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PARENTAL-STATUS EMPLOYMENT DISCRIMINATION: A WRONG IN NEED OF A RIGHT?

Peggie R. Smith*

This Article evaluates strategies to challenge employment discrimination based on parental status. Specifically, it examines proposals put forth by some commentators to establish parental status as a protected class. While such a suggestion is attractive, the Article argues that it ultimately offers few practical advantages and remains wedded to a limited conception of equality, requiring only that employment decisions not reflect differences based on parenthood. Consequently, such a strategy would satisfy anti-discrimination legislation so long as both men and women with parental obligations are equally ill-treated. The Article concludes that a shift in perspective from gender to parental status will not foster meaningful change in the situation of working parents without a parallel shift in legal strategies to resolve work-family conflicts. The model must change from one of formal equality to one that requires the workplace to accommodate the parenting obligations of workers.

INTRODUCTION

Employees with parental responsibilities face enormous challenges trying to balance the demands of child care with the pressures of work.¹ Caught in a workplace culture that accords little value to parenting,² working parents must struggle to nurture and provide for their children. Few individuals are employed in job settings that afford the necessary flexibility to respond adequately to the “predictable unpredictability” of childrearing.³ As a result, many working parents labor under constant stress, worried about a “parental time famine” and concerned that they are compromising

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1. See SYLVIA A. HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS* 29–30 (1998); S. JODY HEYMANN, *THE WIDENING GAP* (2000); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) [hereinafter WILLIAMS, *UNBENDING GENDER*].

2. See HEWLETT & WEST, *supra* note 1, at 153 (observing that “contemporary American culture has become profoundly antagonistic toward parents”).

3. See HEYMANN, *THE WIDENING GAP*, *supra* note 1, at 15–31 (describing how the “predictably unpredictable” nature of caring for children leads to constant work disruptions and runs counter to the assumption of most workplaces that workers will perform in an uninterrupted fashion).

the care of their children.⁴ To help parents achieve a satisfactory medium between work and family, lawmakers have pursued various strategies, including prohibiting employment discrimination against individuals based on their parental status.⁵

Proposals to treat parenthood as a protected category—similar to race and sex—reflect a concern that parents are vulnerable to inaccurate assumptions and negative stereotypes about their career potential and job commitment, and that they encounter work/family conflicts more frequently than individuals without children. Although there are a few statutes that prohibit parental-status-based employment discrimination,⁶ in most jurisdictions employers can freely discriminate against employees based on such status. Commentators point to cases like that of Diane Piantanida to support extending the scope of fair employment laws to specifically include protection for employees with parental obligations.⁷ Ms. Piantanida, a new mother, claimed that she was demoted because her employer felt that her previous position was ill-suited for new mothers.⁸ The employer allegedly offered her a position that was more appropriate “for a new mom to handle.”⁹ Affirming a lower court’s dismissal of Ms. Piantanida’s discrimination suit against the employer, the Eighth Circuit observed that while discrimination based on one’s status as a parent was “reprehensible,” it was not actionable under federal law.¹⁰

4. HEWLETT & WEST, *supra* note 1, at 216 (concluding that “parents’ central and increasingly desperate concern revolves around a time crunch”); *id.* at 232–33. See generally ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 124–25 (1997) (exploring the impact of the “time bind” on the ability of workers to care for their families).

5. Throughout this Article, the term “parent” is used to encompass individuals with parental obligations. The Article defines “parent” in accordance with proposed federal legislation to prohibit employment discrimination against parents. Ending Discrimination Against Parents Act, S. 1907, 106th Cong. (1st Sess. 1999). Under the proposed legislation, “parent” refers to biological parents, adoptive parents, foster parents, stepparents, custodians of a legal ward, individuals in loco parentis who stand vis-à-vis such an individual, and individuals actively seeking legal custody or adoption. The proposed legislation further defines parent to include individuals who have parental relationships with people under the age of eighteen or people unable to take care of themselves due to mental or physical disability. *Id.* § 4(k); see also *infra* Part II.A (discussing the proposed Ending Discrimination Against Parents Act). When referring to parents, I use the concepts of parental obligations and parental responsibilities interchangeably with child care obligations and child care responsibilities.

6. See *infra* notes 92–102 and accompanying text (listing local ordinances and state statutes that prohibit employment discrimination based on parental status).

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

8. *Id.* at 340.

9. *Id.* at 341.

10. *Id.* at 342.

Occurrences of parental-status-based discrimination are often gender-related and are therefore subject to Title VII of the Civil Rights Act of 1964.¹¹ Title VII's comparative approach to sex equality, however, does not effectively address discriminatory workplace obstacles that hinder the employment opportunities of individuals with parental obligations.¹² While detrimental to both men and women with parental responsibilities¹³ Title VII's shortcomings are particularly pronounced with respect to working mothers who, as childbearers and primary caretakers of children, are more likely to experience parental-status-based employment discrimination than men.¹⁴ Based on formal equality principles, Title VII requires that individuals who are alike should be treated alike; in the context of gender, this means that women must be treated the same as men only if they are similarly situation with men.¹⁵ While appealing in

11. 42 U.S.C. §§ 2000e to 2000e-17 (2001).

12. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1226-33 (1989) [hereinafter Abrams, *Gender Discrimination*]; Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Reconstructing the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 143 (1989) [hereinafter Dowd, *Gender Paradox*]; Maxine N. Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 139-40 (1998); see also *infra* notes 37-64 and accompanying text (examining Title VII's effectiveness in eliminating discrimination against workers with parental obligations).

13. Although work/family conflicts have long been regarded as a woman's issue, scholars are increasingly examining the impact of such conflicts from the perspective of fathers. See JAMES A. LEVINE & TODD L. PITTINSKY, *WORKING FATHERS: NEW STRATEGIES FOR BALANCING WORK AND FAMILY* (1997); Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523 (1996); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994); Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25 (1998); Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 967 (2001).

14. See DAPHNE SPAIN & SUZANNE M. BIANCHI, *BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN* (1996).

15. See GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 101 (Katherine T. Bartlett & Angela P. Harris eds., 2d ed. 1998):

Formal equality is a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than stereotypical assumptions made about them. It is a principle that can be applied either to a single individual, whose right to be treated on his or her own merits can be viewed as a right of individual autonomy, or to a group, whose members seek the same treatment as members of other, similarly situated groups. What makes an issue one of formal equality is that the claim is limited to treatment *in relation* to another, similarly situated individual or group and does not extend beyond same-treatment claims to any demands for some particular, *substantive* treatment.

See also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *FEMINIST THEORY*] (critiquing the theory of formal equality); Katherine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1 (1994) (distinguishing among different feminist perspectives including formal equality, substantive equality,

principle, this approach to equality ignores critical gender-based biological distinctions as well as important socioeconomic disparities between men and women.¹⁶ Because women typically shoulder primary parenting responsibilities, the denial of these differences often leaves them without adequate legal recourse to redress workplace discrimination.

Against that background, some commentators believe that a discrimination baseline associated with parenting, rather than gender, might better aid all working parents and especially working mothers.¹⁷ Such a change promises to secure a measure of equality for women, as parents, without requiring them to engage in comparisons with men, as parents. In this Article, I appraise the strength of that promise. I argue that, while theoretically attractive, the promise of associating discrimination with parental status is largely illusory, offering few practical advantages. Although a parental-status-based approach to discrimination stands to promote a gender-neutral understanding of child care, and in the process, to advance the interests of all workers with parental obligations,¹⁸ such an approach remains wedded to a limited conception of equality, requiring only that employment decisions not reflect differences based on parenthood. Consequently, anti-discrimination legislation is satisfied so long as both women and men with parenting obliga-

nonsubordination theory, different voice theory, and postmodern feminism); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998) (describing both the disadvantages and the advantages of a formal equality approach to eliminating gender discrimination).

16. See Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699 (1986) [hereinafter Dowd, *Maternity Leave*]; Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

17. See *Special White House Briefing Subject: White House Conference on Teenagers and President's Upcoming School Reform Tour*, FEDERAL NEWS SERV., May 2, 2000 (announcing measure to prohibit federal government from discriminating against workers based on parental status); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 509-10 (1996) (arguing in favor of legislation to create "a special class of worker—the parent—who would be protected from discrimination in hiring and terms of employment by virtue of her parental responsibilities"); Sylvia Ann Hewlett, *This Nation Simply Has To Do Better by Its Parents*, HOUSTON CHRONICLE, June 05, 2000, at 19 (arguing in favor of prohibiting employment discrimination against parents); Mary Leonard, *Plan for Parents' Rights Opens a Domestic Divide*, BOSTON GLOBE, April 25, 1999, at A1 (noting groups that endorse legislation to prohibit employers from discriminating on the basis of parental status); Bruce Reed, *Working Parents Unprotected*, USA TODAY, April 22, 1999, at 14A (explaining why working parents need protection from employment discrimination); Ruth Rosen, *A Gift That Honors Moms and Families*, L.A. TIMES, May 9, 1999, at M5 (calling for anti-discrimination protection to be extended to working parents).

18. See *infra* Part II.B (discussing the advantages of a parental-status-based discrimination paradigm).

tions are equally ill-treated. I conclude that a shift in perspective from gender to parental status will not foster meaningful change in the situation of working parents without a parallel shift in legal strategies to resolve work/family conflicts. The model must change from one of formal equality to one that requires the workplace to accommodate the parenting obligations of workers.

Not only does treating parents as a protected class lack transformative power, it also raises concerns about the scope of anti-discrimination doctrine. Arguments to prohibit employers from discriminating against parents run counter to traditional anti-discrimination employment measures. When compared with the data regarding racial or gender discrimination, for example, the evidence does not exist to indicate that employment discrimination against parents based on erroneous assumptions is a serious problem. Although critical of efforts to classify parents as a protected class, I respect the motivating desire behind such efforts to lessen work-parenting tensions. Thus, the ensuing analysis, while focusing on the pitfalls of a parental approach to employment discrimination, also briefly examines alternative approaches that will enable working parents to better integrate child care responsibilities with work.

The remainder of this Article is divided into five Parts. Part I examines the extent to which a prohibition against gender-based employment discrimination can help working parents address work/family conflicts. Part II evaluates the merits of existing and proposed legislation to classify parents as a protected class. Part III focuses on the structural inadequacies of a parental-status-based approach to employment discrimination, and maintains that although the approach stands to benefit some litigants, it lacks the capacity to effect substantive change. Part IV borrows from equal protection jurisprudence to consider the appropriateness of treating parents as a protected class. Finally, Part V discusses legal strategies that seem more capable of helping parents resolve work/family conflicts.

I. PROTECTION AGAINST PARENTAL STATUS DISCRIMINATION: BENEFITS AND BARRIERS OF TITLE VII'S GENDER DISCRIMINATION MODEL

This Article uses Title VII's guaranty of gender-based equal protection as a comparative benchmark to explore the merits of a

parental-status-based approach to employment discrimination. Title VII bars employers from discriminating on the basis of race, color, sex, religion, and national origin.¹⁹ While Title VII does not specifically include parental status as a protected category, parents are afforded some protection when discrimination based on parental status is coupled with one of the Act's prohibited factors, most commonly sex.²⁰

To understand the appeal of legislation to prohibit employers from discriminating against workers based on parental status, one must first appreciate how allegations of parental status discrimination presently fare when treated as problems of gender. Thus, this Part examines the ability of a gender-based approach to employment discrimination to redress discrimination against individuals based on their status as parents. Part I.A probes the strengths and limitations of a disparate treatment claim to occurrences of parental status discrimination; Part I.B focuses on the potential of the disparate impact paradigm to counteract neutral practices disadvantaging workers with parental responsibilities. The critical difference between a disparate treatment claim and a disparate impact claim hinges on intent. Whereas the former requires a showing of intent to discriminate,²¹ the latter refers to employment practices that are "fair in form, but discriminatory in operation."²² To establish a disparate impact claim, a plaintiff does not have to prove discriminatory intent, but only that an employment practice "fall[s] more harshly on one group than another and cannot be justified by business necessity."²³

Before turning to Part I.A, it is useful to distinguish among three different ways in which individuals may experience employment discrimination because of their status as parents. First, discrimination can occur as a result of employer stereotypes and assumptions about individuals with parental obligations. For example, an employer may disfavor parents because he or she believes that workers with children are less reliable than workers without children. Second, discrimination against parents may reflect the fact that individuals with children have parental obligations that can prevent them from meeting all the demands of the workplace. To

19. 42 U.S.C. §§ 2000e to 2000e-17 (2001).

20. 42 U.S.C. § 2000e-2(a).

21. See, e.g., *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (articulating differences between disparate impact and disparate treatment claims); see also HAROLD S. LEWIS, JR., *CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW* 217-18 (1997).

22. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

23. *Teamsters*, 431 U.S. at 335 n.15.

illustrate, an employment policy that ties upper-level promotions to weekend work availability may discriminate against parents because of their child care-related responsibilities. Third, parental-status-based discrimination may be linked to biological differences between men and women. For example, the parenting rights of women as mothers are often implicated by employment practices that discriminate on the basis of pregnancy or breastfeeding. While this third form of discrimination is specific to women only, both men and women may experience the first two forms of discrimination.

A. Disparate Treatment

Employees have had some success using Title VII to challenge discrimination based on parental status when an employer relies upon gender stereotypes to differentiate among parents. Courts have recognized that a Title VII disparate treatment claim may arise when an employer discriminates against an individual based on "sex plus" another characteristic, such as parental status.²⁴ *Phillips v. Martin Marietta Corp.*²⁵ presents the classic illustration of the sex-plus doctrine in a case involving parenting. Ms. Phillips accused her employer of discriminating against a subclass of women by hiring men, but rejecting women, with pre-school age children.²⁶ In ruling for Phillips, the Supreme Court held that it was illegal for an employer to treat employees differently where the employer used sex plus a second characteristic, such as marital or parental status.²⁷

The plaintiff in *Trezza v. The Hartford, Inc.*²⁸ also fared well in invoking the sex-plus framework. Ms. Trezza, a married mother of

24. See *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc) (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971)) (recognizing that a Title VII claim "may arise if an employer discriminates against an individual because of sex plus another characteristic, such as marital or parental status"); *Smith v. AVSC Int'l, Inc.*, 148 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) (stating that the sex plus "doctrine recognizes that it is impermissible to treat men with an additional characteristic more or less favorably than women with the same additional characteristic"); see also BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 403 (2d ed. 1983) (observing that "sex plus" discrimination occurs when an employer classifies employees on the basis of sex plus another characteristic); Martha Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1, 9-17 (discussing the history of the sex-plus doctrine).

25. 400 U.S. 542 (1971).

26. *Id.* at 543.

27. *Id.* at 544.

28. No. 98 Civ. 2205 (MBM), 1998 WL 912101, *5 (S.D.N.Y. Dec. 30, 1998).

two young children, worked for Hartford as an attorney. In 1997, she applied for a promotion to the position of managing attorney.²⁹ Hartford, however, did not consider Trezza for the position, assuming instead that she would not be interested because of her family responsibilities.³⁰ The company instead offered the job to two men, both of whom had children.³¹ When the men declined the position, Hartford eventually gave it to a woman who had less legal experience than Trezza, but had no children.³² In her Title VII suit, Trezza alleged that her status as a “woman and a parent” led to Hartford’s failure to consider her for the promotion.³³ The trial court denied Hartford’s motion for summary judgement, reasoning that Trezza’s allegation that Hartford treated women with children less favorably than men with children was sufficient to establish a prima facie case of sex-plus discrimination.³⁴

Phillips and *Trezza* both support the proposition that an employer cannot rely upon gender-based stereotypes about the productivity of workers with children to treat a subclass of women with parental responsibilities less favorably than a subclass of men with parental responsibilities. Of course, as the following discussion illustrates, a claim of sex plus parental status often hinges on the presence of a corresponding subclass of members of the opposite gender to use as a comparison group.³⁵

Anti-discrimination statutes like Title VII, which do not treat parenthood as a distinct protected class, are ineffective if plaintiffs

29. *Id.* at *2.

30. *Id.* at *2. Defendants allegedly made a number of derogatory comments to Trezza including the statements “women are not good planners, especially women with kids” and “I don’t see how you can do either job well” [i.e., being a mother and a worker]. *Id.* at *2.

31. *Id.*

32. *Id.*

33. *Id.* at *5. Trezza also filed claims for hostile work environment sexual harassment, disparate impact discrimination, discriminatory retaliation, and intentional infliction of emotional distress. *Id.* at *3.

34. *Id.* at *6–*7; see also *In re Consol. Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1144–45 (7th Cir. 1978) (holding that TWA’s policy, which required female flight attendants who became mothers to accept employment in ground duty positions or to face termination, but did not apply to male flight attendants who became fathers, constituted unlawful discrimination against mothers under Title VII based on their status as women with parental responsibilities); *Pullar v. Indep. Sch. Dist. No. 701*, 582 N.W.2d 273, 277–78 (Minn. Ct. App. 1998) (concluding that plaintiff’s claim of discrimination under the Minnesota Human Rights Act survived a motion to dismiss because it stated a claim of sex plus familial status discrimination).

35. Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties For Pregnancy, Breastfeeding and Childcare*, 44 VILL. L. REV. 355, 363 (1999) (“Disparate treatment can often be proved by comparing an employer’s treatment of one sex with the treatment of the other sex. A lack of a comparison group, however, will not necessarily defeat a claim of discrimination because of the system of presumptions established by the United States Supreme Court.”).

fail to establish that parents of the opposite sex received more favorable treatment. For example, in *Bass v. Chemical Banking Corp.*,³⁶ the plaintiff, a married mother of two young children, claimed that her former employer denied her a promotion based on her gender plus either her marital status or her parental status.³⁷ The claim relied on the fact that the promotion went to an unmarried woman with no children.³⁸ The court dismissed the claim, concluding that the plaintiff had offered no evidence to establish that the employer had “treated her differently than married men or men with children.”³⁹ The court added that, at most, the employer may have discriminated against married persons or persons with children, acts that fell outside Title VII’s protections.⁴⁰

The inadequacy of a gender-based comparative approach to tackle work-parenting difficulties is particularly glaring in cases that involve gender-determined biological differences such as breastfeeding and pregnancy. For example, in *Martinez v. NBC*,⁴¹ the plaintiff’s discrimination claim alleged that her employer demoted her after she complained about inadequate accommodations for her to pump breast milk for her newborn child.⁴² The court implied that for the plaintiff to state a claim of sex-plus discrimination she had to establish that the employer had treated her differently than a similarly-situated man, namely, a hypothetical breastfeeding man.⁴³ The sheer impossibility of this requirement was not lost on the court, which noted that “there is and could be no allegation that Martinez was treated differently than similarly situated men.”⁴⁴ Thus, the employer’s breastfeeding policy did not discriminate between men and women, but between breastfeeding employees and

36. No. 94 Civ. 8833, 1996 WL 374151 (S.D.N.Y. July 2, 1996); see also *Fuller v. GTE Corp.*, 926 F. Supp. 653, 656 (M.D. Tenn. 1996) (dismissing plaintiff’s discrimination claim based on “her status as a mother of young children,” observing that she had failed to demonstrate a difference in treatment between her and men with young children).

37. *Bass*, 1996 WL 374151, at *5.

38. *Id.* at *6. Plaintiff also alleged that, following the birth of her child, the employer excluded her from “important industry meetings” and took “major responsibilities” away from her. *Id.* at *1.

39. *Id.* at *5.

40. *Id.*; see also *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997) (noting that discrimination based on parental status is not actionable under federal law).

41. 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

42. *Id.* at 308.

43. *Id.* at 310.

44. *Id.* at 310–11.

non-breastfeeding employees,⁴⁵ a distinction beyond the scope of Title VII's prohibitions.

The *Martinez* court based its decision on *General Electric Co. v. Gilbert*.⁴⁶ In *Gilbert*, the Supreme Court held that General Electric's disability plan, which excluded coverage of pregnancy-related disabilities, did not discriminate on the basis of sex⁴⁷ because the plan divided employees into two groups: pregnant women and non-pregnant persons.⁴⁸ Accordingly, this division was not gendered because, "[w]hile the first group is exclusively female, the second includes members of both sexes."⁴⁹ In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act (PDA),⁵⁰ which partially overruled *Gilbert*. The PDA establishes that discrimination based on pregnancy, childbirth, or related medical conditions is, by definition, a form of illegal sex discrimination under Title VII.⁵¹ However, the PDA only nullified *Gilbert* with respect

45. See Henry Wyatt Christrup, *Litigating a Breastfeeding and Employment Case in the New Millennium*, 12 YALE J.L. & FEMINISM 263, 282 (2000) (concluding that every court to decide whether Title VII protects employers from discriminating against breastfeeding women has "conceiv[ed] of the two relevant classes as breastfeeding workers and non-breastfeeding workers"). For other useful scholarship examining judicial treatment of workplace discrimination based on breastfeeding, see Diana Kasdan, *Reclaiming Title VII and The PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309 (2001); Kovacic-Fleischer, *supra* note 35; Isabelle Schallreuter Olson, *Out of the Mouths of Babes: No Mother's Milk for U.S. Children, The Law and Breastfeeding*, 19 HAMLINE L. REV. 269 (1995); Jendi B. Reiter, *Accommodating Pregnancy and Breastfeeding in the Workplace: Beyond the Civil Rights Paradigm*, 9 TEX. J. WOMEN & L. 1 (1999); Corey Silberstein Shdaimah, *Why Breastfeeding Is (Also) a Legal Issue*, 10 HASTINGS WOMEN'S L.J. 409 (1999).

46. 429 U.S. 125, 138-39 (1976).

47. For insightful analyses of *Gilbert*, see Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985).

48. *Gilbert*, 429 U.S. at 135.

49. *Id.*

50. Title VII was amended to prohibit discrimination based on pregnancy after the Supreme Court held in *General Electric Co. v. Gilbert* that pregnancy discrimination was not based on gender. The amended statute provides that:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (2001).

51. *Id.*; see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.").

to pregnancy.⁵² Consequently, *Gilbert* continues to control cases dealing with gender biological differences other than pregnancy-related conditions.⁵³

Unfortunately, the obstacles posed by a formal equality-based approach to gender discrimination remain even in cases that fall firmly within the scope of the PDA, as evident in *Troupe v. May Department Stores*.⁵⁴ In *Troupe*, a pregnant employee was terminated from her job the day before her scheduled maternity leave.⁵⁵ Prior to the termination, Ms. Troupe reported late to work on several occasions because of severe morning sickness.⁵⁶ Troupe filed suit under the PDA, arguing that May fired her because it feared she would not return from maternity leave.⁵⁷ The Seventh Circuit affirmed the lower court's dismissal of the claim.⁵⁸ Writing for the court, Judge Posner reasoned that the termination did not run afoul of the PDA because "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant

52. See Christrup, *supra* note 45, at 276 (noting that "the lower courts have interpreted the PDA as rejecting *Gilbert* as it relates to 'pregnancy, childbirth, and related medical conditions,' but continue to treat the reasoning of *Gilbert* as controlling law with respect to all other forms of discrimination that can only be visited on a subset of women, and not on men."); Kasdan, *supra* note 45, at 310 (noting the continued influence of *Gilbert* in breastfeeding cases); Reiter, *supra* note 45, at 6 ("For lack of a better paradigm, *Gilbert* continues to dictate the conceptual scheme that some courts use to evaluate civil rights claims concerning employer accommodation of breastfeeding, even though it has been widely recognized that *Gilbert* was superseded by the PDA.").

53. See *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1491-92 (D. Colo. 1997) (concluding that breastfeeding is not covered by Title VII as amended by the Pregnancy Discrimination Act); see also *McNill v. N.Y. City Dep't of Corr.*, 950 F. Supp. 564, 569-71 (S.D.N.Y. 1996); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991). For a critique of judicial decisions failing to extend the PDA to breastfeeding, see Olson, *supra* note 45, at 302-03 (maintaining that breastfeeding should be regarded as a "medical condition" for purposes of PDA analysis). *But see* Kovacic-Fleischer, *supra* note 35, at 380-83 (concluding that breastfeeding does not fit the medical "disability" approach under PDA); Reiter, *supra* note 45, at 8-11 (critiquing the disability model as applied to breastfeeding).

54. 20 F.3d 734 (7th Cir. 1994). The district court decision is found at *Troupe v. May Dep't Stores Co.*, No. 92-C2605, 1993 U.S. Dist. LEXIS 7751 (N.D. Ill. June 4, 1993).

55. *Troupe*, 20 F.3d at 736.

56. *Id.* at 735. To the extent that Troupe's termination was based on her work absences caused by the morning sickness, the discharge today would violate the Family and Medical Leave Act (FMLA). See *Miller v. AT&T Corp.*, 250 F.3d 820, 834 (4th Cir. 2001) (stating that severe morning sickness qualifies as a serious health condition under the FMLA); *Pendarvis v. Xerox Corp.*, 3 F. Supp. 2d 53, 55-56 (D.D.C. 1998) (denying summary judgment to employer in an FMLA case on the ground that any pregnancy-related period of incapacity, including morning sickness, constitutes a serious health condition). Troupe was dismissed in 1991, well before the FMLA was enacted. *Troupe*, 20 F.3d at 735.

57. *Troupe*, 20 F.3d at 735-36.

58. *Id.* at 739.

employees.”⁵⁹ As the court saw it, in order for Ms. Troupe to prevail on her gender discrimination claim she had to establish that May would not have dismissed a non-pregnant employee under similar circumstances.⁶⁰ Thus, within the confines of a formal equality concept, Ms. Troupe, and other pregnant workers, could “require employers to offer maternity leave or take other steps to make it easier for [them] to work”⁶¹ only if the employer is taking comparable steps to aid similarly situated non-pregnant workers. This requirement, of course, ignores the fact that pregnancy imposes on certain women specific burdens not experienced by workers who are not pregnant.

Collectively, *Bass*, *Martinez*, and *Troupe* indicate that treating employment inequities caused by work-parenting conflicts as a problem of formal inequality between men and women is a limited strategy to assist working parents. Within the constraints of formal equality, women can sustain a claim for equal treatment only if they can establish their similarity to men.⁶² A key problem with this approach is that it takes for granted the male status quo⁶³ and fails to recognize how the experiences of men and women differ, both socially and biologically. In light of gender-based differences, formal equality’s adoption of a male norm will inevitably disadvantage mothers as well as other women who have primary child care responsibilities.

59. *Id.* at 738.

60. *Id.* at 738; see also Kovacic-Fleischer, *supra* note 35, at 373 (observing that the *Troupe* court “read ‘pregnancy’ out of the PDA and interpreted it to mean that discrimination on the basis of pregnancy is on the basis of sex only if there is a nonpregnant person in the employer’s workplace with similar needs receiving better treatment”).

61. *Troupe*, 20 F.3d at 738 (citations omitted).

62. See MACKINNON, *FEMINIST THEORY*, *supra* note 15, at 220–21 (observing that under the formalism of the sameness/difference doctrine “women are measured according to correspondence with man”).

63. See CATHERINE A. MACKINNON, *Difference And Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32, 34 (1987) [hereinafter MACKINNON, *Difference And Dominance*] (observing that “[g]ender neutrality is . . . simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both”); MACKINNON, *FEMINIST THEORY*, *supra* note 15, at 220 (maintaining that concealed within the law of gender equality is the “substantive way in which man has become the measure of all things”); see also Abrams, *Gender Discrimination*, *supra* note 12, at 1190 (observing that “women have come to see that the norms of the ‘workplace’ might be nothing more than the norms of the dominant group within it [and] the wisdom of conformity has been called into question”).

B. Disparate Impact

In theory, because it does not require a showing of intent, disparate impact analysis offers a better route than disparate treatment to contest discrimination based on parenthood. As stated earlier,⁶⁴ to succeed on a disparate impact claim, a plaintiff must demonstrate that a neutral practice or policy caused a disproportionate impact on the employment opportunities of the protected group of which the plaintiff is a member.⁶⁵ In the context of parenting, gender-based disparate impact analysis can help challenge facially-neutral practices that disadvantage women.⁶⁶ To illustrate, consider the decisions in *EEOC v. Warshawsky & Co.*⁶⁷ and *Roberts v. United States Postmaster General*.⁶⁸

At issue in *Warshawsky* was an employer's policy that precluded employees from taking any paid sick leave during the first year of employment.⁶⁹ The plaintiff alleged that the policy disparately impacted women. In support of that claim, the plaintiff introduced statistics showing that the employer had terminated fifty-three first-year employees pursuant to the policy, fifty of whom were women.⁷⁰ In denying the employer's motion to dismiss, the court observed that women were discharged at substantially higher rates than men because women required more time off from work due to pregnancy.⁷¹ Indeed, of the fifty women discharged, twenty were pregnant.⁷²

Roberts also entailed a challenge to an employer's sick leave policy. The plaintiff wanted to use her sick leave benefits to attend to

64. See *supra* notes 21–23 and accompanying text (distinguishing between disparate treatment and disparate impact discrimination).

65. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609–11 (1993); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432–34 (1971).

66. See HEYMANN, THE WIDENING GAP, *supra* note 1, at 149–51; ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 6–10 (1989).

67. 768 F. Supp. 647 (N.D. Ill. 1991).

68. 947 F. Supp. 282 (E.D. Tex. 1996); see also *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (finding that a ten-day disability leave policy raised a disparate impact claim because it was inadequate for pregnancy purposes); *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P.2d 1243, 1255 (Mont. 1984) (holding that a neutral policy prohibiting leaves to new employees was discriminatory because of disparate impact on women), *vacated by* 479 U.S. 1050 (1986), *aff'd on reh'g*, 744 P.2d 871 (Mont. 1987).

69. *Warshawsky*, 768 F. Supp. at 650.

70. *Id.* at 651–52.

71. *Id.* at 654.

72. *Id.* at 651–52.

the medical needs of her premature child.⁷³ The employer's policy, however, restricted the availability of sick leave to a worker's own illness.⁷⁴ In her Title VII action, the plaintiff claimed that the sick leave policy had an adverse impact upon women because it forced them to resign more often than men due to their childrearing role.⁷⁵ Concluding that the plaintiff had alleged facts sufficient to support the claim, the court denied the employer's motion to dismiss.⁷⁶

A disparate impact analysis could eliminate a variety of gender-neutral workplace policies that conflict with parenting and thereby disadvantage women. For example, in addition to the sick leave policies in *Warszawsky* and *Roberts*, a disparate impact case might challenge employer policies that require frequent travel, excessive time commitments, and unpredictable work hours. Despite the potential to use disparate impact analysis to contest neutral employment practices that adversely affect working mothers, however, and notwithstanding *Warszawsky* and *Roberts*, litigants have achieved few victories proving such claims.⁷⁷

The obstacles to sustaining a gender-based disparate impact claim in the context of parenting are numerous. For one, disparate impact analysis, no less than disparate treatment, hinges on a formalistic comparative notion of equality. As part of a disparate impact *prima facie* case, a plaintiff must show that a challenged practice produced unfavorable consequences for the class of women relative to men.⁷⁸ This showing requires that the employer's workplace contain a statistically significant number of men similarly situated to plaintiff, for comparison purposes.⁷⁹ This

73. *Roberts*, 947 F. Supp. at 284.

74. *Id.*

75. *Id.* at 287.

76. *Id.* at 288.

77. See Dowd, *Gender Paradox*, *supra* note 12, at 137 (describing the many difficulties with trying "to fit particular sex/gender aspects of work-family conflict within the disparate impact framework"); Eichner, *supra* note 12, at 139 n.18 (commenting on the theoretical potential and practical limitations of invoking disparate impact doctrine to challenge job requirements, and collecting cases).

78. See, e.g., *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1126 (7th Cir. 1987) ("All the plaintiff need show to make out a *prima facie* case of disparate impact is that the ostensibly neutral criterion (like height or weight or baldness) excludes a disproportionate fraction of a favored group, such as blacks or women."); *EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727, 735 (S.D. Fla. 1997) ("To establish a *prima facie* case of disparate impact sex discrimination, the plaintiff must show that a facially neutral practice of the employer has a disproportionate impact on one sex.").

79. See, e.g., *Morgan v. Harris Trust & Sav. Bank*, 867 F.2d 1023, 1027 (7th Cir. 1989) (holding that a "*prima facie* case of disparate impact is established by showing through significant statistical disparity that a facially neutral employment practice has a discriminatory impact on a protected class"); *Wilma Stout v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 744,

requirement can be extremely burdensome given the pervasiveness of gender-based occupational segregation in United States labor markets.⁸⁰ Although women currently account for almost half of all workers,⁸¹ women and men work in different occupations, different industries, and different firms.⁸² In short, women tend to work with other women, concentrated in jobs that pay markedly less than those held by men.⁸³

This reality presents a practical hurdle for disparate impact litigants because courts examine only the composition of a particular work setting and do not adopt a broader societal perspective.⁸⁴ Consider, for example, a hypothetical mechanical engineering firm

747 (N.D. Miss. 2000) (“[S]tatistical disparities supporting a claim of imbalance must be ‘sufficiently substantial’ before they raise an inference of discrimination”); *Payseur v. W.W. Grainger, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 789, 791 (N.D. Ill. 1989) (observing in the context of a gender disparate impact case that evidence of a gender-based statistical disparity “must be sufficiently substantial to raise an inference of discriminatory impact”); *see also* *Tranquilli v. Irshad*, 454 N.E.2d 377, 378 (Ill. App. Ct. 1983) (observing that the “most fundamental requirement for a showing of sex discrimination is a demonstration that *men* and *women* were treated in a dissimilar manner because of their sex. If the applicant pool for a position is comprised entirely of one sex, there can be no dissimilar treatment of the sexes in the hiring process. And without dissimilar treatment of the sexes, there can be no sex discrimination.”).

80. *See* Amy S. Wharton, *Feminism at Work*, 571 ANNALS 167, 172 (2000) (observing that “[g]ender segregation is an entrenched and pervasive feature of the industrial workplace”); Committee on Women’s Employment and Related Social Issues, National Research Council, *in* WOMEN’S WORK, MEN’S WORK: SEX SEGREGATION ON THE JOB 5–9 (Barbara F. Reskin & Heidi I. Hartmann eds., 1986) (noting that the “segregation of the sexes is a basic feature of the [U.S.] world of work”).

81. *See* WOMEN’S BUREAU, DEP’T OF LABOR, 20 FACTS ON WORKING WOMEN (2000), available at http://www.dol.gov/dol/wb/public/wb_pubs/20fact00.htm (last visited Mar. 17, 2002) [hereinafter DEP’T OF LABOR, WOMEN’S BUREAU] (on file with the *University of Michigan Journal of Law Reform*) (reporting that “[w]omen’s share of the labor force reached 46 percent in 1994 and has remained at this level” and by “2008, women are projected to comprise 48 percent of the labor force”).

82. *See* Wharton, *supra* note 80, at 172 (commenting that “[w]omen make up almost half of the paid labor force, but women and men are employed in different occupations, firms, and jobs”); *see also* DONALD TOMASKOVIC-DEVEY, GENDER & RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION 111–27 (1993); Randy P. Albelda, *Occupational Segregation by Race and Gender, 1958–1981*, 39 INDUS. & LAB. REL. REV. 404 (1986); Mary C. King, *Occupational Segregation by Race and Sex, 1940–88*, 115 MONTHLY LAB. REV. 30 (1992). *See generally* JERRY A. JACOBS, *The Sex Segregation of Occupations: Prospects for the 21st Century*, *in* HANDBOOK OF GENDER AND WORK (Gary N. Powell ed., 1999); Jerry A. Jacobs, *Long-Term Trends in Occupational Segregation by Sex*, 95 AM. J. SOC. 160 (1989).

83. *See, e.g.*, William Bielby & James Baron, *A Woman’s Place Is with Other Women: Sex Segregation Within Organizations*, *in* WOMEN’S WORK, MEN’S WORK: SEX SEGREGATION ON THE JOB (Barbara Reskin & Heidi Hartmann eds., 1986); William Bielby & James Baron, *Sex Segregation Within Occupations*, 76 AM. ECON. REV. 43 (May 1986).

84. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1034 (1986) [hereinafter Colker, *Anti-Subordination*] (criticizing disparate impact theory for only challenging policies “within an employer’s workforce over a limited time period” and for lacking a “societal perspective”).

that provides its technicians with a month of paid sick leave each year, exclusive of leave under the Family and Medical Leave Act (FMLA).⁸⁵ Support staff are allowed ten days of paid sick leave annually, exclusive of FMLA leave. The leave can be used for an employee's own illness or the illness of a family member. The employer terminates any employee who misses more than the allotted sick leave. The support staff, comprised largely of secretaries, office clerks, and accounting clerks, is ninety percent female,⁸⁶ while women account for only ten percent of the technicians.⁸⁷ During the past five years, only female support staff violated the policy, and all of the violators were terminated. A former support staff employee challenges the policy, arguing that it has a disparate impact because women require leave to care for children more frequently than do men.

At first glance, it may appear that the plaintiff stands an excellent chance of establishing a prima facie case. After all, the policy has had no adverse effect on the technicians, a group that consists largely of men. The disparate impact analysis, however, will concentrate on the male support staff—the group that is similarly situated to plaintiff.⁸⁸ But because this group of male support staff represents a relatively small comparison sample, a plaintiff may

85. 29 U.S.C. §§ 2601–2654 (1994). See *infra* Part V.A. (discussing the FMLA).

86. According to the Department of Labor, the largest share of employed women work in technical, sales, and administrative support occupations. See DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 81. More specifically, women account for 98.9% of all "secretaries," 92.1% of all "bookkeepers, accounting, & auditing clerks," and 83.6% of all "general office clerks." See DEP'T OF LABOR, 20 LEADING OCCUPATIONS OF EMPLOYED WOMEN 2000 ANNUAL AVERAGES available at http://www.dol.gov/dol/wb/public/wb_pubs/20lead2000.htm (last visited Mar. 17, 2002) (on file with the *University of Michigan Journal of Law Reform*).

87. According to the Department of Labor, women actually account for 5.3% of all mechanical engineering technicians. See DEP'T OF LABOR, NONTRADITIONAL OCCUPATIONS FOR WOMEN IN 2001, available at http://www.dol.gov/dol/wb/public/wb_pubs/nontrad2001_txt.htm (last visited Mar. 17, 2002) (on file with the *University of Michigan Journal of Law Reform*).

88. See, e.g., *Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997) ("For the prima facie case, a disparate impact plaintiff must 'identify and relate specific instances where persons situated similarly 'in all relevant aspects' were treated differently.'") (emphasis added) (quoting *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989)); *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1379–80 (7th Cir. 1987), cert. denied, 485 U.S. 936 (1988) (finding that plaintiff failed to establish a prima facie case of either disparate treatment or disparate impact under Title VII because she did not demonstrate that similarly-situated male employees were treated differently); *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 Civ.8494 (HB), 1999 WL 944505, 85 Fair Empl. Prac. Cas. (BNA) 156 (S.D.N.Y. Oct. 19, 1999) (dismissing plaintiff's disparate impact claim because of failure to establish that the comparison group of employees was similarly situated in all material respects); *Donnelly v. R.I. Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 590 (D.R.I. 1996) (noting that "[i]n order to establish that the adverse impact is disparate, the employee must show that the unfavorable consequences are borne disproportionately by the members of the class in comparison to non-members who are similarly situated").

find it difficult to satisfy her prima facie case.⁸⁹ This hypothetical illustrates that formal notions of gender equality can leave undisturbed the discriminatory processes that segregate women into jobs that offer fewer benefits than jobs held predominantly by men. By focusing solely on the composition of the employer's workforce, a gender-based disparate impact analysis may not address the inequality associated with occupational segregation and the ensuing impact on employees with child care responsibilities.⁹⁰

II. PARENTHOOD AS A PROTECTED CLASS

In view of the inadequacies of a gender-oriented approach to redress occurrences of parental-status-based discrimination, perhaps it is not surprising that commentators have suggested that for society to seriously value parenting, parents should be treated as a protected class under employment anti-discrimination law.⁹¹ Presently, a handful of state and local jurisdictions provide employees and prospective employees more direct protection from discrimination based on parental status than that afforded by a prohibition against gender discrimination. In Alaska, for example, the state's Human Rights Act bans employment discrimination predicated on "parenthood" when the "reasonable demands of the position" do not warrant such a distinction.⁹² In the District of

89. See Dowd, *Maternity Leave*, *supra* note 16, at 765 (noting that it may be difficult to sustain a disparate impact analysis in the context of female-segregated workplaces); see also MACKINNON, *FEMINIST THEORY*, *supra* note 15, at 223-24 (noting the inability of gender equality law to address the fact that women are concentrated into low-paying jobs); Chamallas, *supra* note 24 (examining Title VII efforts to challenge employer rules in predominantly female jobs).

90. Much of the gender wage gap is attributable to occupational segregation by gender. See, e.g., Andrea S. Christensen, *Women in the United States Labor Force*, 5 COMP. LAB. L.J. 437, 452 (1982) (observing that job segregation is a major cause of women's low pay, accounting for up to thirty percent of the male-female wage gap); Elaine Sorenson, *The Wage Effects of Occupational Sex Composition: A Review and New Findings*, in COMPARABLE WORTH: ANALYSES AND EVIDENCE 57, 78-79 (M. Anne Hill & Mark R. Killingsworth eds., 1989); WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 33-38 (Donald J. Treiman & Heidi I. Hartmann eds., 1981).

91. See *supra* note 17 (collecting references supportive of measures to prohibit employment discrimination based on parental status).

92. ALASKA STAT. § 18.80.220(a)(1) (2000) (prohibiting discrimination on the basis of race, religion, color, national origin, age, physical or mental disability, sex, parenthood, marital status, changes in marital status, and pregnancy); see also Lisa Demer, *Mom Puts Up Fight; Accounting Firm Denies Firing Woman Over Kids*, ANCHORAGE DAILY NEWS, July 11, 1999, at 1B (reporting on parenting discrimination case filed under the Alaska Human Rights Act).

Columbia, employees are protected from employment discrimination on the basis of “familial status”⁹³ and “family responsibilities.”⁹⁴ The D.C. statute defines these terms in relation to minor children.⁹⁵ Connecticut also offers some protection to employees from discrimination based on parenting responsibilities in the employment context.⁹⁶ Local governments that expressly prohibit parental-status-based employment discrimination include Atlanta,⁹⁷ Aspen,⁹⁸ Chicago,⁹⁹ Dade County,¹⁰⁰ Harrisburg, PA,¹⁰¹ and

93. District of Columbia Human Rights Act, D.C. CODE ANN. § 2-1400 (2001).

94. *Id.* § 2-1411.02.

95. *Id.* § 2-1402(A)(11A) (defining “familial status” to mean “one or more individuals under 18 years of age being domiciled with: (1) a parent or other person having legal custody of the individual; or (2) the designee, with written authorization of the parent, or other persons having legal custody of individuals under 18 years of age. The protection afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or in the process of securing legal custody of any individual under 18 years of age”); *Id.* § 1-2502(12) (defining “family responsibilities” to mean “the state of being, or the potential to become, a contributor to the support of a person or persons in a dependent relationship, irrespective of their number, including the state of being the subject of an order of withholding or similar proceedings for the purpose of paying child support or a debt related to child support”).

96. Connecticut prohibits employers from asking employees or prospective employees questions concerning their familial responsibilities. *See* CONN. GEN. STAT. § 46a-60(a)(9) (2001) (prohibiting “an employer . . . [from] request[ing] or require[ing] information from an employee [or] person seeking employment . . . relating to . . . the individual’s familial responsibilities”).

97. ATLANTA, GA., CODE OF ORDINANCES, No. 2000-79, § 1 (2000) (prohibiting employment discrimination based on race, color, creed, religion, sex, domestic relationship status, parental status, familial status, sexual orientation, national origin, gender identity, age, or disability). The ordinance defines “familial status” as “the state of being a person who is domiciled with one or more minor children, with the permission of the parent or person with legal custody of such minor child or children.” *Id.* The ordinance defines “parental status” as “a parent, step-parent, adoptive parent, guardian, foster parent or custodian of a minor child or children.” *Id.*; *see also* *City of Atlanta Enacts Ordinance Prohibiting Discrimination in Private Employment*, at http://www.kilstock.com/site/print/detail?Article_Id=855 (last visited Mar. 18, 2002).

98. ASPEN, COLO., MUN. CODE § 13-98 (2000) (prohibiting discrimination in employment because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation).

99. Chicago Human Rights Ordinance, CHI., ILL., MUN. CODE § 2-160-020 (1990) (prohibiting discrimination in employment because of race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status or source of income).

100. DADE COUNTY, FLA., CODE OF ORDINANCES § 11A-26 (1997) (prohibiting employment discrimination “on account of the race, color, religion, ancestry, sex, pregnancy, national origin, age, disability, marital status, familial status or sexual orientation of any individual or any person associated with such individual”); *see also id.* § 11A-2(9) (defining “familial status” as “(a) An individual who has not attained the age of eighteen (18) years is domiciled with a parent or other person having legal custody of such individual; or (b) An individual who has not attained the age of eighteen (18) years is domiciled with a designee of a parent or other person having legal custody of such individual with the written permission of such parent or other person; or (c) An individual becomes pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen (18) years”).

101. Harrisburg Human Relations Ordinance, HARRISBURG, PA., CODE § 114-1 (prohibiting discrimination on the basis of race, color, religion, ancestry, national origin, place of birth,

Tacoma, WA.¹⁰² The enactment of legislation to prohibit workplace discrimination based on parental-status reflects a growing concern that working parents are at a disadvantage relative to workers who do not have child care responsibilities.

A. *The Proposed Ending Discrimination Against Parents Act*

In 1999, the idea of extending fair employment laws to include workers with parental responsibilities gained national attention. During his State of the Union Address that year, President Clinton called upon Congress to pass legislation banning employment discrimination against workers because of their status as parents.¹⁰³ Shortly thereafter, Senators Christopher Dodd and Edward Kennedy introduced the Ending Discrimination Against Parents Act (EDPA).¹⁰⁴ The proposed act is the private-sector parallel to Executive Order 13,152.¹⁰⁵ Signed by President Clinton in May, 2000, Executive Order 13,152 amends Executive Order 11,478 to add "parental status" to the characteristics covered by the federal government's equal employment opportunity policy.¹⁰⁶ The proposed EDPA prohibits employers, employment agencies, and labor organizations from "discriminating against parents and persons with parental responsibilities based on the assumption that they cannot satisfy the requirements of a particular position."¹⁰⁷ The bill broadly defines "parent" as a person who has a relationship to someone under the age of eighteen or to someone who is eighteen or older but unable to care for himself

sex, age, handicap or disability, familial status, GED, sexual orientation/preference or association with or advocacy on behalf of persons in these categories).

102. TACOMA, WASH., MUN. CODE, Ch.1.29.050(A) (1993) (prohibiting employment discrimination based on "race, religion, color, national origin or ancestry, sex, age, marital status, familial status, or the presence of any sensory, mental, or physical disability, unless based upon a bona fide occupational qualification").

103. See Christopher Caldwell, *Rights For The Rents*, WEEKLY STANDARD, May 3, 1999, at 19; *Clinton Outlines His Vision for Nation's Transition to the 21st Century*, N.Y. TIMES, Jan. 20, 1999, at A22; *President William Jefferson Clinton State of the Union Address*, FED. DEP'T AND AGENCY DOCUMENTS, Jan. 19, 1999 ("I want to ask Congress to prohibit companies from refusing to hire or promote workers simply because they have children.").

104. S. 1907, 106th Cong. (1st Sess. 1999). For accounts of the bill, see David E. Rosenbaum, *Going Easy on Parents Isn't So Easy*, N.Y. TIMES, May 7, 2000, § 4 at 6; *Bill Would Prevent Employers From Discriminating Against Parents*, FED. EEO ADVISOR, Dec. 16, 1999, Vol. 2, No. 11.

105. Exec. Order No. 13,152, 3 C.F.R. 264 (2000).

106. See 42 U.S.C. § 2000e-16(c), (e) (1994); see also Andrew Mollison, *Clinton Issues Ban on Bias for Parents with Federal Jobs*, SEATTLE POST-INTELLIGENCER, May 3, 2000, at A5.

107. S. 1907, 106th Cong., at § 3(a).

where the relationship is based on the person's status as (i) a biological parent, (ii) an adoptive parent, (iii) a foster parent, (iv) a stepparent, (v) a custodian of a legal ward, (vi) an individual actively seeking legal custody or adoption, or (vii) an individual who stands in loco parentis.¹⁰⁸

EDPA's basic framework parallels Title VII,¹⁰⁹ and its central feature is a disparate treatment provision that is virtually identical to one of the main prohibitory sections of Title VII.¹¹⁰ The proposed provision makes it unlawful for an employer "to fail or refuse to hire, or to discharge, any individual, or otherwise to discriminate against any individual with regard to the compensation, terms, conditions, or privileges of employment of the individual, because such individual is a parent."¹¹¹ As variously characterized, the provision bars employers from "hiring applicants without children over equally qualified parents and from refusing to hire single parents;"¹¹² from "taking workers with parental responsibilities off the fast track because of assumptions that they would not be able to perform in demanding jobs;"¹¹³ and from refusing to hire or promote both men and women who are parents based on unwarranted stereotypes or overbroad assumptions about their level of commitment to the workforce.¹¹⁴

B. *The Potential Value of Treating Parents as a Protected Class*

Although EDPA languished in congressional committees,¹¹⁵ the question remains: Can a prohibition against parental-status-based discrimination in employment overcome the weaknesses of formal equality's approach to gender discrimination? This section investigates that question by evaluating three scenarios in which plaintiffs

108. *Id.* § 4(k).

109. A key difference between the EDPA and Title VII is that the former explicitly disallows recovery for disparate impact claims. *Id.* § 9. Part III of this Article considers the possible benefits of treating parents as a protected class from both a disparate treatment and a disparate impact perspective.

110. 42 U.S.C. § 2000e-2(a)(2) (1994).

111. S. 1907, 106th Cong., at § 5(a)(1).

112. *Clinton Supports Bill to End Workplace Discrimination Against Parents*, 15 COMMUNITY ACTION 5 (1999).

113. *Id.*

114. Charles Babington, *Clinton to Seek Ban on Job Bias Against Parents*, WASH. POST, April 17, 1999, at A1.

115. On November 10, 1999, the bill was referred to the Senate Committee on Health, Education, Labor, and Pensions, where it remained until Congress adjourned. S. 1907, 106th Cong. (1st Sess. 1999).

may benefit by pursuing a claim of parental status discrimination. The first two scenarios involve intentional discrimination while the third scenario concerns indirect discrimination.

1. Scenario One: The Absence of Similarly Situated Men—At issue in the first hypothetical scenario are allegations of intentional discrimination, based on stereotypes or assumptions about employees with parental obligations, that do not fit within a gender discrimination framework because the plaintiff cannot prove that the employer has treated members of the opposite sex differently. One can gauge the potential benefits of classifying parenthood as a protected category in this scenario by revisiting *Bass v. Chemical Banking Corp.*¹¹⁶ Recall that in *Bass*, the plaintiff filed suit for gender discrimination when the employer failed to promote her based on her gender plus either her marital or parental status. The court dismissed the claim, holding that the plaintiff had not established a prima facie case of discrimination; specifically, Ms. Bass did not satisfy the fourth element of her prima facie case,¹¹⁷ which required that she demonstrate that the employer's failure to promote her occurred under circumstances giving rise to an inference of unlawful discrimination based on membership in the protected class.¹¹⁸ The court found that Ms. Bass had failed to prove this element because (1) the promotion at issue ultimately went to a woman—a member of her own protected class—and (2) she was unable to offer evidence showing that the employer had treated women with children differently than men with children.¹¹⁹ Had Ms. Bass been able to claim discrimination based on her status as a parent, however, she most likely could have established a prima facie case with ease, given that the employer promoted someone outside the protected class of parents, namely, an individual without children.¹²⁰ Because this approach does not center

116. No. 94 Civ. 8833, 1996 WL 374151 (S.D.N.Y. July 2, 1996). See *supra* notes 36–40 and accompanying text (discussing *Bass*).

117. A plaintiff can establish a prima facie case of discrimination by showing that (1) she was a member of a protected class; (2) she applied for the position and was qualified for it; (3) she was rejected for the position; and (4) she was replaced by a person outside the protected group. See, e.g., *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972); *Stockett v. Muncie Ind. Transit Sys.*, 221 F.3d 997, 1001 (7th Cir. 2000).

118. *Burdine*, 450 U.S. at 253; see also *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582–83 (6th Cir. 1992) (indicating that the fourth element of the prima facie disparate treatment case is satisfied by showing that a similarly situated employee, outside of plaintiff's protected class, received better treatment for the same or similar conduct).

119. *Bass*, 1996 WL 374151, at *5.

120. See *Mitchell*, 964 F.2d at 582–83 (indicating that the prima facie disparate treatment case can be satisfied by showing that a similarly situated employee, outside of plaintiff's protected class, received better treatment for the same or similar conduct).

on gender, the fact that the person promoted was also a woman becomes irrelevant.

In addition, whereas Ms. Bass' failure to show that the employer had favored men with children undermined her gender discrimination claim, the same fact supports a claim of parental discrimination. Indeed, part of the appeal of a parental-status approach to discrimination stems from its comprehension of mutual disadvantage. Even when courts recognize the gender neutrality of parenting, and acknowledge that work-parenting discord can harm both men and women,¹²¹ this awareness does not translate into relief for plaintiffs unless parenting disadvantages can be reduced to issues of sex discrimination. In contrast to gender anti-discrimination doctrine, which targets comparative disadvantages between the sexes, a discrimination model premised on parental status focuses on inequities between parents and non-parents. By shifting the lens from men and women to parents and non-parents, a parenting model of discrimination can potentially challenge conduct that discriminates against both men and women with parental obligations.¹²²

2. *Scenario Two: Intersectional Claims*—Treating parenthood as a protected class may also prove useful in scenarios involving low-income single mothers of color, many of whom are former welfare recipients who face substantial obstacles to permanent employment.¹²³ In addition to the problems of inadequate child care, limited job training, and a lack of transportation, women of color struggling to transition from welfare to work must contend with discrimination.¹²⁴ Public perceptions of welfare dependency are

121. See *Piantanida v. Wyman Ctr., Inc.*, 116 F.2d 340, 342 (8th Cir. 1997) (explaining that “[w]hile the class of new parents . . . includes women who give birth to children, it also includes women who become mothers through adoption rather than childbirth and men who become fathers through either adoption or biology”).

122. Others have proposed different approaches to prohibit employment discrimination against parents. See Catherine G. Meier, *Protecting Parental Leave: A Fundamental Rights Model*, 33 WILLAMETTE L. REV. 177, 208 (1997) (putting forth a fundamental rights model of parenthood that “recognizes that employment discrimination on the basis of child-rearing and childbearing decisions interferes with the fundamental right to privacy”).

123. See, e.g., Lucie E. White, *Facing South: Lawyering For Poor Communities in The Twenty-first Century*, 25 FORDHAM URB. L.J. 813 (1998) (discussing the impact of welfare reform on low-income women with children); Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 GEO. L.J. 1961 (1993); see generally KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997).

124. See SUSAN T. GOODEN, RACE AND WELFARE REPORT: EXAMINING RACIAL DIFFERENCES IN EMPLOYMENT STATUS AMONG WELFARE RECIPIENTS (1997) at <http://www.arc.org/gripp/researchPublications/reports/goodenReport/reportTitlePg.html> (documenting various reasons, including discrimination, to explain racial disparities in employment outcomes between black and white welfare recipients); see also WELFARE LAW CENTER, STRATEGIES TO

highly racialized and gendered; the general public associates welfare almost exclusively with women of color, especially African-American women.¹²⁵ Stereotypes cast welfare recipients as lazy, slothful, morally bankrupt, and irresponsible women who bear illegitimate children on the taxpayer's dime.¹²⁶ Despite the fact that the majority of welfare recipients are white,¹²⁷ the race-typing of welfare as a problem unique to poor single black mothers persists in the public mind and hinders their ability to attain economic self-sufficiency.¹²⁸

IDENTIFY AND ADDRESS DISCRIMINATION IN WELFARE PROGRAMS 2 (2000) (discussing impact of discrimination in job search experiences of former welfare recipients).

125. See, e.g., Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological Warfare by Narrative Means*, in RACING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 320, 330–33 (Toni Morrison ed., 1992); Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 493 (1997) (observing that “[t]he popular perception is that welfare mothers are black, and while racism has become socially and legally unacceptable, condemning welfare mothers remains as American as apple pie”). For accounts of the historical link between welfare and race, see generally, LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942* (1995); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994) (exploring the connection between the lack of success of American public policy programs and American perceptions of race).

126. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 71–78 (1990) (concluding that the stereotype of lazy, irresponsible welfare mothers is one of the most harmful images of black women); Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reforms and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 482–85 (1995) (citing the historically pervasive images of black women as sexually promiscuous and lazy, views that enable policymakers to shift the blame for the women's problems away from systemic social factors to the women themselves); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1444 (1991) (describing “the contemporary image of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check”); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1178 (1995) (examining how media portrayals of welfare recipients have shifted over time from that of “worthy white widow to lazy African-American breeder” and how the latter image has served to argue in favor of welfare reform measures).

127. See, e.g., Albiston & Nielsen, *supra* note 126, at 486–87 (observing that the typical welfare recipient is portrayed as African-American even though African-American families comprised only 36.6% of AFDC families in 1993, whereas white families comprised 38.3% of AFDC recipients); Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567, 624 (1997) (noting that the images of black women “adorn the covers of magazines discussing welfare reform, even though the majority of recipients of welfare are White”). See generally MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999).

128. Martin Gilens, “Race Coding” and White Opposition to Welfare, 90 AM. POL. SCI. REV. 593, 602 (1996) (observing that even as whites represent the majority of welfare recipients, white America associates welfare with “black welfare mothers”); Martin Gilens, *Race and Poverty in America: Public Misperceptions and the American News Media*, 60 PUB. OPINION Q. 515,

Ideally, Title VII should provide a remedy when such stereotypes operate to the disadvantage of women of color. Within the sex-plus paradigm,¹²⁹ plaintiffs should be able to pursue a discrimination claim predicated on their status as women of color with children who have been treated differently on account of their race, sex, and parental status. It is doubtful, however, that the sex-plus framework can sustain this charge in light of judicial reluctance to apply the framework to discrimination claims that involve multiple factors. In *Judge v. Marsh*,¹³⁰ a case with a black female plaintiff, the court limited the sex-plus doctrine “to employment decisions based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic.”¹³¹ The court argued that capping the number of characteristics at two was necessary to avoid turning employment discrimination into “a many-headed Hydra.”¹³² Applying the *Judge* logic, a woman of color would be unable to maintain a discrimination claim on the base of her race and sex, plus a third factor such as parental status.¹³³

The *Judge* holding fails to recognize the complexity of individual experiences and capitulates to essentialism.¹³⁴ It effectively con-

516 (1996) (“Americans substantially exaggerate the degree to which blacks compose the poor . . . [and] white Americans with the most exaggerated misunderstandings of the racial composition of the poor are the most likely to oppose welfare.”).

129. See *supra* notes 24–40 and accompanying text (discussing use of the sex-plus doctrine to challenge employment discrimination based on parental status).

130. 649 F. Supp. 770 (D.D.C. 1986).

131. *Id.* at 780.

132. *Id.*

133. See Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991) (illustrating how the *Judge* holding disadvantages litigants who encounter discrimination on the basis of more than two factors, i.e., sex plus race plus parental status).

134. In the context of gender, essentialism refers to the notion that there exists a monolithic, universal, “essential” women’s experience that can adequately capture the experiences of all women, irrespective of differences such as race, class, or sexual orientation. See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988) (exploring problems of essentialism in feminism). For discussions of essentialism in the law, particularly with respect to race and gender, and the duplication of essentialist tendencies in feminist legal theory, see Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (criticizing anti-discrimination law for failing to account for the experiences of black women); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139 (examining how anti-discrimination doctrine marginalizes the multidimensional experiences of black women); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 610 (1990) (discussing the ways in which much of feminist legal theory excludes the experiences of women of color); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993) (examining the effects of essentialist tendencies in labor laws and employment discrimination laws on women of color in the workplace); Smith,

strains the ability of women of color with children to confront negative and harmful stereotypes that portray them as undeserving.¹³⁵ Extending the scope of fair employment laws to include parental status can help overcome this limitation by allowing plaintiffs to directly contest such discrimination based on their parental status.

3. *Scenario Three: Too Few Men*—The third scenario in which a parental-status-based discrimination claim may prove more viable than a claim of gender discrimination involves employer reliance on neutral practices that disadvantage workers with parental responsibilities, particularly in female-intensive workplaces.¹³⁶ Even if the disadvantaged workers are primarily women, it will be difficult to sustain a disparate impact challenge to the employment practice. The problem for our hypothetical plaintiffs is that because they work in a predominantly female setting, there may not exist a statistically significant group of male employees to establish a prima facie case of gender discrimination inimical to women. Yet,

supra note 133 (examining how employment anti-discrimination law marginalizes the experiences of black women).

135. For thoughtful discussions critical of *Judge* and the effects of legal essentialism in employment discrimination case law, see Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); April Burey, *No Dichotomies: Reflections on Equality for African Canadians in R. v. R.D.S.*, 21 DALHOUSIE L.J. 199 (1998); Pamela J. Smith, *Part II—Romantic Paternalism—The Ties That Bind: Hierarchies of Economic Oppression That Reveal Judicial Disaffinity for Black Women and Men*, 3 J. GENDER RACE & JUST. 181 (1999); Smith, *supra* note 133; Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23 (1996); Jesse B. Semple, Note, *Invisible Man: Black and Male Under Title VII*, 104 HARV. L. REV. 749 (1991); Rosalio Castro & Lucia Corral, Comment, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159 (1993); Mary Elizabeth Powell, Comment, *The Claims of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE U. L. REV. 413 (1996); Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989); Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996).

136. Scenario three presents an issue similar to that in scenario one; namely the absence of a male comparison group. The key distinction between the two turns on the fact that scenario one involves a claim of intentional discrimination while scenario three involves a claim of indirect discrimination. In cases involving disparate treatment claims, a lack of a comparison group can present an obstacle for a plaintiff but it need not be fatal as other evidence can be used to establish intent. See *Furukawa v. Honolulu Zoological Soc.*, 936 P.2d 643, 644 (Haw. 1997) (observing that “[t]o prevail on claim of [disparate treatment] employment discrimination, plaintiff need not proffer evidence that employees outside of [plaintiff’s] protected class received better treatment”). By contrast, a comparison group must exist in order for a plaintiff to succeed on a disparate impact claim. More importantly, the number of individuals in the comparison group must be statistically significant. See *supra* notes 78–90 and accompanying text (discussing the effects of occupational segregation by gender on plaintiffs’ ability to sustain a disparate impact claim).

while jobs are heavily segregated by gender,¹³⁷ the same does not appear true with respect to parental status. As a result, a shift from a gender-based comparison to one predicated on parenthood arguably should improve the ability of female plaintiffs to establish a prima facie case when targeting practices that adversely effect the class of parents.

Like the gender-based anti-discrimination doctrine, a parental-status-based approach to discrimination involves a comparative notion of equality that construes the world in terms of sameness and difference. The critical distinction between the two is that a parenting approach has a greater potential to address gender inequities predicated on parental status because it does not necessarily depend on a male norm. Consequently, it improves the likelihood of success for plaintiffs like Ms. Bass and Ms. Piantinada.¹³⁸ It also may prove instrumental in combating occurrences of parental status bias that bear the interlocking marks of racism and sexism. Finally, and perhaps most importantly, using parental status as a discrimination baseline allows for the possibility of advancing parenting as a gender-neutral activity. At this stage of the analysis, however, it remains to be seen if these speculative advantages might actually yield meaningful results. Thus, this Article shifts focus in the next two Parts to examine both the shortcomings and drawbacks of expanding the scope of anti-discrimination legislation to protect employees who claim to be victims of discrimination because of their actual or perceived parental obligations.

III. STRUCTURAL LIMITATIONS

Although treating parenthood as a protected status may reduce the type of old-fashioned bias at issue in scenarios involving the lack of similarly situated men or intersectional claims (scenarios one and two discussed previously), intentional discrimination does not pose a serious impediment to the employment opportunities of individuals with parental obligations.¹³⁹ Work-parenting conflicts that typically confront employees are less a matter of intentional conduct based on prejudice and stereotypes and more a matter of

137. See *supra* notes 81–85 and accompanying text.

138. See *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340 (8th Cir. 1997); *Bass v. Chem. Banking Corp.*, No. 94 Civ. 8833, 1996 WL 374151 (S.D.N.Y. July 2, 1996).

139. See Dowd, *Gender Paradox*, *supra* note 12, at 135–36 (observing that very few work-parenting conflicts “can be ascribed to conduct which would fall within intentional discrimination analysis”).

structural barriers.¹⁴⁰ The reality is that many parents, especially women, face child care issues that often clash with their job responsibilities. Working parents commonly find themselves in a bind when they must stay home with a child who has a common medical ailment, meet with a teacher during the middle of the work day, pick up a child early from school, or secure alternative child care arrangements.¹⁴¹ Consequently, while eliminating intentional discrimination based on parental status will assist some employees, it will do little for the majority of parents struggling to find an acceptable balance between work and family. To effect purposeful change on behalf of individuals with parental obligations, workplace practices must be restructured to value parenting as a social good that requires affirmative support.

Of course, as indicated earlier,¹⁴² some of these practices are ideal targets for disparate impact challenges. In addition, as in the situation involving too few men (scenario three, discussed previously), a discrimination paradigm based on parenting theoretically can improve upon the comparative limitations of a gender-based disparate impact analysis. Yet, from a practical perspective, treating work/family conflicts as problems of parental discrimination can achieve little more than can a gender-based anti-discrimination approach. This Section illustrates the point by discussing *Upton v. JWP Businessland*,¹⁴³ a case that involves problems common to working parents—long work hours¹⁴⁴ and a lack of adequate child care.¹⁴⁵

140. *Id.* at 136 (noting that “[w]ith the exception of certain pregnancy or pregnancy-related classifications or policies, those aspects of the workplace which cause work-family conflict are largely structural features that have resulted from the adoption of facially neutral policies, or from the inaction and inadequacies of the structure which generate conflict between work-family roles”).

141. See HEYMANN, *THE WIDENING GAP*, *supra* note 1, at 15–31 (describing the many aspects of the “predictably unpredictable” nature of caring for children that create constant work disruptions).

142. See *supra* notes 64–77 and accompanying text (discussing the potential applicability of a disparate impact analysis to neutral employment practices that disadvantage women because of their primary role as caretakers).

143. 682 N.E.2d 1357 (Mass. 1997)

144. See HEWLETT & WEST, *supra* note 1, at 71–74.

145. See, e.g., Margaret R. Burchinal, *The Silent Crisis in the U.S. Child Care: Child Care Experiences and Developmental Outcomes*, 563 ANNALS 73 (1999); Peter Cattani, *Child-care Problems: An Obstacle to Work*, 114 MONTHLY LAB. REV. 3 (1991); William Gormley, Jr., *The Silent Crisis in U.S. Child Care: Regulating Child Care Quality*, 563 ANNALS 116 (1999); Sandra L. Hofferth, *The Silent Crisis in the U.S. Child Care: Child Care, Maternal Employment, and Public Policy*, 563 ANNALS 20 (1999).

Ms. Upton was an at-will employee of JWP and a single mother.¹⁴⁶ When she was hired, she arranged child care based on JWP's representation "that her hours of work would be 8:15 a.m. to 5:30 p.m., with the need to work late on one or two days each month."¹⁴⁷ Once Upton began working, however, her job necessitated that she regularly work until 6:30 p.m. or 7:00 p.m. and occasionally as late as 10:00 p.m., as well as on some weekends.¹⁴⁸ JWP discharged Upton after she told the company that she was unable to work such long hours because of her parental obligations.¹⁴⁹ She filed suit against the company, claiming wrongful discharge in contravention of public policy.¹⁵⁰ Specifically, she alleged that an employer could not justifiably discharge an employee who refuses to work long hours in order to fulfill parental responsibilities; to allow her employer to do so, she contended, would cause her "to neglect her child in contravention of public policy."¹⁵¹ The Supreme Court of Massachusetts, while "sympathiz[ing] with the difficulties of persons in the position of the plaintiff who face the challenge of reconciling parental responsibilities with the demands of employment,"¹⁵² refused to recognize a public policy exception to the employment-at-will doctrine¹⁵³ and dismissed Upton's claim.¹⁵⁴

Although the claim in *Upton* was based on common law, it can be stylized readily as a disparate impact discrimination claim. As a matter of gender discrimination, a disparate impact analysis would probe whether the employer's facially neutral policy of requiring employees to work evenings and late night hours had a disparate impact on women relative to men. As a matter of parental status discrimination, the analysis would be similar except the comparison would focus on parents and non-parents. Under both approaches, the existence of a disparate impact would be likely given that child care responsibilities are borne disproportionately

146. *Upton*, 682 N.E.2d at 1358.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1359.

152. *Id.* at 1360.

153. The employment-at-will doctrine holds that an employment relationship of unspecified duration is presumptively terminable at the will of either party. See Jay Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). Given its broadest interpretation, the doctrine allows employers to dismiss employees "for any cause, good or bad, or without cause." *Payne v. W. Atl. R.R.*, 81 Tenn. 507, 517 (1884). See Matthew W. Finkin, "In Defense of the Contract at Will"—Some Discussion, Comments, and Questions, 50 J. AIR L. & COMMERCE 727, 730-33 (1985) (criticizing *Payne*).

154. 682 N.E.2d at 1360.

by women¹⁵⁵ and that employees with children typically have less flexibility than their colleagues without children.¹⁵⁶

Assuming a prima facie case exists, the employer has an opportunity to justify the impact by showing that the challenged practice is job-related and necessary to the operation of its business.¹⁵⁷ Because long hours of work are an acceptable part of most business practices, an employer could likely satisfy this burden with relative ease. The plaintiff might still prevail if she could prove that an alternative practice would accomplish the business purpose advanced by the employer but would have less of a discriminatory impact on the protected group and that the employer refused to adopt the alternative.¹⁵⁸ Alternatives might include job-sharing, the creation of part-time positions, and telecommuting options that would allow some work to be performed at home.¹⁵⁹

The plaintiff could expect to encounter formidable obstacles, however, in trying to persuade a court that these alternatives were viable. In evaluating a proposed alternative, a court examines whether it is "equally as effective as" the challenged practice in achieving the employer's legitimate goals.¹⁶⁰ This inquiry presents a huge ideological hurdle to a plaintiff challenging workplace practices that collide with family responsibilities. The world of work is sorely out of step with the realities of a twenty-first century

155. That said, depending on the gender composition of the work force, a plaintiff may have an easier time establishing a prima facie case of parental status discrimination than of gender discrimination. See *supra* notes 78–90 and accompanying text (discussing the effects of occupational segregation by gender on the ability of plaintiffs to establish a prima facie case of gender-based discrimination under the disparate impact analysis).

156. See Marybeth Shinn, et al., *Promoting the Well-Being of Working Parents: Coping, Social Support, and Flexible Job Schedules*, 17 AM. J. OF COMTY. PSYCHOL. 31 (1989); Joan Williams, *Afterword: Exploring the Economic Meanings of Gender*, 49 AM. U. L. REV. 987 (2000); Symposium, *Unbending Gender: Panel One: Redesigning Work and the Benefits Related to It*, 49 AM. U. L. REV. 851 (2000).

157. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (providing that the employer has the burden of proving "that the challenged practice is job related for the position in question and consistent with business necessity").

158. See *id.* § 2000e-2(k)(1)(A)(ii) (stating that the plaintiff may prevail if she demonstrates alternative employment practices and the defendant refuses to adopt the asserted employment practices).

159. See WILLIAMS, UNBENDING GENDER, *supra* note 1, at 85–88 (referencing various ways to restructure market work to better accommodate workers—including flexible work schedules, job-sharing, telecommuting, part-time career tracks, and employer support for child care and elder care).

160. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 612, 661 (1989) (noting that "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals") (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988)).

workforce. Despite the increasing number of women entering the paid labor force, the typical work setting remains firmly anchored to a male-defined image of the ideal worker.¹⁶¹ It is assumed that the ideal worker takes no time off for childbearing, has no childrearing responsibilities, and is available to work full-time and overtime.¹⁶² Against these views, a disparate impact plaintiff faces the overwhelming task of convincing courts to seriously entertain the possibility of “a workplace that departs from the norm of comprehensive commitment, that accommodates the needs of working parents, [and] that values the contributions of those following nontraditional work patterns.”¹⁶³

Shifting from a gender-based approach to one based on parental status does not make this task any easier. Even though a model of parental status discrimination avoids explicit gender-based comparisons, the act of parenting is a “a phallogocentric,” gendered concept.¹⁶⁴ Thus while a parenting approach demands that parents be treated like non-parents instead of demanding that women be treated like men, in both cases the standard of equality centers on a worker who does not have primary responsibility for day-to-day child care obligations. As long as this standard remains controlling, few employees—men or women—will be able to use the law to claim the requisite support to integrate effectively parenting with work.¹⁶⁵

Ultimately, traditional anti-discrimination law proves too much in the context of parenting. At its core, the anti-discrimination principle demands that employers wear blinders when rendering employment decisions, so as to block out forbidden characteristics.¹⁶⁶ While such attribute-masking has proven instrumental in dismantling discrimination premised on attributes such as race,

161. See WILLIAMS, UNBENDING GENDER, *supra* note 1, at 2; Abrams, *Gender Discrimination*, *supra* note 12, at 1228 (noting the persistence of workplace practices which assume that workers are men with wives who take care of child-related concerns); Dowd, *Gender Paradox*, *supra* note 12, at 105 (observing that workplace structure incorporates a patriarchal conception of family consisting of “a male wage earner in the paid workforce married to a stay-at-home female spouse who performs the unpaid housework and childcare”).

162. Joan C. Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249, 254 (2000).

163. Abrams, *Gender Discrimination*, *supra* note 12, at 1229–30 (adding that unless a plaintiff can “paint a comprehensive picture of a reconstructed workplace, or . . . detail precisely all the related costs and ripple effects change might create with customers and clients, the court may be inclined to find her alternative implausible”).

164. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1304 (1987).

165. See, Dowd, *Gender Paradox*, *supra* note 12, at 115–16 (observing that “[s]imply treating women ‘the same’ as men means cutting off any change in the concept of parenting and accepting the paradigm of non-support or minimal support for that role”).

166. Affirmative action is of course a notable exception.

gender, and age, use of this technique in the context of parenting would surely prove counterproductive. Employees with child care obligations are often disadvantaged in the workplace precisely because employers presently turn a blind eye towards their needs and assume that they have no parental responsibilities. Instead of adopting measures to codify employer disinterest in the parental status of workers, legislatures must do the exact opposite: they must insist that employers acknowledge the pervasiveness of parenting-work conflicts, with an eye towards adopting strategies to help alleviate those conflicts. Irrespective of whether one approaches work/parenting conflicts from the perspective of gender discrimination or parental discrimination, the problem remains the same: the anti-discrimination model accepts the basic premise of existing workplace structures and seeks only to eliminate discriminatory defects within those structures.¹⁶⁷ It does not aim to create a new structure, one capable of valuing and maintaining a strong, healthy parent-child bond that will enrich both the family unit as well as the larger community. Creating such a structure requires a departure from an equal treatment understanding of equality in favor of a model that respects and accommodates the familial interests of all workers. Part V offers an initial exploration of what such a departure might entail. First, however, I argue in Part IV that treating parents as a protected class not only seems ill-suited to alleviate work/family conflicts, but also seems ill-advised.

IV. THE MYTH OF PARENTISM

Even as a parental status approach to discrimination is incapable of substantively altering workplace structures, its proponents insist that protection nevertheless should be extended to employees with parenting obligations.¹⁶⁸ While acknowledging the defects of the approach, they maintain that it is a worthwhile strategy given its potential to eliminate intentional discrimination against parents of

167. See Colker, *Anti-Subordination*, *supra* note 84, at 1034 (observing that because disparate impact is only available to challenge neutral policies, it cannot be used "to argue for the possible *benefits* of race- or sex-specific rules"); Dowd, *Gender Paradox*, *supra* note 12, at 139; Eichner, *supra* note 12, at 139 (observing that anti-discrimination law is limited by its nature to protect the broad "spectrum of interests at stake in work-and-parenting conflicts").

168. See Reed, *supra* note 17, at 14A (observing that the EDPA "in and of itself, will not solve the entire problem of the time crunch for working families" as "there's far more that government needs to do, and frankly . . . businesses need to do to give parents more choices").

the sort outlined earlier in scenarios one and two.¹⁶⁹ Advocates argue that such a strategy, while no panacea, represents an important piece of the solution to work-parenting conflicts.¹⁷⁰

Prohibiting employers from making employment decisions, based not on individual merit and capacity but on prejudicial beliefs about parents and their work commitment, no doubt seems like a logical extension of meritocratic principles. Certainly, if employees can meet employer demands for long hours, extensive travel, and the like, they should not be automatically disqualified because of their status as parents. To the extent that preconceived notions about parents are highly gendered and reflect stereotypes about mothers, rather than parents in general, employees should have some recourse under gender discrimination prohibitions. Likewise, if employers rely upon invidious stereotypes about welfare mothers to disadvantage women of color, such discrimination should be actionable within the sex-plus framework.

However, protecting parents, as parents, from employment discrimination raises troubling concerns about the proper scope of anti-discrimination doctrine. It is important to remember that federal law does not prohibit all biased employment decisions. As Lisa Eichhorn observes,

[i]f one defines prejudice as assumptions based upon stereotype, then one may harbor prejudices against an infinite variety of people. Asians, blonds, athletes, convicted felons, teenagers, accountants, dog-owners, short people, or any other identifiable group could, theoretically at least, become subjects of prejudice and thus targets of discrimination. However, the law proscribes discrimination only when it is based upon certain societally sanctioned categories.¹⁷¹

Thus the question must be asked: On what basis should society single out employment prejudice against parents for legal sanc-

169. See, e.g., Leonard, *supra* note 17 (noting comments of Donna Lenhoff, general counsel of the National Partnership for Women and Families: the EDPA is "getting at old-fashioned prejudice, and it doesn't matter how much of that there is If it is there, it should be eradicated."); Reed, *supra* note 17, at 14A (arguing that "outright discrimination against any parent is wrong and should be stopped, no matter how many cases have been brought so far").

170. See *Special White House Briefing Subject: White House Conference on Teenagers And President's Upcoming School Reform Tour*, FED. NEWS SERV., May 2, 2000 (describing the proposed legislation as "only one piece of a larger strategy to enable parents to have more choices and choose more time with their children") (comment of Bruce Reed, Director, Domestic Policy Council).

171. Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evil*, 31 ARIZ. ST. L.J. 1071, 1074 (1999).

tion? This Part investigates that question by comparing parenting with various protected categories presently precluded under federal employment discrimination statutes.

Legislative decisions to protect particular groups from employment discrimination occasionally hinge on a list of factors comparable to the criteria used by courts to determine which classifications require heightened judicial scrutiny under the Equal Protection Clause.¹⁷² These factors include the possession of an immutable characteristic by members of the protected class; the existence of a history of discrimination against members of the class; the relevance of the characteristic to legitimate decisionmaking; and the political power of the class.¹⁷³ Of course, the import of these factors in the legislative process is not the same as in the judicial process. A given legislative outcome may reflect countless considerations, including the influence of political coalitions and interest groups as well as the personal prejudices and allegiances of lawmakers.¹⁷⁴ That said, the aforementioned factors do allow for some comparisons to be made between the justifications for protecting parents from employment discrimination and the justifications supporting the protection of other groups that have triggered the

172. See *infra* Part IV.B (discussing the legislative histories of Title VII, the ADA, and the ADEA).

173. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 16–23 (3d ed. 2000) (considering such factors as political powerlessness, the history of discrimination, immutable characteristics, and relevancy between classification and governmental purpose); see also James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 *CONST. COMMENT.* 375, 376 (1986); Jane Rutherford, *Equality as the Primary Constitutional Value: the Case for Applying Employment Discrimination Law to Religion*, 81 *CORNELL L. REV.* 1049, 1081 (1996) ("The Supreme Court focuses on immutability, a history of discrimination, lack of political access, and discrete and insular status as the hallmarks of powerlessness, that trigger heightened scrutiny."); Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 *U. MIAMI L. REV.* 107, 123–28 (1990); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 *TEMP. L. REV.* 937, 938–39 (1991).

174. See Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 *TEX. L. REV.* 469, 497 (1985) (observing that "[n]o extant model is capable of capturing the interaction of all the subtle and ambiguous forces that determine the outcome of the legislative process"). Of course, the judicial process is also subject to these considerations, though presumably less so. See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 9 (1979) (contrasting the personal preferences that influence legislators with the judiciary's objective search for "true" values); Michael P. Kenny & Teresa D. Thebaut, *Misguided Statutory Construction to Cover the Corporate Universe: The Misappropriation Theory of Section 10(b)*, 59 *ALB. L. REV.* 139, 141 (1995) (observing that the "words of a statute must necessarily constrain courts when they engage in [the interpretive] process, otherwise, they simply substitute arbitrary normative expressions of personal preference for any semblance of legislative intent"); see also *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting) (commenting that "[w]e should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision").

enactment of anti-discrimination legislation. Thus, beginning with immutability, Parts IV.A. through IV.D. assess the significance of these factors to parenting.

A. Immutability

Discrimination on the basis of immutable characteristics often prompts strong societal and judicial condemnation because individuals have no control over such characteristics.¹⁷⁵ Compared to race and sex, the classic examples of immutable traits, parental status seems highly mutable. To be sure, once a parent, always a parent. However, construed in terms of the parent's relationship to minor children, the status of parenthood is not a fixed identity. Unlike race or sex, which cannot be set aside, individuals can usually escape whatever negative stereotypes might accompany their status as parents by the time that their offspring reach the age of majority.¹⁷⁶ In addition, parenthood is frequently a chosen status, or at the very least, a status subject to individual control.¹⁷⁷ Hence, at first glance, treating parenthood as a protected class may seem odd.

Immutability, however, is not a prerequisite in order for a trait to warrant inclusion in anti-discrimination statutes. Title VII illustrates this point. While it protects traits that society deems immutable (race, color, sex, and national origin), it also prohibits discrimination on the basis of religion, an arguably alterable trait.¹⁷⁸ The same observation holds for various state fair

175. See Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 673 (2001) ("Few arguments offered on behalf of ending discrimination or inequality resonate more powerfully than immutability. It reflects the universal appeal of the concept that it is unfair to disadvantage people based on a characteristic over which they exercise no control."); Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1332 (1997) (commenting that "[a]t its core, corrective justice requires that workers not be penalized for traits that they cannot change and that are not job-related").

176. Statutes that prohibit employment discrimination based on parental status acknowledge the degree to which parental bias is linked to the age of children by defining the status in terms of responsibility for children under the age of eighteen. See *supra* notes 92–102 (listing statutes that prohibit parental-status-based employment discrimination).

177. See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (holding that the right to privacy protects a woman's choice to terminate her pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (holding that the right to privacy protects a married couple's choice to use contraception).

178. See *Garcia v. Gloor*, 618 F.2d 264, 270 n.6 (5th Cir. 1980) (observing that under Title VII, religion is "a forbidden criterion, even though a matter of individual choice"); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 403 n.3 (6th Cir. 1977) (McCree, J., dissenting) (commenting that an "employee's religion is certainly not immutable"); see also Mark

employment laws that extend protection to characteristics that readily yield to alteration, including marital status and familial status.¹⁷⁹ Likewise, the Age Discrimination in Employment Act (ADEA) provides protection against age-based discrimination, even though some commentators believe that age “‘is not a discrete and immutable characteristic of any employee which separates the members of the protected group indelibly from persons outside the protected group.’”¹⁸⁰

In fact, immutability is neither a necessary nor sufficient condition for a characteristic to merit inclusion in anti-discrimination statutes. Consider that various immutable characteristics, such as eye color and height, receive no protection when they form the basis of employment decisions.¹⁸¹ In addition,

Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 403 (1995) (observing that “religion is not immutable, neither in the sense that it is genetic nor in the sense that it is unchangeable (one can convert)”). *But see* Rodriguez v. Taylor, 569 F.2d 1231, 1236 (3d Cir. 1977) (categorizing religion as an “immutable personal characteristic” protected under Title VII); Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 62–63 (1992) (discussing the immutability of religious beliefs); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000) (commenting that “American antidiscrimination laws . . . typically prohibit discrimination based upon religion and marital status, even though neither trait is ‘immutable.’”).

179. See *supra* notes 92–102 and accompanying text (referencing state and local employment statutes that prohibit employment discrimination based on familial status); see also Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal For Title VII Protection*, 46 WAYNE L. REV. 1, 15–16 (2000) (collecting state statutes that prohibit employment discrimination on the basis of marital status).

180. Baker v. Sears, Roebuck & Co., 903 F.2d 1515, 1519 (11th Cir. 1990) (quoting Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1442 (11th Cir.), cert. denied, 474 U.S. 1005 (1985)); see also Janet M. Bowermaster, *Two (Federal) Wrongs Make A (State) Right: State Class-Action Procedures As An Alternative to the Opt-In Class Action Provision of the ADEA*, 25 U. MICH. J.L. REFORM 7, 40 (1991) (observing that “age discrimination may differ from other forms of employment discrimination because of the self-corrective aspect of age discrimination”; aging “is universal—everyone will be old someday”); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 307–08 (1995) (commenting that “[a]ge is not an immutable characteristic such as race, sex or national origin, since age changes over time”). *But see* Howard Eglit, *Of Age and the Constitution*, 57 CHI-KENT L. REV. 859, 888–89 (1981); Bryan B. Woodruff, Note, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1301 (1998) (observing that “for the old, age is an immutable characteristic, just like race and sex”). The question of whether one regards age as an immutable trait has occurred against a larger debate regarding whether disparate impact analysis should apply to age discrimination. See, e.g., Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780 (1997); Symposium, *The Aging American Workforce: Thirty Years under the Age Discrimination Employment Act*, 31 U. RICH. L. REV. (1997).

181. See Eichhorn, *supra* note 171, at 1075 (noting that “there are many immutable or nearly immutable characteristics, such as height or left-handedness, that do not incur societal or legal censure when they become the bases of prejudice”).

even traits deemed highly immutable, like race and sex, are occasionally the by-product of social construction rather than biological determinism.¹⁸² At the end of the day, the mutability of parental status conveys little probative information to help evaluate whether parents should be protected from employment discrimination.

B. History of Discrimination

A more meaningful inquiry asks whether a group has experienced a history of purposeful discrimination based on invidious stereotypes regarding a trait shared by members of the group. The most cursory examination of the legislative history of employment anti-discrimination statutes reveals a strong congressional concern with combating the effects of past and present discrimination against disadvantaged groups. Title VII, for example, was enacted to address a long and shameful history of employment discrimination, particularly against African-Americans, who for years were systematically relegated to society's economic fringes.¹⁸³ Largely limited to low-skilled and menial jobs, blacks were openly and routinely discriminated against in all aspects of employment.¹⁸⁴ A

182. See, e.g., Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 772 (1987) (critiquing the "immutability" theory in the context of employment discrimination); Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1367-70 (1997) (describing the mutable-immutable distinction as a "false dichotomy"); Dwight J. Davis, 'Garcia v. Gloor': *Mutable Characteristics Rationale Extended to National Origin Discrimination*, 32 MERCER L. REV. 1275, 1279-82 (1980) (criticizing mutable-immutable dichotomy); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1067 (1985) (expressing the belief that "the social and psychological differences between men and women are constructed and mutable, rather than biologically determined and immutable").

183. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 37-162 (1977) (focusing on national socioeconomic policy and employment discrimination); IRVING KOVARSKY, *DISCRIMINATION IN EMPLOYMENT* 5-94 (1976) (addressing discriminatory employment practices and subsequent legal responses).

184. For historical accounts of how African-Americans were systematically denied employment opportunities, see HILL, *supra* note 183; PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER 1619-1973* (1974); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 179-80 (1985); *BLACK WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT* 186 (Philip S. Foner & Ronald L. Lewis eds., 1981); and *BLACK WORKER: THE ERA OF POST-WAR PROSPERITY AND THE GREAT DEPRESSION, 1920-1936* (Philip S. Foner & Ronald L. Lewis eds., 1980).

similarly blatant and disturbing record of employment discrimination existed against women.¹⁸⁵

The Americans with Disabilities Act (ADA)¹⁸⁶ evinces a comparable concern with America's cruel history of discrimination against persons with disabilities.¹⁸⁷ "For many years, the nation hid the disabled from public view and confined them to institutions where they were subjected to inhumane and horrific conditions. When confronted up close, American society pitied the disabled, demeaned their worth, and employed the rule of law to restrain their integration into mainstream society."¹⁸⁸ The Age Discrimination in Employment Act (ADEA)¹⁸⁹ also sought to address a pervasive pattern of discrimination against older workers. While the legislative history of the ADEA did not document significant workplace animus against or intolerance of older workers,¹⁹⁰ it did find that such workers experienced widespread discrimination based on stereotypical and often arbitrary assumptions about their abilities.¹⁹¹

185. For informative historical examinations of employment discrimination against women, see PHILIP S. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM THE FIRST TRADE UNIONS TO THE PRESENT* (1980); JONES, *supra* note 184; SUSAN ESTABROOK KENNEDY, *IF ALL WE DID WAS TO WEEP AT HOME: A HISTORY OF WHITE WORKING-CLASS WOMEN IN AMERICA* (1979); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982).

186. 42 U.S.C. §§ 12101-12213 (1994).

187. Congress, in enacting the ADA, found that like racial minorities, "individuals with disabilities are a discrete and insular minority" who have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(7), 2000e-5(f)(1) (1994).

188. Louis S. Rulli, *Symposium, The Americans with Disabilities Act—Past Present and Future: Developing Law over a Decade: Employment Discrimination Litigation under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled For Low-income Workers in the Next Decade?*, *TEMPLE POL. & CIV. RTS. L. REV.* 345, 346 (2000).

189. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

190. See Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 *U. RICH. L. REV.* 757, 758-63 (1997) (detailing the findings of the Wirtz Report on age discrimination). See generally EEOC, *LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT* (1981).

191. See Harper, *supra* note 190, at 758-59; see also 113 *CONG. REC.* 34,742 (1967) (statement of Rep. Burke: "Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance."). Of course, as various scholars increasingly point out, discrimination based on stereotypical assumptions is a problem not only as regards age but other protected categories as well, such as race and color; see, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach*

In stark contrast to the experiences of these groups, the class of parents does not exhibit a similar record of workplace discrimination. There is neither a history of bigotry, stigma, or animus, nor is there evidence that parents are the victims of pervasive generalizations that have hindered their employment and their ability to participate fully in society.¹⁹² Unlike, for example, historically marginalized ethnic groups or women, there is no suggestion that parents, as a group, have been denied a fair share of the economic pie or that they cannot compete for employment opportunities.¹⁹³

Presently, the Fair Housing Act (FHA)¹⁹⁴ is the only federal civil rights statute that prohibits discrimination on the basis of familial status, which is defined in relationship to minor children.¹⁹⁵ A 1988

to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161 (1995); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing prevalence of unconscious racism); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

192. To be sure, there is persuasive evidence that women as parents often experience gender-based discrimination both in the form of deliberate exclusions and as a matter of unconscious bias. See, e.g., *supra* notes 12, 35 and 45. However, the record does not support the existence of discrimination against parents as a group compared to non-parents. See, e.g., Demer, *supra* note 92, at 1B (noting that in the past five years, Alaska officials have “found substantial evidence of discrimination against parents only twice” pursuant to the state’s prohibition against parental-status-based employment discrimination); Bonnie Erbe, *Perks for Dad and Mom*, SCRIPPS HOWARD NEWS SERV., April 9, 2001 (reporting on study conducted by the Employment Policy Foundation which found that “there is simply no evidence that parents as a group face labor market discrimination”); Susan Laccetti Meyers, *Do Parents Need Job Protection?*, ATLANTA J. & CONSTITUTION, May 1, 1999, at 10A (quoting Professor Steven Kaminshine of the Georgia State University Law School: “I don’t think we can find state laws that have ostracized on the basis of being a parent”); Mortimer B. Zuckerman, *Piling on the Preferences*, U.S. NEWS & WORLD REP., June 28, 1999, at 88 (concluding that “[t]here is no real evidence or history of major discrimination against parents”).

193. See Timothy Noah, *Breeder Blues, Part 2*, (CHATTERBOX, SLATE.COM) (April 21, 1999) at <http://slate.msn.com/code/Chatterbox/Chatterbox.asp?Show=4/21/1999&idMessage=2619> (last visited Mar. 24, 2002) (evaluating cases documenting incidents of alleged discrimination against parents cited in support of EDPA and concluding that the cases offer little, if any, support for the bill).

194. 42 U.S.C. § 3601 (1994).

195. The Act defines the term familial status as:

One or more individuals (who have not attained the age of 18 years) being domiciled with 1) a parent or another person having legal custody of such individual or individuals; or 2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

Id. § 3602(k). The scope of this definition also extends to all individuals who are pregnant or in the process of securing legal custody of a child. *Id.*

The other federal civil rights statute that applies to discrimination based on parental responsibilities is Title IX of the Education Amendments of 1972. 20 U.S.C. § 1681 (1994) (providing that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”). However, Title IX itself does not include parenting as an explicit protected category. Instead, the Act’s implementing

amendment to the FHA led to the addition of familial status to the list of protected categories.¹⁹⁶ The legislative history of that amendment is instructive in evaluating whether fair employment laws should also prohibit parental status discrimination. The addition of family status to the FHA followed on the heels of a Department of Housing and Urban Development study that documented pervasive housing discrimination against families with children.¹⁹⁷ The study found that seventy-five percent of all housing providers either refused to rent to families with children or imposed restrictions on rentals to families with children.¹⁹⁸ Such discriminatory practices created a "nationwide housing crisis"¹⁹⁹ that was particularly devastating to poor families with children. Lacking the economic means to own their own homes, these families relied heavily on the availability of affordable rental units.²⁰⁰ When proposals to elevate parenthood to a protected status in the employment arena are evaluated against these findings, it becomes clear that there exists scant evidence to indicate that parents suffer from comparable effects of intentional job discrimination.

C. Job-Relatedness

A third factor that courts frequently focus on is the relation of the classification to job performance. The moral underpinning of fair employment laws is that individuals should not be penalized for personal traits that correlate weakly, if at all, with legitimate

regulations provide that Title IX's prohibition against sex discrimination expressly applies to parent status: "A recipient [of federal funds] shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex." 34 C.F.R. § 106.40(a) (1996).

196. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(b)(2), 102 Stat. 1619, 1622 (codified at 42 U.S.C. § 3604(a) (1994)).

197. See Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L.J. AM. U. 297, 300-10 (1995) (examining the legislative history behind the inclusion of familial status in the FHA); James A. Kushner, *Symposium: The State of The Union: Civil Rights: The Fair Housing Amendments Act*, 42 VAND. L. REV. 1049 (1989); see also H.R. REP. NO. 100-711 at 19-21 (1988) (detailing pervasive discrimination against families with children and noting that the few existing state laws were ineffective at eliminating this discrimination).

198. Allen, *supra* note 197, at 300.

199. *Id.* at 301 (quoting 134 CONG. REC. H4612 (daily ed. June 22, 1988) (statement of Rep. Miller)).

200. *Id.*

business considerations.²⁰¹ For example, racial identity is rarely relevant to one's ability to perform a job. Employer reliance on characteristics such as race and gender as job qualification proxies typically reflect irrational and suspect assumptions about the differential worth of individuals solely because of their group affiliation.²⁰²

Yet, while racial and gender traits are more likely than not illegitimate anchors on which to ground employment decisions, one can readily imagine circumstances that may lead an employer to classify workers according to their parental status. Employers frequently require employees to be able to work long hours, to work nights, to work weekends, to travel frequently, or to be on call at odd hours. While some employers simply assume that an employee's status as a parent will interfere with his or her job performance, it is not irrational to think that employees with children are less willing or able to put in long hours relative to co-workers who do not have children.

Consider a hospital in search of employees who have sufficient flexibility to be on-call during the evening hours, and who can report to the hospital within twenty minutes in case of an emergency. To be sure, many individuals with parental obligations could satisfy these requirements. Yet, the hospital may find it efficient to use parental status as a basis for selecting employees by screening out all applicants who have young children. Unlike statistical discrimination based on race, which creates inefficiencies over the long

201. See Sujit Choudhry, *Distribution vs. Recognition: the Case of Anti-discrimination Laws*, 9 GEO. MASON L. REV. 145, 152–53 (2000) (observing that “discrimination is unjust because its purpose is to deny persons access to a material good or opportunity on the basis of reasons that are irrelevant to the distribution of that material good or opportunity”); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 339 (1993), where the author articulates an anti-caste principle that:

[d]ifferences that are irrelevant from the moral point of view ought not without good reason to be turned, by social and legal structures, into social disadvantages. They certainly should not be permitted to do so if the disadvantage is systemic . . . [operating] along standard and predictable lines in multiple important spheres of life, and applies in realms that relate to basic participation as a citizen in a democracy.

Id.

202. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976):

The antidiscrimination principle fills a special need because—as even a glance at history indicates—race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference.

run,²⁰³ there is no reason to believe that the same inefficiencies will occur with generalizations premised on parental status. The reality is that parental status correlates with job performance far more strongly than do other personal attributes that are subject to employment anti-discrimination legislation. Work and child rearing frequently clash, and when they do, the amount of time that individuals have available to devote to work often diminishes. This observation is not an endorsement of the status quo. Strategies must be pursued that will enable workers to forge a viable bond between work and parenting. However, treating parenthood as a protected class is neither a promising strategy nor is it one that bears much resemblance to the original aims of employment discrimination law.

D. Political Power

An additional factor relevant to determining whether a group requires government protection from discrimination is the group's political power. Judicial concern with political power addresses whether a group, faced with undesirable state action, can effectively use the political process to protect its interests. Absent that ability, the group may need special judicial protection by way of heightened scrutiny of government classifications that discriminate against group members.²⁰⁴ A similar notion often informs the inquiry as to whether groups require extraordinary congressional solicitude to protect their interests from the discriminatory acts of private parties or local governments. For example, passage of the Civil Rights Act of 1964 evinced congressional recognition of the fact that blacks lacked the political power to defend against the pervasive racism of both private entities as well as local public entities.²⁰⁵ Congress articulated a similar awareness in the context of

203. See Owen Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971) (observing that, in the employment context, criteria such as race or color "impair rather than advance productivity and wealth maximization for the individual businessman and for society as a whole").

204. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1937) (leaving open the question of whether a heightened form of judicial scrutiny is warranted to protect a group that lacks political power). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing in favor of judicial protection of groups likely to be denied political power in a majoritarian regime).

205. For accounts of the legislative history of Title VII, see HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* (1990); Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and*

the ADA, concluding that like racial minorities, individuals with disabilities have been “relegated to a position of political powerlessness in our society.”²⁰⁶

Against this background, the question is straightforward: Assuming workers encounter invidious employment discrimination on the basis of parental status, do they lack the requisite political power to obtain relief from local and state governments? Is there a role for the federal government to play regarding employment discrimination against parents? The short answer to both questions is no. There is no basis for thinking that parents, as a group, have been excluded from political and economic power. On the contrary, the political process has yielded considerable benefits for individuals with parental obligations, including tax breaks,²⁰⁷ educational subsidies,²⁰⁸ and family-friendly employment legislation such as the Family and Medical Leave Act (FMLA).²⁰⁹

Of course, some may argue that even though the class of parents does not resemble groups that have traditionally garnered federal protection against employment discrimination, prohibiting discrimination based on parental status may still serve a useful symbolic value in expressing society’s commitment to the role of parenting. Yet, while this symbolism may be worthy, the costs of achieving it via an anti-discrimination framework may be too high. The Equal Employment Opportunity Commission (EEOC), the agency that is responsible for administering federal fair employment statutes, has very limited enforcement resources. At present, the agency is “spread six miles wide and an inch deep,”²¹⁰ trying

Litigation Record, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 263, 263 (Herbert Hill & James E. Jones, Jr. eds., 1993); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985). See generally UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 (1968).

206. 42 U.S.C. § 12101(a)(7) (1994).

207. See 26 U.S.C. § 21 (2001) (Child and Dependent Care Tax Credit); see also Sharon C. Nantell, *The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private Public Parental Alliance*, 80 MARQ. L. REV. 883 (1997); Ann F. Thomas, *Child Care and Federal Tax Policy*, 16 N.Y.L. SCH. J. HUM. RTS. 203 (1999).

208. See Nina J. Crimm, *Core Societal Values Deserve Federal Aid: Schools, Tax Credits, and the Establishment Clause*, 34 GA. L. REV. 1 (1999) (discussing educational benefits provided to individuals with children); Stephen G. Gilles, *Selective Funding of Education: An Epsteinian Analysis*, 19 QUINNIPIAC L. REV. 745, 769 (2000) (evaluating educational subsidies to parents in the form of vouchers or tax benefits).

209. See *infra* Part V.A. (discussing the FMLA).

210. *Oversight Hearing on the U.S. Equal Employment Opportunity Commission Before the Comm. on Education and the Workforce*, 105th Cong. 178 (1997) (statement of Richard T. Seymour, Lawyers’ Committee for Civil Rights Under Law) (quoted in Dorothy E. Larkin, Note, *Participation Anxiety: Should Title VII’s Participation Clause Protect Employees Participating in Internal Investigations*, 33 GA. L. REV. 1181, 1214 (1999)).

desperately to make a noticeable dent in an enormous backlog of cases.²¹¹ Lacking adequate staff and resources, and faced with thousands of new complaints each year,²¹² the EEOC is currently unable to respond effectively to the many complaints it receives each year.²¹³ In light of this situation, it seems unwise to pursue a measure for symbolic value and, in the process, run the risk of further diluting the EEOC's efforts to vindicate the goals of Title VII, the ADEA, and the ADA. Moreover, given the practical constraints facing the EEOC, a prohibition against parental status discrimination would benefit primarily those employees with the financial resources to bring and finance a private lawsuit.²¹⁴ Consequently, legislation like EDPA would have little, if any, practical utility for low-income workers who may experience parental-status-based discrimination.

211. See *EEOC Struggles with Caseload*, 45 LAB. L.J. 432 (1994); *EEOC Inventory Grows to 92,000 Pending Charges*, DAILY LAB. REP. (BNA) No. 174, at D5 (Sept. 12, 1994); Peter T. Kilborn, *Backlog of Cases Is Overwhelming Jobs-Bias Agency*, N.Y. TIMES, Nov. 26, 1994, at 1.

212. See Kristin Downey Grimsley, *EEOC Chief Voices Frustration Over Case Backlog, Budget Cuts*, WASH. POST, Feb. 11, 1996, at A4 (reporting that the EEOC received approximately 88,000 complaints of illegal discrimination in 1995, a figure representing a forty-two percent increase from the 1990 caseload); John Montoya, *New Priorities for the '90s*, 42 HR MAG. 118 (1997) (reporting that the EEOC backlog of cases grew "to about 100,000 by the end of fiscal year 1995").

213. See Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 60 (1998) (observing that the EEOC backlog has resulted in the EEOC taking up to two years in some cases to initiate an investigation); J. Clay Smith, Jr., *Open Letter to the President on Race and Affirmative Action*, 42 HOW. L.J. 27, 44 (1998) (observing that "increasing numbers of cases filed by the EEOC and private parties are being lost in court and languishing in filing cabinets"); *EEOC Backlog of Discrimination Cases Leads to Greater Use of Right-to-Sue Letters*, EMPL. POL. & L. DAILY (BNA) D6, at 16 (Sept. 30, 1996).

214. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 458 (1999) (observing that "EEOC and group suits are less significant today, and the private litigant's individual cause of action is now the main vehicle to pursue the public goal," and commenting that the costs of private litigation excludes some claimants); see also *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 360 (7th Cir. 1997) (observing that "because the [EEOC] has an enormous backlog and limited resources for litigating, the vast majority of workers who have claims under any of the statutes that the Commission enforces have perforce to bring and finance their own lawsuits; they cannot rely on the Commission to do so for them").

Note that Section 706(f)(1) of Title VII expressly grants individuals a private right of action against employers. 42 U.S.C. § 2000e-5(f)(1) (1994). Section 706(f)(1) provides that the person claiming to be aggrieved may file a private suit after the EEOC has dismissed the charge or if, within 180 days from the filing of the charges, the EEOC has not pursued a suit against the employer or reached a conciliation agreement. *Id.*; see also *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 45 (1974) ("[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.").

Still, the argument remains that as a matter of basic fairness, an employer should not compromise the employment opportunities of workers simply because of their status as parents. While I share this sentiment, I hasten to add that when working parents are subject to discriminatory treatment, their situation parallels that of countless employees-at-will who believe that they have been treated unfairly but who have little, if any, legal recourse.²¹⁵ Like many commentators critical of the employment-at-will doctrine,²¹⁶ I believe that the doctrine has outlived its usefulness and that a “good cause” standard should govern modern employment relationships. Consequently, if individuals require protection from the adverse consequences of parental bias in the workplace, they should be afforded claims predicated on judicial or legislative notions of good cause,²¹⁷ not employment discrimination law.

215. See *supra* note 153 (defining the employment-at-will doctrine).

216. The literature criticizing the employment-at-will doctrine is voluminous. See, e.g., MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 284–86 (1989) (discussing specific anti-retaliation laws and general “whistleblower laws”); Robert M. Bastres, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 346–50 (1988) (arguing that at-will rule should be discarded and replaced with just-cause protection); Larry Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (advancing the creation of a tort remedy to protect employees from unjust employment dismissals); David Dominguez, *Just Cause Protection: Will the Demise of Employment at Will Breathe New Life into Collective Job Security?*, 28 IDAHO L. REV. 283 (1992) (supporting the adoption of a statutory just cause standard instead of employment-at-will); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986); Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: the Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319 (1983); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 493 (1976) (discussing need for statutes to remedy arbitrary or malicious discharges and reviewing history of at-will doctrine).

Those articles have been countered by commentators who insist that the doctrine remains worthwhile and should not be abandoned. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (arguing that at-will rule maximizes economic efficiency in employment); Lary S. Larson, *Why We Should Not Abandon the Presumption That Employment Is Terminable At-Will*, 23 IDAHO L. REV. 219, 219 (1987) (suggesting that it may be premature to abandon the termination at-will rule); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1923 (1996) (evaluating common criticisms of the employment at-will doctrine and concluding that the doctrine “allow[s] individuals freedom to find employment situations which more closely approximate their preferences”); Richard W. Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U. L.J. 881, 899 (1983) (suggesting that adopting just-cause rule would subject employers to voluminous record keeping); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 842 (arguing that courts and legislatures “should reject mandatory rules and reaffirm the at will default”).

217. Proposals to enact good cause employment standards are generally dubbed wrongful discharge legislation. The effect of such legislation is typically to prohibit employers from discharging employees absent good cause. My decision to refer to the standard as a good cause standard as opposed to a wrongful discharge standard reflects a belief that a requirement of good cause should extend to any employment disciplinary action, and not be

V. AN ALTERNATIVE STATUTORY APPROACH

Although in this Article I have argued against treating parents as a protected class, I am sympathetic to the concerns prompting proposals for such treatment. Many employees with parental obligations confront constant obstacles trying to manage the often competing demands of home and work. As suggested earlier,²¹⁸ creating a framework that can support working parents requires a departure from the traditional anti-discrimination model of Title VII and its insistence on symmetry. This Part begins by briefly commenting on the Family and Medical Leave Act (FMLA),²¹⁹ which marks such a departure by providing workers with concrete benefits as opposed to simply prohibiting discrimination.²²⁰ Although the FMLA is not without flaws, it offers a useful framework for thinking about how to empower working parents in a manner that avoids false comparisons between parents and groups presently protected by employment anti-discrimination legislation. The second half of this Part surveys strategies to further the FMLA's vision of insuring that "American workers will no longer have to choose between the job they need and the family they love."²²¹

limited solely to discharge. While most courts allow exceptions to the employment-at-will doctrine only for discharge, some courts have taken a more liberal approach, extending exceptions to other forms of employer discipline, such as demotions and suspensions. See, e.g., *Mack v. McDonnell Douglas Helicopter*, 880 P.2d 1173, 1176 (Ariz. Ct. App. 1994) (stating that the public policy exception covers "employee demotions as well as employee terminations"); *Zimmerman v. Buccheit of Sparta*, 615 N.E.2d 791, 793 (Ill. App. Ct. 1993), *rev'd*, 645 N.E.2d 877 (Ill. 1994) (concluding that there is "little difference" between terminations and demotions). See generally Gregory Mark Munson, Note, *A Straitjacket for Employment At-Will: Recognizing Breach of Implied Contract Actions for Wrongful Demotion*, 50 VAND. L. REV. 1577 (1997).

218. See *supra* Section III (examining the limitations of anti-discrimination doctrine to eliminate work/family conflicts and suggesting prerequisites for an alternative model).

219. 29 U.S.C. §§ 2601-2654 (1994).

220. See Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2189 (1994) (describing the FMLA as "[a]n alternative statutory model that seeks to provide actual benefits rather than simply to prohibit discrimination").

221. *Statement of President Clinton on Signing the Family and Medical Leave Act of 1993*, 1 PUB. PAPERS 50 (Feb. 5, 1993), *reprinted in* 1993 U.S.C.C.A.N. 54, 54.

A. The Family & Medical Leave Act

In passing the FMLA, Congress was particularly concerned with eliminating workplace discrimination against women who were victimized by virtue of being parents with primary child care responsibilities.²²² However, as enacted, the FMLA functions in a manner that is different from anti-discrimination statutes. Under traditional anti-discrimination statutes, like Title VII or the proposed parental-status-based discrimination statute, employers have a duty to refrain from discriminating against employees based on a particular characteristic (race, sex, parental status, etc.), but no affirmative duty to accommodate the needs of employees.²²³

In sharp contrast, the FMLA imposes upon employers an affirmative duty to help workers harmonize work and family.²²⁴ Indeed, properly understood, the FMLA is not an anti-discrimination statute but a labor standard statute similar to the Fair Labor Standards Act (FLSA).²²⁵ Like the FLSA, the FMLA insures that workers receive a base level entitlement. The Act requires employers to accommodate certain familial obligations of employees by providing eligible employees with up to twelve weeks

222. See 29 U.S.C. § 2601(b)(4) (1994) (including among stated purposes of the FMLA the goal of “minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis”).

223. Title VII actually does contain a notable exception to the traditional anti-discrimination approach; namely, the Act requires employers to accommodate the religious interests of employees. 42 U.S.C. § 2000e(j) (1994). Title VII’s religious accommodation provision was added via a 1972 amendment and provides that:

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.

Id.; see also Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 742 (1996):

The normal duty under Title VII is not to treat employees differently in an adverse manner based on the listed characteristics. But, as a result of the amendment, an employer has an affirmative duty to treat certain employees differently, and some would argue favorably, by accommodating their religious needs. Thus an employer has a duty to discriminate in favor of certain employees by granting an employee special treatment because of the employee’s religious practices, that is, to accommodate the employee’s special religious needs.

224. See *supra* notes 219–21 and accompanying text (describing duties that the FMLA imposes on employers).

225. 29 U.S.C. §§ 201–19 (1994) (establishing minimum wage and hour standards).

of unpaid leave per year.²²⁶ Leave must be made available for the birth or adoption of a child or for a serious health condition that affects the employee or a covered family member.²²⁷ Upon returning to work from an FMLA leave, an employee has the right to be restored to the same job, or an equivalent position to the one held by the employee.²²⁸

To be sure, the FMLA is not without serious deficiencies.²²⁹ Importantly, the Act mandates unpaid leave only, a fact that leads many employees to forego taking time off because they cannot afford the wage loss.²³⁰ The Act is further limited by its narrow application to serious medical conditions,²³¹ providing no protection for the many routine parental obligations and exigencies that most commonly clash with work demands.²³² These

226. 29 U.S.C. § 2612(a)(1) (1994).

227. *Id.*; 28 C.F.R. § 825.112(a)(1)-(3) (1997).

228. 29 U.S.C. § 2614(a); 28 C.F.R. § 825.100(c). To insure the availability of these substantive guarantees, the Act also imposes upon employers a negative duty, i.e., a duty not to discriminate against an employee for exercising his or rights pursuant to the FMLA. *See* 29 U.S.C. § 2615(a)(1) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."); *id.* § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful [under the FMLA].").

229. For examples of articles critical of the FMLA, see Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness, and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 239-50 (1997) (evaluating the FMLA and concluding that it has "provided little job security for many employees in the workplace") [hereinafter Colker, *Hypercapitalism*]; Cristina Duarte, *The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. LOUISVILLE J. FAM. L. 833, 834 (1994) (observing that the FMLA "will not provide relief to those families who most desperately need relief"); Eichner, *supra* note 12, at 133 (discussing the limitations of the FMLA); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 140 (1998) (assessing the merits of the FMLA and concluding that while it is a "step in the right direction in terms of recognizing the work/family conflict, its provisions are meager").

230. *See* COMMITTEE ON FAMILY & MED. LEAVE, U.S. DEP'T OF LABOR, *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS* (2000); *see also* Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61, 62 (1997) (observing that the FMLA "provides few genuine options for the overwhelming number of poor, or even middle-class women, who cannot afford to take unpaid leave and still pay the bills"); Jim Williams, *Building on Ed Sparer's Legacy: Redefining Legal Advocacy For Low-income People*, 66 BROOKLYN L. REV. 153, 161 (2000) (stating that "[t]he vast majority of people cannot take leave because they cannot afford to").

231. *See* 29 U.S.C. § 2612(a)(1)(D) (1994) (providing leave for "serious health conditions"); *see also* 29 C.F.R. § 825.114 (1999) (defining "serious health condition" as one that requires hospitalization or period of incapacitation exceeding three days and that excludes ordinary conditions such as flu, ulcers, and upset stomach).

232. *See* HEYMANN, *THE WIDENING GAP*, *supra* note 1, at 30 ("Most of the reasons parents needed to take leave from work to help school-age children were covered neither by the FMLA nor by existing programs serving school-age children."); S. Jody Heymann et al.,

limitations notwithstanding, the FMLA represents a critical turning point in strategies to address the discriminatory effects of work/family conflicts. The Act recognizes that positive action is required in order to minimize the likelihood that work/family conflicts will trigger discrimination against workers with child care obligations.

In addition, the accommodation approach of the FMLA avoids some of the inapt comparisons associated with efforts to treat parents as a protected class. As part of its goal of ensuring equal employment opportunities, anti-discrimination doctrine has functioned traditionally to counter the stigmatic harm and the presumption of inferiority that frequently accompanies discrimination. Discrimination premised on traits such as race and gender, for example, perpetuates demeaning stereotypes and reinforces notions of racial and gender superiority on the part of whites and men.²⁵³ By comparison, discrimination based on parenthood does not foster oppression nor does it generate feelings of superiority in the minds of individuals without children.²⁵⁴ To treat parents as a protected class is to belittle the very notion of invidious discrimination and to minimize the experiences of those groups that have been disadvantaged in the workplace by harmful misconceptions and prejudice.

In contrast, the message sent by an accommodation approach, such as that embodied in the FMLA, is not that parents have endured stigmatizing oppression and irrational prejudice but that

Parental Availability for the Care of Sick Children, 98 AM. ACAD. OF PEDIATRICS 226 (1996) (concluding that "the FMLA does not address the majority of children's sick care needs"); see also Colker, *Hypercapitalism*, *supra* note 229, at 240 (observing that judicial interpretations of "serious health condition" have excluded "many of the health conditions that cause many parents to miss work to care for their children").

253. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

254. Indeed, just the opposite seems true; namely, childless individuals are often regarded as inferior because they have no children. See CAROLYN MORELL, UNWOMANLY CONDUCT: THE CHALLENGES OF INTENTIONAL CHILDLESSNESS 77 (1994) (noting how the equation of family with children disregards the experiences of individuals without children: "In common discourse it is the act of having children which defines the family" and "[w]hile 'single-parent family' is a common term, we hear little of 'no child family'"); ELLEN PECK, PRONATALISM: THE MYTH OF MOM AND APPLE PIE 250 (1974). Such perceptions are particularly pernicious for women without children for whom childlessness is regarded as a "condition" that alternately invites suspicion or pity from strangers. See LAURIE LISLE, WITHOUT CHILD: CHALLENGING THE STIGMA OF CHILDLESSNESS 235 (1999) (observing that "[a]s long as a female is young and unmarried, her childlessness is unquestioned, even honored, since she represents the virgin archetype. When it is a matter of considered choice, however, the reaction is often different. The attractive lover of man, the Aphrodite or mistress type, is usually tolerated. But a nullipara who is old, isolated, or angry, or who is not sexual or maternal, runs the risk of being regarded as an anti-mother or an imperfect male and being cast out of the human family").

they, like most workers, face considerable difficulties trying to balance the competing demands of work and family.²³⁵ To the extent that the FMLA addresses harmful stereotypes, it does so in connection with gendered norms and assumptions that have disadvantaged the class of women as primary caretakers, not the class of parents.²³⁶ In the end, an accommodation model, as compared to a parental status discrimination paradigm, is both better suited to make a real difference in the lives of working parents, and it constitutes a more principled solution to work-parenting conflicts. As importantly, the entitlement structure of an accommodation model stands to benefit all covered workers, and not just those who have the financial resources to pursue a discrimination action.²³⁷

B. Looking Forward

The challenge that lies ahead is developing work/family strategies that can strengthen the FMLA and restructure the workplace so as to value caregiving. Key suggestions to improve the FMLA are providing for paid leave;²³⁸ lengthening the period of leave beyond twelve weeks;²³⁹ and extending coverage to more workers.²⁴⁰ These

235. See Marion Crain, "Where Have all the Cowboys Gone?": Marriage and Breadwinning in Postindustrial Society, 60 OHIO ST. L.J. 1877, 1952 (2000) (citing evidence indicating that "work-family balance issues are a pressing concern for the vast majority of employees"); Mary Young, *Work-Family Backlash: Begging the Question, What's Fair?*, 562 ANNALS 32, 34 (1999) (reporting on a study which found that even as "44 percent of respondents did not have children, 88 percent agreed that work and personal life responsibilities sometimes conflicted with each other" and concluding that "[t]hese findings suggest that work-life conflicts are not restricted to a specific employee population but are widespread").

236. See 29 U.S.C. § 2601(b)(4) (including among stated purposes of the FMLA the goal of "minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis").

237. See *supra* notes 209-14 and accompanying text (observing that because of the major resource constraints on the EEOC, only individuals with financial resources to sustain a private lawsuit against an employer would actually benefit from a federal law prohibiting discrimination against parents).

238. See Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395 (1999); Marc Mory & Lia Pistilli, Note, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689 (2001) (discussing needed improvements in the FMLA, including provisions for paid leave and greater leave time).

239. Mory & Pistilli, *supra* note 238, at 707-08.

240. The Act only covers employers with fifty or more employees. 29 U.S.C. § 2611(4)(A)(i). In addition, an employee must have worked for his or her employer for at least one year and at least 1250 hours during the previous twelve months in order to qualify for

recommended changes should be accompanied by measures to restructure the workplace so as to allow for flexible work/family arrangements that can promote parenting as a social good.

Importantly, studies indicate that many working parents lack the requisite workplace flexibility to attend to routine child care demands²⁴¹ such as parent-teacher conferences, staying home with a sick child,²⁴² taking a child for routine medical and dental visits, and caring for a child when child care arrangements unexpectedly fail. When these responsibilities conflict with work requirements, employees can find themselves having to choose between their jobs and the welfare of their children.²⁴³ To minimize the occurrence of these hard choices, strategies must be pursued that afford individuals sufficient workplace flexibility. For example, the FMLA could be amended to allow workers a certain number of hours per year to respond to routine work/family conflicts.²⁴⁴ A different approach would

leave. 29 C.F.R. § 825.110(a)(1)-(2) (1999). These two restrictions together operate to deny FMLA coverage to approximately 41 million private-sector workers. *See, e.g.,* Melissa A. Childs, *The Changing Face of Unions: What Women Want From Employers*, 12 DEPAUL BUS. L.J. 381, 426-27 (1999); *see also* G. John Tyse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361, 361-62 (1994) (estimating that the FMLA does not cover "approximately ninety-five percent of all businesses and from forty to fifty percent of all United States employees").

Recent proposed measures to expand coverage of the FMLA include the Family and Medical Leave Fairness Act of 2001, H.R. 265, 107th Cong. § 511 (2001) (amending the FMLA to extend coverage to employees at worksites where the employer employs at least twenty-five employees at the worksite and within seventy-five miles of that worksite) and the Family and Medical Leave Fairness Act of 2001, S. 18, 107th Cong. § 511 (2001) (same).

241. *See* HEYMANN, *THE WIDENING GAP*, *supra* note 1.

242. The FMLA does not cover routine illnesses such as the common cold, the flu, earaches, and upset stomachs. *See* 29 U.S.C. § 2612(a)(1)(D) (providing leave for "serious health conditions"); *see also* Eichner, *supra* note 12, at 142 (observing that the FMLA does not "meet the needs of sick-but-not-deathly-ill children. [It] does not entitle a parent to take a day off, paid or unpaid, to care for a child with the chicken pox or to take a child to a doctor's appointment."). According to Jody Heymann, the children's illnesses that most require parents to miss work are those that are not covered by the FMLA. HEYMANN, *THE WIDENING GAP*, *supra* note 1, at 24.

243. *See* Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 47 WISC. L. REV. 1443 (2001) [hereinafter Smith, *Accommodating Routine Parental Obligations*] (discussing negative impact of work-parenting conflicts on employees).

244. In 1997, President Clinton urged Congress to expand the FMLA so as to allow employees up to twenty-four hours per year for leave to attend parent/teacher conferences or to accompany a child, spouse, or elderly parent on a medical or dental visit. *See* Stanley Meisler, *Clinton Seeks to Expand Law on Family Leave*, L.A. TIMES, Feb. 2, 1997, at 1; Sandra Sobieraj, *Clinton Pushes to Expand Family Leave*, AUSTIN AMERICAN-STATESMAN, April 13, 1997, at A2. In the ensuing years, lawmakers have introduced a number of "parental involvement" bills in Congress. *See* The Time for Schools Act of 2001, H.R. 265, 107th Cong. (2001) (amending the FMLA to allow employees up to twenty-four hours, during any twelve-month period, "to participate in: an academic activity of [their child's] school, such as a parent-teacher conference or an interview for a school or . . . literacy training under a family literacy program"); The Time for Schools Act of 2001, S. 18, 107th Cong. (2001) (same).

require employers to accommodate work/family conflicts if the accommodation can be achieved without imposing an undue hardship on the employer's business.²⁴⁵ Finally, if as a society we are truly committed to restructuring the workplace to better accommodate familial needs, then serious attention must be accorded to proposals to reduce the work week,²⁴⁶ which would enable all workers more time to attend to family obligations and household demands without fear of adverse employment consequences.

CONCLUSION

In today's workplace, it is clear that employees with parental obligations require assistance to fulfill the demands of both work and parenting. In this Article, I have argued that treating parenthood as a protected category in employment discrimination statutes might advance the interests of a few workers with parental obligations, but that such an approach ultimately achieves only a marginal improvement over the ability of a gender

Presently, several states provide workers with protected leave to participate in educational activities involving their children. Louisiana, for example, provides eligible employees up to sixteen hours of leave during any twelve-month period "to attend, observe, or participate in conferences or classroom activities" that are conducted at his or her child's school or day care center, if activities cannot reasonably be scheduled during non-work hours. LA. REV. STAT. ANN. § 23:1015.2 (West 2000) ("School and day care conference and activities leave"); see also CAL. LAB. CODE § 230.8(a)(1) (West 2001) (mandating that an employee can take off "up to 40 hours each year, not exceeding eight hours in any calendar month of the year, to participate in activities of the school or licensed child day care facility of any of his or her children"); MASS. ANN. LAWS ch. 149, § 52D (Law Coop. 2001); MINN. STAT. § 181.9412 (West 2000); NEV. REV. STAT. ANN. § 392.490 (Michie 2001); VT. STAT. ANN. tit. 21, § 472a (2001). A few states also allow employees leave for medical needs that are not covered by the FMLA. For example, Massachusetts family and medical leave statute provides an employee twenty-four hours of leave during any twelve-month period, in addition to leave available under the FMLA, to accompany his or her child to routine medical or dental appointments, such as check-ups or vaccinations. MASS. ANN. LAWS ch. 149, § 52D(b)(2) (Law Coop. 2001); see also OR. REV. STAT. § 659.478 (1999); VT. STAT. ANN. tit. 21, § 472a (2001).

245. See Smith, *Accommodating Routine Parental Obligations*, *supra* note 243 (borrowing from Title VII's religious accommodation framework to advance a model of accommodation for routine parental obligations).

246. Much of the present discussion on the need to shorten the work week was prompted by Juliet Schor's work concluding that after a century-long decline in work hours, Americans are now working more. See JULIET B. SCHOR, *THE OVERWORKED AMERICANS: THE UNEXPECTED DECLINE OF LEISURE* (1991); see also Crain, *supra* note 235, at 1944-49 (recommending a shorter work week); Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 469 (1998) (discussing the advantages of a shorter work week); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1957 (2000) (recommending an amendment to the FLSA to reduce the workweek to thirty or thirty-five hours).

anti-discrimination model to alleviate discrimination based on parental status. Equipping parents with civil rights to combat workplace discrimination is simply no solution for a lack of time and resources. As one commentator remarked, “[a]ll the ‘rights’ in the world [cannot] help when you have to get your toddler on a bus at 5:30 a.m. so you can get her to her substandard day care in time to get to your own job cleaning hotels by 7:30.”²⁴⁷ Employees with parental obligations need more time to devote to child care activities and greater resources to enhance those activities.

Expanding the scope of anti-discrimination legislation to include parents is not only an inadequate means of helping workers strike an acceptable balance between work and parenting; the strategy also bears little semblance to the goals and purposes of equal employment opportunity legislation. In contrast to other groups that have gained federal protection against employment discrimination, there exists no sound basis for protecting parents. Instead of devoting precious resources to a largely symbolic anti-discrimination measure, attention should focus on strategies that can accommodate the parenting needs of workers.

247. Majorie Williams, *Parenthood Without Punishment*, WASH. POST, May 5, 2000, at A27.