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1999]

## Articles

### MARKET WORK AND FAMILY WORK IN THE 21ST CENTURY\*

JOAN WILLIAMS\*\*

#### I. INTRODUCTION

AS we gather together to remember and celebrate the work of Mary Joe Frug, we can start by noting how little has changed since Mary Joe wrote her groundbreaking article on labor market hostility towards working mothers in 1979.<sup>1</sup> “The labor force is organized as if workers do not have family responsibilities. The traditional work schedule is both too inflexible and too long for a parent with primary child care responsibility.”<sup>2</sup> The problem has not changed. Nor has the accepted wisdom that discrimination law offers few weapons to challenge the problem of work/family conflict.<sup>3</sup>

Today I will contest some long-accepted assertions. My talk draws on Mary Joe’s work not only through its subject, but also through its methodology. For she broke ground not only in defining work/family conflict as a major feminist issue;<sup>4</sup> her work on postmodernism also showed what in-

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\* This Article is dedicated to my cherished colleague Peter Cicchino, in celebration of his cheer and grace. It derives from a speech at the Thirty-Third Annual *Villanova Law Review* Symposium honoring the late Mary Joe Frug on November 7, 1998, entitled *Still Hostile After All These Years? Gender, Work & Family Revisited*. Related material appears in JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT*, 1-6, 13-15, 64-113 (1999).

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1. See generally Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979).

2. *Id.* at 56.

3. See *id.* at 66-67 (discussing “obvious and foreseeable” limitations on role that Title VII can play in regulation of employment policies that restrict opportunities of individuals with children); see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1186 (1989) (stating that victories for women under Title VII have not secured all gains for which women had hoped); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 791 (1989).

4. See Katharine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education upon the Profession*, 72 N.C. L. REV. 1259, 1262 n.11 (1994) (describing Professor Frug’s work as “one of the first serious feminist examinations of how the contemporary workplace favors men”); Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50

novative theory offers to legal scholars by way of weapons for feminist change.<sup>5</sup> Using weapons from philosophy, I return to the issue of work/family conflict and propose a paradigm shift, arguing that this conflict reflects not only hostility to working mothers, but also constitutes discrimination against women.

I want to start out today with an analysis of the basic structure of our gender arrangements through a discussion of several children's books by Lois Lowry. I will then document the contours of our gender system (called domesticity) and propose a paradigm shift that allows us to see work/family conflict as discrimination against women. I will end by sketching several new causes of action under Title VII of the Civil Rights Act of 1964<sup>6</sup> and the Equal Pay Act (EPA).<sup>7</sup>

## II. THE DREAMS WE CHOOSE TO DREAM

I begin with Lois Lowry's charming series about a ten to fourteen-year-old girl named Anastasia Krupnik.<sup>8</sup> These books, published between 1979 and the mid-1990s to rave reviews from both critics and children, remain very popular with girls Anastasia's age.<sup>9</sup> They have framed my

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ME. L. REV. 225, 229 n.25 (1998) (referring to Professor Frug's work as "the classic discussion of the way in which workplace structures affect women's lives"); Linda J. Lacey, *Mimicking the Words, but Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1, 33 n.213 (1993) (stating that "[the] call for a massive restructuring of the workplace, is a major theme of much of feminist jurisprudence" and citing Professor Frug's work in this regard); Pierre Schlag, *In Memoriam: Mary Joe Frug*, 62 U. COLO. L. REV. 435, 435 n.1 (1991) (stating that "Mary Joe Frug's *Securing Job Equality for Women: Labor Market Hostility to Working Mothers* is one of the earliest among those articles that would later come to be known as 'feminist jurisprudence'") (citation omitted).

5. See Schlag, *supra* note 4, at 435 (discussing Frug's work on legal postmodernism).

6. 42 U.S.C. § 2000 (1994).

7. 29 U.S.C. § 206 (1994).

8. See generally LOIS LOWRY, ANASTASIA KRUPNIK (1979) [hereinafter LOWRY, ANASTASIA]; LOIS LOWRY, ANASTASIA AGAIN! (1981) [hereinafter LOWRY, AGAIN!]; LOIS LOWRY, ANASTASIA AT YOUR SERVICE (1982) [hereinafter LOWRY, SERVICE]; LOIS LOWRY, ANASTASIA ASK YOUR ANALYST (1984) [hereinafter LOWRY, ANALYST]; LOIS LOWRY, ANASTASIA ON HER OWN (1985) [hereinafter LOWRY, ON HER OWN]; LOIS LOWRY, ANASTASIA HAS THE ANSWERS (1986) [hereinafter LOWRY, ANSWERS]; LOIS LOWRY, ANASTASIA'S CHOSEN CAREER (1987) [hereinafter LOWRY, CAREER]; LOIS LOWRY, ANASTASIA AT THIS ADDRESS (1991) [hereinafter LOWRY, ADDRESS]; LOIS LOWRY, ANASTASIA, ABSOLUTELY! (1995) [hereinafter LOWRY, ABSOLUTELY].

9. See, e.g., Dana Flora Cadwell, *Prize-Winning Lois Lowry Lures Middle-School Set*, PORTLAND OREGONIAN, April 12, 1998, at C4. One critic notes the series' popularity:

Lois Lowry's books are easy to locate on the revolving racks in the school library. . . . They wear the look of books that have been in every backpack and backpocket in the building. . . . In a word, they are loved. . . . Through skill and intuitive feel for the young mind, Lowry has struck a vein of literary gold. She writes the books that teachers want kids to read and that kids want their friends to read.

*Id.*

daughter's childhood in much the same way Laura Ingalls Wilder's *Little House* books framed my own.

The political implications of the vision projected by the *Little House* books has been the subject of intensive study; the *Anastasia* books offer equally important insights.<sup>10</sup> Like the *Little House* books, the *Anastasia* series sketches an optimistic and reassuring image of womanhood and an idealized picture of middle-class family life. Anastasia's father, Myron, is a Harvard English professor who conveys a love of books, poetry and intellectual life.<sup>11</sup> Her mother is a prize-winning illustrator of children's books who consistently receives desirable commissions.<sup>12</sup>

If the Krupnik family sends the message that all adults are entitled to successful careers, it also sends the message that this entitlement has little impact on family life. For though Anastasia's mother has a rewarding career, she also does everything traditionally expected of a housewife. Married to a man ten years older, she had her first child at twenty-five.<sup>13</sup> Now, twelve years later, she greets Anastasia's little brother Sam when he returns from nursery school and makes him a hot dog for lunch.<sup>14</sup> She paints again during his naptime, but when he is awake she plays with him.<sup>15</sup> She is in charge of getting Sam up in the morning, getting him dressed, getting Anastasia up, doing the laundry and doing the grocery shopping.<sup>16</sup> In other words, she does virtually all of the child care.

10. See generally LAURA INGALLS WILDER, *LITTLE HOUSE IN THE BIG WOODS* (1932); LAURA INGALLS WILDER, *FARMER BOY* (1933); LAURA INGALLS WILDER, *THE LITTLE HOUSE ON THE PRAIRIE* (1935); LAURA INGALLS WILDER, *ON THE BANKS OF PLUM CREEK* (1937); LAURA INGALLS WILDER, *BY THE SHORES OF SILVER LAKE* (1939); LAURA INGALLS WILDER, *THE LONG WINTER* (1940); LAURA INGALLS WILDER, *LITTLE TOWN ON THE PRAIRIE* (1941); LAURA INGALLS WILDER, *THESE HAPPY GOLDEN YEARS* (1943). This eight-volume series has been referred to as one of the few good histories of women written for children. See Jennifer L. Hochschild, *The Word American Ends in "Can": The Ambiguous Promise of the American Dream*, 34 *WM. & MARY L. REV.* 139, 150 (1992) (commenting on "American dream" and *LITTLE HOUSE* series); Sue Stauffacher, *A Woman's Place . . . With Ingenuity, Drive and Courage, Women Earn Spot in History*, *GRAND RAPIDS PRESS*, March 15, 1998, at L7 (reporting on book series).

11. See, e.g., LOWRY, *ANASTASIA*, *supra* note 8, at 2 ("Anastasia's father, Dr. Myron Krupnik, was a professor of literature and had read just about every book in the world . . . . He was also a poet. Sometimes he read his poems to Anastasia by candlelight, and let her take an occasional (very small) sip of his wine."); LOWRY, *ANSWERS*, *supra* note 8, at 85 (describing Mr. Krupnik's criticism of school-assigned poems and his complaint, "Why don't they assign you something great to memorize.").

12. See LOWRY, *ADDRESS*, *supra* note 8, at 3 (noting mother's profession); LOWRY, *ON HER OWN*, *supra* note 8, at 30-34.

13. See LOWRY, *ANASTASIA*, *supra* note 8, at 21 (revealing Anastasia to be ten, her mother to be thirty-five and her father to be forty-five when Anastasia's parents announce her mother is pregnant).

14. See LOWRY, *ANALYST*, *supra* note 8, at 16.

15. See LOWRY, *ON HER OWN*, *supra* note 8, at 17.

16. See *id.*

She also does virtually all of the housework.<sup>17</sup> This allocation of work is presented as unproblematic for much of the series. It becomes contested on only two occasions. I will focus on the first.<sup>18</sup> “Once, several years ago, [Anastasia’s] parents had had a huge fight about sewing . . . . Having just pricked her finger, [Anastasia’s mother] announces, ‘This is the most sexist household in Cambridge . . . . Why is it the wife gets stuck with the sewing? Myron, you do some of the *cooking*. Will you tell me one good reason why you don’t *sew*?’”<sup>19</sup>

“Because I don’t know how,” Dr. Krupnik had said, chewing on his pipe.<sup>20</sup>

“I’ll teach you, then.”<sup>21</sup>

“Thank you, but I don’t *want* to know how to sew.”<sup>22</sup>

“In that case, thank you,” she retorts, “but I don’t want to do any laundry anymore. Ever.”<sup>23</sup> He answers: “In that case, I don’t think I want to be an English professor anymore. I have always, if you must know, wanted to be a beachcomber. So I think that from now on I will walk on empty beaches—all alone by the way—and recite poetry to myself. Of course that means there will be no more paychecks.”<sup>24</sup> Anastasia scurries from the room, terrified, only to return to find her father sewing the button on his shirt, with her mother, giggling, with his pipe in her mouth.<sup>25</sup> “Since then, her mother had always done all the sewing. Anastasia couldn’t figure it out.”<sup>26</sup>

Maybe we can. Note how Mrs. Krupnik’s proposal to redistribute household work is interpreted as a refusal to shoulder the kinds of burdens that keep the family together. To Anastasia it is terrifying; it is presented as a fast track to family breakdown and child abandonment. The proposal also triggers a direct statement by her father that her mother’s contribution of household work is balanced by his paycheck. This is the old breadwinner/housewife bargain, legally enforceable at common law, which now persists as a matter of social custom.<sup>27</sup> We feel intuitively that “we’ve come a long way baby,” but a brief look at some statistics shows we haven’t come so very far at all. American women still do

17. *See id.*

18. The second time, the only task shifted to Anastasia’s father is that he will now make his bed. *See id.* at 15.

19. *See* LOWRY, AGAIN, *supra* note 8, at 77.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.* at 78.

26. *Id.*

27. *See, e.g.,* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1058 (1989) (discussing common law obligation of family breadwinner to support family).

eighty percent of child care and two-thirds of the housework.<sup>28</sup> Most married men still are perceived as the breadwinners, even if their wives also work.<sup>29</sup> Lowry communicates these sociological facts deftly—after a face-saving role reversal that implies that a man sewing is as incongruous as a woman smoking a pipe, Anastasia's mother retreats into coquettishness (“giggling”) and yields to the old ways.

Thereafter, Mrs. Krupnik continues doing all the work of a traditional housewife, even as she is referred to as a “professional woman.”<sup>30</sup> She is never depicted as having had to make contacts or build a network (when she was twenty-five with an infant); instead her career seems to have fallen into her lap.<sup>31</sup> To anyone who has actually had to put the time into mak-

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28. See JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* 105 tbl.3 (1997) (charting trends in family care, by gender and employment, in hours per week for those aged 18-64 from 1965-1985 in United States); see also Erik Olin Wright et al., *The Non-Effects of Class on the Gender Division of Labor in the Home: A Comparative Study of Sweden and the United States*, 6 GENDER & SOC'Y 252, 262-63, 266-67 (1992) (presenting basic distribution of husbands' percentage contribution to housework as reported by male and female respondents in United States and Sweden). Not surprisingly, considerable controversy exists about how much family work men do. Studies based on self-reporting are notoriously unreliable. One study found that when women report their husbands' contribution, they indicate that men do about twenty-five percent less than when men report their own contributions. See *id.* at 260 (describing perceived exaggeration by men). Another study also found high levels of over-reporting; high-status men tend to exaggerate their level of contribution the most and the reporting gap is so high it overshadows the small increases in husbands' housework observed in recent years. See Julie E. Press & Eleanor Townsley, *Wives' and Husbands' Housework Reporting: Gender, Class, and Social Desirability*, 12 GENDER & SOC'Y 188, 203, 208 (1998) (examining reporting gaps in husband housework hours). Studies based on self-reporting include the influential reports of the Families and Work Institute, one of which announced to much fanfare in 1998 that men are assuming a bigger share of the work at home. See Tamar Lewin, *Men Assuming Bigger Share At Home, New Survey Shows*, N.Y. TIMES, Apr. 14, 1998, at A18 (discussing Family and Work Institute Study which shows gradual convergence in way men and women in workforce use their time). Note that some men do much more than others; it is important that men who do a lot recognize that they are being penalized along with the women. It is not in their interest to overestimate the amount of household work done by the large majority of men doing very little. When Arlie Hochschild interviewed fifty men in the 1980s, she found that 80% did not share household work or child care at all. See ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* 173 (1997) (reporting results of her study). It appears that fathers' family work increases most when they and their wives work split shifts, or when the wives work weekends and evenings. See Carol S. Wharton, *Finding Time for the "Second Shift": The Impact of Flexible Work Schedules on Women's Double Days*, 8 GENDER & SOC'Y 189, 190 (1994) (citing Brayfield & Hofferth's study).

29. See Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 280 (1997) (discussing “sexist” stereotype in which husband is viewed as primary breadwinner and working wife is mere discretionary earner).

30. See LOWRY, CAREER, *supra* note 8, at 57 (describing Anastasia's mother as professional woman).

31. See LOWRY, ADDRESS, *supra* note 8, at 3; LOWRY, ON HER OWN, *supra* note 8, at 30, 31, 39; LOWRY, CAREER, *supra* note 8, at 16.

ing opportunities happen, it is all a bit of a mystery. Indeed, it is a bit of a mystery to Anastasia when, in *Anastasia's Chosen Career*, she interviews a book store owner for a school paper on what she wants to be when she grows up.

Anastasia's father puts her in touch with Mrs. Page, who once gave him a book party.<sup>32</sup> Anastasia finds that she has a suitable job for a woman—she runs a bookstore out of her basement. The store has high repute but few customers; Mrs. Page seems to give away as many books as she sells.<sup>33</sup> Anastasia wonders how she survives:

I don't mean to be rude or anything, but how do you make any money? I mean my dad said that you gave forty-seven people wine and cheese and only sold three books, and now you tell me that you let people return books with coffee spilled on them, and you tell them to buy records, and you send them to other bookstores, and I don't see how— . . .<sup>34</sup>

A man's voice interrupted their conversation. "Barb?"<sup>35</sup>

"What, honey?" the bookstore owner called back.<sup>36</sup>

"Where's yesterday's *Wall Street Journal*?" the man called.<sup>37</sup>

"On your desk. You left it there last night," Barbara Page replied. Turning to Anastasia, she continues, "That's how I pay the rent. There isn't any rent. We own the whole building—my husband and I."<sup>38</sup>

"Oh."<sup>39</sup>

"You look disappointed."<sup>40</sup>

"No," Anastasia said, "not disappointed. Just confused."<sup>41</sup>

No wonder. Young girls, in this book and many others, are presented with a picture that does not compute.

That is precisely these books' importance. They tell young girls not the way things are but the dreams we want to dream. Our job today is to break through this dreamworld, first through a description of the world we actually live in, and then through a description of how to change it to a world that makes more sense.

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32. See LOWRY, CAREER, *supra* note 8, at 52 (introducing Barbara Page).

33. See *id.* at 54-56 n.34-41, 58 (describing Barbara Page's bookstore and her business practices).

34. *Id.* at 55.

35. *Id.* at 56.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

## III. THE WORLD WE LIVE IN: DOMESTICITY

The common assumption is that we live in the era of “the demise of domesticity in America.”<sup>42</sup> Domesticity is a gender system comprised of both a particular organization of market work and family work and of the gender norms that justify, sustain and reproduce it.<sup>43</sup> Before roughly 1780, market work and family work were not sharply separated in space or time.<sup>44</sup> By the late eighteenth century this way of life was changing—domesticity set up the system of men working in factories and offices, while women (in theory) stayed behind to rear children and tend to “home sweet home.”<sup>45</sup>

Domesticity remains the entrenched, almost unquestioned, American norm and practice.<sup>46</sup> As a gender system it has two defining characteristics. The first is its organization of market work around the ideal of a worker who works full-time and overtime and takes little or no time off for childbearing or childrearing.<sup>47</sup> Although this ideal-worker norm does not define all jobs today, it defines most of the desirable ones—full-time blue-collar jobs in the working-class context and high-level executive and pro-

42. See, e.g., Alice-Kessler Harris & Karen Brodtkin Sacks, *The Demise of Domesticity in America*, in WOMEN, HOUSEHOLDS AND THE ECONOMY 65 (Lourdes Beneria & Catherine R. Stimpson eds., 1987) (stating that domesticity is on decline because women’s access to wages, job supply and business opportunity has improved).

43. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1567-69 (1991) (discussing domesticity’s affiliation/achievement dichotomy, which legitimizes and re-enforces work and family roles based on gender) [hereinafter Williams, *Gender Wars*].

44. See NANCY F. COTT, *THE BONDS OF WOMANHOOD: WOMAN’S SPHERE IN NEW ENGLAND, 1780-1835* 63-74 (1977) (identifying 1780 as year when market and family work began to become separate entities); Williams, *Gender Wars*, *supra* note 43, at 1566 (“Whereas traditional society interspersed leisure, family life, and work, modern society isolates “work” from family life both temporally and geographically.”).

45. See Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 509-10 (1993) (describing ideology that men belong in market and women at home); Williams, *Gender Wars*, *supra* note 43, at 1581 n.126 (stating that domesticity is so tied with gender-training in femininity that many women identify with its norms); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 190-200 (1982) (describing ideology that women belong at home, but men belong in market).

46. See Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 869 (1988) (“Whether because of sex discrimination, the division of marital responsibilities, or individual differences in ability, ambition, education, training, or social encouragement, husbands are likely to earn more than their working wives. . . . [and] women continue to assume a larger share of the family’s domestic responsibilities . . . .”); see also Frances Elisabeth Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L.J. 2215, 2232 (1997) (discussing women’s return to more domestic roles following unprecedented involvement in industry during World War II).

47. See Williams, *Gender Wars*, *supra* note 43, at 1597 (describing “ideal worker” as person without primary childcare responsibilities and often working overtime at short notice).



fessional jobs for the middle class and above.<sup>48</sup> When work is structured in this way, caregivers typically cannot attain these jobs because they cannot perform as ideal workers. Their inability to do so gives rise to domesticity's second defining characteristic—its system of providing for children's care by marginalizing their caregivers, thereby cutting them off from the social roles that offer authority and responsibility.<sup>49</sup>

Domesticity also introduced a new description of men and women. The ideology of domesticity held that men belong in the market because they are competitive and aggressive;<sup>50</sup> women belong in the home because of their focus on relationships, children and an ethic of care.<sup>51</sup> In its original context, domesticity's descriptions of men and women served to justify and reproduce the breadwinner and housewife roles by establishing norms that identified successful gender performance with character traits suitable for those roles.<sup>52</sup>

Both the ideology and the practice of domesticity retain their hold. A 1998 survey found that two-thirds of Americans believe it would be best for women to stay home and care for their family and children.<sup>53</sup> Domesticity's ideals persist in vernacular gender talk such as John Gray's *Men Are From Mars, Women Are From Venus*.<sup>54</sup> Even some strains of feminist theory

48. *See id.* (stating that to be successful lawyer or other corporate employee, women must often be childless to meet standard of "ideal worker").

49. *See id.* at 1608-38 (discussing how marginalization of caregivers from positions of authority leads to disempowerment in work environment and at home). Domesticity ascribes to women characteristics such as nurturing, selflessness, emotionality, patience and asexuality which make them better suited for the routine daily tasks of home maintenance and childcare. *See* Ehrenreich, *supra* note 45, at 509 (discussing current influence of "cult of domesticity"). Due to the devaluation of the domestic realm, however, "these traits are seen as good for women to possess but not as valuable or important in and of themselves." *Id.* Moreover, these feminine ideals of domesticity result in women rarely being accorded moral authority and social respect. *See id.*; *see also* Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 388 (1993) (explaining "separate spheres" ideology that confined women to distinct world focused on children, husbands, family dependents and church).

50. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE* 17 (1982) (describing how "masculine" traits are associated with success in workplace); Ehrenreich, *supra* note 45, at 510-11 (stating that men are characterized as being selfish, authoritative and aggressive and, therefore, as well-suited to marketplace).

51. *See* GILLIGAN, *supra* note 50, at 17 (describing woman as nurturer, caretaker and helpmate); Ehrenreich, *supra* note 45, at 509 (discussing characteristics typically attributed to women according to ideology of domesticity).

52. *See* Ehrenreich, *supra* note 45, at 510 (distinguishing between "good" characteristics for women and those for men).

53. *See* Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat; Poll Shows Sexes Agree on Pros and Cons of New Roles*, WASH. POST, Mar. 22, 1998, at A17 (discussing finding that majority of Americans believe that it is better for mothers to stay home and take care of house and children).

54. JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS 2* (1994) (discussing how men and women communicate and view world differently). Gray

tend to perpetuate this domestic vision by associating women with an ethic of care.<sup>55</sup>

If we ask not whether women are in the workforce, but whether they have achieved equality there, we find that most have not. High levels of workforce participation gloss over the fact that, even today, roughly forty percent of mothers of childbearing age do not work full time full year in an economy where part-time workers typically received low pay and little advancement.<sup>56</sup> In addition, one-fourth of mothers of childbearing age are homemakers.<sup>57</sup>

The implications of these data are rarely noted. Nearly *two-thirds* of mothers of childbearing age are not "ideal" workers even in the minimal sense of working full time all year.<sup>58</sup> Single as well as married mothers are affected: never married mothers are the group of women most likely to be at home.<sup>59</sup> If most mothers are excluded by our work ideals (now defined by the life patterns of men), it is time to change those ideals.

In addition, the mommy track debate has shown us that full-time work is no guarantee of avoiding economic vulnerability.<sup>60</sup> Full-time workers who cannot work overtime often suffer adverse job consequences as a re-

compares men to Mars, the Roman god of war, and women to Venus, the Roman goddess of love and beauty. *See id.*

55. *See, e.g.,* GILLIGAN, *supra* note 50, at 157-60 (stating that some feminist theorists have claimed ethic of care as part of feminism); Toni Lester, *Efficient But Not Equitable: The Problem with Using the Law and Economics Paradigm to Interpret Sexual Harassment in the Work Place*, 22 VT. L. REV. 519, 549 (1998) (recognizing division between feminists who associate women with ethic of care and those who do not).

56. The statistics on page 2, except where another source is indicated, are based on the computations of Professor Manuelita Ureta, based on machine-readable versions of Bureau of the Census, U.S. Dep't. of Commerce, Current Population Survey, March Supplement, Public Use Files (1996). Washington: Bureau of the Census [producer and distributor], 1962-1997. Santa Monica, CA: Unicon Research Corporation [producer and distributor of CPS Utilities], 1997 [hereinafter Census Data]. Data are for mothers between 25 and 45 years of age, who have children under eighteen. Full time full year is defined as working forty hours or more per week, forty-nine or more weeks per year. This definition reflects my sense that employers generally consider full-time to mean at least a forty-hour workweek. Grateful thanks to Professor Ureta for her help.

57. *Id.* (40% do not work full time full year); Anne L. Kallenberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 775 (1996) (low pay and little advancement).

58. Census Data, *supra* note 56.

59. *See* CHRIS TILLY, *HALF A JOB: BAD AND GOOD PART-TIME JOBS IN A CHANGING LABOR MARKET* 16 tbl.2.1 (1996) (discussing role of part-time married workers); Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209, 211 (1997) (explaining that never-married mothers are most likely to stay at home).

60. *See* RUTH SIDEL, *ON HER OWN* 170-79 (1990) (documenting glass ceiling in medicine, law, management and politics); Williams, *Gender Wars*, *supra* note 43, at 1601 (arguing that women are disempowered in elite working environments).

sult—the best jobs today typically require overtime work.<sup>61</sup> An extraordinarily important fact is that *jobs requiring extensive overtime exclude virtually all mothers of childbearing age* (ninety-three percent).<sup>62</sup>

Our economy is divided into mothers and others. Having children has a very strong negative effect on women's income, an effect that actually *increased* in the 1980s.<sup>63</sup> Women who work full-time earn only sixty cents for every dollar earned by men.<sup>64</sup> Single mothers are most severely affected, earning one-third the wages of two-earner families and one-half those of two-parent families where the wife is not employed.<sup>65</sup>

Moreover, although the wage gap between men and women has fallen, the gap between the wages of mothers and others has widened.<sup>66</sup> As a result, in an age when women's wages are catching up with men's, mothers lag behind.<sup>67</sup> Given that eighty-seven percent of women become mothers during their work lives, this pattern is inconsistent with gender equality.<sup>68</sup>

61. See Allen M. Parkman, *Bringing Consistency to the Financial Arrangements of Divorce*, 87 KY. L.J. 51, 86 (1999) (stating that mothers are put at disadvantage because "[h]igher paying jobs often require unexpected overtime and travel").

62. See Census Data, *supra* note 56 (noting that 93% of mothers of childbearing age work less than 49 hours per week); JULIET B. SCHOR, *THE OVERWORKED AMERICANS: THE UNEXPECTED DECLINE OF LEISURE* 5 (1991) (explaining rise in amount of time spent working); Williams, *Gender Wars*, *supra* note 43, at 1598-99 (discussing women's inability to work overtime because of caregiving responsibilities).

63. See Williams, *Gender Wars*, *supra* note 43, at 1602-04 (providing insight into growing economic disparity).

64. See Mariana Moore, *Proposition 165: We Won the Battle, But Are We Losing the War?*, 8 BERKELEY WOMEN'S L.J. 6, 10 (1993) (noting that women earn 60 cents on the dollar compared to men). More recent reports show that the wage gap between men and women is narrowing. See *Wage Gap Between the Sexes Is Narrowing*, N.Y. TIMES, June 10, 1998, at A20 (stating that wage gap between sexes narrowed by three cents since last spring). Note, however, that the standard wage gap calculation compares full-time male workers to full-time female workers. Consequently it misses most of the marginalization mothers experience, because it does not take into account either part-time workers or women staying home with children. Of course, wage gap data is very useful for other purposes, notably for comparing ideal-worker men with ideal-worker women.

65. See Williams, *Gender Wars*, *supra* note 43, at 1604 n.257 (comparing income of single mothers and two-parent families). In fact, "female headed families . . . are three times more likely than other families to have incomes below the poverty line." *Id.* at 1604; see also Spenser Rich, *Children Feel Financial Pinch When Families Split*, WASH. POST, Mar. 7, 1991, at A21 (stating that mothers and children suffer economically when parents divorce).

66. See Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688, 723 (1998) (noting that wage gap between men and women has improved, but that mothers remain disadvantaged).

67. See *id.*

68. See Waldfogel, *supra* note 59, at 209 (finding that nearly ninety percent of working women become mothers in course of their working lives); see generally Jane Waldfogel, *The Family Gap for Young Women in the U.S. and Britain*, 16 J. LAB. ECON. 505 (1998) (discussing disparity in ages).

The gender arrangements that form the core of domesticity remain unbending. Like Mrs. Krupnik, women still shoulder virtually all the family work traditionally performed by housewives.<sup>69</sup> Unlike Mrs. Krupnik, in real life, they pay a steep price for doing so.<sup>70</sup> Meanwhile, men still specialize in market work, which continues to be framed around the ideal worker with access to a flow of family work.<sup>71</sup>

Domesticity did not die—it mutated.<sup>72</sup> In the nineteenth century most married women were housewives.<sup>73</sup> Most remain economically marginalized today.<sup>74</sup> This is not equality.

#### IV. DECONSTRUCTING DOMESTICITY

One of the social and cultural norms that sustain and reproduce domesticity is the social convention of denying its existence. The fact that it is denied in children's books should not concern us, for many hard facts of life are glossed over in the interests of reassuring the young. What is

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69. See Williams, *Gender Wars*, *supra* note 43, at 1599 (“[W]ives who work outside of the home still do the majority of work inside it.”). Studies have found that working wives do 79.9% of housework, up to five times the domestic work that their husbands do, and an average of 144% of the total work of a traditional homemaker. See *id.* (reciting figures of several studies comparing time worked by working wives, working husbands and non-working wives).

70. See *id.* (stating that working mothers reported “a lot” or “extreme” stress because of their dual responsibilities).

71. See *id.* (explaining that domestic work done by women allows married men to conform to “workaholic norms”); see also Rebecca Korzec, *Working on the “Mommy-Track”: Motherhood and Women Lawyers*, 8 HASTINGS WOMEN’S L.J. 117, 126 (1997) (same).

72. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-80*, 103 YALE L.J. 1073, 1189-91 (1994) (developing notion that gender patterns tend to mutate rather than disappear) [hereinafter Siegel, *Home as Work*]; see also Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2210 (1994) (stating that domesticity was able to survive because of its malleability, adaptability and ability to disguise itself) [hereinafter Siegel, *Modernization*]. This article builds upon the work of many prior legal scholars in addition to Siegel. See, e.g., DEBORAH RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 305-06 (1989) (discussing advancements in feminist movement and new discriminatory hurdles movement faces) [hereinafter RHODE, JUSTICE]; Nancy Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990) (proposing mechanism to restructure workplace by degendering work and family roles); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045 (1992) (discussing labor market hostility to working mothers); Deborah Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39 (1994) (revealing women’s role in marketplace) [hereinafter Rhode, *Gender*]; Deborah Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L. J. 1731 (1991) (same) [hereinafter, Rhode, *Problem*]; Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (same).

73. See Williams, *Gender Wars*, *supra* note 43, at 1568 (stating that nineteenth-century women knew that their sphere was at home and were barred from male marketplace sphere).

74. For a discussion of economic marginalization, see *supra* notes 56-68 and accompanying text.

distressing is that we, as a society, often gloss over the persistence of inequality with reassurances that “most women now work.”<sup>75</sup>

Women have always worked.<sup>76</sup> The point is that their hard work frequently does not translate into economic entitlements. We live in a world in which men hold most of the “good jobs,” while women are disadvantaged by the ideal-worker norm in two ways.<sup>77</sup> As I discussed in an earlier article, women are disadvantaged when courts treat the ideal worker’s wage as his sole personal property upon divorce.<sup>78</sup> This is inappropriate because that wage reflects the joint work both of the ideal worker *and* of the caregiver whose family work allows him to perform as an ideal worker.<sup>79</sup> Absent coverture, an asset produced by two parties should not be treated as the property of only one of them.<sup>80</sup> Ending this practice would go a long way towards eliminating the impoverishment of divorced women and their children.

Moreover, women are disadvantaged not only by the ideal-worker norm in family entitlements, but also by the ideal-worker norm in market work.<sup>81</sup> For the remainder of this talk, I will discuss how that norm structures market work and how to eliminate it.

The accepted understanding is that mothers often drop off the career track for personal reasons and that these reasons reflect their own choice. Not only do conservatives such as Richard Posner endorse this view,<sup>82</sup> but women often use “choice” language themselves.<sup>83</sup> Said a letter to the *Yale Alumni Magazine* in 1992:

75. See Williams, *Gender Wars*, *supra* note 43, at 1600 (arguing that working mother statistics do not accurately represent percentage working part-time or at home).

76. See Silbaugh, *supra* note 72, at 10-13 (classifying traditional household tasks as work).

77. See Williams, *Gender Wars*, *supra* note 43, at 1597 (criticizing gender system of “ideal-worker father and marginalized woman”).

78. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2252 (1994) (discussing courts’ application of “he who earns it, owns it” rule that gives ownership of what should be family wage to husband).

79. See *id.* at 2290 (concluding that family property is produced by simultaneous effort of husband and wife). “Without a flow of domestic services from the wife, the husband could not meet the ideal of a worker with geographical mobility, no daytime childcare responsibilities, and few other domestic responsibilities.” *Id.*

80. See *id.* at 2229 n.5 (defining coverture as system that allocates all property rights in couple’s assets to husband). “Property produced jointly should be owned in common, not allocated one-sidedly to the husband.” *Id.* at 2290.

81. See Williams, *Gender Wars*, *supra* note 43, at 1597-1603 (discussing extreme challenge women must face in trying to be both “ideal worker” and home-maker).

82. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 157 (5th ed. 1998) (stating that women “decide” to become housewives); see also Robin West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1455-56 (1986) (rebuking Posner’s notions).

83. See Williams, *Gender Wars*, *supra* note 43, at 1596-98 (stating that women often feel they choose between childbearing and career); see also SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 142-46 (1989) (discussing how marginalization of caregivers affects women’s “choice” in favor of domesticity).

I left a Yale doctoral program in 1988, disillusioned with academic life. Since then . . . I have found my ambitions for a career—any career—gradually being submerged by the desire to raise my children at home. I do work part-time, as a freelance copy editor. But working in sweat clothes at the dining room table, surrounded by toys and unfinished housework, is not exactly a fulfilling professional experience. Yet despite occasionally longings for the world of ‘real’ work, I am sure that I have made the right choice—for me.<sup>84</sup>

Feminists need to provide a clear response to the problems engendered by viewing mothers’ exodus from market work in terms of “choice.”

An analysis of domesticity as a gender system allows us to see that women’s “choices” take place in a context that requires ideal workers to command the social power available to men—to relocate their families and to enjoy a flow of family work that most fathers (but few mothers) enjoy.<sup>85</sup> A system that requires workers to command the social power of men in order to get “good jobs” discriminates against women. It is inconsistent with our ideals of gender equality.<sup>86</sup>

The argument may best be understood by beginning with the situation in which equipment is designed around men’s bodies. Equipment used in traditionally male jobs is typically designed to specifications that fit most men but few women.<sup>87</sup> The most famous example is the cockpit case in which a court found that cockpits excluded 93 percent of women but only 25.8 percent of men.<sup>88</sup> If cockpits are designed around men’s bod-

84. Letter from Ruth Wilsea Adkins to the Editor, *Yale Alumni Magazine*, at 4-5 (Feb. 1992).

85. See Williams, *Gender Wars*, *supra* note 43, at 1603 (stating that most wives of high-income husbands “choose” not to work, reinforcing ability of men to conform to ideal-worker standard); see also Margaret M. Paloma, *Reconsidering the Dual-Career Marriage: A Longitudinal Approach*, in *TWO PAYCHECKS: LIFE IN DUAL-EARNER FAMILIES* 713 (Joan Aldais ed., 1982) (stating that married professional mothers tend to slow or sacrifice career development whereas fathers do not).

86. For a discussion of anti-discrimination laws, see *infra* notes 92 to 164 and accompanying text.

87. See Ellen Shapiro, *Remedies for Sex-Discriminatory Health and Safety Conditions in Male-Dominated Industrial Jobs*, 10 *GOLDEN GATE U. L. REV.* 1087, 1088 (1980) (describing equipment in heavy industry as suited for male workers rather than average worker).

88. See *Boyd v. Ozark Air Lines*, 568 F.2d 50, 52 n.1 (8th Cir. 1977) (quoting statistics that defendant’s pilot height requirement excluded 25.8% of men and 93% of women); see also Shapiro, *supra* note 87, at 1089-92 (detailing relationship between productivity and design of equipment). Professor Shapiro addresses the required interaction between people and machinery and argues that “optimum production results when mechanical devices function . . . in ways which do not oppose the physiological integrity of their operators.” *Id.* at 1089. Efficient workplace design becomes most important for women who are in male-dominated manufacturing jobs, as improved ergonomics may increase their ease in operating machines and ultimately enhance job performance. See *id.* at 1091 (revealing potential obstacles to women in manufacturing positions).

ies, it should not surprise us that more men than women have jobs as pilots.<sup>89</sup> Giving women “equal” opportunity to live up to standards designed around men does not offer women true equality. Rather, it is a way of perpetuating discrimination against women and calling it equality.

The same conclusion holds true when society designs workplaces around the ideal of an employee who works without career interruptions and takes no time off for childbearing or childrearing. This way of designing the ideal worker enshrines men’s bodies — for men need take no time off for childbearing — and their life patterns, in a society where men do only twenty percent of the child care.<sup>90</sup>

Designing workplaces around men’s bodies and life patterns discriminates against women. In demanding the elimination of masculine norms, women are asking not for special treatment but for simple equality: a world designed around the average *person* rather than the average *man*.<sup>91</sup>

Is the discrimination mothers experience actionable under existing federal and state anti-discrimination statutes? Answering this question is a large project, beyond the scope of this short article. Yet here I take an important first step: to conceptualize potential test cases where mothers stand the best chance of winning.

Note that the issue is not whether mothers *should* sue; mothers already *are* suing. A recent preliminary review of federal cases turned up more than fifty cases where mothers sued claiming discrimination.<sup>92</sup> We can expect increasing numbers of mothers’ lawsuits because of a generational shift. Generation X has different attitudes towards paid work than have previous generations. In the past, workers may well have been willing to do whatever the employer required because of informal guarantees of permanent employment. Younger workers who saw their fathers, or their friends’ fathers, fired after they had “given their all” to the company, are often less willing to follow in the tracks of prior generations. Karen McGuire, manager of staffing and development for Northwestern University, explains, “They’re looking for quality of life issues. They’re fitting work into their entire life. Work is just a part of their life, as opposed to the baby boomers, where work was their life. They’re still career-minded. The

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89. See *Boyd*, 568 F.2d at 54 (discussing number of female applicants who failed to meet height specifications designed to ensure safety within cockpit); see also Shapiro, *supra* note 87, at 1091 (illustrating potential problems for women who attempt to work with equipment designed for men). In addition to being kept out of certain professions due to ill-fitting equipment, many women suffer from increased physical stress and muscular strain (documented by employee injury and disability records). See *id.* (“The disproportionate incidence of chronic musculo-skeletal impairments suffered by women in traditionally all-male workplaces may be documented by a variety of records.”).

90. See ROBINSON & GODBEY, *supra* note 28, at 105 tbl. 3.

91. Cf. MARTHA MINOW, MAKING ALL THE DIFFERENCE 87 (1990) (discussing masculine norms in context of market work and family work).

92. These cases will be discussed in a forthcoming article entitled *Litigating Motherhood*.

difference is that they also focus on relationships and family. They're different from the yuppies who came before."<sup>93</sup> A second contributing to the generational shift in attitudes towards paid work is that, whereas my generation of women was simply amazed that we were allowed to compete with men on any terms, many younger women feel entitled or compelled to work full-time. This new sense of entitlement to work (for privileged women) or compulsion to do so (for less privileged ones) feeds younger women's sense that they should not have to give up their traditions of motherhood as a condition of paid employment.

Suits litigating motherhood are here to stay: the only choice for feminist lawyers is whether we will continue to allow them to proceed with no attempt to shape the course of this litigation. This would be a mistake, because if we leave the litigation to chance, we will continue to see what the cases now show: unsympathetic plaintiffs, flawed legal analysis, and suits hobbled by the lack of the necessary statistics documenting the continuing marginalization of mothers. Take for example the suit where a woman whose job included fund raising neglected to send eighty-three acknowledgment letters to donors and then claimed discrimination on grounds of motherhood.<sup>94</sup> Or the case where the plaintiff had taken advantage of a close personal relationship with her employer: after being granted a four-day work week and getting paid for work her colleagues did while she was at home, she then demanded a three-day workweek and a raise.<sup>95</sup> Other cases involved analytical flaws, notably where mothers sued under the Pregnancy Discrimination Act for issues that clearly involved *childrearing* rather than *childbearing*; courts are correct in concluding that such cases do not involve pregnancy.<sup>96</sup> An additional litigation problem is the paucity of recent statistics documenting mothers' marginalization: this hurt the plaintiff in a case where the court faulted her for relying on "decades old studies" on the percentage of women who work part-time.<sup>97</sup>

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93. Meredith Gordon, *Northwestern U.: Job Hopping, Family Focus Characterize Gen Xers*, 2/10/99 U-WIRE (No Page), 1999 WL 12724825. See also Bernard J. Wolfson, *Workplace Ethic Defined by Age Generation Gap Demands More Flexibility*, 8/15/99 ARIZ. REPUBLIC D6, 1999 WL 4192847 ("companies can't afford to lose employees because of rigid work environments that alienate any one age group"); Maggie Jackson, *Generation X Makes Mark in the Workplace*, 2/19/99 PATRIOT LEDGER (Quincy Mass.) 23, 1999 WL 8451995 ("His generation is also comfortable drawing the line at too much work. They are driving companies to allow employees to make use of work-life programs that were little promoted or honestly supported."); Roger Trapp, *Smells Like Team Spirit*, 3/5/98 THE INDEPENDENT (London) F2, F3, 1998 WL 13639801 ("they 'like money, but they also say they want balance in their lives.'")

94. See *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 340 (8th Cir. 1997).

95. See *Spina v. Management Recruiters of O'Hare*, 764 F. Supp. 519 (N.D. Ill. 1991).

96. See, e.g., *Record v. Mill Neck Manor Lutheran Sch. For The Deaf*, 611 F. Supp. 905 (E.D.N.Y. 1985).

97. See *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151 (7th Cir. 1997).



Mothers have sued, and will continue to sue.<sup>98</sup> The only question is whether the issue of marginalized motherhood will be litigated in an un-systematic way, with idiosyncratic and often unsympathetic plaintiffs, poor statistics, and flawed analysis. This should not be allowed to happen. What is needed is a concerted effort to carefully choose and litigate the test cases most likely to win, on the model of Ruth Bader Ginsberg's early work at the ACLU Women's Rights Project.

This Article begins that effort. Though I focus on federal statutes, this does not mean that I discount the possibilities for litigation based on state law. Yet we have to start somewhere, and I have chosen to start by analyzing the potential for lawsuits under the Equal Pay Act<sup>99</sup> and Title VII of the Civil Rights Act.<sup>100</sup>

#### V. EQUAL PAY ACT SUITS

The EPA requires a plaintiff to prove first that she is receiving less compensation than male workers for substantially equal work in the same establishment.<sup>101</sup> A key challenge for part-time workers in EPA suits is to prove that they are doing "substantially equal" work.<sup>102</sup> This requirement means that a plaintiff cannot win an EPA suit in a situation where part-

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98. Some of the plaintiffs have met with some success, although the litigation is still at the motion stage. See, e.g., *Trezza v. The Hartford, Inc.*, 1998 WL 912101 (S.D.N.Y. 1998) (holding that plaintiff stated cause of action where she claims employer treated women with children differently from men with children); *Roberts v. United States Postmaster General*, 947 F. Supp. 282, 289 (E.D. Tex. 1996) (finding policy that prohibits use of sick leave to attend to family members may constitute disparate impact claim).

99. For a discussion of EPA suits involving depressed wages for part-time workers, see *infra* notes 92-120 and accompanying text, Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 715-22 (1986) (outlining explanations for pay disparity between full- and part-time workers). Studies have shown that pro rata, part-time workers earn less than their full-time counterparts. See Chamallas, *supra*, at 715 (revealing part-time workers only earned twenty-eight percent of wages earned by full-time employees even though part-time employees worked forty-six percent of hours worked by full-time employees).

100. For a discussion of the law suits I envision under Title VII, see *infra* notes 130-67 and accompanying text.

101. The Equal Pay Act (EPA), 29 U.S.C. § 206(d) (1988) The EPA mandates that: "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex." *Id.* The EPA provides three specific and one broad exception to its prohibition against discrimination: a seniority system, a merit system, a system based upon quality or quantity of production or any system based on "a factor other than sex." See Jack A. Friedman, *Real-Gender Neutrality for the Factor-Other-Than-Sex Defense*, N.Y.L. SCH. J. HUM. RTS. 241, 272 (1994) (discussing exceptions in more detail).

102. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (stating that plaintiff must prove employer pays different wage scales for equal work); *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 597 (3d Cir. 1973) (same); see also Chamallas, *supra* note 99, at 738 (stating that part-time worker must establish that employment is substantially equal to establish prima facie case).

time status is used as a reason not to offer plum assignments, or where a part-time worker is otherwise not doing work substantially equal to that of full-time employees.<sup>103</sup> A suitable test case might involve a law firm where a female attorney is in a highly specialized, technical field that does not ordinarily require travel. For example, a Washington, D.C. lawyer involved in agency litigation, trusts and estates or a specialized tax practice might be a good candidate to bring such a suit. Further, a promising plaintiff would be an employee with excellent evaluations who had worked full-time for a significant period and then switched to part-time, who continued to get excellent evaluations but who ultimately found herself making less per hour than full-time attorneys doing similar work.

A key issue for such a plaintiff's success will be whether she can dislodge judges' sense that only people who meet the masculine ideal-worker norm are really "serious" and "committed" workers.<sup>104</sup> This is precisely the kind of discriminatory norm that equality theory should begin to target.

The second issue is whether the part-time employee's work requires the same level of effort.<sup>105</sup> The challenge for an EPA plaintiff will be to convince the courts to define effort as *effort per hour*. This should not be too difficult—there already exists management literature stressing the need to redefine productivity in terms of output rather than in terms of face time.<sup>106</sup> Surely the notion that employers should be required to measure productivity in terms of output cannot be seen as a radical claim.<sup>107</sup>

In some cases, a track record may also exist that will be helpful in proving that the full- and part-time jobs at issue are in fact substantially similar. For example, at a large bank in California, permanent bank tell-

103. See *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1049 (5th Cir. 1973) (stating that "the controlling factor under the Equal Pay Act is job content" as determined by actual duties that respective employees are called upon to perform); see also Carole Supowitz Katz, *Wage Discrimination Claims: Employee's Prior Salary Fails the "Factor Other Than Sex" Test*, 15 COLUM. HUM. RTS. L. REV. 207, 221 (1984) (stating ways employers could pay less to part-time employee without violating EPA). Factors that provide a legitimate basis for compensating employees differently include: seniority, shift differential, differences in number of hours worked each week and whether the work is temporary or part-time. See *id.* at 221 (outlining potential obstacles for part-time employees challenging employers for unequal treatment and wages).

104. See Peter Goselin & Gileen Silverstein, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 STETSON L. REV. 1, 18 (1996) (discussing perception that part-time workers are not as productive as full-time workers). The authors note that "there is simply no incentive for most contingent employees . . . to participate in improving productivity." *Id.*

105. See 29 U.S.C. § 206(d)(1) (1994) (requiring showing that compared jobs meet equal effort requirement); see also *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1969) (discussing requirements under EPA).

106. See 6/22/89 NAT'L PROD. REV. 261 (noting that measuring productivity by number of hours worked is ineffective).

107. See *id.*; see also Katz, *supra* note 103, at 220 (suggesting job performance as optimal method of evaluating work).

ers were laid off and then rehired as part-time workers.<sup>108</sup> During the UPS strike in 1997, employees made a number of statements to the effect that part- and full-time workers did the same work.<sup>109</sup> This type of data would be useful in showing the existence of wage disparities between two workers, male and female, in jobs that require equal “skill, effort, and responsibility.”<sup>110</sup>

Another important issue is whether this type of case can be distinguished from comparable worth cases, in which a plaintiff argues that an employer is required by anti-discrimination law to pay workers in predominantly female jobs the same wage as employees are paid in predominantly male jobs that are rated by the employer as requiring equal levels of skill, effort, risk, responsibility, etc.<sup>111</sup> Comparable worth cases appear to make courts nervous because they involve comparing people in very different jobs—for example, a nurse and an electrician.<sup>112</sup> Although the logic of

108. See *The Wells Fargo-First Interstate Merger*, L.A. TIMES, Jan. 26, 1996, at D1 (discussing bank teller layoffs in California).

109. See Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799, 804-05 (1995) (observing that these “new” part-time employees were mostly women and received no health care benefits, pensions, vacation or sick leave); *Labor Still Loses the War*, WASH. TIMES, Sept. 7, 1998, at A19 (discussing UPS strike). These “new” part-time employees were mostly women and received no health care benefits, pensions, vacation or sick leave. See Judith Evans, *Teamsters, UPS Agree to Resume Talks at Federal Mediator's Behest*, WASH. POST, Aug. 7, 1997, at E7 (“I’m a part-timer, but work 50 to 60 hours a week, receive part-time pay, while the person standing next to me does the same job and earns more.”).

110. See Bookman, *supra* note 109, at 805.

111. See Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN’S L.J. 1, 22-23 (1993) (defining development of comparable worth theory). The article suggests that the passage of the EPA in 1963 and the passage of Title VII of the Civil Rights Act of 1964 caused feminists to focus on wage discrimination in segregated labor markets. See *id.* (discussing placement of women in lower-paying “female” occupations). Comparable worth programs, designed to educate the public, showed that certain occupations are undervalued because they are performed mainly by women. See *id.* (discussing problem of “pink-collar” ghetto). Comparable worth attempts to “realign women’s wages with those of men” and stress the importance of pay equity for women’s jobs that require similar skills and responsibilities as higher-paid male occupations. See *id.*

112. See, e.g., *American Nurses’ Ass’n v. State of Illinois*, 783 F.2d 716 (7th Cir. 1986) (comparing higher rated, lower paid nurses and lower rated higher paid electricians); *Christensen v. Iowa*, 563 F.2d 353, 354 (8th Cir. 1977) (comparing clerical workers and physical plant workers such as carpenters, plumbers and electricians). Comparable worth cases require courts to apply a “substantially equal” test to jobs that require the performance of different tasks. See Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1733 (1986) (discussing how “substantially equal” test forces courts to use discretion when comparing different jobs and wages). For the critics of comparable worth, it is worth noting that the European Union and Canada have had success with the implementation. See M. Neil Browne et al., *Comparable Worth in Ontario: Lessons the United States Can Learn*, 17 HARV. WOMEN’S L.J. 103, 130-31 (1994) (suggesting that greater government guidance was key to Ontario’s success, yet acknowledging United States’s greater reluctance to accept intervention into market); Christo-

comparable worth cases is clear—presumably an employer would not give equal rankings to jobs that were not equal—many courts felt that such cases were asking them to dictate wages instead of allowing the market to do so.<sup>113</sup> What EPA masculine-norm cases ask is less ambitious. Instead of requiring courts to mandate equal pay to a nurse and an electrician, they would only require courts to mandate equal pay for two trust and estates lawyers in the *same* firm doing the *same* highly specialized work, or two UPS workers in a context where no substantial difference exists between the work performed by part- and full-time workers doing the same job.<sup>114</sup> This prospect may prove less unsettling.

If a plaintiff can successfully prove that the full- and part-time jobs at issue are substantially similar, the burden shifts to the defendant.<sup>115</sup> Because the EPA prohibits only pay differentials based on sex discrimination, an employer can defend by proving that the wage differential is due to a “factor other than sex.”<sup>116</sup> Thus, the question becomes: “Is a part-time schedule a factor other than sex?”

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pher McCrudden, *Comparable Worth: A Common Dilemma*, 11 YALE J. INT'L L. 396, 436 (1986) (stating that European subsidiaries of American companies have been subjected to legal requirement of equal pay and have survived).

113. See *Bush v. University of Washington*, 740 F.2d 686, 706 (9th Cir. 1984) (stating that courts cannot engage in sweeping revisions of market rates); *Christensen v. State of Iowa*, 563 F.2d 353, 356 (8th Cir. 1977) (stating that Title VII was not intended to abrogate law of supply and demand); see also Dennis, *supra* note 102, at 23 (quoting Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1330 (1989)). One commentator stated:

[A] competitive labor market will achieve comparable worth; for that is the equilibrium condition of such a market. If a particular job classification happens to be overpaid relative to skill, responsibility and other considerations that determine the value and cost of workers' time, workers will flow into the classification, reducing the wage until the excess demand is eliminated. And if the job classification happens to be underpaid, workers will leave for better jobs, causing the wage to rise.

*Id.* (quoting Posner).

In response to such criticism to comparable worth, other economists have stated:

In the future, after sex . . . discrimination [has] been eliminated, the pattern of occupational wages will be determined in a market that is more free and competitive. The wage structure that then results from the interplay of supply and demand will surely look very different from the existing one, because the supply of and demand for labor in each occupation will no longer be affected by discrimination as they now are.

Barbara Bergmann, *The Economic Case for Comparable Worth*, in *COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH* 71, 72 (Heidi Hartmann ed., 1985).

114. See *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1049 (5th Cir. 1973) (stating that “the controlling factor under the Equal Pay Act is job content”).

115. See *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992) (stating that plaintiff suing under EPA must meet fairly strict standard of proving that she performed substantially similar work for less pay, and burden then falls to employer to establish one of four affirmative defenses provided in Act).

116. See *Friedman*, *supra* note 101, at 242-43 (outlining Circuit courts' standards for “factor other than sex” defense). The Fourth, Seventh and Eighth Cir-

Although case law exists in both directions, it should be clear that the EPA's protection is broader than the situation where an employer has lower-paying jobs explicitly set aside for women and higher-paying jobs explicitly set aside for men. It seems highly unlikely that any employer in the United States today would be foolish enough to openly discriminate in this way. Rather, sex discrimination today is more likely to be based on a gendered sense of who is a "good candidate." If the EPA does not apply whenever the employer disguises a discriminatory job description in gender-neutral language, an employer can easily evade the EPA by differentiating jobs on the basis of a factor that correlates highly with sex but does not refer to body shape.<sup>117</sup> It makes no sense to assume that Congress intended to make the EPA so easy to evade.<sup>118</sup>

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culcs require a wage classification system to be "gender neutral" and "equally applied." See *id.* at 242 n.8 (citing *Brewster v. Barnes*, 788 F.2d 985, 992 (4th Cir. 1986)) (holding that state compensation board's failure to pay female correctional officer same salary as male counterparts was not based on bona fide use of factors other than sex); see also *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (stating that "an employer cannot use a gender-neutral factor to avoid liability unless the factor is used and applied in good faith"); *Strecker v. Grand Forks Soc. Sec. Bd.*, 640 F.2d 96, 103 (8th Cir. 1980) (finding state personnel classification system was valid factor other than sex), *overruled by Robino v. Norton*, 682 F.2d 192 (8th Cir. 1982).

The Second and Eleventh Circuits have taken a different approach by using a standard that is less deferential to the employer. These courts allow the exception only for wage systems that are related to the performance of the complaining employee's specific job duties. See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 440 (1992); *Glenn v. General Motors Corp.* 841 F.2d 1567, 1571 (11th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988).

The Third, Sixth and Ninth Circuits use an intermediate standard that requires an employer to specify a legitimate reason for its wage classification system. See *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982); *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 594 (3d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973) (stating that "economic benefits to an employer can justify a wage differential"); see also *Katz*, *supra* note 103, at 210-11 (discussing potential for employers to use "factor other than sex" exception to circumvent purposes of EPA due to exception's open-ended language).

117. See Deborah J. Vagins, Note, *Occupational Segregation and the Male-Worker-Norm: Challenging Objective Work Requirements Under Title VII*, 18 WOMEN'S RTS. L. REP. 79, 83 (1996) (noting that supposedly "neutral" qualifications still disproportionately affect women; originally student paper written at suggestion of author). "Objective" work requirements tend to be adapted to the workstyles and lifestyles of non-caretakers and therefore adversely impact women. See *id.* ("Facially neutral job requirements often reflect the family roles and work schedules that men traditionally have adopted."). Most professional jobs are still based on a male-worker norm, which keeps women from competing for these jobs because they can not meet these "male" norms. See *id.* (stressing continued male bias in job requirements and notions of "good" job candidates).

118. See *Katz*, *supra* note 103, at 210-11 (discussing Congressional intent for passage of EPA). The article notes that the Senate and House Reports and Subcommittee Hearings, the floor debates in Congress and President John F. Kennedy's message when signing the act into law all "express the broad anti-discriminatory purposes of the EPA." See *id.* at n.22-25 (citing S. REP. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. REP. No. 309, 88th Cong., 1st Sess. 1, 2 (1963);

In *Corning Glass Works v. Brennan*,<sup>119</sup> the United States Supreme Court held that employers could not pay a wage differential for night-shift work because the different schedule was not a “factor other than sex.”<sup>120</sup> Because the difference between night work and day work seems more significant than the difference between a part-time and a full-time worker, *Corning Glass* provides support for the view that part-time work is not a “factor other than sex.”<sup>121</sup> This interpretation is reinforced by the *Corning Glass* Court’s restriction of the EPA’s “factor other than sex” language to working conditions, which it then narrowly defined as “surroundings” (such as toxic chemicals or other, more conventional, “work hazards”).<sup>122</sup> In addition, although an old bulletin issued by the agency in charge of implementing the EPA defined part-time work as a factor other than sex, the new rules do not take a position on the matter.<sup>123</sup>

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*Hearings on S. 882 and S. 910 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 16 (1963) (statement of W. Willard Wirtz, Sec. of Labor); *Hearings on H.R. 3861 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 8, 16-33 (1963); 109 CONG. REC. 9212 (1963) (remarks of Rep. Donahue); XXI CONG. Q. 978 (June 14, 1963)).

Despite Congress’ intent to target discrimination, it did not want to eliminate employer flexibility in formulating job classification systems. See Katz, *supra*, at 211 (discussing Congress’s intent in providing for exceptions to wage discrimination prohibition).

119. 417 U.S. 188 (1974).

120. See *id.* at 204-05 (outlining Court’s reasons for affirming lower court’s holding). The *Corning* Court held:

The differential in base wages originated at a time when no other night employees received higher pay than corresponding day workers . . . . The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work.

*Id.*

121. See Friedman, *supra* note 101, at 242 (explaining conflicts in defining other-than-sex requirement). Although the Supreme Court has not yet defined a “proper” standard for determining whether an employer has asserted a “factor other than sex” defense, the Court has generally required the employer to prove a “bona fide” wage classification system that does not discriminate on the basis of sex.

122. See *Corning*, 417 U.S. at 202-03 (defining “working conditions”). The Court defined “surroundings” as measuring the elements such as “toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency.” See *id.* “Hazards” was outlined as including the “physical hazards regularly encountered, their frequency, and the severity of injury they can cause.” *Id.* The Court stressed that these definitions did not include “time of day” as a means for job differentials, evaluations, or wage differentials. *Id.*

123. See Chamallas, *supra* note 99, at 741 (contrasting author’s interpretation with general interpretation of EPA). Professor Chamallas argues:

The interpretation does not explicitly state or otherwise indicate that employers who pay part-time workers less than full-time workers are insulated against liability . . . . Rather, the interpretation suggests that pay disparities between part-time and full-time workers are generally tolerated, unless a suspicion of discrimination is created because of the sexual composition of the two groups of employees and the lack of substantial

In summary, the EPA may provide significant opportunities to challenge the practice of paying women in part-time jobs less than full-time workers who do substantially equal work. Masculine-norm EPA suits should be of particular interest to unions, for they could provide a potent tool against the practice of cutting wage costs through a shift to contingent work.<sup>124</sup>

As a remedy for sex discrimination, however, the EPA has several notable limitations. First, as noted above, in many situations employers consign part-time workers to more routine, less desirable work.<sup>125</sup> Although this practice is part of the problem, an employer can defend against an EPA suit if it can prove that full- and part-time workers do not have equal responsibility.<sup>126</sup> Second, because the EPA covers only wages, it does not offer a way of challenging the common practice of penalizing part-time workers in terms of benefits.<sup>127</sup> Nor does the EPA require an employer to change promotion practices that currently marginalize many part-time

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difference in the number of hours worked by each group. Thus, if the two workforces are significantly integrated or . . . work a substantially different number of hours per week, the interpretation implies that a pay disparity is not unlawful.

*Id.*

124. See Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 204 (1991) (“[U]nions wisely bring comparable worth lawsuits based on Title VII or the Equal Pay Act to raise wages without expending bargaining chips.”). *But see* Norma M. Riccucci, *Union Liability for Wage Disparities Between Women and Men*, 65 U. DET. L. REV. 379 (discussing potential for continued wage disparities between women and men due to unions). Note, too, that these suits would work only in contexts where the part-time track consists disproportionately of women.

125. See Chamallas, *supra* note 99, at 719 (noting lower status given to part-time workers). Typically, an employer gives the jobs that require higher levels of skill or supervisory responsibility to full-time workers in both blue-collar and white-collar jobs. *See id.* (“Employers often stereotype part-time employees as marginal or unnecessary workers, suitable only for entry-level or inferior jobs.”).

126. See *Timmer v. Michigan Dep’t of Commerce*, 104 F.3d 833, 843 (6th Cir. 1997) (stating that plaintiff must show equal work requiring substantially similar skill, effort and responsibilities, and that work was performed under similar working conditions); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 548 (7th Cir. 1991) (same).

127. See *Corning*, 417 U.S. at 199 (stating that focus of EPA is to guarantee equal pay for equal work); *see also* Chamallas, *supra* note 99, at 716 (discussing discrepancies between full- and part-time workers). The exclusion of part-time workers from employment fringe benefits is an additional method that employers use to discriminate between the two groups. *See id.* (outlining benefits given to full-time employees). Studies have shown that full-time employees are more likely to enjoy holiday benefits, employer-provided health insurance and employment-based pension plans than part-time employees. *See id.* (comparing percentages of full- and part-time employees who receive benefits).

workers, as when part-time lawyers are taken off the promotion track.<sup>128</sup> To address these issues requires a suit under Title VII.<sup>129</sup>

## VI. TITLE VII SUITS

### A. *Disparate Treatment Suits to Challenge Discrimination Against Mothers*

*Since I came back from maternity leave, I get the work of a paralegal . . . I want to say, look, I had a baby, not a lobotomy.*<sup>130</sup>

In December of 1998, a federal district court held that Joann Trezza had stated a sex discrimination claim when she was passed over for a promotion, despite the fact that the person who received the promotion was a woman.<sup>131</sup> Trezza, a lawyer in the legal department of The Hartford, Inc. and the mother of two children, was passed over in late 1991 or early 1992 in favor of a woman without children.<sup>132</sup> When Trezza asked why she had not been considered for the job, she was told that because she was a mother, management assumed she would not be interested.<sup>133</sup>

In 1993 she was up for promotion again.<sup>134</sup> Once again she was passed over in favor of two other employees, one an unmarried male and the other a father.<sup>135</sup> She contacted a senior vice president and told him

128. See Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Court's Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 271-72 (1994). Perhaps the marginalization of part-time lawyers can be attributed to people's preference for colleagues who are similar to themselves. See *id.* (discussing disadvantages of women at upper-level professions due to inability to remain on promotion track). As a result of this bias, "top executives tend to promote people into leadership positions who are as much like them as possible' because they are 'simply more comfortable with and seem to gravitate toward people like themselves.'" *Id.* (quoting Basia Hellwig, *The Breakthrough Generation: 73 Women Ready to Run Corporate America*, WORKING WOMAN, Apr. 1985; at 148).

129. Title VII challenges to unequal pay may also be available. Moreover, suits contesting unequal benefits would have to be filed under Title VII because the EPA covers only wages. See Emilie M. Meyer, Note, *Employment Law—Title VII—United States Supreme Court Clarifies Standards for Statistical Evidence and Burdens of Proof in Private Litigation Under the Disparate Impact Theory—Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), 20 SETON HALL L. REV. 831, 831 (1990) (noting that Title VII has been interpreted by Supreme Court to forbid intentional discrimination and use of facially neutral employment practices that adversely affect protected class); see also Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMPLOYMENT & LAB. L. 108, 126 (1988).

130. Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 588 (1996).

131. See *Trezza v. The Hartford, Inc.*, 98 Civ. 2205, 1998 WL 912101, at \*6 (S.D.N.Y. Dec. 28, 1998).

132. See *id.* at \*1.

133. See *id.*

134. See *id.*

135. See *id.*



she believed that the failure to promote her reflected sex discrimination.<sup>136</sup> Two months later she received a promotion.<sup>137</sup>

Finally, in 1997, she was not considered for the position of senior managing attorney despite the fact that she asked to be considered and had consistently received excellent job evaluations.<sup>138</sup> Instead the company considered two men with children, and then offered the job to a nonmother with less experience than Trezza.<sup>139</sup>

Trezza sued, alleging sex discrimination under the so called "sex-plus" disparate treatment theory.<sup>140</sup> This theory, first articulated by the United States Supreme Court in 1971 in *Phillips v. Martin Marietta*,<sup>141</sup> forbids discrimination against mothers even if equal opportunity is offered to nonmothers.<sup>142</sup> In *Martin Marietta*, the employer refused to allow the mothers of school-aged children to apply for jobs that were open to the fathers of school-aged children.<sup>143</sup> The court in *Martin Marietta*, like the court in *Trezza*, held that the fact that men and women without children were treated the same did not excuse discrimination against mothers; the *Trezza* court explicitly rejected Hartford's contention that no sex discrimination existed because the job in question had been awarded to a woman.<sup>144</sup> Trezza pointed out that only seven of the forty-six managing attorneys at Hartford were women and only three were mothers.<sup>145</sup> In contrast, many of the male managing attorneys were fathers.<sup>146</sup>

These new "I had a baby, not a lobotomy" suits have tremendous potential because discrimination against mothers remains very open today. This is precisely because it is not conceptualized as discrimination. *Trezza* and similar suits may have begun to change that, reversing prior cases in which plaintiffs often lost.<sup>147</sup>

#### B. *Disparate Impact Suits to Challenge Masculine Ideal Worker Norms*

Two different types of lawsuits could challenge masculine ideal worker norms under Title VII's disparate impact theory. One would focus

136. *See id.*

137. *See id.*

138. *See id.* at \*2.

139. *See id.*

140. *See id.* at \*3. *Trezza* also argued disparate impact theory, which was dismissed. There may have been some flaws in the presentation of this theory. It is difficult to tell from published materials.

141. 400 U.S. 542 (1971).

142. *See generally id.*

143. *See id.* at \*2.

144. *See Trezza*, 1998 WL 912101, at \*6.

145. *See id.* at \*3.

146. *See id.*

147. *See generally* Piantanida v. Wyman Ctr., Inc., 927 F. Supp. 1226 (E.D. Mo. 1996), *aff'd*, 116 F.3d 340 (8th Cir. 1997). For a discussion citing other cases, see generally Martha Chamallas, *Motherhood and Disparate Treatment*, 44 VILL. L. REV. 337 (1998).

on the design of the promotion track in blue- or white-collar jobs. Another would contest an employer's decision not to allow part-time work.

Disparate impact suits involving nonfinancial issues entail three steps. First, the plaintiff must prove that a facially neutral policy has a disparate impact on women.<sup>148</sup> Such proof might involve a comparison of the sex composition of the workforce in entry-level positions with that in high-level positions. If a plaintiff carries her burden of proving disparate impact, the burden shifts to the defendant to prove that the challenged employment practice, despite its disparate impact, is required by business necessity.<sup>149</sup> If the employer proves business necessity, a plaintiff can still win by proving the existence of a less discriminatory alternative (LDA); that is, an employment practice that will serve the employers' business goals but will create less of a disparate impact than the challenged practice or practices.<sup>150</sup>

In masculine-ideal worker norm scheduling promotion suits, the key is to present a vivid picture of how the *particular workplace* at issue can be restructured and yet still meet the employer's legitimate business needs. It would be ideal to have a study by a work/family consultant that shows how to restructure the particular workplace at issue—after all, reimagined workplaces are their business. The most important role of such a report is to help diffuse the heavy (if unofficial) burden imposed by the often articulated sense that, although redesigning work places is a worthy good, "it's just not practical."

A picture of the reimagined workplace is also relevant to several legal inquiries. The first concerns an ambiguous provision of Title VII which may require a plaintiff to present a viable proposal that the employer refused to adopt early on in the lawsuit.<sup>151</sup> The provision in question states

148. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (holding that liability is established when facially neutral policy affects members of protected class in significantly discriminatory manner); see also Gilda Vinzulis Boyer, *Employment Law—Redefining the Evidentiary Burdens in Title VII Disparate Impact Employment Discrimination Cases: Wards Cove Packing Co. v. Atonio*, 15 J. CORP. L. 573, 573-74 (1990) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)). The employee must provide statistical evidence to establish that "a facially neutral employment practice has a significant discriminatory impact against the employee." *Id.*

149. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) (stating that once plaintiff establishes disparate impact burden shifts to defendant to prove business necessity); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989) (same). The *Wards Cove* Court did not require an employer to show the practices at issue were essential or indispensable to satisfy the business necessity test. See *id.* at 2126 (noting low burden for employers).

150. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (stating that plaintiff bears burden of establishing less discriminatory alternatives); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 495 (1975) (same). The basic format for disparate impact suits involving financial issues, as when paying women in a predominantly female part-time track a lower wage rate for part-time work, combine requirements from the EPA and from Title VII, as well as complex threshold issues that are beyond the scope of this article.

151. See 42 U.S.C. § 2000e(2)(k)(1) (1991).

that disparate impact is established if a plaintiff proves an alternative employment practice “and the respondent refuses to adopt” it.<sup>152</sup> A consultant’s report can also help to rebut an employer’s claim that business necessity requires that current practices remain unchanged, as well as, help to establish the existence of less discriminatory alternatives. In some cases, the relevant data for restructuring may be available from first-generation mommy track, work/family policies, often implemented as the result of a consultant’s report analyzing what policies are practical and desirable from a business standpoint.

### 1. *Challenging the Design of the Promotion Track*

Consider a large corporation that hires roughly equal proportions of men and women at the entry level, but has a promotion track that yields disproportionate numbers of men in top-level positions. This must be a very common situation, considering that ninety-five percent of upper-level management practices are staffed by white males.<sup>153</sup> We have previously examined the policies that contribute to this situation. Quite often the promotion track requires the prototypical executive schedule. Perhaps it also requires relocation. Other factors may play a role as well. In the blue-collar context, male physical norms may also play a role in addition to the norms that have evolved as a result of men’s access to a flow of family work from women: large amounts of mandatory overtime, training programs that occur in overtime, stringent sick leave policies that effectively preclude people with primary responsibility for child care and job ladders that severely penalize work interruptions.

Let us first consider a white-collar promotion suit. After generating a picture of a restructured workplace, a plaintiff could file a suit alleging that the design of the promotion track has a disparate impact on women. Proof would first require her to establish that, for example, women hold fifty percent of entry-level but only twenty percent of the top-four corporate levels, and only five percent of top management positions.

The next question is whether the relative paucity of women at the top is caused by the actions of the employer or by women’s choices to quit.<sup>154</sup> An employer faced with such a suit can be expected to argue that, whatever the documented disparities between men and women, they are caused not by discrimination but by women’s lack of interest in the jobs in question.<sup>155</sup> The causation requirement in disparate impact suits was codified in the Civil Rights Act of 1991, which requires plaintiffs to estab-

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152. *Id.*

153. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 191, 220 (1999).

154. For a further discussion of the implications of the use of choice language, see *supra* notes 85-89 and accompanying text.

155. See *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 322 (7th Cir. 1988) (identifying “women’s lack of interest” as reason for their under-representation in certain positions).

lish that the challenged policies caused the impact documented.<sup>156</sup> This argument over causation then takes us back to the analysis of choice. When women use choice rhetoric, they speak as people struggling with the constraints handed to them by a world they did not invent. Courts considering Title VII claims are in a different position; their mandate is to consider whether the constraints women face constitute discrimination. If they do, the fact that many women may have internalized those constraints does not provide employers with an excuse for continuing the discrimination.

The third legal requirement is that a plaintiff must articulate specific policies which produce the discrimination alleged.<sup>157</sup> One example is the common law-firm policy that takes part-time workers off the partnership track. Even if the impact in question is produced by an integrated set of policies that cannot be separated, a plaintiff may be able to challenge the entire integrated set by showing that the "bottom-line" results are discriminatory.<sup>158</sup>

Once an employee has (1) offered statistics proving disparate impact, (2) refuted the employer's argument that this predicament could only be the result of women's own choices and (3) delineated the policy or policies at issue, she has proven her prima facie case. The burden of proof then shifts to the defendant, who is given the opportunity to show that the policy that produces the disparate impact is a business necessity.<sup>159</sup>

The law on business necessity is complex. In 1971, the Supreme Court held that an employer had the burden of proving that the challenged policy was "job related" and had "a manifest relationship to the employment in question."<sup>160</sup> This decision originally placed a heavy bur-

156. See David Charny & G. Martin Gulati, *Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 101 n.151 (1998) (stressing importance of causation in disparate impact suits). The Civil Rights Act of 1991 exempts plaintiffs from identifying a particular employment practice that causes disparate impact when the process is not conducive to "separation for analysis." See *id.* (discussing Act's exemption).

157. See 42 U.S.C. §2000e-2(k)(1) (1991) (noting change). The Civil Rights Act of 1991 added the requirement that "the complaining party . . . demonstrate that each particular challenged employment practice causes a disparate impact . . ." *Id.*

158. See 42 U.S.C. § 2000e2(k)(1)(1991). Note, however, under this section, that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." *Id.*; see also MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 456-59 (4th ed. 1997).

159. See 42 U.S.C. § 2000e-2(k)(1)(A)(i)(1994) (conditioning validity of claimant's case on employer's failure to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity").

160. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (stating that "if an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited"). The Court found that

den on the employer. Eighteen years later, however, the Supreme Court greatly strengthened the employer's hand in *Wards Cove Packing Co. v. Atonio*.<sup>161</sup> There, the Court required only that the employer be able to articulate a reasonable "justification for his use of the challenged practice."<sup>162</sup> The Court stated that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."<sup>163</sup>

Congress overturned *Ward's Cove* with the passage of the Civil Rights Act of 1991.<sup>164</sup> Unfortunately, it did so in language that is so ambiguous that the current test for business necessity remains unclear.<sup>165</sup> It appears, however, that the current test is closer to the previous requirement that a discriminatory practice be essential to the business.<sup>166</sup> Assuming this is true, many current practices would likely not be justifiable as business necessity. The use of masculine norms in job descriptions of high-level white collar work strongly suggests that, at best, the executive schedule and other practices "are not actually job related but [are] merely 'corporate convenient.'"<sup>167</sup> Indeed, such policies may not be as convenient to the corporation as is often assumed. Flexible policies, properly implemented,

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the high school completion requirement and general intelligence test imposed by the employer "[did] not bear a demonstrable relationship to successful performance of the jobs" where the employer had adopted the policies "without meaningful study" and employees hired prior to their adoption "who ha[d] not completed high school or taken the tests . . . perform[ed] satisfactorily." *Id.*

161. 490 U.S. 642 (1989), *rev'd in part by statute*, 42 U.S.C. § 2000e(2)(k) (1994).

162. *Id.* at 659.

163. *Id.*

164. See Civil Rights Act of 1991, Pub. L. No. 102-166 § 3, 105 Stat. 1071 (1991) ("The purposes of this Act are . . . to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*." (citations omitted); H.R. REP. NO. 102-40(I), at 28 (1991) ("For eighteen years, the *Griggs* rule of business necessity operated to remove these unnecessary barriers. The Committee finds that there is a compelling need to overrule the *Wards Cove* decision and to restore the rule of *Griggs* and its progeny.").

165. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (providing no definition for terms "job related" and "business necessity").

166. See 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991) ("The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with respect to *Wards Cove*—business necessity/cumulation/alternative business practice—the exclusive legislative history is as follows: The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*." (citations omitted). As enunciated by the Court in *Griggs*, an employer has the "burden of showing that any given requirement . . . [has] a *manifest relationship* to the employment in question." *Griggs*, 401 U.S. at 432 (emphasis added).

167. LOTTE BAILYN, *BREAKING THE MOLD* 77 (1993) (quoting Virginia E. Schein).

would improve productivity and lower the costs of absenteeism, turnover and recruitment in many instances.

A crucial issue concerns the role of costs in establishing business necessity because an employer can be expected to argue that promoting only people who work long hours ensures maximum profits. Employers are, of course, entitled to engage in cost containment; that is a crucial part of management's job. The issue becomes whether employers are entitled to structure their cost containment measures in ways that systematically disadvantage women. The alternative is to contain costs in ways that do not perpetuate practices which produce "built in headwinds" for anyone without the social resources typically available to many, although not all, men.<sup>168</sup> If plaintiffs follow the proposal I present here, the per-hour costs of full- and part-time employees should be similar, provided that part-time workers request only *proportionate* pay, benefits and advancement. Nevertheless, federal courts have not consistently treated the issue of whether or not costs are relevant in determinations of business necessity.<sup>169</sup>

If an employer is successful in proving business necessity, a plaintiff can still win if she can prove the existence of a "less discriminatory alternative;" that is, an alternative way of structuring the promotion track that has a less harsh effect on female employees.<sup>170</sup> A plaintiff's reimagined workplace becomes directly relevant in this final stage because a plaintiff employee may be able to prevail if she can show specific changes that are feasible and less discriminatory.<sup>171</sup>

## 2. *Individual Redesign Suits*

Another type of lawsuit would involve a full-time female employee who, after working for a number of years in her job, is denied a request to have her schedule changed to part-time. I know from my experience that

168. See *EEOC v. Steamship Clerks Union, Local 10666*, 48 F.3d 494, 602 (1st Cir. 1995) (citing *Griggs* holding that absence of discriminatory intent does not justify procedures that act as "built-in headwinds" for minority groups); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1302 (5th Cir. 1994) (citing *Griggs* holding finding unlawful "mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"); *Butler v. Home Depot*, Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754, at \*3 (N.D. Cal. Aug. 29, 1997) (citing *Griggs* requirement that an employer's practice need only act as "built-in headwinds" rather than have discriminatory intent).

169. For a discussion of the role of costs, see BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW* 871-72 (1996).

170. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658 (1989) (noting that second phase of disparate impact cases contain two components: "first, a consideration of the justifications an employer offers for his use of these practices; . . . and second, the availability of alternative practices to achieve the same business ends, with less racial impact").

171. See *International Union v. Johnson Controls, Inc.*, 886 F.2d 871, 901 (7th Cir. 1989) ("The absence of economically and technologically feasible alternatives to [defendant's] policy also supports a bona fide occupational qualification determination.").

this is a common situation among federal employees in Washington, D.C. No doubt it exists elsewhere as well.

An ideal plaintiff in this type of suit would be someone who has been working for the employer for many years and has consistently received excellent work evaluations. In addition, this plaintiff would need to present a plan for part-time employment that is clearly workable and meets the employer's needs. Again, a work/family consultant may be helpful in framing a proposed plan.

Proof of disparate impact would require such a plaintiff to show that a large number of employees (disproportionately women) have requested to have their hours cut, that they left when these requests were turned down, and that a disproportionately low number of women now hold the jobs at issue. The actual workplace data, which provides evidence of disparate impact, may be hard to compile. In my experience, however, certain key women have served as mentors for women seeking part-time work in specific agencies of the federal government; these women serve as an institutional memory of requests denied. Similar situations may well exist elsewhere. In lawsuits of this type, the issues of business necessity and less discriminatory alternatives will be much the same as in the promotion suits previously described.<sup>172</sup>

The challenges involved in litigating work/family conflict would be lessened if a proposed amendment to the Equal Pay Act were adopted. In 1994, the Contingent Workforce Equity Act (CWEA) proposed to amend the Equal Pay Act to prohibit employers from paying part-time employees at a rate different from that paid to full-time employees for equal work in jobs, the performance of which requires equal skills, effort and responsibility, and which are performed under similar working conditions.<sup>173</sup>

172. For further discussion of promotion suits under Title VII, see *supra* notes 130 through 159 and accompanying text.

173. See S. 2504, § 102 (1994) (addressing issues arising from replacement of full-time employees with part-time, temporary and other contingent employees). The Act states in pertinent part:

(g)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of employment status by paying wages to part-time or temporary employees in such establishment at a rate less than the rate at which the employer pays wages to full-time employees in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to—

- (A) a seniority system;
- (B) a merit system;
- (C) a system that measures earnings by quantity or quality of production; or
- (D) a differential based on any other factor other than employment status.

CONG. REC. S14247 (daily ed. Oct. 5, 1994) (statement of Sen. Metzenbaum) (Contingent Workfare Equity Act).

Now that unions have begun to take an interest in the issue of equal pay rates for part-time work, the time may be ripe to resurrect this proposed statute. The International Labour Office's proposed convention on part-time work has many of the same provisions as CWEA, including its guarantees that part- and full-time workers receive equal wage rates.<sup>174</sup>

#### VII. BUT THAT'S IMPOSSIBLE!

*The early proponents of a Title VII remedy for sexual harassment were told that because the practice was so pervasive and of such long standing, because drawing a line between the permissible and the impermissible was so insurmountable, because the problems of proof were so complex and because the issue was so far from the core prohibitions of Title VII, nothing could or should be done by the courts.*<sup>175</sup>

Obviously, suing your employer is not the ideal mechanism of social change. Law suits are costly in several ways. Litigation is itself costly. Suing your employer may also be emotionally draining in the short run and may hurt your career in the long run—who wants to hire a “troublemaker”?<sup>176</sup>

Nonetheless, legal liability has a remarkable ability to focus the mind. Sexual harassment has been around a long time; employers became serious about its damaging effects only when they faced legal liability.<sup>177</sup> The threat of legal liability, rather than the damages awarded in individual lawsuits, is what leads to social change.

Until now, discussion of “family friendly” policies has largely been limited to the realm of management consulting, which has emphasized the potential bottom-line benefits of flexibility.<sup>178</sup> Work/family consultants

174. See International Labour Conference, 81st Session, Report IV (2B), Part-time work (discussing proposed amendment).

175. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 81-82 (1995).

176. See Jill Andrews, *National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact*, 14 NW. J. INT'L L. & BUS. 413, 439 (1994). As the author notes, “while there is not the same cultural aversion to litigation as in Japan, an American woman faces the risk of being labeled a troublemaker if she decides to use the courts to enforce her rights. This label may even prevent her from obtaining other employment.” *Id.*; see also Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, 3 KAN J.L. & PUB. POL'Y 57, 69 (1994) (“While many attributed these losses to direct retaliation by superiors who were the harassers, other victims said they were subjected to what they perceived as company-wide ‘blacklisting’ in which they were labeled as troublemakers and found their careers dead-ended.”).

177. See HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 195 (1997). “[I]t is settled that an effective policy and procedure against sexual harassment avoids employer liability for harassment by subordinate employees and for environmental harassment by supervisors.” *Id.*

178. See *The Work-Family Equation: More Companies Are Finding It's Good Business to Consider The Family Needs of Their Employees*, ST. PAUL PIONEER PRESS DISPATCH,



have tried for years to convince employers to adopt "family friendly" policies on the grounds that such policies improve employee retention, decrease training and recruiting costs, and boost employee productivity.<sup>179</sup> The result has been a generation of "mommy track" policies that offer scheduling flexibility at the cost of permanent marginalization.<sup>180</sup>

What we need is not a mommy track, but a work paradigm restructured around values people hold in family life. This would not only end systematic discrimination against women; it would also empower fathers to break away from the provider role domesticity scripts for them. Both for basic economic reasons and for the reason that masculinity tends to be measured by the size of a paycheck, most fathers will not feel free to contribute equally to family work if they have to pay the price mothers currently pay.<sup>181</sup> Once the marginalization of committed parents is recognized as discrimination against women, the result will be to unbend gender for men as well.

For over a decade, work/family consultants have articulated a new vision of restructured work, but mothers have never had a cause of action. Courts should give them one.<sup>182</sup>

Nov. 26, 1990, at 1F; Work & Family Benefits, Inc., Why Invest in This Employee Benefit? (visited Oct. 31, 1997) <<http://www.wfbenefits.com/WHYINVST.HTM>>.

179. See SALLY COBERLY & GAIL G. HUNT, WASHINGTON BUSINESS GROUP, THE METLIFE STUDY OF EMPLOYER COSTS FOR WORKING CAREGIVERS 6-8 (1995); see also Phyllis H. Raabe, *The Organizational Effects of Workplace Family Policies: Past Weaknesses and Recent Progress Toward Improved Research*, 11 J. FAM. ISSUES 477, 482 (1990). But see Fuller v. GTE Corp., 926 F. Supp. 653, 658 (M.D. Tenn. 1996) ("Title VII does not automatically require a family friendly workplace.")

180. See ARLIE RUSSELL HOCHSCHILD, TIME BIND 27 (1997); Deborah L. Rhode, *Fleeing Home for the Comforts of an Office*, NAT'L L. J., Oct. 6, 1997, at A23; Debra B. Schwartz, *An Examination of the Impact of Family Friendly Policies on the Glass Ceiling* 5, 18 (Jan. 1994) (unpublished manuscript on file with Federal Glass Ceiling Commission).

181. See Case, *supra* note 175, at 19 ("Masculinity was associated with career success in both sexes and with desirable qualities in a wide variety of employment contexts, particularly for those jobs accorded high status and high pay in our society."); Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1152 n.2 (1995) (citing JERRY A. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS 151-55 (1989)).

182. For patient assistance in helping me frame these lawsuits and proposals, thanks to Martha Chamallas, Stanford Ross, Susan Ross, Michael Selmi and Marley Weiss. The mistakes that remain, of course, are mine.

Though I have focused on litigation in the text, to be effective litigation must be part of an integrated approach that includes community-based programs such as that described in Sylvia Law, *Girls Can't Be Plumbers—Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 HARV. CIV. RTS.—CIV. LIB. 45 (1989). She suggests that "three components are critical to assuring equality of opportunity . . . 1) executive oversight, especially the enforcement of federal . . . compliance guidelines; 2) judicial oversight, including vigorous application of Title VII's prohibition against job requirements that are discriminatory in effect and cannot be justified as job-related; and 3) well constructed, aggressive community-based programs . . . which open opportunities so that goals may be met." *Id.*