supra* note 15, at 1115 ("Originally, the duty to support was the father's only . . . .").

86 Hansen, *supra* note 17, at 1123, 1130.

87 *Id.* at 1129 (citing MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 51 (1994)).

88 *Id.* at 1131.

89 *Id.*

90 *Id.* (citing Charles R. Lee, *Public Poor Relief and the Massachusetts Community*, 1620-1715, 55 NEW ENG. Q. 564, 584 (1982); Thomas A. McMullin, *Overseeing the Poor: Industrialization and Public Relief in New Bedford*, 1865-1900, 65 SOC. SERV. REV. 548, 559 (1991)).

subsistence living for the child and its mother and soon, mothers relied on the generosity of philanthropists to make ends meet.[91] As a natural progression, these "philanthropists," or essentially creditors to the child, located the deserting fathers and sued for reimbursement.[92] These suits were often successful,[93] so mothers began to sue in the same capacity as third party plaintiffs.[94] The courts, too, found these suits to have merit—although contemplated a higher threshold for mothers to be successful for reimbursement of child support costs.[95] Mothers who wanted to recover child support had to prove that their husband failed to provide for their children and that the husband was at fault for causing the divorce.[96] This requirement for proving that the father was delinquent in providing for his children in order for the mother to collect against him, further vilified the father.

As desertion and nonpayment of child support ever increased in the second half of the nineteenth century, many states began to enact statutes which criminalized the failure to obey child support orders in order to bolster a municipalities redress against fathers who placed additional financial burdens on those towns by needing to care for the former wife and her offspring.[97] The statutes in effect punished men who caused their wives or former wives and children to be placed on state funded care.[98] The criminal statutes further vilified fathers as a class that generally could not be trusted to honor their obligations to individuals and to society as a whole. While fathers who lived up to their obligation to support their children were seen only as fulfilling "a duty which he owes to the state, as well as to his children,"[99] those who did not were seen as criminals, according to statute.

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[91] *Id.* at 1142.

[92] *See, e.g.*, Reynolds v. Sweester, 81 Mass. (15 Gray) 78 (1860). Reynolds sued to recover from Stephen Sweester when Sweester's wife and child had left him after he had physically abused them. *Id.* Reynolds was allowed to recover because Sweester had "made no suitable provision, either at his home or elsewhere, for the mother and child" and "utterly failed . . . to relieve [his child] from the absolute destitution to which by his neglect and misconduct it had been exposed." *Id.*

[93] Hansen, *supra* note 17, at 1139 ("courts readily upheld claims against the father, referring constantly to the pressing dependency of the mother and children involved, and finding fault with the father who had caused the marital breakdown and subsequent dependency").

[94] *Id.* at 1140 ("Before long, American courts applied the child support doctrine to allow newly divorced mothers to recover directly from their husbands for their outlays in supporting their children" instead of borrowing money from others who then could have a third party claim against the absconding debtor father.).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1145. By 1886, eleven states made it a penal offense for a father to abandon or refuse to support his minor children. *Id.* (citing FREDERIC J. STIMSON, AMERICAN STATUTE LAW 751 (Boston, Charles C. Soule 1886)).

[98] *Id.*

[99] *Id.* at 1150 (citing Bowen v. State, 46 N.E. 708, 709 (Ohio 1897)).

III. THE CHALLENGE TODAY

It is against that historical and traditional background that fathers have been fighting for more presumptive rights to their children. Child rearing should be an equal enterprise between loving partners—not an institution of doubt, lack of trust and vilification, if one does not "fulfill his duty to society." Society should view this arrangement by way of providing an incentive to providing for loved ones and offspring, not a punishment and vilification for failure to do so. Portrayed in such a way, it has been exceedingly difficult for fathers' rights to be solidified and expanded, even after the sexual revolution during which time women increasingly returned to the workforce, and fathers began spending more time with their children.

Succinctly stated, "society treats a divorced father as less of a father."[100] Apart from historical traditions of divorce decrees and custody decisions, society's perception of fathers has also been influenced by television shows portraying what the "typical" American family looks like or should look like. *The Dick Van Dyke Show*, for instance, told the story of a family living in New Rochelle, New York.[101] Dick Van Dyke, as father and husband would leave the suburbs daily to commute to Manhattan to work.[102] Upon his return each evening, his beautiful stay-at-home wife and dutiful son would be waiting for him, where dinner would be served.[103] Popular culture like this instilled the notion in society that their family life should fit within that mold. Further, these television shows and popular culture served only to further solidify the mother's role as a caregiver. As a result, fathers seemed to be given a secondary role when it came to every day issues of running the family and child rearing.

An important development in the departure away from maternal preference was the implementation of the "nurturing parent doctrine."[104] This doctrine came about in the late twentieth century and essentially gave credit to the parent who had been staying home with the couples' children and thus was not earning an income to contribute to childcare expenses.[105] That is all well and good, and on its face seems like a just and equitable goal; however, as one can imagine, the doctrine tended to support women more than men, as women during the twentieth century

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[100] Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 939 n.88 (2005).

[101] *The Dick Van Dyke Show* (CBS 1961-1966).

[102] *Id.*

[103] *Id.*

[104] *See generally* Kraisinger v. Kraisinger, 928 A.2d 333 (Pa. Super. 2007); Little v. Little, 975 P.2d 1171 (Ariz. 1999). Compare Little where husband who wanted to go to law school and stop earning an income wanted a reduction in his child support payments owed (disallowed) and Kraisinger where mother wanted to not work and stay home to raise the couple's remaining infant child as she had done for the other older children (court allowed her to forego income while she raised the remaining child; court noting that it would be inequitable to deprive remaining child of the benefit of being raised at home by mother as the child's siblings had been. *See id.*

[105] *Id.*

were usually the parent to stay home with the child during the marriage, as the men joined the workforce.

IV. THE STATUS TODAY: SOME PROGRESS HAS BEEN MADE

Despite all of these challenges to the historical and traditional view of families and fatherhood, progress has come about in various ways. First of all, what society views as a family has been changing with increasing speed. Two-thirds of households today are headed by two married parents, compared with ninety-two percent in 1960.[106] A record 8% of households with minor children are headed by a single father, as opposed to just above 1% in 1960;[107] and, 24% of single parent households in America are headed by fathers, up from 14% in 1960.[108] The changing face of the American family, just like the traditional model of family, has been portrayed and cast into every living room in the country by popular television shows.[109] It is also clear that lone fatherhood is on the rise.[110]

Second, who a "father" is has been questioned by lawmakers and scholars alike, and the definition of the term is ever expanding. Erin Marie Meyer argues that children do not actually need a father *per se*; they simply need a strong, supportive role model.[111] This argument suggests that the sex of the parent should not and does not matter when making decisions regarding child custody.[112] Meyer suggests that in order to promote gender-neutral parenting

> legal restrictions on gay men's ability to become parents . . . and implementing policies that will encourage men to focus less on breadwinning and more on the caretaking aspects of parenting . . . may be areas in which to begin the process of promoting gender-neutral parenting and the elimination of sex-stereotyped parenting roles.[113]

That kind of thinking about gay adoption and gay parenting is broadening the public's rationalization of what fatherhood can look like.[114] This suggests that

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[106] Gretchen Livingston, *Pew Research Center's Social & Demographic Trends Project: The Rise of Single Fathers*, PEW RESEARCH CTR. (July 2, 2013), http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers/.

[107] *Id.*

[108] *Id.*

[109] "Modern Family" explores the issues and drama surrounding a typical American family.

[110] Livingston, *supra* note 106. Single fathers as polled include those who have no spouse or partner living with them as well as those cohabitating with partners or others. *Id.* Fifty-nine percent of single fathers have no spouse or partner living with them, while forty-one percent are living with a partner. *Id.*

[111] Erin Marie Meyer, *Gay Fathers: Disrupting Sex Stereotyping and Challenging the Father-Promotion Crusade*, 22 COLUM. J. GENDER & L. 479, 529-30 (2011).

[112] *Id.* Drawn from quote "Gay fathers challenge the notion that only women can or ought to engage in 'mothering.'" If gay fathers can parent well, straight single fathers can as well. The sex of the parent no longer remains important.

[113] *Id.* at 530.

[114] *Id.* at 486 (defining father as a "male parent, a masculine parent, a parent who performs a role traditionally associated with fathers, and/or a parent who is complementary or supplemental to and/or different from a mother").

society may be on its way to seeing parenting not as dictated by sex, but instead perhaps just as "parents" with equal and shared responsibilities. The old school notion that gay, lesbian or any other nontraditional parents are unfit to be successful and supportive parents who could raise "normal" children has been widely rejected recently as being untrue and unfounded.[115]

Third, increasing divorce rates (in part owing to the proliferation of no-fault divorce regimes) mean that more fathers have an ever-increasing presence in their children's lives.[116] No longer does a father have to desert his family in order to escape a bad marriage if there was no-fault on the part of his wife. As seen above, with no-fault divorce regimes, fathers do not have an incentive to desert in order to obtain a divorce.[117]

Fourth, a new "best interest of the child" standard has taken hold in virtually every family court in this country regarding a rebuttable presumption of split custody between parents, as opposed to the long standing maternal preference for custody or the tempered nurturing parent doctrine.[118] "[C]ourts have warmly embraced the concept that it is generally in the best interest of the child to have a healthy relationship with both parents following marital dissolution."[119] In this regard, the law of custody disputes has come a long way; no longer is fault *per se* taken into account when deciding custody, and fault and child custody disputes are separate and distinct. The separation of fault and custody disputes is a great positive. The consequences are that if one is at fault in contributing to the divorce, it does not necessarily mean that he or she will have their rights vis-a-vis their child affected, if that fault did not negatively impact the children of the marriage. However, while fault is not taken into account for the purposes of custody under this standard, it is exceedingly important that both parents continue to act in good faith and without ill will toward the other parent in front of the child.[120]

Ultimately, if gender of the parent does not affect children's future well-being, then there is no viable argument to deny benefits to same-sex co-parents. For this reason, same-sex co-parents are entitled to the legal benefits associated

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[115] *Id.* at 522 ("[T]here is no evidence to suggest that lesbian women or gay men are unfit to be parents or that psychosocial development among children of lesbian women or gay men is compromised relative to that among offspring of heterosexual parents. Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents.").

[116] *Id.* at 510 & n.19 ("increasing number of fathers are playing an integral role in their children's upbringing after divorce").

[117] This, however, leaves apart the idea that fathers may have an incentive to desert in order to not have a child support judgment issued against them. This is made possible by the notion of a bifurcated divorce, which was made popular by the case of Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

[118] UMDA, *supra* note 46.

[119] N.Y. MATRIMONIAL LAW & PRACTICE § 20:15 (2015).

[120] When a custodial parent seeks to "alienate affection of the child for the other parent, a modification of the custody award may be justified." 40 TEX. JUR. 3D FAMILY LAW § 1434 (2015) (citing McLeod v. McLeod, 9 S.W.2d 141 (Tex. Civ. App. Eastland 1927)).

with child rearing, including the legal right and protection to change their children's diapers in public facilities without undue or excessive inconvenience.

V. CHANGING TABLES

The law has advanced to provide more rights to fathers; however, it has not advanced far enough or quick enough. As a result of the evolution of what is considered to be the American family, more rights as a matter of law must be given to the father, regardless if he is single, married, gay, or cohabitating. Despite advancements in rebuttable presumptions or a perceived increase in equality between sexes in the family unit, it is often difficult for a father to have custody of a child when he is not married or partnered in a traditional sense. Those fathers cannot truly take advantage or enjoy being out of their home with their children.

This Note argues that changing tables (and the lack of its availability for fathers' use in public spaces) manifest society's continued lack of respect for fatherhood. Changing tables are poised to serve as the means to establish progress for all fathers, whether they are married, divorced, gay, or single. Without having access to changing tables, fathers not married to a woman would have a difficult time to spend the day away from home with their children.

By enacting a law to require a changing table in every restroom, subject to certain limitations, the legislature—and in effect society itself—would be condoning and supporting a change in what has traditionally been considered to be a mother's duty alone. A law dictating that every public restroom must have a changing table would recognize the very real, and increasingly apparent, trend that fathers are more than ever responsible for the care of their children. This is not something to be shied away from or denied; it is to be embraced and welcomed with open arms.

As of now, no state or federal law in the United States mandates the provision of a changing table in a restroom held open to the public.[121] A law to this effect would guarantee the right and the means for an ever-growing class of fathers, and men who act in a fatherly capacity, to change their children in comfort, security, and cleanliness. And yet—no such law exists. This is while the United States Congress, in addition to virtually every state, has taken the time and taxpayer resources to provide for some questionable laws. For example, in Nevada, it is illegal to use X-rays to determine one's shoe size.[122] In California, while one may

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[121] Natasha Paulmeno, *Rudiak Introduces Baby Changing Table Legislation*, LAWSTREET (July 23, 2013), http://pittsburghpa.gov/rss/print.htm?mode=print&id=2694; *Fight for the Right to Potty: Dads Battle to Get Diaper Changing Tables into the Men's*, MAILONLINE (June 13, 2014), http://www.dailymail.co.uk/femail/article-2657505/Fight-right-potty-Dads-battle-diaper-changing-tables-mens-room.html; Pawlowski, *supra* note 1; Natasha Paulmeno, *A Good but Stinky Step for Parenting Equality*, LAWSTREET (June 26, 2014), http://lawstreetmedia.com/news/headlines/good-stinky-step-parenting-equality/.

[122] NEV. REV. STAT. ANN. § 202.245 (West 1985) ("A person shall not operate or maintain any shoe-fitting device or shoe-fitting machine which uses fluoroscopic, X-ray or radiation principles.").

possess as many live frogs as they like to use in a frog-jumping contest, if a frog dies or is killed, it may not be eaten or used for any purpose.[123] In Arkansas, one cannot honk their horn at a sandwich shop after 9 p.m.[124]

The law that this Note proposes not only is rational, but there is also a substantial harm in failing to establish such a law. It should be noted that 90% of fathers with children under the age of five change diapers.[125] Over 57% of the fathers who live with their children bath, diaper, or dress their children every day.[126] But even fathers who do not live with their children are ever increasingly involved with the care of their children: 30% ate meals with their children every day or several times per week; 39% played with their children at least several times per week; 31% bathed, diapered, or dressed their children at least several times per week; and 23% read to their children at least several times per week.[127] These statistics indicate that there is a clear need for fathers to have an adequate and designated changing location in restrooms open to the public.

Moreover, there is a long tradition in this country of providing for equal rights for citizens. For example, the California state legislature decreed in the 1897 Unruh Civil Rights Act that all citizens must be entitled to equal accommodations in establishments held open to the public.[128] While owners of these establishments retained the right to refuse service due to "some reasonable ground for discrimination," the general precept was that every citizen should be afforded the same rights when visiting a restaurant, bar, bathhouse, or theater.[129] This same sentiment is provided for today, although under slightly differing language.[130] An important qualifying point to this legislation today is that no new "construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever" is

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123 CAL. FISH & GAME CODE § 6883 (West 1957) ("Any person may possess any number of live frogs to use in frog-jumping contests, but if such a frog dies or is killed, it must be destroyed as soon as possible, and may not be eaten or otherwise used for any purpose.").

124 ARK. CODE ANN. §§ 25-74 (West 1961).

125 Jo Jones et al., *Fathers' Involvement With Their Children: United States, 2006–2010*, 71 NAT'L HEALTH STAT. REP. 1, 1 (2013) ("nine out of 10 fathers who lived with children under age 5 bathed, diapered, or dressed the children, or helped them bathe, dress or use the toilet 'every day'").

126 *Id.*

127 *Id.* at 9.

128 1897 Unruh Civil Rights Act, 1897 Cal. Stat. ch. 108, § 1, at 137; Buhai, *supra* note 36; Rothi, *supra* note 36 ("[A]ll citizens within the jurisdiction of this civil state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating-houses, barber shops, bath-houses, theaters, skating rinks, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.").

129 1897 Unruh Civil Rights Act, 1897 Cal. Stat. ch. 108, § 1, at 137.

130 CAL. CIV. CODE § 51(b) (West 2012) ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.").

required.[131] Essentially, equal accommodations are mandatory when they are not unduly burdensome.

The Unruh Civil Rights Act has been challenged before in relation to changing tables.[132] Donald Driscoll went to a restaurant with his wife and infant child.[133] Their child needed to be changed and Mr. Driscoll proceeded to the men's restroom where he realized there was no changing table.[134] He went to the reception area of the restaurant to make sure that he had not missed the changing table.[135] An employee told him that the men's room did not have a changing table.[136] The employee failed to notify him that one was located in the women's restroom and did not offer to accompany him to the woman's restroom so that he could use the changing table.[137] Mr. Driscoll was not offered any other suggestions; he proceeded back to the men's room to change his child the best he could.[138]

Mr. Driscoll sued the restaurant alleging gender discrimination in violation of sections 51 and 51.5 of the Unruh Civil Rights Act.[139] The trial court granted the defendant restaurant's motion to dismiss on several grounds: (1) the "fail[ure] to state a cause of action arising under the Unruh Act" as the amended complaint did not state a basis in law for the proposition that the defendant restaurant had to provide a changing table in the men's room;[140] (2) any and all of the alternatives to providing for a changing table inside of the men's room "would require some sort of construct, alteration, repair or modification of defendant's facilities,"[141] which is a specific limitation of the Unruh Act; and, (3) there is and was no obligation of the defendant restaurant to affirmatively offer a customer the use of equal facilities in the absence of that customer requesting the use of those facilities.[142]

The court of appeals affirmed the lower court's dismissal; Mr. Driscoll's argument that he was not under an obligation to specifically request the use of

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131 *Id.* § 51(c) ("Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.").

132 Driscoll v. OSF Int'l Inc., No. A099229, 2003 WL 21359344, at *1 (Cal. Ct. App. June 12, 2003).

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* at *2.

141 *Id.*

142 *Id.*

equal accommodations was unpersuasive.[143] Similarly, the court rejected the argument that Mr. Driscoll had constructively requested equal treatment because the Unruh Act, as construed, required "intentional discrimination in the form of willful, affirmative conduct."[144] Lastly, Mr. Driscoll argued that, in fact, any of his five alternatives to providing a changing table in the men's room would not require "modification" to any building within the meaning of the Act.[145] The court responded by noting that Mr. Driscoll had "conveniently overlook[ed] the modifier 'whatsoever.'"[146] Like the trial court, the court of appeals interpreted the statute broadly: *any* change to the entire restaurant for the provision of changing facilities for men, even if they were not in the men's room and did not require "construction," constituted an "alteration" or "modification."[147]

Under similar facts, the court in *Brynes v. Junior's Restaurant, Inc.* took an equally broad approach to construing "construction, alteration, repair, . . . or modification of any sort whatsoever."[148] It was important to the court that the plaintiff did not show any independent basis in the law that an establishment had an obligation to provide changing tables in men's (or women's) restrooms.[149] The court also looked to the lack of intentional discrimination as a basis for granting defendant's *demurrer*.[150] As the Unruh Act "requires an affirmative request and denial of equal treatment, defendant did not intentionally discriminate against plaintiff."[151] The court held that the claim of violation of the Unruh Act failed as a matter of law.[152]

Other cases similar to *Driscoll* and *Brynes* have been filed in other jurisdictions, yet are often settled out of court. For instance, Andrew Dwyer sued Lord & Taylor in Manhattan Supreme Court on behalf of his son, then a toddler, for not providing access to a changing table.[153] Mr. Dwyer argued that the department store's failure to provide the same access to changing tables for men as well as women was a violation of the state's public accommodation law, and as such gender discrimination.[154] The case was settled before trial on the grounds that the store agreed to provide access to changing tables and stations for men in all locations where it provides the same for women.[155]

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[143] *Id.* at *1.
[144] *Id.* at *2.
[145] *Id.*
[146] *Id.* at *3.
[147] *Id.* at *2.
[148] Brynes v. Junior's Rest., Inc., No. B193936, 2007 WL 2800335, at *2 (Cal. Ct. App. Sept. 27, 2007).
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Newman, *supra* note 2.
[154] *Id.*
[155] *Id.*

A. Changing Tables: Passed and Defeated Legislation

Driscoll and *Brynes* indicate the difficult presumption that fathers work against in securing equal accommodations to their female counterparts even in jurisdictions that have statutes purportedly enacted to provide equal treatment, service and accommodation. It is evident from these examples that the mere existence of a statute, even one like the Unruh Civil Rights Act, which purportedly provides for equal accommodation for all, does not actually provide for fathers to have access to the same benefits and accommodations as their female counterparts due to the drafting of the law.

Despite the failure of state and federal jurisdictions to provide these equal accommodations, several local jurisdictions have enacted laws that require the installation of baby changing tables to provide for true equality. The most notable jurisdictions to do so to date are San Francisco, Pittsburgh, and Miami-Dade County.

1. San Francisco, California

San Francisco's Planning Code dictates that changing tables must be installed in buildings accessible to the public.[156] The Code mandates that a "safe, sanitary and convenient baby diaper-changing station, deck table or similar amenity that is installed or placed in a separate, designated location in a Public-Serving Establishment."[157] The section applies to "Public Serving Establishments," defined as new hospitals, retail sales and personal services use or entertainment use that is at least 5,000 square feet in size, amusement game arcades and the like, libraries operated by the city's Public Library, and any publicly accessible facility operated by the city's Department of Recreation and Parks.[158] The section also stipulates that in addition to new establishments, "Substantially Renovated" establishments must also comply with the addition of changing tables.[159] A substantially renovated building is one for which a building permit is issued for renovation or construction that has an estimated cost of at least $50,000.00.[160]

Every building that falls under this ordinance must provide a changing station in each restroom, regardless of which sex it is designated for, or a single "Diaper-Changing Accommodation that is accessible to both" sexes.[161] In addition, signage must be installed and maintained near the building's entrance or in the building's central directory to indicate the location of the changing stations.[162] The San

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156 CAL. SAN FRANCISCO PLANNING CODE § 168(b) (2015) ("Baby Diaper-Changing Accommodations Required"), http://planning.sanfranciscocode.org/1.5/168/.

157 *Id.* § 168(a)(3).

158 *Id.* § 168(a)(1)(A)-(D).

159 *Id.* § 168(a)(2).

160 *Id.*

161 *Id.* § 168(c).

162 *Id.*

Francisco Code ensures compliance with state and federal law "relating to access to the disabled."[163] If the Zoning Administrator deems that an establishment falling under this provision cannot install a changing station, the requirements may be waived.[164] This seemingly provides primary importance to upholding state and federal disability laws.

San Francisco's law is as a model law, which states should use as a guiding post to draft their own laws. It is not overly onerous on businesses, and yet provides the correct requirements to provide for equal access to changing stations and tables in public for men.

2. Pittsburgh, Pennsylvania

Councilwoman Natalia Rudiak introduced a bill on July 23, 2013 to the Pittsburgh City Council which would require all city owned buildings that were open to the public to "install and maintain baby changing stations in the restrooms" of those buildings.[165] Seeing the need to provide these accommodations, the City Council gave preliminary approval of the bill just one week later.[166] The bill was approved and codified.[167]

Pittsburgh's law directs all city owned buildings "normally open to the public" to provide baby changing stations for "parents and guardians, regardless of gender."[168] In the event that a building has more than two floors, diaper-changing stations must be located on each floor that has restrooms open to the public.[169] Signs are required to be installed and maintained in order to identify the location of baby changing stations.[170] All provisions of the law were required to be fulfilled prior to December 31, 2014.[171]

While this law took a step in the right direction, it did not go far enough. It limits the law's application to city owned buildings. In order for a law to have widespread impact, it cannot be limited in such regard, and should apply to all buildings that qualified regardless of ownership.

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163 *Id.* § 168(d).

164 *Id.*

165 Paulmeno, *supra* note 121.

166 Moriah Balingit, *Pittsburgh City Council Gives Early Approval for Baby-Changing Tables in Men's and Women's Bathrooms*, PITTSBURGH POST GAZETTE (July 31, 2013), http://www.post-gazette.com/local/city/2013/07/31/Pittsburgh-City-Council-gives-early-approval-for-baby-changing-tables-in-men-s-and-women-s-bathrooms/stories/201307310107.

167 PA. PITTSBURGH CODE OF ORDINANCES § 491.01 (2015) ("Baby Changing Stations in Municipal Buildings").

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

3. Miami-Dade County, Florida

As of the 2010 Census, Miami-Dade County is the seventh most populous county in the United States, having population of approximately 2.5 million people.[172] In July 2013, Miami-Dade County enacted "The Baby Diaper-Changing Accommodations Ordinance."[173] The ordinance required that all new establishments were required to provide a changing table for men and women alike.[174] If an establishment received its Certificate of Use and Occupancy prior to February 13, 1999, it would not need to comply with this ordinance *unless* the establishment underwent remodeling of more than 50% of gross floor space (as calculated by including restrooms).[175]

The accommodations to be made available are delineated broadly so as to provide foremost for the substance of an adequate changing location, not necessarily the form of a "changing table" *per se*. The establishment needs only provide a "safe, sanitary and convenient baby diaper-changing station, deck, table or similar amenity,"[176] and the "diaper-changing station" may be "in women's and men's restrooms or unisex/family restrooms."[177] Establishments so required under the ordinance include theaters, sports arenas and stadiums, convention centers, libraries, shopping centers of more than 25,000 square feet, restaurants with seating for over fifty guests, tourist attractions and retail stores over 5,000 square feet.[178]

Similar to the Unruh Civil Rights Act, however, Miami-Dade law provides several exemptions to avoid "hardship[s]" to businesses that fall under this statute.[179] Establishments are exempt from providing changing stations if: (1) "[n]o reasonable physical alternative exists for providing baby diaper-changing accommodations; or (2) [t]he cost of providing such accommodation exceeds ten (10) percent of the cost of constructing, purchase or substantially modifying the building or facility occupied by the establishment or use."[180] However, if an establishment does not fall under one of these exemptions, it is subject to a $500 civil penalty for non-compliance.[181]

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[172] *Table 7. Resident Population Estimates for the 100 Largest U.S. Counties Based on July 1, 2011 Population Estimates: April 1, 2010 to July 1, 2011*, U.S. CENSUS BUREAU, POPULATION DIV., http://www.census.gov/popest/data/counties/totals/2011/tables/CO-EST2011-07.csv (last visited Apr. 13, 2016).

[173] FLA. MIAMI-DADE COUNTY CODE § 8A-114 (2015).

[174] *Id.* This could be in the form of changing table accommodations in each of the men's and women's room or one restroom equipped with these accommodations available for use by both sexes. *Id.*

[175] *Id.*

[176] *Id.* § 8A-114(B)(3).

[177] *Id.*

[178] *Id.* § 8A-114(B)(1).

[179] *Id.* § 8A-114(C).

[180] *Id.* § 8A-114(C)(1)-(2).

[181] *Id.* § 8A-114(D). For the dollar amount, see FLA. MIAMI-DADE COUNTY CODE § 8CC-10 (2015).

This law is both similar and different from the San Francisco law. It is similar to the San Francisco's law in that it does not require all publicly accessible spaces to implement these changes immediately. If it is an older building, and not undergoing substantial renovation, the premises need not comply with the requirements. Unlike the San Francisco law, however, there are also exceptions that relieve the obligation when undue hardships on the premises' owners exist. Similar to the San Francisco's law, Miami-Dade's law is one that can and should serve as a model to state and federal legislatures on how to address this issue.

4. New York, New York

Some legislatures have not been able to muster enough support to actually pass a bill into law. New York City tried to enact a similar statue in 2002, but was unable to do so. Council Member Eva Moskowitz authored Bill 202-2002,[182] which was introduced on May 21, 2002.[183]

The bill itself mandates, through an amendment of title 26 of the administrative code,[184] that the owner, agent or person directly or indirectly in control of a building with occupancy of greater than or equal to 250 people shall provide for the use of the public baby changing stations.[185] The types of buildings that fall under this bill include but are not limited to: auction rooms, public auditoriums, banquet halls, bowling alleys, catering establishment, amusement parks, churches, community centers, dance halls, public libraries, eating places, meeting halls, museums, playgrounds, non-commercial stadiums, studios (music, dancing, theatrical, radio or television), and swimming pools.[186] The bill provides a formula to determine how many changing stations must be installed.[187] It is the greater of 25% of the urinals and stalls assigned to men or 50% of those that are assigned to women.[188] Changing stations may be unisex or marked specifically for use by one gender, but if so designated, must be not more than three times the number of changing stations accessible solely to one gender instead of the other.[189] The bill provides for 120 days from the date of enactment for all such premises to comply.[190]

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182 N.Y.C. Council B.-0202-2002, Reg. Sess. (N.Y. 2002), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=437939&GUID=CFFC8AE4-F691-4E8E-AB76-F488F3DB891A&Search=&Options.

183 *Id.*

184 HUMAN SERVS. DIV., REPORT OF THE COMMITTEE ON WOMEN'S ISSUES (2002).

185 N.Y.C. Council B.-0202-2002, § 26-252.1(b); *Memo of Support for the Bill*, N.Y.C. COUNCIL, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=437939&GUID=CFFC8AE4-F691-4E8E-AB76-F488F3DB891A&Search=&Options (last visited Jan. 12, 2015).

186 N.Y.C. Council B.-0202-2002, § 26-252.1(c), tbl. 3-1, Use or Occupancy Building Code.

187 *Id.* § 26-252.1(b).

188 *Id.*

189 *Id.*

190 *Id.* § 26-252.1(c).

This bill was introduced and considered in the Committee on Women's Issues.[191] The stated purpose of the bill, as summarized by the Chairwoman of the Committee Tracy Boyland (a young mother at the time of the hearing),[192] was "to reduce some of the burdens faced by mothers trying to meet the burdens of daily life."[193] In this regard, the bill (and issue more generally) was not framed as a men's or fathers' rights issue; the bill was intended to promote and provide for ease of women to change their children in New York City.[194] Apparently, the Committee saw an equally pressing issue (actually, more pressing) presenting women (than men) at the time in New York City; one member of the Committee remarked that in her district spanning from 14th Street to 96th Street, she knew of only one place to change her child.[195] The bill failed and was unable to help anyone in the city who would benefit from increased access to changing tables in New York City.

5. California

Two drastically different bills were introduced in the California State Senate to promote equality with respect to changing tables amongst men and women: Senate Bill 1350 takes a more moderate approach than Senate Bill 1358.

Senator Ricardo Lara (SD-33) authored Senate Bill 1350 in reaction to more men becoming involved in the care of their young children.[196] As introduced in 2013, the bill seeks to achieve parity between the sexes by adding a section to the Health and Safety Code, which would require any public establishment that installs a baby changing station to do so for the use of both sexes.[197] The new law would be prospective only, meaning that it would only apply to the construction of a new restroom, or when a substantial renovation of a restroom took place, and to the extent that the changing stations can be installed without violating local, state, or federal disability, fire, and health safety laws.[198] In other words, existing buildings do not need to comply with the ordinance by commencing construction as a result of the proposed law.[199] If an existing building had only one changing station and it was in a women's restroom, the building owner would not need to install any additional equipment or accommodations unless those premises were to undergo a

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[191] *Hearing on N.Y.C. Council B.-0202-2002 Before the Comm. on Women's Issues*, at 3: 6-7 (N.Y. 2002).

[192] *Id.* at 3: 23-24.

[193] *Id.* at 3: 20-22.

[194] *Id.*

[195] *Id.* at 5: 9-14. *See* Comment by Council Member Moskowitz that one location was at Barnes and Nobles on 86th and 3rd. *Id.*

[196] S.B.-1350, 2013-2014 Reg. Sess., cmt. 1 (Cal. 2014).

[197] S.B.-1350, § 2(b).

[198] S.B.-1350, § 2(b)(1)-(3).

[199] S.B.-1350. "The bill does not require any retrofitting of existing bathrooms." *Id.* (Bill Analysis by Mark Stivers).

"substantial renovation."[200] The bill provides a relaxed, elective standard: an existing building owner is not required by law to install a baby changing station at all; however, if he or she elects to do so, a station of equal convenience and functionality must be provided for the other sex to use as well.[201]

Senate Bill 1358 was authored by Senator Wolk (SD-3) and introduced to the California Assembly in February 2014.[202] This bill, as drafted, was more comprehensive and all-encompassing than Senate Bill 1350; it had numerous provisions to address several categories of establishments. Section 1 deals with public buildings owned by a state agency or portions of a building that is owned by the state.[203] Section 2 has directives for a public building owned by a local agency.[204] Section 3 pertains to a public food facility.[205] Section 4 regards itself with public establishments for entertainment or general everyday living, such as movie theaters, grocery stores, sports arenas and complexes, auditoriums, shopping centers larger than 25,000 square feet, tourist attractions, and retail stores of more than 5,000 square feet.[206]

Regardless of the category, the bill has an overarching directive. If a building open to the public falls under one of the several delineated categories, that building must provide "baby diaper changing station[s]" accessible to both men and women on every floor that has restrooms open to the public.[207] In public buildings owned wholly or in part by a state or local agency, signage must be installed, maintained and repaired as necessary to allow patrons easily to locate the changing stations.[208] However, a limiting factor exists in the bill for public buildings owned wholly or in part by a state or local agency and for places of public entertainment; those buildings need only install changing stations if the building is new construction or the building undergoes renovations for which a permit is needed and where the estimated cost of the construction or renovation is at least $10,000.[209] If installation of a changing station is infeasible or would cause the building to fail to adhere to directives regarding disabled persons, that building for that prospective changing station is exempt from the bill.[210] Further, the bill takes a practical approach to facilities that do not permit the entrance of minors or facilities where minors would not usually be found; industrial buildings, nightclubs, and bars are exempt from the provision to install baby-changing stations.[211] Health facilities

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200 *Id.*
201 *Id.*
202 S.B.-1358, 2013-2014 Reg. Sess., § 1(a) (Cal. 2014).
203 *Id.*
204 *Id.* § 2(a).
205 *Id.* § 3(a).
206 *Id.* § 4(a).
207 *Id.* §§ 1(a), 2(a), 3(b)(1)(B)(i), 4(a)(1).
208 *Id.* §§ 1(a), 2(a).
209 *Id.* §§ 1(b)(1), 2(b)(1), 4(c)(1).
210 *Id.* §§ 1(b)(2), 2(b)(2), 4(b)(2).
211 *Id.* § 4(a)(2).

where the restroom is intended for use by one patient or resident at a time are also exempt.[212]

Only section 2, relating to permanent food facilities, provides an enforcement or penalty mechanism for noncompliance; the first violation results in a warning, every violation thereafter results in a fine of $250.[213] Interestingly, and tellingly, section 5 states that the legislature "finds and declares" that ensuring the provision of safe and sanitary changing stations, which are readily available throughout the state, is a matter of state concern.[214] The bill specifically regards this as worthy of a state law, and therefore is "not a municipal affair."[215]

The two bills, if read together, clearly show the motivation behind their drafting: equality between sexes and social classes for child rearing. The purpose of Senate Bill 1358, in part, was to provide parity for those parents who cannot simply elect to change their children in their cars, as it is "an option not possible for those who take public transit.[216] Senate Bill 1350 and Senate Bill 1358 passed both houses of the California State Legislature in August of 2014 with popular support.[217]

The introduction of two bills[218] to the California State Senate looked like a momentous step for the fathers' rights movement, and for fathers like Driscoll and Brynes. However, Governor Brown vetoed both bills on September 19, 2014.[219] In one Veto Message, the Governor returned both bills to the legislature without his signature.[220] The five-sentence message cited the concerns of many constituents "about the number of regulations in California."[221] The Governor seemingly believes that a *laissez-faire* approach to baby changing stations is a more prudent method of addressing the issue.[222] He stated that many businesses have already begun to accommodate customers in the regard prescribed by the bills.[223]

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212 *Id.* § 4(a)(2).

213 *Id.* § 3(b)(1)(B)(ii).

214 *Id.* § 5.

215 *Id.*

216 *Id.* cmt. 1.

217 *SB-1350 Baby Diaper Changing Accommodations: History*, CAL. LEGISLATIVE INFO., http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140SB1350 (last visited Apr. 13, 2016). SB 1350 passed the Senate on May 23, 2014 with a vote of 32 Ayes and 0 Noes. It passed the Assembly on Aug. 25, 2014 with a vote of 67 Ayes and 8 Noes. *Id.* The bill was enrolled and presented to the Governor at 4:30 p.m. on August 28, 2014. *SB-1358 Baby Diaper Changing Stations: History*, CAL. LEGISLATIVE INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml (last visited Apr. 16, 2016). SB 1358 passed the Senate on May 23, 2014 with a vote of 29 Ayes and 1 Noes. *Id.* It passed the Assembly on Aug. 29, 2014 with a vote of 66 Ayes and 11 Noes. *Id.* The bill was enrolled and presented to the Governor at 4 p.m. on September 8, 2014. *Id.*

218 S.B.-1350, 2013-2014 Reg. Sess. (Cal. 2014); S.B.-1358, 2013-2014 Reg. Sess. (Cal. 2014).

219 *Id.* (veto message of Governor Edmund G. Brown, Jr.).

220 *Id.*

221 *Id.*

222 *Id.* ("I believe it would be more prudent to leave the matter of diaper changing stations to the private sector.").

223 *Id.*

Governor Brown indicated that he thinks it is best to leave the arena to private business practice, not have the State mandate a policy via legislation.[224]

As an aside, this veto took place with close chronological proximity to the 2014 election. With some speculation, it is possible that the Democratic Governor could have been pressed by big business donors to veto the bill in return for continued or new support and donations for members of his party in the midterm Congressional election.

In a state that has been at the forefront of establishing for equality of all, whether it be sexual orientation or the first state to provide for no-fault divorce, many were hopeful that this legislation, or at least one of the bills introduced, could turn the tide. Passage of the bill would surely have made other state legislatures stand up and take notice, as it would have provided major national press to the topic.

B. Proposed Draft Legislation

The following draft bill should be enacted by Congress or, in the alternative, serve as a model bill to be enacted by every state in the country. The draft bill is based on the laws of San Francisco, Pittsburgh, and Miami-Dade County as well as the bills of New York City and State of California.

Baby Diaper-Changing Accommodations Required:

(1) Definitions.

> (a) "Establishment." Any existing or to-be-constructed place of business, non-private space, social gathering location and/or locations having a lawful capacity of more than 1,000 persons that is held open to the public for any period of time.
>
> (b) "Designated Location." A place which may include, but is not limited to, women's and men's restrooms, unisex and family restrooms, unisex rooms specifically provided for the purpose of changing and dressing a baby or young child.
>
> (c) "Baby Diaper-Changing Accommodation." A safe, private, sanitary and convenient baby diaper-changing station, table or similar amenity having functioning safety straps or other appropriate restraint to secure a baby or young child that is installed, affixed or placed within a Designated Location in an Establishment.

(2) Baby Diaper-Changing Accommodation Required. Every Establishment shall be required to provide and maintain Baby Diaper-Changing Accommodations in accordance with this section.

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224 *Id.* ("Already, many business have taken steps to accommodate their customers in this regard. This may be a good business practice, but not one that I am inclined to legislate.").

(3) Responsibility. It shall be the responsibility of the owner of an Establishment to bear the cost and expense of compliance with this section.

(4) Implementation. All items under subsection (b) shall be completed no later than five-hundred (500) days from the date hereof.

(5) Exemptions. An Establishment shall not be subject to the provisions of this section if compliance would create an unduly burdensome hardship. Under this section, a hardship shall mean that:

(a) No reasonable physical alternative exists for providing Baby-Diaper Changing Accommodations; or

(b) The cost of providing such accommodation exceeds ten (10) percent of the cost of constructing, purchasing or substantially modifying the building or facility occupied by the establishment or use; or

(c) The instillation or provision of a Baby-Diaper Changing Accommodation would be a violation of another municipal, state or federal law.

(6) Violation. Failure to comply with the provisions of this section shall result in a violation subject to an annual fine of five (5) percent of the Establishment's land value as determined by real property tax records.

CONCLUSION

Much of American and English tradition can be classified as a divorceless society.[225] Over time, the necessary factors to be granted a divorce have become relaxed. As divorce shifted from solely a legislative initiative, and thus nearly impossible to secure, toward a judicial decree based on fault grounds, it became easier to satisfy the requirements to end a marriage.[226] This situation remained for over one hundred years until the establishment of a no-fault divorce regime in California, whereby any party could cite irreconcilable differences in order to invoke the authority of the court to grant a divorce.[227] As every state in the United States has adopted some form of no-fault regime, a proliferation of divorce has taken hold.

At English common law, fathers were held in high esteem.[228] They were given presumptive custody rights to their children and there was no duty to provide child support to their former spouse.[229] This was until the moral notion that fathers should provide for their children took hold; in main part to try to avoid the state, township or municipality for needing to provide for deserted mothers and

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225 Friedman, *supra* note 10, at 695.

226 *Id.*

227 CAL. FAM. CODE §§ 2311, 2333 (West 2015).

228 AREEN ET AL., *supra* note 15, at 1115.

229 *Id.*

children.[230] American courts created a common law duty to support one's children out of this moral obligation engrained in society, which was at the time yet to be immortalized in law.[231] Yet, the responsibility to support a child was the father's alone.[232] Slowly, creditors to mothers on behalf of children were seen to have standing to sue fathers who refused to support their children.[233] As this growing class of third-party creditors began to grow, courts extended standing to mothers and often awarded them reimbursements for child support if they could prove fault of the father.[234]

The fault regime that existed for so long has tainted society's perception of fathers. Those who secured a divorce and paid child support were by definition at fault, they were offenders. Furthermore, criminal statutes were enacted which now made fathers who were absconding debtors into criminals.

However, in the last few decades there has been some change to the way fathers are viewed. As the face of the American family changes with more fathers spending more time with their minor children and alternative family forms are a growing minority, the way society views fatherhood has changed for the better. There no longer is the maternal preference for child custody the case in virtually all jurisdictions. The best interest of the child standard has taken hold as the guiding light in this area and takes into account many factors, sex of the parent not being one of them.

San Francisco, Pittsburgh, and Miami-Dade County have all taken steps to provide equal access to changing tables and changing stations for both sexes. Every state should follow those jurisdictions' example. The only state to attempt to provide such an accommodation for men was California, and while two similar bills passed the state legislature, the governor vetoed them both.

The fathers' rights movement's front line is the ability to change one's child's diaper in a safe and clean environment without the assistance of someone of the opposite sex. Until states band together to provide for a somewhat unified right of access to a safe and clean changing station for children regardless of the sex of the parent, fathers will continue to be disenfranchised as the market, without regulation, will continue to provide changing tables accessible only to women in public establishments. As one journalist suggested, "with more pressure from

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230 Hansen, *supra* note 17 (citing Mortimore v. Write, 151 Eng. Rep. 502 (Ex. of Pleas 1840); Bainbridge v. Pickering, 96 Eng. Rep. 776 (C.P. 1779); Urmston v. Newcomen, 111 Eng. Rep. 1022 (K.B. 1836); Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309 (1994) (charting the history of the term "dependency" and noting its ability to impose moral connotations of unworthiness on recipients of public aid)).

231 *Id.* at 1134.

232 AREEN ET AL., *supra* note 15, at 1115 ("Originally, the duty to support was the father's only. . . .").

233 Hansen, *supra* note 17, at 1139 ("[C]ourts readily upheld claims against the father, referring constantly to the pressing dependency of the mother and children involved, and finding fault with the father who had caused the marital breakdown and subsequent dependency.").

234 *Id.* at 1140.

parents, especially celebrity parents, perhaps more businesses will take note and work toward potty parity for moms and dads."[235]

[235] Bogna, *supra* note 8.