

Employer-Provided Child Care Under Title VII:

Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees

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INTRODUCTION

Motherhood, perhaps one of the more significant and rewarding of social roles, is also one of the most persistent impediments to economic equality for women. The structure of the labor market is built on the foundation of unpaid labor that women have provided in bearing and rearing society's children. For women to achieve economic equality, society must acknowledge and assume the long-ignored economic costs of child care. While women have made significant steps toward equality of employment by assimilating into the existing labor system, they cannot compete on an equal basis with men without someone providing the child care services that women traditionally provide. When women try to fit the "male" model of full-time work without having adequate child care to enable them to do so, they experience a variety of adverse employment consequences because of their conflicting responsibilities to their children. This is discrimination on the basis of gender.

This Article explores the possibility of using Title VII of the Civil Rights Act of 1964 to challenge otherwise neutral employment policies that have an adverse effect on women because of their role as primary caretakers of children and to remedy the discrimination by obtaining a court order that employers must take affirmative steps to address the child care needs of their employees. In Part I, the Article suggests that

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child care is disproportionately a problem for women workers. Part II discusses how this phenomenon may be analyzed as gender discrimination under Title VII. Part III considers the extent to which an employer could defend against the imposition of a duty to accommodate employees' child care needs by arguing that Title VII's business necessity defense justifies the use of employment policies that have a discriminatory effect on workers with primary child care responsibilities. The Article concludes that there are many difficult issues raised by approaching the lack of child care from the perspective of Title VII, and that the case would be difficult to litigate and unlikely to win. It may nevertheless be a potentially viable theory of last resort. It must be emphasized, however, that the Article is exploratory and the thesis is extremely tentative. The purpose is not to suggest that someone file this lawsuit, but rather to contribute to the search for strategies to address the problem that child care poses for women's equality.

I. CHILD CARE, EQUAL EMPLOYMENT AND ECONOMIC EQUALITY FOR WOMEN

Despite the many job market gains women have made in the last 20 years,¹ and despite the increasing number of women in the labor force,² women have yet to achieve equality in employment. On the average, women are paid less than men.³ Women predominate in relatively few occupations, those that tend to pay little, to provide few fringe benefits, and to offer little prestige, job security, or opportunity for advancement.⁴ Many women do not work at full-time jobs⁵ and are therefore ineligible to receive valuable fringe benefits.⁶ The barriers to equal employment for

¹ For example, during the 1970s, women's share of the job market rose from 34.4% to 41%, and the largest increases were in three white collar categories. The proportion of women officials and managers increased by 81%, from 10.2% to 18.5%. The proportion of professionals who are women rose from 24.6% to 37.7%, and the proportion of female technicians from 26.4% to 40.2%. L.A. Times, Mar. 31, 1985, at VIII6, col. 1.

² Twelve percent more women worked outside the home in 1978 than in 1960, while men's participation in the labor force decreased during the same period. By 1978, half of all women aged 16 and older were in the labor force. U.S. COMM'N ON CIVIL RIGHTS, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN 2 (1981) [hereinafter CHILD CARE AND EQUAL OPPORTUNITY].

³ Women working in full-time jobs earn only 59 cents for every dollar earned by male full-time wage-earners. U.S. COMM'N ON CIVIL RIGHTS, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN 2 (1983) [hereinafter A GROWING CRISIS].

⁴ In 1976, 78.5% of women workers were concentrated in clerical, sales, service and blue-collar jobs. CHILD CARE AND EQUAL OPPORTUNITY, *supra* note 2, at 3.

⁵ In 1975, only 41.4% of women held full-time year-round jobs, whereas 63.9% of men did. Women constituted 70% of all part-time workers in 1977. CHILD CARE AND EQUAL OPPORTUNITY, *supra* note 2, at 3.

⁶ One disadvantage of working part-time is that very few part-time employees receive fringe benefits. For example, fewer than one-tenth of all part-time workers receive pension benefits, and only about 15% receive health insurance coverage through their jobs. Kamerman & Kingston, *Employer Responses to the Family Responsibilities of Employees*, in FAMILIES THAT WORK: CHILDREN IN A CHANGING WORLD 157-59 (S. Kamerman & C. Hayes ed. 1982). Part-time work also is frequently underpaid, available only in occupations offering minimal

women are many and are more complex than simple antifemale animus on the part of employers. A fundamental problem is that women are perceived as having more irregular labor force participation, higher rates of turnover, higher absentee rates than men have,⁷ and are believed to be less willing and less able than men to sacrifice their family life for career advancement.⁸ These phenomena, whether real or perceived, pose significant barriers to equal employment for women.

A related and equally alarming phenomenon is the enormous increase in the proportion of people living in poverty who are women, usually single mothers. This is the so-called "feminization of poverty." In 1982, 60.1% of households headed by Hispanic women were below the poverty level, as were 58.8% of households headed by black women and 30.9% of households headed by white women.⁹ The number of persons in poor families headed by women rose 54% between 1960 and 1981, whereas the number of persons in poor families headed by white men decreased 50% during the same period. For families headed by minority women, the situation is even worse; the number of poor blacks in female-headed families more than doubled between 1959 and 1981. The number of poor Hispanics in female-headed families doubled between 1972 and 1981.¹⁰ Some predict that if current trends continue, by the year 2000, 95% of Americans below the poverty line will be women and children.¹¹ Even when female heads of households are employed, they still tend to be poor. In 1981, 57.2% of employed black female household heads with three children were poor, 47.5% of similarly situated white women were poor.¹²

The barriers to equal employment for women and the "feminization of poverty" share a common source: women, whether employed outside the home or not, are still believed to be, and usually are, primarily

employee responsibility, and may also not count toward promotion, tenure or salary increases. See Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 57 (1979).

⁷ One study indicated that women's absentee rate was almost twice that of men. Overall absentee rates ranged from 0% to 5.4% for the month surveyed. A more damaging fact, from the point of view of women's struggle to gain equal employment opportunity, is the widespread perception that women have a higher incidence of absenteeism than do men. In one survey, 66% of the employers polled estimated that women had a higher absentee rate than men and the remaining 34% believed that it was about the same. None of the respondents believed that women had a lower absence rate. CALIF. DEPT OF SOCIAL WELFARE, CHILD CARE: A CHALLENGE FOR INDUSTRY. FINAL REPORT OF THE TASK FORCE ON INDUSTRY'S INVOLVEMENT IN CHILD CARE 14 (1971).

⁸ Related to perceptions concerning the rates of absenteeism and turnover among female employees is the widespread belief that women are unwilling or unable to sacrifice their family's demands when an emergency requires them to work late on the job. See, e.g., Frug, *supra* note 6, at 84.

⁹ San Francisco Chron., Feb. 15, 1985 at 9, col. 1.

¹⁰ A GROWING CRISIS, *supra* note 3, at 2.

¹¹ San Francisco Chron., *supra* note 9, at 9.

¹² A GROWING CRISIS, *supra* note 3, at 3.

responsible for the care of children.¹³ Women constitute a disproportionate share of single parents who are caring for children, and the numbers are growing.¹⁴ The role as the primary child caretaker handicaps women in the labor market. Child care responsibilities prevent women from receiving equal education necessary to get good jobs,¹⁵ and thus from seeking many types of jobs. Home responsibilities were cited by 75.4% of unemployed women and only 1.9% of unemployed men as the reason that they were not seeking work.¹⁶ Whether married or single, more women than men face the problems of combining work and child care responsibilities. Thus, while both males and females are parents, females disproportionately suffer the adverse employment consequences of combining work and family responsibilities.¹⁷ A crucial step on the long road toward equality in employment for women and toward the reduction of the poverty rate among women is to lessen the burden on women workers that child care responsibilities impose.

There is no question that the need is pressing, and becoming more so. Between 1950 and 1970, the proportion of women with children under six years old who were in the labor force grew from 12% to 30%.¹⁸ In 1979, 56.1% of these women were working.¹⁹ In 1982, 46% of mothers with children under the age of three were in the labor force.²⁰ Recent data show that 80% of the female work force are in the childbearing years (ages fifteen to forty-four) and that 93% of the women

¹³ See Frug, *supra* note 6, at 56-57.

¹⁴ The population of children under the age of 10 living in single parent households is expected to rise by 48% between 1980 and 1990, from 6 million to 8.9 million. Nearly one child in four under 10 years old will live in a single parent household by the end of the decade. SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES, 98TH CONG., 1ST SESS., DEMOGRAPHIC AND SOCIAL TRENDS: IMPLICATIONS FOR FEDERAL SUPPORT OF DEPENDENT-CARE SERVICES FOR CHILDREN AND THE ELDERLY, IV (Comm. Print 1983).

The number of female-headed families with children increased 93% between 1970 and 1981. S. KAMERMAN, A. KAHN & P. KINGSTON, *MATERNITY POLICIES AND WORKING WOMEN* 8-9 (1983).

¹⁵ See *CHILD CARE AND EQUAL OPPORTUNITY*, *supra* note 2, at 3-6; *De la Cruz v. Tormey*, 582 F.2d 45 (9th Cir. 1978) (low-income mothers successfully challenged under Title IX community college's failure to provide child care as denying equal educational opportunity to women due to disproportionately adverse impact on their ability to seek and succeed in higher education), *cert. denied*, 441 U.S. 965 (1979).

¹⁶ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2080, *PERSPECTIVES ON WORKING WOMEN: A DATABOOK 13* (1980) [hereinafter *PERSPECTIVES ON WORKING WOMEN*].

¹⁷ See, e.g., *CHILD CARE AND EQUAL OPPORTUNITY*, *supra* note 2; Frug, *supra* note 6; Christian Science Monitor, Mar. 15, 1985 at 25, col. 1; Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983); Zeitlin & Campbell, *Strategies to Address the Impact of the Economic Recovery Tax Act of 1981 and the Omnibus Budget Reconciliation Act of 1981 on the Availability of Child Care for Low-Income Families*, 28 WAYNE L. REV. 1601 (1982); Nussbaum, *Issues for Working Families*, 35 LABOR L.J. 465 (1984).

¹⁸ WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *ECONOMIC REPORT TO THE PRESIDENT* 93 (1971).

¹⁹ *PERSPECTIVES ON WORKING WOMEN*, *supra* note 16, at 34, Table 34.

²⁰ S. KAMERMAN, A. KAHN & P. KINGSTON, *supra* note 14, at 8-9.

in that age group are likely to have at least one child.²¹

There are two levels at which the problems of working mothers must be addressed. The first is pregnancy and the second is child care. The two are significantly different: only women become pregnant, whereas men and women are equally capable of caring for a child from birth onward. There is no biological reason that women must be primary caretakers of children.²² But pregnancy and child care are similar in the handicap they pose for women in the labor market under current law. The effects of pregnancy on the struggle for equality in employment for women are the subject of legislation,²³ litigation,²⁴ and a substantial and

²¹ S. KAMERMAN, MATERNITY AND PARENTAL BENEFITS AND LEAVES: AN INTERNATIONAL REVIEW 7 (1980).

²² Notwithstanding this general fact, it seems to me possible that women and men are not similarly biologically situated in all aspects of early infant care, specifically breast-feeding. A woman who wishes to have her child breast-fed must maintain more frequent contact with the infant than a man who wishes to have his child breast-fed. This suggests the possibility that at least some women, for biological reasons, may have a particular need for a nursery at their place of employment. But this is a rather limited exception to the general fact that men and women do not differ in their ability to care for children.

Feminist lawyers disagree whether breast-feeding should be included with pregnancy as a uniquely female "disability" for purposes of analyzing how the sexes should be treated with respect to childbearing. Compare Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERK. WOMEN'S L.J. 1, 35 n.174 (1985) with Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 376, 435 (1981). See also Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE, 325, 360 n.135 (1985). Professor Kay rests her argument that breast-feeding should not be grouped with pregnancy at least in part on the availability of techniques whereby a mother can express milk and preserve it for later feeding of the baby by a bottle. Kay, *supra* at 35 n.174. However, insofar as poor or uneducated mothers lack access to the information and devices necessary to employ such a procedure, it seems to me that the mother is differently situated than the father and perhaps should be treated accordingly.

²³ E.g., 42 U.S.C. § 2000e-(k) (1978).

The purpose of the PDA was to reaffirm Congress' original intent that Title VII "mandate[s] equal access to employment and its concomitant benefits for female and male workers," and to overrule what the Congress believed to be "the Supreme Court's narrow interpretations of Title VII [which] tend to erode our national policy of non-discrimination in employment." H.R. REP. NO. 948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4751. See also S. REP. NO. 331, 95th Cong., 1st Sess. 2-3 (1977). Specifically, the PDA overruled the Supreme Court's decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), that discrimination on the basis of pregnancy was not sex discrimination under Title VII.

Throughout the legislative history of the PDA Congress used broad language suggesting that beyond simply prohibiting discrimination on the basis of pregnancy, Congress intended that Title VII be used to eliminate the discrimination women suffer in employment due to childbearing and childrearing. The widespread sex inequality in employment that Congress sought to end by amending Title VII to prohibit discrimination on the basis of pregnancy stems as much or more from discrimination on the basis of women's role as primary caretakers of children — their social role in reproduction — as from discrimination on the basis of pregnancy — their biological role in reproduction. For example, in introducing the PDA in the Senate, the bill's sponsor, Senator Williams, said:

I am afraid that lurking between the lines of the *Gilbert* opinion is the outdated notion that women are only supplemental or temporary workers — earning "pin money" or waiting to return home to raise children full-time. . . .

Approximately 46 percent of all women over the age of 16 are in the labor force today. There are 39 million women who are working or seeking work. Twenty-five million of these women are doing so because of the basic need to support their families

growing body of academic literature.²⁵ Gradually, the law is being changed to reflect the fact that reproductive behavior has consequences on employees' ability to work and to ensure that those consequences do not hurt females more than males.

Pregnancy, however, is the lesser part of the problem. Child care is a far more demanding task and interferes much more with a person's ability to conform to the requirements of the labor market as it is presently structured. The demands on workers in an industrial society are premised upon the existence of a class in society whose primary role is to raise children — women. The gender division of labor must change if women and men are to achieve full economic and social equality.²⁶ Unfortunately, such a profound social change is unlikely to happen in the near future. In the meantime, something must be done to enable women to succeed in the economic world designed by and for men so that the costs of combining work and family are not borne primarily by women.²⁷

— because they have husbands who earn less than \$7,000 a year or because they are single, divorced, or widowed. . .

[The loss of a mother's salary] will make it difficult for families to provide their children with proper nutrition and health care. For some women and their families it will mean dissipating family savings and security and being forced to go on welfare. . .

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., THE LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 3 (Comm. Print 1979) (remarks of Sen. Williams introducing the bill to Senate).

The House Committee Report echoes the same concern: "As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs." H.R. REP. NO. 948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4751.

For most women, pregnancy itself poses relatively little problem in continuing to perform their jobs normally. It is the need to care for their children once they are born that causes women to leave the labor force and leads to the view of women as marginal workers. Although the PDA was not specifically designed to address that issue, its goals will not be achieved if it is construed as a limit on the scope of Title VII, indicating that Congress would permit discrimination on the basis of motherhood as soon as the pregnancy has come to term. Had Congress so intended, it would have taken away with one hand what it gave with the other, for it is not merely discrimination on the basis of pregnancy that leads to the view of women as marginal workers and that forces women into low-paying dead-end jobs; rather, it is a work and family structure that makes it extremely difficult to combine full-time participation in the labor force with the full-time child care role that society has allotted to women. Using Title VII to attack discrimination on the basis of child care responsibilities can therefore be seen to further Congress' original goal of providing equality of employment to women.

²⁴ E.g., *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987); *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987), *vacating and remanding* 692 P.2d 1243 (Mont. 1984).

²⁵ See *supra* note 22. See also Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983).

²⁶ Theoretically, several reforms are possible. One suggestion has been to abolish the nuclear family altogether. S. FIRESTONE, *THE DIALECTIC OF SEX* (1970). Another possibility would be to rely on extended family or friends for child care, but they are frequently unavailable. See generally Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Project, *Law Firms and Lawyers with Children: An Empirical Analysis of the Family/Work Conflict*, 34 STAN. L. REV. 1263 (1982); Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1985).

²⁷ In a physical sense, pregnancy might interfere more with the ability to work, depending on the

To lessen the burden on working mothers²⁸ it is essential to provide greater numbers of easily accessible quality child care facilities.²⁹

One formidable obstacle to the increased use and availability of child care is money. Quality child care, even minimally adequate child care, is expensive. Well-to-do parents can find adequate child care if they are willing to pay for it, but many middle class and poor parents cannot afford it, particularly where there is only one wage earner in the household. Indeed, it may be less expensive for many single women to receive Aid to Families with Dependent Children (AFDC) and to care for their children themselves than to take a job at the minimum wage and to pay for child care.³⁰ For these single women living in or at the edge of poverty, the problem of caring for their children is not just an inconvenience, it may be an absolute barrier to finding a job or to completing education. Unfortunately, government funding for child care is grossly inadequate to meet the ever-growing need, and more funding is not likely to be forthcoming in the current political climate.³¹ Thus, the economic costs of caring for children while parents work are, and will continue to be, borne by parents, primarily women, until other sources of funding are found.

It might be argued that notwithstanding the hardships imposed on women the cost of raising children is appropriately borne exclusively by parents because the decision whether to have children is personal and the consequences of the decision ought to be a private matter. How parents choose to allocate child care responsibilities is their decision, in this view, not the responsibility of employers.³² The fact that child care is necessary is, however, a product of the labor system structure that externalizes

nature of the job and on the stage or physical complications of the pregnancy. Child care is a more demanding task than being pregnant because it requires more energy and attention. It interferes more with the parent(s)' ability to work because its burdens last longer than nine months and at least for most jobs, it is more difficult to work and to supervise children simultaneously.

²⁸ I dislike using the term "working mother" to refer to mothers in the paid labor force because it tends to imply that those mothers who are not paid for their labor in the home are not working, which is both false and demeaning to homemakers. I use it only because it is widely used and is the least wordy description of the phenomenon that I know.

²⁹ To address fully the many and varied needs of working parents, a variety of policies are necessary, including parental leaves with pay or with government-provided wage replacement, part-time work and flexible work hours (or "flex-time"), and child care. Child care is an indispensable option because many parents, especially single parents, cannot take a leave long enough to care for their children until the children are able to care for themselves, either because of the lack of wage replacement or because they are unwilling to forego their job or profession for that long.

³⁰ P. Hosni & B. Donnan, *An Economic Analysis of Child Care Support to Low Income Mothers* (unpublished 1980) (copy on file at the Child Care Law Center, San Francisco, CA).

³¹ Frug, *supra* note 6, at 101-03. Various forms of government subsidies for child care expenses, including tax credits to parents and employers (26 U.S.C. § 129), AFDC income disregards, and block grant payments to states, are discussed in Zeitlin & Campbell, *supra* note 17, at 1610-67.

³² The argument asserting that decisions regarding allocation of child care tasks ought to be the private choice of parents, assumes that parents *have* some choices. It ignores the widespread and growing phenomenon of single parents who have no choice about how to share child care responsibilities.

the costs of childrearing. Employers have been able to use human resources in the existing form (i.e., eight or more consecutive hours a day, five or more days a week) only because the family structure provided the services necessary to make the labor available. The real cost of employing a worker who has children includes the cost of hiring someone to care for the children so that the parent-worker is free to devote his or her services elsewhere. Child care is a cost of producing that employers have avoided paying until recently. It is unfair to women who continue to bear a disproportionate amount of the cost.³³

II. CHILD CARE AND GENDER DISCRIMINATION PROHIBITED BY TITLE VII

A. Child Care and the Feminine Gender Role

The structure of the economy, and of the labor market in particular since the Industrial Revolution, has been based on the model of the male worker who has a wife to care for his children; it is premised on the increasingly anachronistic notion that workers do not have child care responsibilities. The traditional workday is both too long and too inflexible for a parent with primary child care responsibilities.³⁴ Pervasive social norms for work behavior require the worker to be at his or her job at least eight consecutive hours a day, and more in many jobs. Furthermore, in most jobs, family and work are rigidly separated so that child care and work cannot be done simultaneously. Yet, until recently, workers were not expected to have to choose between having a job and having a family; even workers whose jobs demanded long hours had children. This is still true for many men (and a few women), even men whose spouses work, because women still handle the bulk of child care.³⁵

Most working women with children, whether married or single, do have primary child care responsibilities.³⁶ They cannot be said freely to

³³ Consistent with my argument, the government rather than private employers could bear the cost, although it seems unlikely to do so. In its recent consideration of ways to address the problems of child care, Congress has proposed putting the cost on private employers. See *infra* note 72.

³⁴ Frug, *supra* note 6, at 56.

³⁵ See Hochschild, *The Toted Woman*, N.Y. Times, May 11, 1986, Book Review Section, at 15 (reviewing three recent books on motherhood and work: "one study of top women in the Fortune 1,000 companies found that over half were unmarried and nearly two-thirds childless. Among top men 4 percent were unmarried or divorced, 3 percent childless. More and more, women can have what men have at work, but they sacrifice what men have at home — children and a warm familial refuge from work.") See also Cohen, *Hey Guys, All A Woman Wants is Everything, Too*, San Jose Mercury News, June 4, 1986, at 8C ("It is perfectly all right for men to want it all — to want to be husband, father and that most wonderful of all things, an entrepreneur. . . . For women, though, 'wanting it all' is seen as a character flaw. The punishment, the comeuppance, is spinsterhood — a lonely old age, no husband, no children and no grandchildren. Such object lessons . . . do not square with reality. There are, in fact, millions of women who do 'have it all' — marriage, family and career. They do not have it easy. They do have their problems.").

³⁶ See sources cited *supra* notes 16-21.

choose to shoulder the bulk of the responsibility; they are simply doing what their mothers did and what they believe is expected of them as mothers. Firmly entrenched social norms accord child care a central place in the feminine gender role; motherhood is an integral part of the popular image of a woman. Therefore, women more than men suffer the adverse consequences of a labor system which is inhospitable to their dual roles.

The ideal solution to the dilemma confronting working mothers would be to change gender roles so that women and men share child care equally. Then the issue of how to combine work and family would take an entirely different shape and would be no more an issue than is combining work and any other aspect of one's personal life. As the modern industrial economy developed, if the men in power had not had wives to care for their children, it would have seemed perfectly normal that work and children could be combined without requiring superhuman effort and without sacrificing excellence in either role. The demands of the labor market would never have required choosing between having a job and caring for a family. When the painstakingly slow process of social change effects an equal division of labor between the sexes with respect to child care, the issue of how to balance job and family may well disappear, and some balance between public and private responsibility for the costs of child care will be struck. Until that change occurs, the problem of combining job and family will continue to be a "women's issue," and women's role as primary caretaker of children will continue to be a handicap in the job market. Because of the close connection between gender and child care, equal employment legislation should be considered as a possible means of attacking this form of gender discrimination.

Gender discrimination, whether intentional or arising as a result of a neutral policy that falls more harshly upon women than men, can be seen as a violation of Title VII of the Civil Rights Act of 1964.³⁷ In theory, if

³⁷ 42 U.S.C. § 2000e. Section 703(a) of Title VII makes it an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex

Section 703(c)(3) makes it an unlawful employment practice for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." In a situation where terms and conditions of the plaintiff's employment are governed by a collective bargaining agreement, she might also join the union as a defendant based on its discriminatory failure to attempt to secure child care benefits as part of the contract. Although the federal labor laws expressly state that child care benefits are not a mandatory subject of bargaining, 29 U.S.C. § 186(c)(7), if a woman could prove that her union's failure to ask for employer support for child care had a discriminatory impact on women or was the result of discriminatory intent, she theoretically could establish a Title VII violation.

a mother could prove that certain employer policies — overtime, travel, promotion, hiring, and restrictive leave — cause her, because of her gender role as primary childrearer to suffer adverse job consequences that fathers do not suffer, she should be able to make out a prima facie violation of Title VII. One remedy for that violation would be instituting a program of employer support for child care.³⁸ Alternatively a Title VII violation could be found by analogizing it to the employer's duty to accommodate an employee's religious practices in order to avoid discriminating on the basis of religion: an employer's failure to provide child care assistance to mitigate the impact of the policy and to enable women to participate on an equal basis with men has an unlawful discriminatory impact on women. Under either approach, the theory would be essentially the same: gender roles that place primary child care responsibilities upon women, combined with a labor system premised on the male norm of an employee who does not have significant child care responsibilities, cause women more than men to suffer a variety of adverse employment consequences in violation of Title VII.³⁹

³⁸ There are other possible remedies for the violation, including flex-time, part-time employment, and extended parenting leaves. The latter two are often unsatisfactory to the employee because they result in a reduction of income which many employees, especially single parents, can ill afford. Working full-time or flex-time, even when feasible given the nature of the employer's business, still requires the employee to pay for eight hours a day of child care, unless parenting responsibilities are shared with someone else who can schedule his or her day accordingly.

³⁹ There are many open questions about the relative feasibility of different kinds of employer support for child care. Such employer support could take a variety of forms, such as providing an on-site center, contributing to an existing off-site center in exchange for reduced tuition or priority admission for employees or offering information and referral services to help employees make child care decisions. See, e.g., EMPLOYERS AND CHILD CARE: DEVELOPMENT OF A NEW EMPLOYEE BENEFIT [SPECIAL REPORT] (BNA) (1984). Each possibility presents advantages and disadvantages that would make one more appropriate than another under different circumstances. Many employers would be financially unable to provide any except the most minimal support for child care. The level of interest among employees will vary as well. Many parents might prefer not to entrust their children to the care of others and might choose, by staggering maternity and paternity leaves (if available), to care for their children themselves. Other parents would prefer to rely on relatives for child care. Some parents might prefer not to use on-site day care because of the difficulty of commuting with small children. In part because of low use by employees of employer-provided day care and in part because of the high cost, some on-site child care facilities have been unsuccessful. See, e.g., *The KLH Experience: An Evaluative Report of Day Care in Action at the KLH Child Development Center, Cambridge, Mass.*, reprinted in *Hearings on S. 2003 Before the Senate Comm. on Finance*, 92d Cong., 1st Sess. 111 (1971).

Most of these considerations, however, pertain to the issue of the most desirable form of employer support for child care, not to the question of whether the employer should support child care at all. The problems entailed in implementing a policy of employer support for child care as well as the choices that must be made about the form the support should take, are beyond the scope of this Article. Suffice it to say that some sort of employer support, even if only information and referral, would materially assist most parents and is necessary to permit women to seek and hold jobs on an equal basis with men.

The possibility that some employees might refuse to use employer-provided child care even at the expense of job performance raises an interesting question. Could an employer refuse to promote a woman whose inferior job performance could be attributed to her refusal to use employer-provided child care? Assuming that the refusal to promote the employee is linked to her child care responsibilities, the adverse action would, by my hypothesis, be taken on the basis of her gender role; such an action is sex discrimination. But if the woman prefers

B. Title VII and the Lack of Child Care: The Prima Facie Case

There are two ways to prove unlawful gender discrimination under Title VII, disparate treatment and disparate impact. In a disparate treatment case, the plaintiff shows that an employer treats males and females differently. The Supreme Court ruled long ago that an employer cannot treat women with small children differently than it treats men with small children by refusing to hire women but not men with preschool-aged children.⁴⁰ Consequently, employers are unlikely to have an official policy that on its face treats men and women differently, therefore use of disparate treatment theory would not be appropriate in this case.

Under disparate impact theory⁴¹ an employer violates Title VII

not to use the employer-provided child care — for whatever reason — should her preference about how to raise her children or the employer's preference about how to run the business take precedence? Under existing Title VII law, it is relatively clear that if the employer has compelling legitimate business reasons for its action, the woman will have to compromise. How compelling those reasons must be is the subject of some debate, as explained *infra* in Part III.

⁴⁰ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), held that such a policy violated Title VII. However, the Court did suggest in *Phillips*, presumably in response to the employer's argument that women with children were less reliable employees because of their conflicting family obligations, that "[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for . . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* at 544, (quoting 42 U.S.C. § 2000e-2(e)). Justice Marshall, concurring, expressed alarm at that remark: "I fear that . . . the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result." *Id.* at 545. Justice Marshall suggested, however, that an employer could require minimum performance standards for both sexes and "can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with." *Id.* at 544-45. While his remarks may be construed as allocating some responsibility to the employer to assist employees in arranging care for their children to enable the employees to comply with neutral performance standards, his remarks could also be read as suggesting that he believes the matter to be solely the concern of parents. To be consistent with the rationale underlying both the majority opinion and Marshall's concurrence, Marshall must have meant the former.

If a plaintiff can establish that an employer's action, although apparently neutral as to sex, is in fact a pretext for discrimination against women with children, then she can make out a disparate treatment Title VII violation under *Phillips* and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). The focus of this Article, however, is to show that even perfectly benign policies discriminate against women because women more than men are either single parents with custody of children or have primary child care responsibility in the family.

⁴¹ The Supreme Court first used disparate impact analysis in a sex discrimination case in *Dothard v. Rawlinson*, 433 U.S. 321, 329-30 (1977), in which the Court held that the plaintiffs established a prima facie violation of Title VII by showing that minimum height and weight requirements for prison guards would exclude 41.13% of all women in the general population but less than 1% of all men.

The disparate impact concept, which greatly broadened the reach of Title VII, was an invention of the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It is unclear whether Congress originally intended Title VII to outlaw practices that perpetuate the effects of societal discrimination. The Court was therefore being somewhat disingenuous when it asserted in *Griggs* that

[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face,

when he maintains an employment practice that is apparently neutral in its treatment of different groups, but in fact falls more harshly on a protected group than on other employees.⁴² Proof of discriminatory motive is not required.⁴³ To prove a prima facie case, the plaintiff presents evidence which shows that the challenged facially neutral practice has a disproportionately adverse impact on a protected group.⁴⁴ The burdens of production and persuasion then shift to the employer to prove that the challenged practice is justified by overriding business necessity.⁴⁵ Either on rebuttal or in her case in chief, the plaintiff may show that there are alternative practices available to achieve the employer's legitimate business goals and that those alternative practices have a less discriminatory impact on the protected group.⁴⁶

The language of Title VII, in either § 703(a)(1) or § 703(a)(2), could conceivably support a claim of sex discrimination based on an employer's hiring, pay, discipline, scheduling, travel, promotion or other practices that disadvantage employees who have primary child care responsibilities when the employer refuses to accommodate them.⁴⁷ Section 703(a)(1) makes it an unlawful employment practice

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .⁴⁸

Section 703(a)(2) makes it an unlawful employment practice

to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . .⁴⁹

The claim would be essentially the same under both sections. An employee would first establish the necessary connection between her sex

and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices.

Id. at 429-31. Whether or not the Court was correct about Congress' original intent in passing Title VII, however, Congress adopted the Court's views and gave its imprimatur to the use of the disparate impact model when it amended and extended the reach of the statute in 1972, and in doing so recognized that "employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . ." S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971).

⁴² *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

⁴³ *Id.*, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

⁴⁴ On the general requirements, see B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1324-31 (2d ed. 1983).

⁴⁵ The defense that a discriminatory practice is a matter of "business necessity" was first enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. at 431. See *infra* Part III.

⁴⁶ *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

⁴⁷ Disparate impact analysis may be applied to claims under both § 703(a)(1) and § 703(a)(2). *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1494 (9th Cir. 1983) (citing *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982)), *cert. denied*, 467 U.S. 1255 (1984).

⁴⁸ 42 U.S.C. § 2000e-2(a)(1) (1982).

⁴⁹ 42 U.S.C. § 2000e-2(a)(2) (1982).

and the feminine gender role as primary child caretaker. She would then attempt to prove that a neutral and legitimate employment policy adversely affected her because of her primary child care responsibilities. Because primary child care responsibilities are, by hypothesis, linked to the feminine gender role, which is linked to sex, the adverse effect of the facially neutral employment policies on the female employee is sex discrimination cognizable under Title VII.

For example, a plaintiff might show that her employer failed to promote her or fired her because she was often late or absent when her children were ill or because she refused to work overtime or weekends due to her child care responsibilities. The adverse effect on her of the facially neutral promotion or discipline rules would constitute a prima facie violation of § 703(a)(1) because of the causal connection to her gender role and thus to her sex. Similarly, there might be a violation of § 703(a)(1) when an employer's failure to provide child care deters so many potential female applicants from seeking employment with the employer that the lack of child care can fairly be shown to be the cause of their failure to apply and the employer's consequent failure to hire. Under § 703(a)(2), the plaintiff might argue that her discharge, lack of promotion, or lower wages, for example, resulted from the employer's expectation that all employees should conform to the traditional male model of an employee who has a woman available to care for his children full-time. Thus, she might argue, the employer's failure to accommodate women's social role as primary child caretaker limits and segregates female employees or applicants for employment in ways which tend to deprive them of employment opportunities and otherwise adversely affects their status as employees because of sex. Under both sections, the claim would be that women are channeled into low-paying, low-prestige jobs because their gender role dictates that their families take priority over their careers.⁵⁰

The possibility of using Title VII to eliminate one facet of the implicit sexism of the work-family dichotomy raises several theoretical and practical issues that might pose obstacles to proof of the prima facie case. First, Title VII prohibits discrimination only on the basis of a few specified classifications, among them sex. It is necessary to prove, but it is not immediately obvious, that the child care problem results in sex discrimination. Apart from the empirical question of whether the lack of child care really hurts women more than men, there is a deeper question

⁵⁰ This raises an interesting question. Would an employer violate Title VII if it refused to hire parents of either sex with custody of young children? There would be no disparate treatment because parents of both sexes would be treated the same. Whether there would be a disparate impact violation is harder to say. Theoretically, since every child has two parents, males and females would be affected equally. If, however, the employer's potential work force encompassed a high percentage of single parents, there might be a disparate impact on women because in some populations single mothers are more prevalent than single fathers. See *supra* note 14.

about whether it ought to be treated as gender discrimination. What are the doctrinal as well as practical dangers in analyzing the problem of child care from the perspective of gender equality?

Second, even if the lack of child care is sex discrimination, it is unclear whether the adverse effect on women could properly be attributed to any identifiable employer policy or whether it is the result of broad societal discrimination and the totality of employment conditions. At one level this is a technical problem of Title VII doctrine and proof; can the plaintiffs launch a broad attack against several employment practices, and if so, can they identify the source of the problem and connect it to the disparate effect? At another level there is a question of strategy; would an injunction requiring the employer to establish some sort of child care program adequately remedy the problem? If the pervasive inequality women experience in employment could not be ameliorated by the provision of child care, it may be that child care is not the source of the problem. Alternatively, it may be that the problem is simply too large to be remediable by litigation. Whatever the reason, a different approach to the child care issue would have to be taken.

A third major issue in proving liability is whether Title VII's prohibition of discrimination can fairly be construed as imposing an affirmative obligation on employers to accommodate the child care needs of their employees or whether the statute imposes only a negative duty to refrain from discriminatory conduct. The typical Title VII plaintiff seeks to have a particular act or policy invalidated and enjoined. The plaintiff in this case, by contrast, would seek the provision of a service so that the particular policies no longer adversely affect women.

The final significant issue concerning the *prima facie* case lies in the difficulty of obtaining adequate statistical or other proof of discrimination, particularly in sex-segregated work forces. A Title VII suit, based as it is on comparisons within a work force, cannot successfully be used when there is no comparison group. If women with child care needs work in a sex-segregated industry precisely because their child care responsibilities prevent them from working elsewhere, Title VII cannot readily be employed to help them. Each of these four major issues is discussed below.

1. Is This Sex Discrimination?

The first step is to prove that employer policies that disadvantage persons with primary child care responsibilities discriminate against a group protected by Title VII, i.e., women. This is both a nontrivial problem of proof and a serious theoretical issue. Not all women have children, and some that do may not have primary responsibility for them. Moreover, some men do have primary child care responsibility, and some

parents share the task equally.⁵¹ There is no necessary connection between gender and childrearing. Why, then, is child care a gender equality issue? Why litigate this case under Title VII?

Clearly, child care is the concern of all parents. But to look at the issue as the problem of working *parents* obscures the reality of women's experience. The data presented in Part I indicate that child care is much more of a problem for women than it is for men.⁵² More women than men are unemployed⁵³ or underemployed⁵⁴ because of their child care responsibilities. The connection between gender and child care, however, is social, not inevitable, and will (it is hoped) change. In this sense, the claim would resemble the claim the plaintiffs made in *Griggs v. Duke Power Co.*⁵⁵ and its progeny,⁵⁶ that the requirement of a high school diploma or the use of tests to determine eligibility for a job were invalid under Title VII because they adversely affected blacks in a disproportionate manner. The diploma requirements or tests have an adverse impact because, as a result of societal discrimination, blacks on the average receive education inferior to that whites receive. Similarly, the adverse impact on women of the lack of child care is the result of societal discrimination that accords women primary responsibility for the care of children.

The modern labor structure's indifference to the child care responsibilities of workers is founded upon the exclusion of women from the paid

⁵¹ The fact that not all women have primary child care responsibility and that some men do does not alter the reality that the number of women for whom child care is a barrier to full employment vastly exceeds the number of men who experience the same problem. See *supra* text accompanying note 16.

It has been argued in the context of the debate about whether denial of benefits to pregnant women constitutes sex discrimination that it is not discriminatory for employers and unions to exclude pregnancy-related expenses from employee benefit plans because the cost of pregnancy is borne by "family units, which include fathers as well as mothers." Kirp & Robyn, *Pregnancy, Justice, and the Justices*, 57 TEX. L. REV. 947, 955 (1979). By analogy, then, it would not be sex discrimination to fail to accommodate child care responsibilities because both males and females have those responsibilities. While the proponents of this view acknowledged that 16.3% of all children in 1978 were being raised in female-headed households, which would suggest that the sexes are not similarly situated with respect to child care responsibilities, they contend that "the father remains legally responsible for the economic support of the child in many of these cases." *Id.* at 955 n.14. Even if these assertions were accurate — the difficulty of enforcing child support obligations suggests that they are not — they would still be irrelevant under Title VII, because regardless of who is legally responsible for children, it is women who suffer adverse employment consequences because of pregnancy and childrearing responsibilities. Thus, the fact that every child born has a biological (and legal) father and mother does not mean that men face the same problems that women face in trying to work and care for children. For further discussion of this point, see H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 528-29 (2d ed. 1981), and Boling, *Pregnancy Benefits, Benign Sex Discrimination, and Justice: Why Does It Matter How We Ask the Questions?* 11 GOLDEN GATE U.L. REV. 981 (1981).

⁵² See *supra* text accompanying notes 1-32.

⁵³ See *supra* text accompanying note 16.

⁵⁴ See *supra* text accompanying notes 3-6.

⁵⁵ 401 U.S. 424 (1971).

⁵⁶ *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). See sources cited in B. SCHLEI & P. GROSSMAN, *supra* note 44, at 80-161.

labor force. Indeed, the rigid separation of work and family is made possible only by the relegation of some members to full-time family work and others to full-time "economic" work. It is no accident therefore that child care has become a "women's issue." It is the result of centuries of oppression. Full equality for women will not be achieved until the assumption that workers do not have child care responsibilities is exposed and changed. Title VII is not merely an expedient means to achieve that change.⁵⁷ Rather, the choice of antidiscrimination law as a basis for challenging the work/family dichotomy recognizes the sexist origins of the dichotomy. It is worth considering whether this statute, one of the important legal tools for building a society without discrimination, can be used to dismantle this particular part of the edifice of male domination.⁵⁸

⁵⁷ Courts have recognized that discrimination frequently occurs not on the basis of sex per se, but rather on the basis of sex plus some other characteristic not inherently related to sex, such as marital status or hair length. Although these "sex-plus" discrimination cases were decided under disparate treatment analysis, the principle in them, that discrimination against a subgroup of one sex which has a particular characteristic is as illegal as is discrimination against all members of a sex, ought to be equally applicable to a disparate impact case. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (refusal to hire mothers but not fathers of small children violates Title VII). See also *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir.) (no-marriage rule for flight attendants violates Title VII, even though the rule theoretically applied to both sexes, because in practice it adversely affected women), *cert. denied*, 404 U.S. 991 (1971); *contra Stroud v. Delta Air Lines*, 544 F.2d 892 (5th Cir.) (upholding no-marriage rule for flight attendants because the job classification was exclusively female and thus there was no discrimination between the sexes), *cert. denied*, 434 U.S. 844 (1977).

The theory underlying the sex-plus discrimination doctrine was stated by the *Sprogis* court as follows:

In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class.

444 F.2d at 1198.

Unfortunately, some courts are reluctant to question the legitimacy of discrimination on the basis of gender stereotypes that are widely regarded as acceptable. Thus, for example, one court found itself unable to hold that separate grooming codes for the sexes constitute sex discrimination for fear that to do so would render

employers . . . powerless to prevent extremes in dress and behavior totally unacceptable according to prevailing standards and customs recognized by society. . . . [I]t would not be at all illogical to include lipstick, eyeshadow, earrings, and other items of typical female attire among the items which an employer would be powerless to restrict to female attire and bedeckment.

Willingham v. Macon Tel. Publishing Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972) (refusal to hire male plaintiff solely because of length of his hair where employer permitted women to wear their hair the same length does not violate Title VII), *aff'd per curiam*, 507 F.2d 1084 (5th Cir. 1975). See generally *H. KAY, supra* note 51, at 511-17.

Insofar as people today regard gender stereotypes about proper parenting roles to be less acceptable than gender stereotypes about proper grooming, however, courts may be willing to perceive illegal sex discrimination in employer policies which adversely affect women because of their social role as mothers.

Of course, in cases involving race discrimination many employer practices have been struck down because the disparate impact stemmed from a characteristic not inherently related to race. For example, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), no one contended that blacks are inherently less intelligent than whites. Rather, the adverse impact was believed to have resulted from the fact that blacks have been denied equality of education.

⁵⁸ Outside of the United States, the difficulty women face in combining their dual roles has been recognized as sex discrimination. An English statute, the *Sex Discrimination Act 1975* (c.65),

Even if it is conceded that more women than men experience a conflict between the requirements of their job and their children, it might be argued that that is the result of women's choice to have children and their own notions of their parental responsibilities, none of which is the responsibility of employers. However, this argument ignores the overwhelmingly important effect of gender roles in our society. Females are socialized differently than males, and one of the key differences concerns their respective views of children. Women no more choose to consider it primarily their responsibility to raise children than they choose to wear dresses instead of trousers for formal occasions, or choose any other behavior considered appropriate for women. While some aspects of mas-

§§ 1(1), 6(2), somewhat similar to Title VII in its prohibition of employment practices having a discriminatory effect on women, has been interpreted by the English Employment Appeal Tribunal as requiring an employer to provide part-time work to a single mother in order to accommodate her responsibilities to her children, even though part-time work was not generally available in her department. In *Home Office v. Holmes*, [1985] 1 W.L.R. 71 (Empl. App. Tribunal), the employee, a civil servant in the Home Office, experienced no difficulty with her employer's inflexible rule against part-time work until she had her first child. After the birth of her child, "her duties as a mother made it difficult and almost impossible for her to fulfil the hours required" and she was forced to take more than two years' unpaid leave in less than three years. *Id.* at 73. For two and one half years after that she worked full-time. Then her second child was born. After a six-month maternity leave, she notified the Home Office that she intended to return to work, but requested that she be permitted to work part-time. Her employer refused, based on the established policy of allowing no part-time work. She returned to work, but shortly thereafter took several months sick leave. *Id.* at 73-74.

After a hearing, the Industrial Tribunal charged with enforcement of the sex discrimination statute decided in her favor. The decision is described in detail in the opinion of the Employment Appeal Tribunal. *Id.* at 74-75. It decided that the full-time requirement "was such that the proportion of women who could comply with it is considerably smaller than the proportion of men who could comply with it" due to the fact "that despite the changes in the role of women in modern society, it is still a fact that the raising of children tends to place a greater burden upon them than it does upon men." *Id.* at 74. The Industrial Tribunal also found that the requirement of full-time work had a detrimental effect on the complainant because "her parental responsibilities prevented her carrying out a normal full-time week's work, and . . . in trying to fulfill all of these at the same time she had had to suffer excessive demands on her time and energy." *Id.* at 75. Finally, the Tribunal decided that the full-time rule was not justified by any reasons offered by the Home Office. *Id.* at 74.

The Home Office appealed the adverse decision to the Employment Appeal Tribunal, arguing, *inter alia*, that the requirement was justifiable on the ground that "the bulk of industry in this country and, in very large measure, the national and local government service is still organised upon the basis of full-time employment." *Id.* at 76.

The Appeal Tribunal was not persuaded:

The scheme of the anti-discrimination legislation involves casting a wide net throwing upon employers the onus of justifying the relevant requirement or condition in particular circumstances. One must be careful, however, not to fall into the error of assuming that because the net is wide, the catch will necessarily be large. [The barrister for the Home Office] eloquently invited us to envisage the shock to British industry and to our national and local government administration which, he submitted, would be bound to be suffered if, in addition to all their other problems, they now had to face a shoal of claims by women full-time workers alleging that it would be discriminatory to refuse them part-time status. In answer to that we emphasise . . . that this one case of the employee and her particular difficulties within her particular grade in her particular department stands very much upon its own. . . . There will be cases where a policy favouring full-time staff exclusively within a particular grade or department is found to be justified. There will be cases where no actual or no sufficient detriment can be proved by the employee. All such cases will turn upon their own particular facts.

Id. at 77. Accordingly, the Appeal Tribunal affirmed the decision. *Id.*

culine and feminine gender roles are changing, others are not.⁵⁹ The child care aspect has not yet completely changed.⁶⁰

There are at least two difficult problems with approaching the child care problem as a sex discrimination issue under Title VII. One concerns the implications of approaching child care as a sex discrimination issue and the so-called "special treatment versus equal treatment" debate. The second concerns the wisdom of seeking this kind of social change through litigation rather than legislation.

The danger in arguing that employers must accommodate child care from the perspective of women's needs is that it tends to reinforce the sexist notion that women are, and should be, primarily responsible for the care of children. Professor Williams has perceptively observed that a theory that depicts women's dual role as a problem of accommodating the needs of *women* workers resembles "the philosophy that underlay protective labor legislation for women in this country. It *does* describe the reality of many women's lives, but it also assumes the inevitability of that reality and, more deeply, the desirability of traditional family roles for women."⁶¹ She urges that to avoid perpetuating gender stereotypes it is necessary to treat pregnancy-related disabilities in gender neutral terms, to seek parenting leaves available to both men and women,⁶² and to address the problem by means of gender neutral legislation.

There is, of course, no question that child care or other forms of accommodation to employees' parental roles must be equally available to both sexes in order that the remedy to discrimination not perpetuate discriminatory stereotypes and family structures. Although only women would have standing under Title VII to raise the claim because, by hypothesis, women disproportionately suffer the adverse effect,⁶³ a successful challenge under Title VII to employer practices that adversely

⁵⁹ Thus, to choose a trivial example, it is no longer considered inappropriate for women to become lawyers. But relatively few women lawyers would wear trousers to court. For a more serious and relevant example, consider the phenomenon of the "working mother," also referred to as "Supermom." A woman who has a demanding job as well as a family is seen as something special, or at least as filling two roles. A "working father," by comparison, is just the average man with children. *See supra* note 35.

⁶⁰ The cause of action described here, like the cause of action in *Griggs*, will ideally become obsolete in the not-too-distant future. When men and women share equally the burdens and joys of child care — as when whites and blacks enjoy complete equality of education — the lack of child care will no longer be a gender equality issue, just as the use of educational requirements for employment will no longer be a race equality issue.

⁶¹ Williams, *supra* note 22, at 377. Elsewhere in her article, Williams quotes a passage on this point from *Muller v. Oregon*, 208 U.S. 412, 422 (1908), in which the Supreme Court upheld protective labor legislation for women:

Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.

Williams, supra note 22, at 333-34.

⁶² *Id.* at 379.

⁶³ *Patee v. Pacific Northwest Bell Tel. Co.*, 803 F.2d 476 (1986).

affect women because of their parental role would not provide a benefit available only to women. Unlike cases involving pregnancy, the remedy for the cause of action proposed in this Article would be equally available to mothers and fathers as long as they were the primary child caregivers. The disparate impact theory invalidates a rule for everyone, not just for the protected class.⁶⁴ Structurally, this case resembles *Dothard v. Rawlinson*, in which minimum height and weight restrictions for the job of law enforcement officer were invalidated under Title VII because of their disparate impact on women.⁶⁵ Short men benefited as well as women when height restrictions were eliminated. The dangers of the special treatment approach are somewhat reduced⁶⁶ because women would not need to be treated differently than men.⁶⁷

Where adherents of equal treatment theory might disagree with this Article's approach is over the strategic and symbolic wisdom of seeking to achieve any kind of sex equality by using a duty of accommodation approach. My suggestion that Title VII might be used in this case is based on a broad reading of the Civil Rights Act as imposing affirmative duties on employers to avoid perpetuating broad social discrimination by accommodating the different needs of employees who are parents. As I understand her, Professor Williams believes that reliance on a duty of accommodation analysis perpetuates a discriminatory division between the norm and the deviants who must be accommodated.⁶⁸ She eschews the accommodation concept when thinking about pregnancy and child-rearing in favor of an "incorporationist" vision that seeks to redefine the worker-norm to encompass both sexes.⁶⁹ She finds Title VII's antidiscrimination principle inadequate to the task of redefining the norm. Antidiscrimination legislation is designed, she believes, "for telling legislatures, governments and designated others what they may not do,"⁷⁰ not for doing "the basic job of readjusting the social order,"⁷¹ i.e. for imposing new obligations on employers. I take it that Professor Williams thus

⁶⁴ Williams, *supra* note 22, at 364.

⁶⁵ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

⁶⁶ I therefore address Professor Williams' concern that Title VII disparate impact analysis be used only to invalidate discrimination for everyone and not to provide a benefit only for women. See Williams, *supra* note 22, at 368.

⁶⁷ The theory of equality on which the theory in this Article is based need not be, and is not, a "bivalent" theory in which there is an "inherent asymmetry in parenthood" experiences between the sexes, apart from the biological difference. See E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 26 (1980). But the theory is "pluralist" in its recognition that due to the imperatives of child care, not all employees are equally situated in their ability to compete in the marketplace as it is currently structured and that fairness demands that those employees with children not be handicapped by policies that assume that employees do not have children. On "pluralist" and "assimilationist" theories of equality, see Note, *supra* note 25, at 699-702 and Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 *UCLA L. REV.* 581, 604-15 (1977).

⁶⁸ Williams, *supra* note 22, at 367-68.

⁶⁹ *Id.*

⁷⁰ *Id.* at 374-75.

⁷¹ *Id.*

advocates a legislative rather than a litigation approach to the problem for two separate reasons. The first is that the problem, for practical as well as symbolic reasons, should not be addressed as a gender equality issue, and the second is that antidiscrimination legislation should not be construed, at least in this situation, as imposing affirmative obligations on employers.

As explained above, the practical dangers involved in treating the problem as the need to accommodate women's dual roles may be less serious in this case than in the case of pregnancy because the child care remedy would be available to both men and women, although, by hypothesis, more women would use it. As to the symbolic issue, again the danger is reduced because the remedy will be available to all. Further, unlike in the case of pregnancy where the difference between the sexes is inherent, this cause of action is a strictly interim measure, a way of achieving an incorporationist society. Regarding pregnancy as a women's issue today may mean that it will always be regarded as a women's issue; the same is not true with respect to child care. Therefore, even if it is true that treating the differences between men and women as a women's issue is undesirable as a matter of theory, the interim nature of this approach may mean the benefits outweigh the risks.

As a practical matter, it is true that legislation⁷² would be a preferable solution to this problem, because courts may be hesitant to enforce the potentially expensive changes suggested here without strong evidence in the legislative history supporting such an outcome.⁷³ Further, in a

⁷² Legislation was introduced in the second session of the 99th Congress to address the problem, but it did not go far enough. H.R. 4300 (1986), introduced by Rep. Clay (D-Mo.) on March 4, 1986, would have entitled both full- and part-time employees to take 18 workweeks of parental leave during any two year period because of the birth, adoption, or placement with the employee for foster care of a child, or to care for a child with a serious health condition. H.R. 4300, 99th Cong., 2d Sess. (1986). Congress adjourned without acting on the bill. Similar legislation was introduced by Rep. Schroeder (D-Col.) in the previous session on April 4, 1985, but it also died without passing. H.R. 2020, 99th Cong., 1st Sess. (1985). Although either of these bills would have been an important step in the right direction, 18 weeks of leave is simply inadequate to solve the long-term child care needs of most employees.

⁷³ The legislative history of the inclusion of sex as a protected classification under Title VII when the statute was enacted in 1964 reveals very little about Congressional intent, as sex was introduced by an opponent of the Civil Rights Act the day before the bill passed in the House, allegedly in hopes of defeating the passage of the Act. Note, *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971). Nonetheless, there are a few indications in the legislative history suggesting what Congress believed to be the appropriate limits on the statute's sweeping language of equality. In some cases, Congress explicitly limited the reach of the antidiscrimination principle: seniority, merit, productivity, ability tests, and bona fide occupational qualifications (BFOQs). And where it did not want these statutory limits to apply, it so indicated by refusing, for example, to permit the use of race as a BFOQ. 42 U.S.C. § 2000e-2(e)(1) (1982).

Based on this, one commentator has argued that Congress intended that Title VII be applied broadly to eradicate all discrimination, except where it expressly provided limitations. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 82-83 (1972) (arguing that exclusion of race from list of factors which may be considered BFOQs is evidence that Congress confronted and rejected the argument that managerial prerogative and business convenience could trump antidis-

democratic society, legislation, because it is more democratic than litigation, is the preferred method of effecting social change. But litigation has served well as an adjunct to the political process or when the process failed to respect principles of equality or to protect claims of right. Moreover, the remedy requested — a court order that the employer do something to address the child care problem — would not be unduly burdensome on the judiciary.⁷⁴ I do not mean to suggest that the litigation described here is a preferable strategy for addressing the problem. It is not. My purpose is rather to explore whether litigation could be used if a legislative approach fails.

2. What is the Source and the Effect of the Discrimination?

To establish a *prima facie* case, plaintiffs will have to prove that one or more of the employer's policies including the eight-hour day, the forty-hour week, mandatory overtime, discipline for absenteeism and tardiness, standards for promotion, and restrictive leave policies, have an adverse impact on women with children. The primary issues raised by this aspect of the *prima facie* case concern (1) the difficulty of isolating the particular employer policy or policies that harm women with chil-

crimination efforts). *But see* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 102-06 (1974).

There is considerable ambiguity in the legislative history of the PDA with respect to whether Congress intended Title VII, as amended by the PDA, to impose on employers an affirmative duty to accommodate the pregnancy and childbirth-related disabilities of their employees. *See* California Fed. Sav. & Loan Ass'n, 107 S. Ct. 683 (1987) (legislative history of PDA shows that Congress did not intend to prohibit preferential treatment of pregnancy). On the one hand, Congress said that the bill

prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. [The bill] in no way requires the institution of any new programs where none currently exist.

H.R. REP. NO. 948, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4752.

On the other hand, Congress emphasized repeatedly that the bill was intended to protect women from discrimination in "the whole range of matters concerning the child-bearing process." *Id.* at 4753. The House Committee Report states that Justice Brennan's dissenting opinion in *General Electric v. Gilbert* represents the proper interpretation of Title VII. *Id.* at 4750. In his *Gilbert* dissent, Brennan espoused the view that Title VII imposes on employers the affirmative duty to ensure that employment is truly accessible to all, asserting that "the broad social objectives that underlie Title VII" can fairly be understood to require affirmative efforts to accommodate the societally-imposed disadvantages suffered by women employees due to their child-bearing role. 429 U.S. 125, 159 n.9 (1976), *reh'g denied*, 429 U.S. 1079 (1977). Insofar as Congress adopted Brennan's opinion about proper interpretation of Title VII it adopted a position that tends to support the idea that employers have an affirmative duty to provide child care if necessary to avoid discriminating against women employees.

⁷⁴ In *Lau v. Nichols*, 414 U.S. 563, 565 (1974), in which non-English-speaking public school students sought supplementary English instruction in the public schools, the plaintiffs requested only that the defendant be required "to apply its expertise to the problem and rectify the situation." Similarly, the plaintiffs and their employer could agree to work out an appropriate remedy, as is done in most institutional litigation today. *See generally* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (discussing constitutional cases and public institutions).

dren and therefore violate Title VII; and (2) identifying the nature of the discriminatory effect and proving a causal connection between the challenged practice and the adverse effect.

a. Identifying the Discriminatory Practice(s)

Discrimination in employment seldom involves only one employer policy or practice; instead it affects employees at all stages, from recruiting and hiring to evaluations and promotions to layoffs and pensions. This is true in the case of working mothers as well. For example, many employers do not offer desirable part-time or flex-time work, and as a result mothers of young children are deterred from applying, or work at the lowest rungs of the ladders of responsibility and remuneration where part-time work is available. Once hired, they cannot work overtime, so they earn less and their dedication to their work is questioned. They may be absent frequently, which hurts their chances for promotion or results in discipline or firing. They may be unable to travel as required by their job, which may lead to losing a promotion or to being fired.⁷⁵ Their need to leave and to reenter the labor force as children are born means they lose seniority and pension rights.⁷⁶

⁷⁵ Plaintiffs in two cases challenged their employers' policies requiring them to travel as part of their jobs. In *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 685 F.2d 1149 (9th Cir. 1982), the court indicated that the plaintiffs' allegations and supporting evidence would have been sufficient to survive summary judgment under both disparate treatment and disparate impact theories because the union and the company instituted the travel requirement with the knowledge that it would be disadvantageous to women. *Id.* at 1153. However, the court upheld the district court's dismissal of the claim for laches. *Id.* at 1154.

One year later, the same court reached the merits of a similar claim and refused to afford the plaintiff any relief. In *Goicoechea v. Mountain States Tel. & Tel. Co.*, 700 F.2d 559 (9th Cir. 1983), a different panel of judges held that even assuming the plaintiff could establish under *Gifford* a prima facie case of sex discrimination based on the adverse impact on women of the travel policy, the employer was nevertheless entitled to summary judgment because it had shown that travel had a "manifest relationship" to the plaintiff's job, and was therefore justified by business necessity. *Id.* at 560. The plaintiff was not permitted to show that a less discriminatory alternative was available because the travel requirement was based on a seniority system which was adopted without discriminatory intent and was therefore lawful under 42 U.S.C. § 2000e-2(h). Furthermore, the court noted that the employer had offered the plaintiff two lesser-paying jobs that did not require travel and had permitted her to defer one trip so that she could attend to her children. The court rejected the plaintiff's argument that the offer of two lower-paying jobs did not constitute "reasonable accommodation" within the meaning of the religious discrimination provision of 42 U.S.C. § 2000e-(j). Even assuming the analogy could be drawn between religion and sex (the court did not decide the issue), *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), required that the seniority system be respected. *Id.* See *infra* text accompanying notes 125-46.

⁷⁶ Yet another consequence of interrupted workforce participation caused by the lack of parental leave and child care is that more women than men quit their jobs when they have children and therefore suffer the effects of antinepotism rules when they attempt to reenter the work force at the same place where their husband works. See generally Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U.L. REV. 75 (1982). Employer policies against hiring two members of the same family are said to serve the valid purpose of protecting workplace morale and preventing employees' family relationships from interfering with work relationships. *Id.* at 78. However, because many women leave the labor force at some point to raise children and return later, the wife is more likely than the husband to be the member of the family prevented by an antinepotism rule from getting a job where her spouse works. In

To address all of these problems would require a wide-ranging attack on the fundamental structure of labor. The breadth of the challenge raises two issues. One concerns the plaintiff's ability to prove the causation element of the prima facie case the second concerns the fairness of the allocation of the burden of proof. However, it should be noted that the plaintiffs would not argue that the practices should be abandoned or changed, as in the normal discrimination case, but rather, that the employer must provide child care to enable women to participate on an equal basis with men.

Nonetheless, some courts may balk at the wide scope of the plaintiffs' attack, citing cases holding that disparate impact analysis is unavailable to attack simultaneously several points in the employment process.⁷⁷ The wide-ranging attacks where courts have refused to use disparate impact analysis usually involved attacks on the cumulative effect of several elements in a hiring and promotion process. A common concern of the courts was that the plaintiff would prove discriminatory effect without proving precisely which of the employer's practices was responsible, and the employer would have to figure out which practice was responsible before going on to justify it.⁷⁸ This procedure in essence would shift

addition, the woman is often the employee with less seniority who is fired when co-workers marry. *Id.* at 92.

In *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978), the court of appeals reversed the district court's finding of a Title VII violation, notwithstanding the fact that the challenged antinepotism rule resulted in 71 women and only 3 men being denied employment. The trial court had concluded that this constituted a disparate impact and that the employer failed to prove that the rule was justified by the reasons it offered as a business necessity defense: supposedly greater tardiness and absenteeism of spouse employees, greater problems in scheduling vacations and work assignments, and undermined morale and efficiency. *Id.* at 497.

The Seventh Circuit conceded that it was unable to find a basis for reversing the district court's findings that the defendant had not proved that the no-spouse rule prevented absenteeism and problems with scheduling; it nevertheless speculated that the defendant's arguments that the rule preserved morale and efficiency were "plausible." *Id.* at 499. The court concluded that the no-spouse rule did not constitute sex discrimination under the *Griggs* rationale because the disproportionately adverse effect on women had not been imposed on women for having "failed to develop certain personal characteristics as a consequence of their environmental or genetic backgrounds." *Id.* at 500. The court failed to realize that "the rule's discriminatory impact [which] is the result of the historical fact that in the past far more men than women chose to work in defendant's Ottawa plants," is closely linked to the feminine gender role as mother. *Id.*

⁷⁷ Recent cases stating that disparate impact analysis may only be used to challenge identified, objective, facially neutral practices one at a time include: *American Fed'n of State County & Municipal Employees v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985); *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 707 (9th Cir. 1984); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 638-39 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 620 (5th Cir. 1983); *Mortensen v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982); *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800 (5th Cir. 1982).

Recent cases in which courts have permitted disparate impact analysis to be used to challenge simultaneously a wide range of employer practices and multiple points in the employer's hiring and promotion process include *Segar v. Smith*, 738 F.2d 1249, 1270-72 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985), and *Wheeler v. City of Columbus*, 686 F.2d 1144, 1152 (5th Cir. 1982).

⁷⁸ *Pouncy*, 668 F.2d at 801.

part of the burden of proving causation from the plaintiff to the defendant. The problem could be avoided in the child care case if the plaintiff could prove the disparate impact of each employment practice individually.⁷⁹ However, if data were not available to prove the discriminatory effect of each individual practice, a plaintiff would have difficulty.

Given the broad remedial policy of Title VII and the employer's better access to information regarding its employment practices and the effect of those practices on employees, some courts have permitted plaintiffs to attack several practices without identifying which practice causes the discriminatory effect and have left to the employer the task of identifying the practice which causes the effect before allowing the employer to justify the practice as a business necessity.⁸⁰ There is precedent for requiring the employer to identify the discriminatory practice; in "pattern and practice" discrimination cases, the employer must first identify the offending practice and then go on to defend it.⁸¹

⁷⁹ See, e.g., *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014 (1st Cir. 1984) (because disparate impact model cannot be used to challenge several practices simultaneously, court analyzes each of several practices separately).

⁸⁰ *Segar*, 738 F.2d at 1270-72. See also D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 26 ("[T]he requirement that a plaintiff identify which of several facially neutral criteria produced a disparate impact, when the data necessary to do so are unavailable, places an impossible burden on the plaintiff and provides a disincentive for employers to maintain adequate records."); B. SCHLEI & P. GROSSMAN, *supra* note 44, at 192-201. *Pouncy*, the leading case foreclosing the use of impact analysis to challenge a wide array of an employer's policies, has received criticism from many courts, including other panels of the Fifth Circuit. E.g., *Page v. U.S. Indus.*, 726 F.2d 1038, 1045-55 (5th Cir. 1984) (citing *Pouncy*, but using disparate impact analysis on a wide range of employment practices anyway); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 620-21 (5th Cir. 1983) (questioning the wisdom of *Pouncy*, but following it).

⁸¹ See *Segar*, 738 F.2d at 1270.

Another concern that courts have expressed in refusing to permit disparate impact attacks on a wide range of policies relates not to the scope of the attack but to the fact that the challenged practices involved subjective decisions. To permit plaintiffs to attack the discriminatory effects of a subjective decision-making process under disparate impact analysis would, the courts feared, permit plaintiffs to avoid the requirement of proof of discriminatory treatment, i.e., that the employer consciously treated minorities differently than whites. See *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1133 (9th Cir.), *opinion withdrawn*, 787 F.2d 462 (9th Cir. 1985). This problem would not arise in the child care case because the plaintiffs' attack is more focused than in the disparate impact cases in which the intent problem arose. In those cases, the plaintiffs essentially alleged that there were few minorities in the defendants' employ and that they occupied low-level positions, but did not explain precisely why minorities fared so poorly. *Id.* For some allegations, the discriminatory effect could be traced to specific requirements, but for others, such as challenges to subjective evaluation policies, the source of the discriminatory effect was hard to ascertain. The courts suspected that the real nature of the plaintiffs' allegations was that there was pervasive and subtle racism among the defendants' supervisory employees. *Id.* That, however, is an allegation of intentional discrimination which requires that intent must be proven. In the child care case, by contrast, the plaintiffs would challenge specific, facially neutral requirements and evaluation criteria which demand that job commitments take priority over family commitments. Subtle antifemale animus would be no part of the allegations. Therefore, some of the cases holding that disparate impact challenges to a wide range of policies may not be made are distinguishable.

b. Identifying the Discriminatory Effect

Closely related to the problem of identifying with adequate specificity the source of the discrimination is the problem of pinpointing the precise harm caused by discrimination. Three of the most obvious possibilities are failure to hire, failure to promote and loss of seniority. The latter two are more easily challenged than the first because it would be easier to prove the causal connection between the employer's policy and the harm.

While the choice of the discriminatory effect on which to focus would be determined primarily by the facts of the particular case, it seems to me that discrimination by failure to promote would be easiest to prove in most circumstances. Although promotion issues differ among industries, the essential characteristics are relatively similar from factory work to sales, banking, and the professions. Above all, those employees who seem to be truly dedicated to their job — dedication evidenced by working long hours — are the ones who advance to more rewarding and more remunerative jobs. What employers demand is precisely what parents with substantial child care responsibilities cannot give — complete devotion of time and energy to their work.

The plaintiffs would have to establish concretely that, but for their child care responsibilities, they would have worked longer hours, or on weekends, or would not have been absent so frequently. Further, they would have to show that their perceived lack of commitment to their work was a substantial factor in their being denied the promotion i.e., that they were otherwise qualified to be promoted. Such issues of causation are frequently difficult to prove, but they are common employment discrimination issues.⁸²

Other discriminatory effects that might be more upsetting to the potential plaintiffs than not being promoted are less promising foci of litigation from the point of view of Title VII practice. For example, the mothers who suffer the most from the dearth of child care are those who are single, too poor to pay for child care and, therefore, cannot find a job at all. However, it would be very difficult to prove with the requisite certainty that a particular employer's lack of child care deterred a woman from applying for a job or that, after an unsuccessful interview, the factor that prevented the employer from hiring the woman was her

⁸² See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (to establish a prima facie case of disparate treatment, plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.'). Of course, if the required qualifications are themselves under attack as being discriminatory; plaintiff need not prove he meets the qualifications. *Spurlock v. United Air Lines*, 475 F.2d 216, 218-19 (10th Cir. 1972); B. SCHLEI & P. GROSSMAN, *supra* note 44, at 170.

commitment to her children. This type of discrimination in the hiring process simply may not be susceptible to remedy by litigation.

3. Title VII and Affirmative Duties

a. Affirmative Obligations and Antidiscrimination Theory

Discrimination based on lack of child care differs from other discrimination issues because the plaintiffs would seek, through Title VII, to impose an affirmative obligation on employers. The gist of the argument would not be that primary childrearsers ought not to be required to work on the same terms as other employees, but that the employer must provide child care to enable them to do so. The employer's likely response would be to deny any responsibility to remedy a situation not of his making,⁸³ arguing that Title VII should not impose liability for a failure to provide an additional benefit.

At one level, such a response misconceives the nature of the claim. Plaintiffs would not demand that the employer assume responsibility for the inconveniences of combining a job and children. Rather, they would request that they not be handicapped because of their parental responsibilities. The essence of the claim is that although there may be formal equality, there is no substantive equality of treatment when some employees, because of their child care responsibilities, are essentially foreclosed from equal opportunity in employment.⁸⁴ The Supreme Court articulated this point in *Griggs v. Duke Power Co.*:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one all seekers can use.⁸⁵

The law under Title VII, as elsewhere, struggles mightily, although not always successfully, to distinguish between harms caused by acts of commission and acts of omission, hesitating to impose liability for the latter in the absence of a clearly stated duty and facts to put the potential defendants on notice of their duty to act. Unfortunately, the distinction is seldom entirely clear or logically defensible, as illustrated by the difficulties encountered by the Supreme Court in its effort to distinguish between policies that unlawfully discriminate against women because they impose a burden on pregnant workers and policies that do not so discriminate because they fail to bestow a benefit. In *General Electric Co.*

⁸³ See *supra* text accompanying notes 13-35.

⁸⁴ See *infra* text accompanying notes 127-28.

⁸⁵ 401 U.S. 424, 431 (1971).

v. Gilbert,⁸⁶ and in *Geduldig v. Aiello*,⁸⁷ the Court held that an employer's failure to cover pregnancy in an otherwise comprehensive health benefit plan was not sex discrimination under Title VII or the Equal Protection Clause, because it was merely a failure to bestow a benefit on both sexes, and treated the sexes equally in that regard. In *Nashville Gas Co. v. Satty*,⁸⁸ however, the Court distinguished these two cases and struck down a facially neutral system of denying women returning from pregnancy leave seniority for job bidding purposes. The Court explained the distinction as follows:

[p]etitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that [§] 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the 'scheme of human existence.'" [citation omitted] But that holding does not allow us to read [§] 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.⁸⁹

In *Satty*, the Court did not explain why the *Gilbert* plaintiffs were not burdened by having to pay their living expenses during the disability period.⁹⁰

The various conceptions of the antidiscrimination principle used in Title VII litigation lie on a spectrum. At one end is the disparate treatment theory, which holds that discrimination exists only when people are treated differently, and that Title VII requires only that all employees be treated the same. In the middle of the spectrum is the disparate impact theory, which holds that discrimination is found in neutral practices that perpetuate the effects of past discrimination or that otherwise adversely affect a disproportionate number of a protected group. The affirmative obligation/duty of accommodation theory is at the other end of the spectrum. Under this theory, employers discriminate when they use a facially neutral policy that has a disparate impact on a protected group without providing additional or alternative services that may be necessary to enable victims of the adverse impact to overcome the burden imposed by the policy or practice. Liability is based essentially on the failure to remedy the discriminatory effect of a facially neutral practice.

The historical development of antidiscrimination law and theory can be seen as moving from one end of the spectrum toward the other.⁹¹

⁸⁶ 429 U.S. 125, 138-40 (1976).

⁸⁷ 417 U.S. 484, 496-97 (1974).

⁸⁸ 434 U.S. 136 (1977).

⁸⁹ *Id.* at 142.

⁹⁰ Congress noted this fact in rejecting the *Gilbert* majority opinion's analysis when it enacted the Pregnancy Discrimination Act, which in effect reversed the holding in *Gilbert*. H.R. REP. NO. 948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4751.

⁹¹ See B. SCHLEI & P. GROSSMAN, *supra* note 44, at 1-2.

Initially, only disparate treatment was seen as discrimination under Title VII.⁹² Soon it became obvious that treating everyone the same could result in discrimination when it perpetuated the effects of past discrimination.⁹³ It is also discriminatory when treatment which assumes one set of characteristics, e.g., an average height of five feet ten inches as the norm when the norm is based on the characteristics of one group and not another.⁹⁴ In some cases the courts have suggested or stated that the disparate impact analysis which invalidates neutral rules is not enough.⁹⁵ Thus eliminating a discriminatory physical qualification may not adequately remedy discrimination against disabled people if a job applicant cannot get her wheelchair up a flight of stairs to the job interview or cannot get into the building once she is hired.

The affirmative obligation/duty to accommodate theory is a subset of disparate impact theory because it focuses on neutral policies that have a discriminatory effect. The difference is that disparate impact cases seek the elimination of the challenged practice, whereas an accommodation theory seeks assistance for those who cannot comply with the rule to enable them to do so. For example, non-English-speaking students would want English instruction, not that all their classes be taught in two languages.⁹⁶ Persons who observe their Sabbath on Saturday would want work schedules to be shuffled around, not that no one be required to work on Saturdays.⁹⁷ Working mothers would seek child care, not (at least in this case) that the forty-hour week be abolished.⁹⁸

b. Affirmative Obligations in Disparate Impact Cases

The notion that the Civil Rights Act imposes affirmative obligations on covered entities as part of the duty to avoid discrimination is not unprecedented. The leading case imposing an obligation to provide "extra" services to members of a protected class in order to prevent a neutral policy from having a discriminatory impact is *Lau v. Nichols*, decided by the Supreme Court in 1974.⁹⁹ In *Lau*, a class of non-English-speaking Chinese students sued San Francisco Unified School District officials, alleging that the school district's failure to provide supplemental English instruction by bilingual teachers violated,¹⁰⁰ *inter alia*, Title VI

⁹² See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

⁹³ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁹⁴ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

⁹⁵ See *infra* text accompanying notes 99-110, 125-47.

⁹⁶ See *Lau v. Nichols*, 414 U.S. 563 (1974).

⁹⁷ See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

⁹⁸ I have chosen to focus on child care as one solution to the problem. As suggested above, part-time work is another. See *supra* notes 29, 38, 58.

⁹⁹ *Lau v. Nichols*, 414 U.S. 563 (1974).

¹⁰⁰ *Id.* at 564-65. There is some ambiguity and confusion in the Supreme Court's and court of appeals' opinions about the nature of the claim and the relief sought. In the Supreme Court, the plaintiffs sought no particular form of relief, and the Court thought instruction in Chinese

(§ 601) of the Civil Rights Act,¹⁰¹ which prohibits racial discrimination by recipients of federal financial aid. The Court held that the failure to offer special English instruction unlawfully discriminated against the plaintiffs, noting “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”¹⁰² The Court concluded that this discriminatory effect must be avoided by providing supplementary instruction to permit the Chinese-speaking students to compete on an equal basis with English-speaking students.¹⁰³

More recently, the District of Columbia Circuit Court of Appeals has construed Title VII to require an employer to take steps to accommodate the needs of a pregnant employee.¹⁰⁴ In *Abraham v. Graphic Arts International Union*, the court reversed summary judgment for the defendant union on the pregnant worker’s claim that the union’s ten-day

or supplemental English instruction were both options. *Id.* at 565. In the court of appeals, plaintiffs apparently requested only supplemental English instruction, although the opinion is somewhat confused on this point. *Lau v. Nichols*, 483 F.2d 791, 802 (9th Cir. 1973) (Hill, J., dissenting).

¹⁰¹ 42 U.S.C. § 2000d (1982).

¹⁰² 414 U.S. at 566.

¹⁰³ *Id.* at 566-67, citing 35 Fed. Reg. 11595 (1970). In so holding, the Court affirmed the interpretation of Title VI then held by the Department of Health, Education and Welfare. This fact, along with some others, distinguishes *Lau* from the cause of action proposed in this Article, for here there is no administrative interpretation supporting the affirmative obligation. Another distinguishing feature is the fact that *Lau* involved public education where full equality of opportunity might be regarded as more important, although there is no authority in the Civil Rights Act supporting such a distinction. Finally, in *Lau*, state law required students to be proficient in English in order to graduate from high school. *Id.* at 566. Again, however, this fact should have no relevance for purposes of determining the existence of discrimination under the Civil Rights Act. The fundamental principle in *Lau* is the same as that on which this cause of action is based. However, because a broad application of the affirmative obligation principle would enable the federal judiciary to restructure significantly the rights of victims of broad social discrimination, courts might seek to limit *Lau* along the lines discussed here, irrespective of their logical merit. See, e.g., *De la Cruz v. Tormey*, 582 F.2d 45, 75-76 (9th Cir. 1978) (Wallace, J., dissenting, makes these arguments), *cert. denied*, 441 U.S. 965 (1979).

Justice Brennan suggested in his dissent in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) that the affirmative duty principle of *Lau* was at least somewhat applicable to Title VII. He criticized the majority opinion’s characterization of pregnancy as “an *additional* risk, unique to women,” *id.* at 139, which, consistently with Title VII, could be excluded from an otherwise comprehensive disability plan as being

plainly out of step with the decision three [t]erms ago in *Lau v. Nichols*, 414 U.S. 563 (1974), interpreting another provision of the Civil Rights Act. There a unanimous Court recognized that discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of “disadvantaged” individuals.

Id. at 159. In a footnote, Justice Brennan noted that in *Lau*, “the Court agreed that the anti-discrimination language fairly can be read ‘to require affirmative remedial efforts to give special attention to linguistically deprived children.’ [414 U.S.] at 571 (Stewart, J., concurring).” *Id.* at 159 n.9. Justice Brennan concluded that “given the broad social objectives that underlie Title VII,” and General Electric’s willingness to accommodate uniquely male disabilities, Title VII required accommodation of pregnancy. *Id.*

¹⁰⁴ *Abraham v. Graphic Arts Int’l Union*, 660 F.2d 811 (D.C. Cir. 1981).

limit on leaves had a disparate impact on women.¹⁰⁵ The plaintiff sued after she had been fired for taking a maternity leave longer than ten days.¹⁰⁶ The court noted that a ten-day leave "falls considerably short of the period generally recognized in human experience as the respite needed to bear a child,"¹⁰⁷ and concluded that such a rule would have a disparate impact on women because "any . . . jobholder confronted by childbirth was doomed to almost certain termination. . . . [T]he ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age — an impact no male would ever encounter."¹⁰⁸ Having found the disparate impact, the court went on to suggest that some sort of affirmative duty to accommodate pregnancy might be necessary to avoid it: "An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have. Title VII outlaws employment discrimination traceable to an employee's gender, and it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action."¹⁰⁹ The court remanded for further consideration the question whether the leave policy was justified by business necessity due to the short duration of the job for which the plaintiff had been hired.¹¹⁰

Lau and *Abraham* are unusual cases. They tend toward the reasonable accommodation end of the antidiscrimination spectrum, as disparate impact cases in which liability was based in part on a failure to act. Although the courts decided the cases only on the facts and carefully avoided making broad statements about liability, they offered unpersuasive rationales for limiting the reach of the principles articulated.

The Ninth Circuit decided a case several years ago that sits on the fence between the *Lau-Abraham* type of case and a conventional disparate impact case, for it is difficult to tell whether the claim was essentially that the defendants blocked the plaintiffs' schemes for establishing a child care center or that the defendants had failed to provide child care.¹¹¹ In *De la Cruz v. Tormey*, the court held that allegations of the adverse consequences suffered by women due to the lack of child care constituted an actionable claim of sex discrimination. The court held that a group of young low-income mothers, three of whom were students in the defendant community college district, stated a legally cognizable claim under both Title IX of the Education Act Amendments of 1972¹¹² and the Equal Protection Clause of the Fourteenth Amendment based on

¹⁰⁵ *Id.* at 820.

¹⁰⁶ *Id.* at 813.

¹⁰⁷ *Id.* at 819.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *De la Cruz v. Tormey*, 582 F.2d 45, 47 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).

¹¹² 20 U.S.C. § 1681 (1982). Title IX provides in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

allegations that the district's failure to provide child care deprived them of equal educational opportunity. Accordingly, the court remanded for trial, but the case settled before trial.

In their pleadings, the plaintiffs described the existence of a severe shortage of child care facilities for low-income families in the county in which the defendant community college district was located, and described how district officials repeatedly refused over a two and one-half year period to permit the plaintiffs and others to establish any sort of child care facilities. They alleged not only that the defendants would not approve funding or permit any space on campus to be used but also that the defendants refused to approve proposals assembled by students and faculty that would have involved no district funds or property.¹¹³ Based on these allegations, the Ninth Circuit concluded that plaintiffs had alleged satisfactorily that but for the defendants' conduct, some child care centers would have been established, and that the effects of the lack of child care fell "overwhelmingly upon women students and would-be students."¹¹⁴

The court rejected the dissenting judge's argument that "no discriminatory effect may be shown where one simply 'declines to extend an additional benefit of disproportionate value to certain members' of a particular group of people, so long as existing benefits are made available in a neutral fashion."¹¹⁵ The court explained that the dissent's reliance on *General Electric Co. v. Gilbert*,¹¹⁶ *Geduldig v. Aiello*,¹¹⁷ *Nashville Gas Co. v. Satty*,¹¹⁸ and *Palmer v. Thompson*,¹¹⁹ was misplaced, for it misconceived the nature of the plaintiffs' theory:

The benefits not granted or programs not offered in each of the above cases were not alleged to have been essential or even related to the enjoyment of benefits already conferred or programs already in existence. . . . Here, by contrast, the essence of the plaintiffs' grievance is that the absence of child care facilities renders the *included* benefits less valuable and less available to women; in other words, that the effect of the [d]istrict's child care policy is to render the entire "package" of its educational programs of lesser worth to women than to men.¹²⁰

The court also rejected the dissenting judge's argument that the

discrimination under any educational program or activity receiving Federal financial assistance."

¹¹³ *De la Cruz*, 582 F.2d at 48-49.

¹¹⁴ *Id.* at 53.

¹¹⁵ *Id.* at 54.

¹¹⁶ 429 U.S. 125 (1976) (exclusion of pregnancy from otherwise comprehensive employee health benefit plan is not sex discrimination under Title VII).

¹¹⁷ 417 U.S. 484 (1974) (exclusion of pregnancy from employee health benefit plan does not deny women equal protection of the laws under the Fourteenth Amendment of the United States Constitution).

¹¹⁸ 434 U.S. 136 (1977).

¹¹⁹ 403 U.S. 217 (1971) (city's closing of public swimming pools after court ordered it to end segregation does not deny blacks equal protection).

¹²⁰ *De la Cruz*, 582 F.2d at 56 (emphasis in original).

challenged discriminatory effects on women with children resulted not from the defendants' conduct but rather from independent social conditions that were not the defendants' responsibility to remedy: "Plaintiffs do not charge the District with an affirmative obligation to remedy conditions not of their making."¹²¹ Rather, the claim was that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum" when some students, due to their child care responsibilities "are effectively foreclosed from any meaningful education."¹²² The court quoted and relied on *Lau* for this point.

The dissenting judge attempted to distinguish *Lau*. He reasoned that whereas in *Lau* attendance at elementary and high school was required by state law and the additional English instruction was necessary to permit the non-English-speaking plaintiffs to develop the proficiency in English required by state law for graduation,¹²³ attendance at and successful completion of community college was

not as critical for success in life as is grade and high school education. Securing a college education may be more difficult when combined with child-care responsibilities, but the defendants have not declared that, in order to graduate, female students with children must eliminate that circumstance from their lives.¹²⁴

The dissenting judge did not explain the legal significance under Title IX of the distinction between equality in a program where attendance and a certain level of achievement are legally required and equality where they are not. Nor could he, for the Civil Rights Act's ban on discrimination has nothing to do with whether a person's presence in the discriminating organization or obtaining a certain skill are legally required, or even critical for success in life.

Thus, some Civil Rights Act case law under the disparate impact model has gone beyond a conception of the duty to avoid discrimination construed only negatively, as a duty to refrain from certain conduct, to a conception of equality in which employers must, in certain circumstances, attempt to provide their benefits or to structure their policies in a manner that makes them reasonably accessible to all. The affirmative obligation principle in disparate impact case law is clearly present, although the cases could hardly be called a trend. Further development of the law in that direction will depend on the continued commitment of litigants and the federal judiciary to using the Civil Rights Act in innovative ways to achieve its goal of equality in employment.

¹²¹ *Id.* at 57.

¹²² *Id.* at 57 n.8 (quoting *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (public schools' failure to offer non-English-speaking students supplemental courses in English denied equal educational opportunity under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d)).

¹²³ 414 U.S. 563, 566.

¹²⁴ *De la Cruz*, 582 F.2d at 75-76.

c. Affirmative Obligations and the Duty of Reasonable Accommodation

There is an additional and related line of argument that plaintiffs could pursue in support of the claim that Title VII imposes an affirmative duty to accommodate the needs of members of protected groups. They could argue that the duty of reasonable accommodation that currently applies to Title VII religious discrimination¹²⁵ and disability discrimination under the Rehabilitation Act of 1973¹²⁶ ought to be applied in Title VII sex discrimination cases.

The Title VII duty of reasonable accommodation originated when the disparate impact concept was applied to the problem of religious discrimination. In 1966 the EEOC announced, and in 1972 Congress amended the statute to adopt the EEOC position, that an employer has an affirmative duty to take steps to mitigate the adverse impact of neutral employment practices on members of religious groups.¹²⁷ Under the reasonable accommodation model, an employer is required, except in cases of undue hardship, to avoid imposing a facially neutral requirement, such as working on Saturdays, on members of religious groups in such a way as to discriminate against them.¹²⁸

There is a similar duty under the federal Rehabilitation Act of 1973 and under some state antidiscrimination laws to accommodate the physical or mental disabilities of employees.¹²⁹ The federal duty to accommodate is contained in regulations defining the statutory term "qualified handicapped individual"¹³⁰ (the protected class) as a person "capable of performing a particular job with reasonable accommodation."¹³¹ The duty applies only to federal contractors.¹³² State courts and agencies have similarly concluded that where a state statute prohibits discrimination on the basis of disability but does not expressly require reasonable accommodation, the duty to accommodate is implicit in the duty not to discriminate.¹³³

¹²⁵ 42 U.S.C. § 2000e-2(j) (1982). See generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 210-42.

¹²⁶ 29 U.S.C. § 701-796i (1982).

¹²⁷ 42 U.S.C. § 2000e-2(j) (1982); Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (1985); see generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 210-42.

¹²⁸ See *Ansonia Bd. of Educ. v. Philbrook*, 107 S. Ct. 367 (1986); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

¹²⁹ See generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 246-89. The federal law barring discrimination by federal contractors on the basis of disability is the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1982).

¹³⁰ The statute defines a "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (1982).

¹³¹ 41 C.F.R. § 60-741.2 (1986).

¹³² 29 U.S.C. § 793 (1982).

¹³³ See, e.g., CAL. ADMIN. CODE, tit. II, § 7293.9 (1982).

Under § 7293.9(a), employers and other covered entities can be required to accommodate

While the reasonable accommodation approach has never been extended to Title VII claims of discrimination on any basis other than religion, the plaintiff in one gender discrimination case did suggest it.¹³⁴ She alleged that her employer's travel requirement had a disparate impact on her due to her conflicting childrearing responsibilities, and apparently argued that the reasonable accommodation concept required her employer to satisfy the business purpose served by the travel requirement in some other fashion. The court declined to decide whether it would entertain such an argument.¹³⁵

It might be argued against making the analogy that religion should receive greater protection than gender receives under Title VII because religion is expressly protected by the Constitution. As a matter of constitutional equal protection doctrine, discrimination on the basis of religion is more likely to be held invalid than is discrimination on the basis of gender.¹³⁶ The short answer to that line of argument is that this cause of action is entirely statutory, and constitutional doctrine does not pose a limit on the amount of protection gender may receive under Title VII. Therefore, apart from the absence of explicit statutory or regulatory authority in the sex discrimination context comparable to that available when religion or disability is involved, there is no reason in principle why gender should not be accommodated just as religion is. However, since Congress in 1972 was simply following the lead of the EEOC and providing express statutory authority for a duty that had its source in the statute's prohibition of discrimination, the lack of express statutory authority is not a significant barrier.

A plaintiff makes out a *prima facie* case of religious discrimination by showing (i) that he or she has a bona fide belief that compliance with some employer-imposed requirement is contrary to his or her religion; (ii) that he or she informed the employer that the requirement conflicted with his or her religious belief; and (iii) that he or she suffered adverse employment consequences due to his or her refusal to conform to the challenged employment requirement.¹³⁷ Evidence of any intent to discriminate against persons with the plaintiff's religious convictions is not

the needs of physically handicapped persons by making facilities accessible, and/or by "job restructuring, reassignment or transfer, part-time or modified work schedules. . . ." In determining whether an accommodation would impose undue hardship, § 7293.2(c) states that factors to be considered include the overall size of the establishment, the number of employees, the size of the budget, the nature and cost of the accommodation involved, and the availability of tax incentives and outside funding.

See also *Holland v. Boeing Co.*, 90 Wash. 2d 384, 583 P.2d 621 (1978) (interpreting WASH. REV. CODE § 49.60.180(1), (2) and (3)).

¹³⁴ See *Goicoechea v. Mountain States Tel. & Tel. Co.*, 700 F.2d 559, 560 (9th Cir. 1983).

¹³⁵ *Id.*

¹³⁶ While discrimination on the basis of religion must be overcome by a "compelling state interest" and is afforded strict judicial scrutiny, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), "[a] gender classification fails unless it is substantially related to a sufficiently important governmental interest," *Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3255 (1985).

¹³⁷ *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978),

necessary.¹³⁸ To prevail the employer must then demonstrate that it is “unable reasonably to accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”¹³⁹ The undue hardship defense is similar to the business necessity defense applicable in disparate impact cases in that it permits the employer to justify a discriminatory policy or practice on the grounds of cost or convenience.

A showing of “undue hardship” is not difficult to make. In interpreting the § 701(j) duty of reasonable accommodation in a case involving a person who refused to work on Saturday because it was his Sabbath, the Supreme Court held in *Trans World Airlines v. Hardison*¹⁴⁰ that

[t]o require TWA to bear more than a *de minimus* cost in order to give Hardison Saturdays off is an undue hardship. . . . [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.¹⁴¹

Accordingly, it reversed the court of appeals’ decision that the reasonable accommodation requirement was not satisfied by the employer’s simply discussing the problem with the plaintiff and attempting to find another employee to volunteer to swap shifts with the plaintiff. The Court rejected the two alternatives that would have imposed costs on the employer: paying another employee overtime to work the plaintiff’s shift or utilizing in the plaintiff’s place a supervisor or an employee on duty elsewhere.¹⁴² The Court was concerned that “[i]n the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”¹⁴³

The limits on the employer’s duty to accommodate set by the “undue hardship” doctrine in the religion context are somewhat different than those set by the business necessity defense in other sorts of discrimination cases. According to *Hardison*, an “undue hardship” is easily shown for two reasons. First, there is a danger that accommodation of

cert. denied, 442 U.S. 921 (1979); 42 U.S.C. § 2000e-2(a)(1) & (j) (1982); see also B. SCHLEI & P. GROSSMAN, *supra* note 44, at 223.

¹³⁸ In fact, Title VII explicitly allows for an exception to this general rule by requiring employees to prove discriminatory intent if the employer’s practices are pursuant to a bona fide seniority system. 42 U.S.C. § 2000e-2(h) (1982); see *Trans World Airlines v. Hardison*, 432 U.S. 63, 82 (1977).

¹³⁹ 42 U.S.C. § 2000e-2(j) (1982); see *Ansonia Bd. of Educ. v. Philbrook*, 107 S. Ct. 367, 371 (1986).

¹⁴⁰ 432 U.S. 63 (1977).

¹⁴¹ *Id.* at 84.

¹⁴² *Id.* at 76-77, 84.

¹⁴³ *Id.* at 85. See also *Ansonia Bd. of Educ.*, 107 S. Ct. at 373 (suggesting that offering unpaid leave for observance of religious holidays may be reasonable accommodation).

the plaintiff's religion will impose a burden on other employees "tantamount to reverse discrimination against them" on the basis of their religion.¹⁴⁴ Second, there is a risk that Congressionally-required special treatment under Title VII of certain employees because of their religion would run afoul of the First Amendment's command that "Congress shall make no law respecting an establishment of religion."¹⁴⁵

Neither of these problems would exist if the duty were applied to discrimination on the basis of sex. In providing child care to employees who need it, unlike accommodating religion, an employer runs no risk of reverse discrimination *on the basis of a protected classification*, because fathers with child care needs could participate as well. Thus, women would not be receiving "special treatment" at the expense of men. While it may be that more women than men would take advantage of employer-sponsored child care, male employees could not make a disparate impact case in such a situation.¹⁴⁶ Moreover, there is good reason to construe the duty to accommodate gender role differences more broadly than *Hardison* construed the duty to accommodate religion because in the gender context there is no comparable danger posed by the First Amendment Establishment Clause problem. In the absence of the reverse discrimination and First Amendment problems, the parameters of the undue hardship defense would probably be similar to those of the business necessity defense. Accordingly, the discussion of the business necessity defense in Part III could be applied equally as well to the undue hardship defense if applied in sex discrimination cases.

In a disability discrimination case, the allocation of proof is generally as follows: the plaintiff must establish a prima facie case showing the adverse impact on disabled employees of a job requirement, usually some sort of physical criteria. The defendant may then rebut the prima facie case by showing that the discriminatory physical criteria are job-related. The plaintiff may then show that other criteria would serve the employer's legitimate interests. The burden is then on the employer to prove that it is not practicable to accommodate the plaintiff's disability. To prevail after such a showing, the plaintiff must present evidence that an accommodation may reasonably be made.¹⁴⁷

Arguing by analogy that child care responsibilities must be accommodated by the provision of some sort of child care services, plaintiffs

¹⁴⁴ *Hardison*, 432 U.S. at 84-85.

¹⁴⁵ U.S. CONST. amend. I.

¹⁴⁶ See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart* the Court held that equal treatment of the sexes under Title VII required the invalidation of the employer's pension plan to which women, because of their longer average life expectancy, were required to make larger monthly contributions than men. The defendant argued that a gender neutral plan would violate Title VII because men as a group would then subsidize pension benefits for their longer-lived female co-workers. The Court rejected this argument. *Id.* at 710 n.20.

¹⁴⁷ See B. SCHLEI & P. GROSSMAN, *supra* note 44, at 281-82.

would prove adverse impact, and the burden would shift to the defendant to prove that it could not, most likely for financial reasons, provide any sort of child care services. Plaintiffs would rebut the employer's defense by proving that some kind of services, even a fairly modest information and referral program, could reasonably be made. Unless the employer is on the brink of bankruptcy, plaintiffs might be able to make a persuasive showing that something could be done.

If a court were willing to accept the analogy to the duty to accommodate religion and handicap, the plaintiff's case would be greatly strengthened. As demonstrated above, the arguments in favor of the analogy are strong, although not flawless. The outcome will depend on the willingness of the court to read Title VII broadly to accomplish its original goal of eliminating all forms of discrimination in employment.

4. Some Problems of Proof and the Limits of Antidiscrimination Law

The case would not be an easy one to litigate. Given that, it must be acknowledged that even if the cause of action is viable in theory, if the case could not feasibly be proved, a different approach to the child care problem should be pursued.

Plaintiffs might make one of three kinds of comparisons to establish a prima facie case of discrimination under disparate impact analysis. First, they might prove that the number of women who work for the employer and who have children of an age requiring supervision, who receive promotions, hold higher paying and more time-consuming managerial jobs, and otherwise survive relatively unscathed any employer practice that burdens working mothers, is significantly smaller than the percentage of fathers with children of the same age who succeed similarly. This comparison would work only when the employer's work force is large enough to provide statistically adequate sample sizes. A second type of comparison would contrast the number of mothers who receive and/or accept job offers with the number of fathers who do so, in order to show that the lack of child care has an adverse effect on female applicants. A third comparison would involve contrasting the percentage of mothers of children of the relevant age in the potential applicant pool (i.e., who live in the appropriate geographical area and who are otherwise qualified) to the percentage of mothers actually working for the defendant employer, in order to show that the lack of child care deters many women from even seeking employment.¹⁴⁸ In all of these comparisons,

¹⁴⁸ See *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977). The population-work force comparison, while particularly relevant in a situation where the employer's practice deters potential applicants before the application process even begins, has fallen into disfavor as the sophistication of statistical analysis in employment discrimination has increased. The population-work force comparison seeks to prove discrimination by showing that the percentage incidence of the

plaintiffs would have to take account of those rare fathers who have primary child care responsibilities as well as those rare mothers who do not.

Thus, the plaintiffs could focus on three groups: (1) the general population of working mothers as opposed to working fathers, in order to identify the extent to which the lack of child care deters more women than men from seeking employment with defendant (it might be wise to limit the general population statistics to those actually seeking work in order to anticipate the employer's objection that all these mothers are happily at home caring for their babies and completely uninterested in paid labor); (2) the applicant pool, in order to identify the impact of the problem on applicants (i.e., who receives job offers, who accepts them, and why); and (3) actual employee histories, in order to identify the impact of the lack of child care on working mothers as opposed to working fathers.¹⁴⁹

Because of the broad nature of the claim and the related difficulty of ascertaining the precise policies responsible for the discriminatory effects,¹⁵⁰ this case would be difficult to prove as a practical matter. The essence of a disparate impact case is usually the plaintiffs' statistics that show the discriminatory effect and that link the effect to the challenged practice.¹⁵¹ One commentator has suggested that plaintiffs proceeding on an adverse impact/reasonable accommodation theory under Title VII would not need to use statistics to prove the adverse impact when the small size of the work force would make it impracticable to do so.¹⁵² This suggestion was based on a pregnancy discrimination case in which the Fourth Circuit held that "[c]ircumstantial evidence, complemented

protected group in the employ of the defendant is significantly less than in the population as a whole. Discrimination is inferred based on the assumption that, in the absence of discrimination, the incidence of the protected group would be the same in the work force as in the general population. In the leading case on the use of statistics to prove discrimination, *Hazelwood School Dist. v. United States*, 433 U.S. 299, 306-13 (1977), the Supreme Court, while affirming the acceptability of comparisons between the general population and the employer's work force, cautioned that more finely tuned statistics have more probative value. It is, of course, important to refine the general population data to reflect only the relevant geographical area and only the persons with the requisite skills, and to refine the work force data to reflect the relevant time frame. Population-work force comparisons have little probative value when the employer's work force is small or highly selective.

¹⁴⁹ See generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 1332-34; Case Note, 32 ARK. L. REV. 571 (1978).

¹⁵⁰ See *supra* text accompanying notes 75-81.

¹⁵¹ Statistical analysis is used as evidence to prove both the existence of the discriminatory effect and the causal connection between the challenged practice and the proven effect. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977). See also Comment, *Statistics and Title VII Proof: Prima Facie Case and Rebuttal*, 15 HOUS. L. REV. 1030 (1978). In its case, the employer may attempt to discredit plaintiffs' statistical proof by showing, for example, that they compared the wrong two groups or that the differences they attribute to discrimination are not statistically significant. A vast literature has developed on the subject of what statistical proof is necessary to establish a prima facie case of discrimination. See generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 98-102; D. BALDUS & J. COLE, *supra* note 80; Case Note, *supra* note 149; Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 IND. L.J. 493 (1980).

¹⁵² Krieger & Cooney, *supra* note 25, at 526 n.43.

by judicial notice to show that a facially neutral policy must in the ordinary course have a disparate impact on a protected group of which an individual plaintiff is a member is often utilized."¹⁵³ Because the link between having primary child care responsibilities and sex is less obvious than the link between pregnancy and sex, the disparate impact on women might require more proof, and carefully tailored statistical proof might be particularly probative.¹⁵⁴ The many and complex issues surrounding the mechanics of proving discrimination are beyond the scope of this inquiry.¹⁵⁵ They are alluded to here only to indicate some of the practical problems litigants might encounter and to illustrate the more fundamental problem of the limited usefulness of litigation for achieving some kinds of social change.

Apart from the technical difficulties of proof, there looms a more fundamental obstacle to success. If plaintiffs work in a predominantly female, low-wage work force, they may have difficulty finding a compara-

¹⁵³ *Mitchell v. Board of Trustees*, 599 F.2d 582, 585 n.7 (4th Cir.) cert. denied, 444 U.S. 965 (1979). The rationale for this holding was to prevent the first disparate impact plaintiff from losing her case simply because she was the first to suffer the effects of the policy or rule.

¹⁵⁴ See generally D. BALDUS & J. COLE, *supra* note 80.

There is some variation among rules regarding the quantum of adverse impact courts have required to establish a prima facie case. See generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 98-102 and authorities cited therein. The EEOC's Uniform Guidelines on Employee Selection Procedures provide that a selection rate of less than 80 percent for the protected group when compared to the group with the highest rate is sufficient. 29 C.F.R. § 1607.4(D) (1986). The Supreme Court has said that a difference greater than two or three standard deviations from the comparison group gives rise to an inference of discrimination when there is a large sample. *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). The degree of disparity necessary to establish discrimination is a question of fact. See Case Note, *supra* note 149, at 582.

¹⁵⁵ It should be noted, however, that two techniques would be of particular use in the child care case. First, multiple regression analyses would be especially useful to establish that each of the complained-of effects stems from the lack of child care rather than from any of the numerous variables which affect employability (e.g., education, experience). See generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 1342-46. Because of the many factors that employers would claim legitimately resulted in the challenged effects, multiple regression analysis could be particularly useful in the child care case, as it has been in wage, promotion, and job-assignment discrimination cases. See *Segar v. Civiletti*, 508 F. Supp. 690, 695-99 (D.D.C. 1981) (plaintiffs successfully used regression analysis to show discrimination in wages and in initial job assignments), *aff'd in part, vacated in part sub nom.*, *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied *sub nom.* *Meese v. Segar*, 471 U.S. 1115 (1985); *Statstny v. Southern Bell Tel. & Tel. Co.*, 458 F. Supp. 314, 323-29 (W.D.N.C. 1978) (plaintiff and defendant used regression analysis in promotion discrimination case), *aff'd in part, rev'd in part*, 628 F.2d 267 (4th Cir. 1980).

If statistical evidence were unavailable, the plaintiff could use cohort analysis, in which a plaintiff's salary and position is compared to that of a working father who was hired at about the same time, placed in a similar position, and has similar qualifications. See B. SCHLEI & P. GROSSMAN, *supra* note 44, at 1346; *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982); *Valentino v. United States Postal Serv.*, 511 F. Supp. 917, 940-41, 954 (D.D.C. 1981), *aff'd* 674 F.2d 56 (D.C. Cir. 1982).

In order to prove that the lack of affordable quality child care is the source of the problem, the plaintiffs would have to survey the availability, quality, and cost of existing child care in the area to show that employer support for child care is needed. See *De la Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979); Note, *Title IX, Disparate Impact and Child Care: Can a Refusal to Cooperate in the Provision of Child Care Constitute Sex Discrimination Under Title IX?*, 52 U. COLO. L. REV. 271, 292 (1981).

ble male group by which to show that but for the employer's refusal to provide child care, they would be in a better position.¹⁵⁶ The reality of many women's situation is that they would not be in the particular female-dominated occupation at all if it were not for the advantages it offered in terms of flexible or predictable working hours and of the ability to leave the job and to return a few years later after raising children.¹⁵⁷ This is not so much a problem of proof as it is a limit in the scope of existing anti-discrimination law. Even if the plaintiffs could prove the discriminatory effects of the lack of child care if their employer's work force is disproportionately female, and could argue that if child care were provided they would have climbed to the upper rungs of management (which is usually where the men are when an employer's work force is predominantly female), they could not use Title VII to argue that but for the lack of child care they would have become surgeons instead of nurses, or administrators instead of school teachers. The remedy to this broader problem of sex discrimination in employment can come only from a widescale change in the structure of the labor market, which cannot be accomplished by a few lawsuits. The usefulness of this litigation, therefore, would be to establish a principle. Once the principle of employer responsibility to accommodate child care responsibilities is established — whether by litigation or by legislation — one significant factor that channels women in a relative few occupations would be eliminated. Then the broader process of social and economic change might proceed.

III. THE BUSINESS NECESSITY DEFENSE: LIMITS ON THE EQUALITY PRINCIPLE

A. The Nature of the Defense

Assuming the plaintiff could establish the prima facie case proving the discriminatory effect on women of employment policies that adversely affect employees with primary child care responsibilities, the next hurdle will be the employer's business necessity defense.

Under the business necessity defense, the employer has what is supposed to be a significant burden of adducing evidence that the challenged practice is "necessary to safe and efficient job performance"¹⁵⁸ or "essential" or "necessary" to the safe and efficient operation of the business.¹⁵⁹

¹⁵⁶ The need for a comparison group weakens the effectiveness of Title VII as a tool to fight other forms of sex discrimination in employment as well. See Krieger & Cooney, *supra* note 25, at 520-22 (pregnancy); see also Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399, 451-54 (1979) (wage discrimination).

¹⁵⁷ See Krieger & Cooney, *supra* note 25, at 522.

¹⁵⁸ *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977).

¹⁵⁹ *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1081 (4th Cir. 1977); *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1297-98 (8th Cir. 1975); *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301, 308 (8th Cir. 1972) (en banc) ("The system in question must not only

Thus, the employer would attempt to show that its practices that adversely affect women because of their primary child care responsibilities are justified by business necessity.

The exact weight of the employer's burden depends on the judge and the facts. While some courts have been quite strict, others have been quite lenient with employers, requiring only that the challenged practice "significantly serve" the employer's "legitimate business interests," but not that it be "required by," or even "necessary to," such interests.¹⁶⁰ While it is generally thought that at the very least the employer must show by a preponderance of the evidence that the practice actually fosters a genuine and substantive purpose (apart from mere managerial convenience),¹⁶¹ in one case the Seventh Circuit reversed a district court's finding of discrimination simply on its belief that the employer's asserted purpose was "plausible."¹⁶² The Supreme Court has done little to reduce the confusion; indeed some commentators see it as leading the way in creating confusion.¹⁶³

Whatever the nature of the employer's burden may be, once the employer has offered some proof of business necessity, the plaintiff may attempt to show that the employer could use an alternative practice with a less discriminatory effect to achieve the same legitimate purpose.¹⁶⁴

foster safety and efficiency, but must be essential to that goal."), *cert. denied*, 409 U.S. 1116 (1973); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied sub nom.*, *Brotherhood of Locomotive Eng'rs v. United States*, 406 U.S. 906 (1972).

¹⁶⁰ *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

¹⁶¹ *Sagers v. Yellow Freight Sys.*, 529 F.2d 721, 730 n.18 (5th Cir. 1976) ("the 'business necessity' doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . Necessity connotes an irresistible demand") (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971)); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971) ("management convenience and business necessity are not synonymous").

¹⁶² *Yuhaz v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 500 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).

¹⁶³ Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 404 (1981). See also Wexler, *supra* note 76, at 111.

¹⁶⁴ The standard version of the less discriminatory alternative test is stated in *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971):

[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Many courts have adopted this articulation of the test. *E.g.*, *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978), *cert. denied*, 459 U.S. 668 (1982); *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374 (5th Cir.), *cert. denied*, 441 U.S. 968 (1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Muller v. U.S. Steel Corp.*, 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Palmer v. General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1975); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), the Supreme Court placed

Proof of a less discriminatory alternative is a way of proving that the practice is not a business "necessity" at all, for if an acceptable alternative exists, the practice is not strictly *necessary*.¹⁶⁵ The less discriminatory alternative device also permits courts to maximize equal employment goals while preserving truly necessary and efficient business practices.

After the employer demonstrated the business purposes served by the challenged practices, the plaintiff would attempt to prove that the employer could provide child care as a less discriminatory alternative to mitigate the effect of the challenged practices. The employer would then attempt to prove that to provide on-site child care or to subsidize enough spaces in existing centers for all its employees' children would be prohibitively expensive.¹⁶⁶ The plaintiffs could then show several things. They could attempt to prove that the cost of child care will be balanced by improved employee morale, improved recruitment, reduced turnover and reduced absenteeism so that on the whole, employer-supported child care will not be a net cost for employers. They might attempt to prove that the employer's cost estimates are inaccurate, or they might show that the funding for child care could be diverted from another source. They might also attempt to show that in light of the employer's financial condition and historical attitude of discrimination against women, the failure to provide child care is a pretext for discrimination.¹⁶⁷ Finally, they could try to show that the employer could provide a less costly alternative form of support for child care, such as information and referral, or could subsidize part of the cost and require employees (assuming they are paid enough to be able to afford it) to provide part of the cost, or could provide a "cafeteria" benefit plan so that employees could choose child

the burden on the plaintiff to prove the existence of alternatives and on the defendant to disprove the efficacy of the alternatives proposed. However, in *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979), the Court did not discuss the possibility of less discriminatory alternatives when it upheld the Transit Authority's broad no-drug rule as applied to minorities on methadone maintenance programs. This led one observer to believe that the Court had abandoned the less discriminatory alternative rule. Note, *supra* note 163, at 418. Another has concluded, however, that no such repudiation was intended because Title VII had been introduced into the case only at the very end, after the constitutional violation had been proven, for the purpose of obtaining attorneys' fees, 440 U.S. at 582, and therefore there had been no evidence presented relating to alternative policies. Frug, *supra* note 6, at 67 n.77.

¹⁶⁵ Note, *supra* note 163, at 397-99.

¹⁶⁶ The costs might include, paying staff to devise and operate a child care center or information or subsidy program, devoting space for child care that could be used for other purposes, or increasing wages to employees to purchase their own child care.

¹⁶⁷ Although in theory the concept of a pretext for discrimination should have no place in a disparate impact case, where discriminatory intent is irrelevant, the Supreme Court suggested in *Albemarle* that the plaintiffs could show, via proof of a less discriminatory alternative, that the employer's asserted business necessity is a pretext for discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). See also *Connecticut v. Teal*, 457 U.S. 440 (1982). Because the potentially large expense of child care suggests that it may be a genuine question of business necessity, it may be difficult to prove that the failure to provide child care is a pretext for discrimination against women.

care over some other benefit.¹⁶⁸ Alternatively, plaintiffs could try to demonstrate that even if the establishment of a child care support program would constitute a net cost for employers, Title VII's goal of eradicating discrimination justifies the imposition of the extra costs. For most of the discussion that follows, this Article assumes for the sake of argument that the plaintiffs will be unable to show that child care will not result in a net cost increase for the employer and explores to what extent Title VII justifies imposing on employers some of the cost of eradicating discrimination.

B. Business Necessity, Child Care and the Limits of the Equality Principle

Depending on the size and wealth of the employer, and on the type of child care support the plaintiffs seek, the success the employer will have in proving the business necessity defense and the viability of less discriminatory alternatives will vary. Whatever the exact dollar figures may be, however, much of the argument over the defense will revolve around the extent to which Title VII justifies imposing extra costs on employers to remedy the effects of societal discrimination which has placed upon women the primary responsibility for the care of children. This explains the central role the business necessity defense plays in Title VII theory and practice: it is the scope of considerations that may legally be offered to justify an acknowledgedly discriminatory practice. It defines the extent to which Title VII will be held to require changes in the economic practices of the nation's employers.¹⁶⁹

The business necessity defense emerged as the appropriate formula for judging an employment practice that does not build on prior discrimination by the employer but that reinforces societal discrimination. Since *Griggs* held that neutral practices not justified by business necessity violate Title VII, there has been great debate about how far Congress and the Supreme Court meant to go in requiring employers to expend money to avoid perpetuating societal discrimination. There is a spectrum of possibilities, and the one that any particular court will choose will depend upon the weight the court assigns to equal achievement versus

¹⁶⁸ This could be problematic because it might require many female employees to do without health insurance or to forego pension contributions for five to ten years with a consequent reduction in their total pension at retirement.

¹⁶⁹ Blumrosen, *The Duty to Plan for Fair Employment: Plant Location in White Suburbia*, 25 *RUTGERS L. REV.* 383, 394 (1971). See also Note, *supra* note 163, at 378 (Examining the scope of the business defense to understand "why more significant progress towards the realization of full equal employment has not been achieved. . . . As the broadest exception under Title VII, the business necessity defense defines the outer limits of the Act's potential effectiveness, as well as the scope of the express statutory exceptions provided by Congress in the Act.").

economic efficiency and entrepreneurial freedom.¹⁷⁰

The most egalitarian theory would prohibit any practice that perpetuates the effects of past discrimination by the employer¹⁷¹ or of past or present discrimination by society.¹⁷² At the other extreme, an employer could defend an admittedly discriminatory, but facially neutral, practice merely by showing that the practice serves some legitimate business purpose.¹⁷³ Neither of these conceptions of the defense is the law;¹⁷⁴ the prevailing conception of business necessity lies somewhere in the middle.¹⁷⁵ A conception of business necessity in the middle of the spectrum would impose some cost or inconvenience on the employer to avoid using practices that discriminate. The question becomes: what amount of cost or inconvenience is necessary to justify discrimination.

As it has developed, the business necessity defense actually is two separate defenses, each of which is appropriately applied to certain facts.¹⁷⁶ One form of the defense permits the employer to show that a challenged neutral policy (such as the use of a test or a diploma requirement) is "job-related," i.e., that it has a manifest relationship to the job which the plaintiff seeks or has.¹⁷⁷ The second form of the defense is applicable when the plaintiff challenges a more general policy, such as the refusal to hire employees whose wages are garnished or who have been arrested.¹⁷⁸ It applies to the use of grooming codes and no marriage

¹⁷⁰ See Note, *supra* note 73, at 99-102. The Note outlines four possible interpretations of the business necessity defense: (1) a "business purpose" test which would justify the challenged practice if any benefit accrues to the business through it; (2) a "no-perpetuation" theory which would prohibit practices which perpetuate past discrimination; (3) a balancing test in which the business purpose must be sufficiently compelling to override the discriminatory impact; and (4) a "no-alternative" approach which would permit a practice only if it serves a valid business purpose and is necessary to the achievement of that purpose in the sense that no alternative with less discriminatory impact would be as effective. Compare Blumrosen, *supra* note 169, at 394-95 and Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 303 (1971).

¹⁷¹ The rationale of an early case articulating this theory, *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) was rejected by the Supreme Court in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). The *Teamsters* case rejected the proposition that a bona fide seniority system that perpetuates the effects of past discrimination violates Title VII. The bona fide seniority system exception is express in the Act. 42 U.S.C. § 2000e-2(h) (1982). However, if the plaintiff can prove that the seniority system is not bona fide, i.e., that it was adopted with the intent to perpetuate the effects of past discrimination, it violates Title VII. *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 351 (5th Cir.), *cert. denied*, 434 U.S. 1034 (1978). See generally B. SCHLEI & P. GROSSMAN, *supra* note 44, at 23-79.

¹⁷² *Robinson v. Lorillard Corp.*, 319 F. Supp. 835, 841 (M.D.N.C. 1970), *aff'd in part, rev'd in part*, 444 F.2d 791 (4th Cir.), *cert. dismissed under Rule 60*, 404 U.S. 1006 (1971). One statement from the *Griggs* opinion suggests this view: "Under the Act, practices, procedures or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

¹⁷³ This approach has been widely rejected. See cases cited *supra* note 161.

¹⁷⁴ See *supra* notes 158-63.

¹⁷⁵ See *supra* text accompanying notes 158-65.

¹⁷⁶ See generally Note, *supra* note 163.

¹⁷⁷ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). See generally Note, *supra* note 163, at 392-94 and cases cited therein.

¹⁷⁸ See B. SCHLEI & P. GROSSMAN, *supra* note 44, at 173-90.

rules. In that type of case, the employer is permitted to show that the challenged practice actually fosters a legitimate business goal such as safety or efficiency.¹⁷⁹ It is the second version of the defense that would be applicable in the child care case, and the business goal that is fostered by the failure to accommodate child care responsibilities is profit. If it would constitute a net cost to support child care, the business's profits would be reduced.

In considering the extent to which cost can be a defense to a facially neutral practice that has a discriminatory effect, it should be noted that cost is not a defense to a charge of disparate treatment. Where an employer intentionally and illegally treats employees differently on the basis of a protected classification the additional cost of treating all employees equally may not be used as a defense. In *Los Angeles Department of Water and Power v. Manhart*,¹⁸⁰ the Court ruled that women could not be required to make larger contributions to an employee pension plan than men were required to make, even though on average women live longer than men. The Court rejected the employer's argument that the evidence of discrimination in required contributions was justified by the greater cost of providing pensions to women than to men: "That argument might prevail if Title VII contained a cost-justification defense. . . . But neither Congress nor the courts have recognized such a defense under Title VII."¹⁸¹ In a footnote, the Court elaborated:

A broad cost-differential defense was proposed and rejected when the Equal Pay Act became law. Representative Findley offered an amendment to the Equal Pay Act that would have expressly authorized a wage differential tied to the "ascertainable and specific added cost resulting from employment of the opposite sex." 109 Cong. Rec. 9217 (1963). He pointed out that the employment of women might be more costly because of such matters as higher turnover and state laws restricting women's hours. *Id.*, at 9205. The Equal Pay Act's supporters responded that any cost differences could be handled by focusing on the factors other than sex which actually caused the differences, such as absenteeism or number of hours worked. The amendment was rejected as largely redundant for that reason. *Id.*, at 9217.¹⁸²

¹⁷⁹ *E.g.*, *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (upholding a rule forbidding men to wear long hair); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir.) (striking down no-marriage policy for flight attendants), *cert. denied*, 404 U.S. 991 (1971); *Gregory v. Litton Sys.*, 316 F. Supp. 401 (C.D. Cal. 1970) (employer's policy against hiring persons with arrest records struck down because it had the "foreseeable effect of denying black applicants an equal opportunity for employment"), *modified*, 472 F.2d 631 (9th Cir. 1972).

¹⁸⁰ 435 U.S. 702 (1977).

¹⁸¹ *Id.* at 716-17.

¹⁸² *Id.* at 717 n.32. While the Court went on in this footnote to concede that the Senate Report did seem to assume that the EPA recognized a "very limited cost defense based on 'all the elements of the employment costs of both men and women,'" the Court could not find language in the statute to support such a defense, and in any event, noted that a defense based on the *total* cost of employing women was not at issue in the case. *Id.* (quoting S. REP. NO. 176, 88th Cong., 1st Sess. 4 (1963)).

EEOC guidelines explicitly provide that "[i]t shall not be a defense under title VIII [sic] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."¹⁸³

Significantly, the *Manhart* Court also dispensed with an argument that might be expected from employers resisting the establishment of child care: that forbidding employers to impose on women the allegedly higher costs of providing equal benefits for women as a group would itself violate Title VII because of its adverse impact on male employees who would have to subsidize the cost. The Court pointed out that each retired employee's pension benefits are determined ultimately by his or her actual life span; and in any event, no reverse discrimination claim could be made because some inequality is inherent in any actuarial scheme.¹⁸⁴ The Court concluded, therefore, that "*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences."¹⁸⁵

The EEOC has taken a similar position in matters other than fringe benefits. Thus, it is an unlawful employment practice to refuse "to hire or otherwise adversely [affect] the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex," even, presumably, if it requires expenditure of substantial sums of money in order to provide equal facilities.¹⁸⁶

It does not necessarily follow that a cost defense should be rejected in disparate impact cases as well. It might be argued, for example, that imposing on employers the costs of counteracting the widespread societal inequities is inefficient. Thus, for example, if society wants equality in employment between the races, it ought to insure that they receive equal education; it ought not to prohibit employers from considering education when hiring, unless the education requirement serves no significant purpose, and therefore no efficiency is lost by eliminating it. This argument seems to make intuitive sense, and one might therefore conclude that some kinds of costs ought to be a permissible defense.¹⁸⁷ Of course, an education requirement presents a situation different than child care because it goes to the issue of an employee's competence, whereas child care is strictly a question of monetary cost. But suppose instead the qualification is prior experience rather than education. Conceivably the employer could, in some circumstances and at some expense, train applicants with insufficient experience and thereby reduce the adverse impact

¹⁸³ 29 C.F.R. § 1604.9(e) (1986).

¹⁸⁴ 435 U.S. at 710 n.20.

¹⁸⁵ *Id.*

¹⁸⁶ 29 C.F.R. § 1604.2(b)(5) (1986). See also Sirota, *Sex Discrimination: Title VII and the BFOQ*, 55 TEX. L. REV. 1025, 1052-54 (1977).

¹⁸⁷ Of course, the statute explicitly provides exceptions for merit and productivity. 42 U.S.C. § 2000e-2(h) (1982). See *infra* text accompanying note 189.

of the experience requirement on minorities.¹⁸⁸ It might thus be argued that it is always a matter of cost — if an employer is required by Title VII to hire less educated, and by hypothesis less competent, employees, it will be less productive and less profitable, just as an employer required to provide child care services would be less profitable.

The question thus becomes: are there some disparate impact cases in which cost should be a defense and some in which it should not? A tentative distinction between policies that relate to job performance, such as education and experience, and those that do not, such as no-wage-garnishment policies might be made. The distinction has a basis in the statute, which expressly provides that it is not unlawful to use a bona fide “merit system,” provided that the system is not adopted with the intent to discriminate on the basis of a protected classification.¹⁸⁹ Education and experience are widely regarded as pertaining to “merit,” and thus the adverse impact of such requirements is expressly excepted from Title VII liability. The statute does not, however, contain any comparable exception for policies that serve only interests of convenience or profit.

In the case of employment practices that do not relate to job performance, but relate only to profit or convenience, no safety issues arise in support of the defense, and the asserted justifications are typically “the expense and time attendant to responding to attachments and garnishments by various sections of the company’s management and clerical staffs, . . . the annoyance and time involved in answering letters and telephone calls from its employees’ creditors. . . .”¹⁹⁰ In such situations, the sole issue is direct monetary costs and inconvenience, just as it would be in the child care situation. One court, invalidating a no-garnishment policy, drew precisely this distinction between policies that serve job-performance functions and policies that serve only cost and convenience goals: “The sole permissible reason for discriminating against actual or prospective employees involves the individual’s capability to perform the job effectively. This approach leaves no room for arguments regarding

¹⁸⁸ The cases do not discuss this possibility, tending instead to uphold the experience requirement where the job involves a high degree of skill or where safety is particularly important, see *Spurlock v. United Air Lines*, 475 F.2d 216 (10th Cir. 1972), and to invalidate the requirement in cases involving less-skilled jobs, see *EEOC v. International Union of Operating Eng’rs Locals 14 & 15*, 553 F.2d 251 (2d Cir. 1977). See B. SCHLEI & P. GROSSMAN, *supra* note 44, at 167-72, and cases cited therein.

¹⁸⁹ 42 U.S.C. § 2000e-2(h) (1982) provides, in relevant part:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

¹⁹⁰ *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 495 (C.D. Cal. 1971). The employer also argued that an employee whose wages were garnished was likely to be less efficient, but the court was not persuaded that there was any connection, and in any event, the employer could discipline employees for loss of efficiency if it were true. *Id.*

inconvenience, annoyance or even expense to the employer."¹⁹¹ However, the distinction has been criticized.¹⁹² It represents, according to some commentators, the narrowest view of the business necessity defense to date.¹⁹³ It is, accordingly, at the most egalitarian end of the spectrum of perspectives on Title VII liability.

One court of appeal has, however, held that the *Manhart* rejection of the cost justification defense in disparate treatment cases should not be extended to disparate impact cases. In *Wambheim v. J.C. Penney Co.*,¹⁹⁴ a case challenging an employer's policy of providing dependent health care benefits only to employees who were "heads of households," i.e., whose income was greater than fifty percent of the household's income, the Ninth Circuit held that the plaintiffs established the discriminatory effect of the policy by showing that only thirty-seven percent of female and ninety-five percent of male employees covered by the program received dependent coverage.¹⁹⁵ The court held, however, that the defendant adequately demonstrated "legitimate and overriding business considerations" justifying the rule,¹⁹⁶ reasoning that the rule kept the cost of health coverage down, thus assuring that less affluent employees could still afford the premiums.¹⁹⁷ In rejecting the plaintiffs' argument that *Manhart* forbids cost justification defenses in disparate impact cases, the court stated, "*Manhart* does not require the conclusion that the neutral policy adopted violates Title VII, when it is justified by independent legitimate business considerations."¹⁹⁸ The use of the term "legitimate," however, is conclusory. Whether cost is a legitimate business consideration when it results in discrimination is precisely the issue. Clearly, it is not when disparate treatment is involved; the whole point of the *Manhart* decision is that extra costs do not necessarily justify a discriminatory policy. Neither J.C. Penney, apparently, nor the court, articulated any legitimate business considerations, except increased costs and the burdens thereof. The court failed to explain why cost was sufficiently important to be a legitimate justification for discrimination.

The EEOC expressly disagrees with the *Wambheim* holding. Under its regulations, to provide benefits only to employees who are "heads of households" or "principal wage earners" constitutes a prima facie violation of Title VII because such distinctions tend to have a disparate

¹⁹¹ *Id.* at 495-96.

¹⁹² Recent Cases, 85 HARV. L. REV. 1482, 1485 (1972) ("[T]he court's conclusion that the business necessity defense is available only when an employment practice measures the employee's ability to carry out his assigned duties . . . rests on an unnecessarily broad reading of the *Griggs* opinion.").

¹⁹³ See B. SCHLEI & P. GROSSMAN, *supra* note 44, at 187.

¹⁹⁴ 705 F.2d 1492 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

¹⁹⁵ *Id.* at 1494.

¹⁹⁶ *Id.* at 1495.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

impact on women employees, and bear no relationship to job performance.¹⁹⁹ This rule implicitly rejects the notion that cost alone is an acceptable justification for policies that have a discriminatory effect. The EEOC has taken a similar position with respect to no-garnishment policies: because of their discriminatory effect and their irrelevance to job performance, they are impermissible, notwithstanding the cost or inconvenience to employers.²⁰⁰

In light of *Wambheim*, the viability of the distinction between costs that are competence-related and costs that are not is open to question. Plaintiffs are therefore more likely to succeed if they can show that the additional costs of providing child care services are negligible and in any event, manageable given the employer's financial situation. But at a more fundamental level, *Wambheim* misconceives the purpose of Title VII. Employers have profited over the years precisely because they could pay minorities and women less than they paid white men, and because they could externalize the costs of labor. The trend in this century has been to internalize those costs in the form of maximum hours and minimum wages legislation, the adoption of fringe benefits programs, and so on. The cost of child care is simply another of the costs that must be taken into account. It should not be a defense under Title VII because when an employer refuses to recognize the cost of child care, women must continue to bear it and to suffer the consequences that Title VII was intended to eliminate.

CONCLUSION

Title VII's goal of equal employment for women will not be achieved until women are relieved of some of the responsibility for the care of children. Women should not have to wait to obtain equality in employment until the slow process of social change allocates child care responsibilities more equitably between the sexes. Employment policies that are based on the sexist and outdated assumption that employees do not have child care responsibilities should be changed first. Title VII can be construed to provide the basis for the employers' duty to accommodate employee child care responsibilities in order that women no longer

¹⁹⁹ 29 C.F.R. § 1604.9(c) (1986). It might be argued, under this ruling, that to provide child care benefits to employees with primary child care responsibilities would itself have an unlawful disparate impact on men, who would be less inclined to take advantage of the child care because, by hypothesis, they are less likely to have primary responsibility for child care. *See supra* text accompanying notes 184-85. It would not violate Title VII, however, because the child care benefit, unlike other fringe benefits given only to heads of households, is job-related. It is necessary to enable persons with primary child care responsibilities to perform at the same level as employees without children.

²⁰⁰ EEOC Dec. 74-02, 6 Fair Empl. Prac. Cas. (BNA) 830, 832 (1973); EEOC Dec. 72-1176, 5 Fair Empl. Prac. Cas. (BNA) 960 (1972); *see* United States v. City of Chicago, 385 F. Supp. 543, 546, 557 (N.D. Ill. 1974).

suffer the discriminatory effects of employment policies based on traditional gender roles that are designed to suit male employees who typically had wives to care for their children. Courts have recognized as unlawful under Title VII discrimination on the basis of the feminine gender role in other contexts, and some have even perceived the discriminatory effects on women of the difficult task of combining the two full-time jobs as worker and mother.

Questions remain about the best method of implementing a policy of employer support for child care, but the problems are not insoluble, as shown by the numbers of employers who have already begun supporting child care. The problems must be confronted, for the need is pressing, and will become more so in the absence of major social change. This Article is an experiment, a tentative probing of one approach to finding a solution. The approach is fraught with problems. Obtaining employer support for child care by court order is not the ideal way of instituting change; there are doctrinal difficulties, the litigation would be expensive, proof would be difficult, and the employer's business necessity defense may persuade many courts. These obstacles are formidable, and perhaps insurmountable. Yet, for those employees who are unable to persuade their employers and/or their unions voluntarily to adjust to the realities of women in the labor force by instituting some sort of child care program, Title VII might conceivably provide an avenue of redress if legislation fails. The Civil Rights Act of 1964 has been a useful catalyst for drastic change throughout American society, and may be a useful tool for reforming employer policies that ignore the child care responsibilities of a sizable portion of the labor force.