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Parental Leaves of Absence for Men

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PARENTAL LEAVES OF ABSENCE FOR MEN

INTRODUCTION

As evidenced by the proposed Equal Rights Amendment,[1] today's society is increasingly aware of discrimination on the basis of sex. While this new awareness often focuses on prejudice and discrimination against women,[2] men are also affected by sex stereotypes and gender classifications.[3] As the language of *Bradwell v. Illinois*[4] illustrates, generalizations concerning women create stereotypes about men:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[5]

This remark reflects traditional thinking about the "proper" roles for both men and women. However, society has changed since 1872, and it is no longer assumed that men should protect and defend women, that men are unsuited for the "domestic sphere," or that women are unsuited for the "occupations of civil life." Such arbitrary role-typing is unjustified for either sex.

In place of these arbitrary classifications there is a need to rethink our instinctive reactions to all phases of traditional sexual stereotyping. Just as women are entering careers that were once considered to be appropriate only for men,[6] men are now assuming

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1. "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. proposed amend. XXVII.

2. *See generally* Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

3. *See* Bear, Berger & Wright, *Even Cowboys Sing the Blues: Difficulties Experienced by Men Trying to Adopt Nontraditional Sex Roles and How Clinicians Can be Helpful to Them*, 5 SEX ROLES 191 (1979). "While the impact of the women's movement has made therapists more sensitive to societal influences on the behavior of women, comparable attention has not been paid to societal influences on the sex-role stereotypical behavior or to the price paid by men who violate stereotypical sex-role expectations." *Id.*

4. 83 U.S. (16 Wall.) 130 (1872).

5. *Id.* at 141 (Bradley, J., concurring).

6. "The tutelary syndrome of Victorian days has yielded to a new era in which women

roles, both in their choice of career[7] and in the home,[8] that were once considered to belong solely to women.

Among those activities once exclusively the "domain and functions of womanhood"[9] is the care of children. Courts have continually extolled the unique role of women in bearing and raising children,[10] thereby effectively denying men an equal opportunity to raise their children. The conflict can be eliminated if legislators and courts recognize a man's ability and desire to assume an equal role in the family itself.

For men to take a more active part in child care, they will often find it necessary to obtain leaves of absence from their jobs. Assuming basic physical needs are met, either parent may regularly care for a child. There is, therefore, no essential reason for employers to premise parental leave benefits[11] on sexual stereo-

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are contributing their talents in every field of endeavor—as prime ministers, governors, legislators, judges, corporate executives, lawyers, scientists, medical doctors, police officers, and professional athletes." Michael M. v. Superior Court, 25 Cal.3d 608, 615, 601 P.2d 572, 577, 159 Cal. Rptr. 340, 345 (1979) (Mosk, J., dissenting), *aff'd*, 450 U.S. 464 (1981).

7. "The goal of sex equality calls for not only an increase in the extent of women's participation in the occupational system, but a more equitable distribution of men and women in all the occupations which comprise that system. This means more women doctors, lawyers and scientists, more men social workers and school teachers." Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 DAEDALUS 607, 638 (1964). *See also* Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, *cert. denied*, 404 U.S. 950 (1971) (male plaintiff applying for job as flight cabin attendant).

8. "The current ferment in Family Law is that virtually no tradition or precedent is secure. There is a real conflict of interests. . . . The traditional prerogatives of husband and father may now be regarded as historical anachronisms; everyone in the family is entitled to do his (or her) thing; and like the members of the Swiss navy, they are all admirals." Foster & Freed, *Life With Father: 1978*, in FATHERS, HUSBANDS AND LOVERS 139, 141 (S. Katz & M. Inker eds. 1979). *See also* Bear, Berger & Wright, *supra* note 3.

9. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

10. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421 (1908):

> [W]oman's physical structure and performance of maternal functions place her at a disadvantage in the struggle for subsistence. . .[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

See also Tuter v. Tuter, 120 S.W.2d 203, 205 (Mont. Ct. App. 1938): "There is but a twilight zone between a mother's love and the atmosphere of heaven."

11. Parental leave benefits are herein defined to include job security, preservation and continuity of accrued seniority, eligibility for temporary disability compensation, and continued eligibility for group employment health and life insurance plans. *See* Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. C.R.-C.L. L. REV. 260, at 264 n.22 (1972). While leave for childbirth might be considered to be a related benefit, it is applicable only to women, and therefore will not be included in this discussion. *Cf.* Martin

types, thus making them available to women but not to men.

This Comment will examine some of the reasons employers might want to discriminate in their child care leave policies. It will then discuss the implications of affording only women these privileges under Title VII of the Civil Rights Act of 1964 (in cases of private employment), and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment (in cases of government employment). The analysis will focus upon two cases, *Danielson v. Board of Higher Education*[12] and *Ackerman v. Board of Education of the City of New York*,[13] both of which reflect much needed changes that are gradually occurring in our society with respect to attitudes and employment policies concerning child care leaves.

I. RATIONALES FOR PAST DISCRIMINATION

In *Orr v. Orr*,[14] the Supreme Court stated that the fact that a classification expressly discriminates against men rather than women does not protect it from scrutiny.[15] The Court noted that in order to be constitutionally permissible, classifications by gender "must serve important governmental objectives, and must be substantially related to achievement of those objectives."[16] The Court then examined possible objectives that might be served by Alabama's statute making alimony available only to women.[17] Similarly, employers' objectives in making parental leaves of absence available only to women must also be examined, in order to determine whether the gender classifications serve "important govern-

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v. Dann, 9 EMPL. PRAC. SEC. (CCH) ¶ 10 (1975) (male plaintiff claimed he was "incapacitated" by the pregnancy of his wife, because the Lamaze method of childbirth required his presence at the birth; District Court dismissed the complaint which alleged that the Civil Service Commission's limitation of *pregnancy* leave to females constituted sex discrimination and denial of his rights to equal protection).

12. 358 F. Supp. 22 (S.D.N.Y. 1972).

13. 372 F. Supp. 274, *aff'd*, 387 F. Supp. 76 (S.D.N.Y. 1974).

14. 440 U.S. 268 (1979) (Alabama alimony statute providing that husbands but not wives may be required to pay alimony upon divorce held unconstitutional).

15. *Id.* at 279.

16. *Id.*, citing Califano v. Webster, 430 U.S. 313, 316-17 (1977).

17. *Id.* These objectives included reinforcing the "State's preference for an allocation of family responsibilities under which the wife plays a dependant role"; providing financial assistance to wives of broken marriages; "using sex as a proxy for need"; and compensating women for past discrimination during marriage, which effectively disabled them from supporting themselves. *Id.* at 279-80.

mental objectives" and are "substantially related to achievement of those objectives."[18]

One possible objective in restricting parental leave privileges to women is administrative convenience. This argument involves the notion that men are seldom willing to request or take a substantial amount of time from their jobs to care for a newborn child, and that consequently employers need not engage in the administrative inconvenience of providing parental leaves of absence to both their male and female employees. However, this rationale will not justify sex-based discrimination under the United States Constitution,[19] since "the Constitution recognizes higher values than speed and efficiency."[20] In *Stanley v. Illinois*,[21] the Supreme Court asserted:

> Procedure by presumption is always cheaper and easier than individualised determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[22]

The Court concluded that all Illinois parents, including unwed fathers, were entitled to a hearing on their fitness before their children were summarily removed from their custody.[23] In *Orr* the Supreme Court also ruled that an administrative convenience rationale was not sufficient to justify generalizations about one sex or the other when deciding whether or not to grant alimony benefits.[24] The Court reasoned that even if the alimony statute conserved some administrative time and effort, it would not justify "a mandatory preference to members of either sex"[25] under the Constitution. Similarly, this rationale should not be used to justify generalizations about either sex where parental leaves are con-

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18. *Id.*, citing Califano v. Webster, 430 U.S. 313, 316-17 (1977).
19. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).
20. *Id.* at 656.
21. 405 U.S. 645 (1972).
22. *Id.* at 656-57. *See also* Reed v. Reed, 404 U.S. 71, 76 (1971), in which the Supreme Court ruled that to give "mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."
23. 405 U.S. at 658.
24. 440 U.S. at 281.
25. *Id.* at 282 n.12.

cerned. The procedure of automatically granting parental leaves only to women infringes upon the vital interests of fathers in their children's upbringing.

A second argument for such gender classifications involves the presumption that women are generally better suited than men to care for very young children. This concept is commonly referred to as the "tender years presumption."[26] It was originally formulated by the family courts as a basis for summarily awarding custody of minor children to the mother after the parents were divorced.[27]

The validity of the "tender years presumption," is now generally considered to be archaic and stereotypical, and therefore, is no longer widely recognized.[28] Consequently, other policies based upon similar presumptions should also be considered suspect. When applied to employment policies on parental leaves, a presumption that the woman is best suited to care for the child does not allow parents to decide for themselves who should remain home and assume primary responsibility for raising their children.

Another rationale for the discrimination is developed from the theory that male employees are indispensable to their employers, and that any absence from their positions, even for a short period of time, would compound the administrative and financial problems of finding and training suitable replacements. Traditionally, men have held positions requiring more education, training, and experience than women, and consequently, employers have found their male employees more expensive and difficult to replace.

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26. *See* State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 180, 350 N.Y.S.2d 285, 287 (N.Y. Cty. Fam. Ct. 1973), where the court stated that the "tender years presumption" is really a court's statement that, until proven otherwise, mothers are always better suited to care for young children than fathers.

27. *See generally Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1333-38 (1980).

28. State *ex rel.* Watts v. Watts, 77 Misc.2d at 180-81, 350 N.Y.S.2d at 288-89.

> [T]he trend in legislation, legal commentary, and judicial decisions is away from the "tender years presumption" . . . . [It] should be discarded because it is based on outdated social stereotypes rather than on rational and up-to-date consideration of the welfare of the children involved . . . . [It is] out of touch with contemporary thought about child development and *male and female stereotypes*.

Id. (emphasis added). *See also* Podell, Peck & First, *Custody—to Which Parent?*, 56 MARQ. L. REV. 51, 56 n.23 (1972), which analyzes recent child custody cases from twenty-six different states. In these cases, the respective courts treated the parents equally and considered the child's best interests, and the *father* prevailed.

This problem, however, becomes less and less valid for sex-based discrimination where parental leaves of absence are concerned, since women are increasingly assuming positions which present similarly serious administrative problems when they take time off for child care. As with many previous gender-based employment policies,[29] the rationales of impossibility and excessive expense cannot withstand scrutiny. Just as employers are able to cope with gender-neutral sick leaves, they are capable of coping with parental leaves for both sexes.

A final argument is connected to a "preference for an allocation of family responsibilities under which the wife plays a dependent role."[30] The Supreme Court in *Orr v. Orr*[31] also analyzed this objective, and found that this basis could not protect the gender-based alimony statute from constitutional attack. Similarly, any preference for the wife remaining at home to care for the children, even if still existent in our society, could not support a gender-based parental leave policy.[32]

In *Stanton v. Stanton,*[33] the Supreme Court ruled that the old notion of the man as provider cannot justify discrimination on the basis of sex, since "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[34] In *Califano v. Goldfarb,*[35] Mr. Justice Stevens, in concurring that arbitrary assumptions about men and women will not suffice to justify gender-based discrimination in the distribution of employment benefits, remarked that the "discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females."[36] Indeed, classifications which distribute benefits on the basis of gender inherently risk reinforcing stereotypical ideas about "the 'proper place' of women and their need for special protection."[37] Such rationales and presumptions concerning the proper roles and

29. *See, e.g.*, Ackerman v. Board of Educ., 372 F. Supp. 274 (1974), *aff'd*, 387 F. Supp. 76 (S.D.N.Y. 1974); Danielson v. Board of Higher Educ., 358 F. Supp. 22 (S.D.N.Y. 1972).
30. Orr v. Orr, 440 U.S. at 279.
31. 440 U.S. 268 (1979).
32. *See id.* at 279-80.
33. 421 U.S. 7 (1975).
34. *Id.* at 14-15.
35. 430 U.S. 199 (1976).
36. *Id.* at 223 (Stevens, J., concurring).
37. Orr v. Orr, 440 U.S. at 283.

preferences of both men and women must be scrutinized under both Title VII of the Civil Rights Act of 1964 and the United States Constitution.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, sex, religion, or national origin.[38] It governs any alleged discrimination in private employment.[39] The Act was originally intended to prohibit discrimination by employers against blacks and, when it was first introduced to the House Rules Committee, it contained no prohibition of sex discrimination.[40] Congressman Smith proposed amending the equal employment section of the Act, Title VII, to include a proscription against sex discrimination, since "sex discrimination in industry was a serious problem."[41] In support of the amendment, Congresswoman Kelly declared: "In this amendment we seek equal opportunity in employment for women. No more—no less."[42] The amendment passed by a comfortable margin.[43]

In order for women to attain the equal opportunity in employ-

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38. 42 U.S.C. § 2000e-2 (1976) entitled "Unlawful employment practices," states:
(a) Employer practices. It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

39. [T]he coverage of Title VII is not as broad as one might wish. The Act does not cover private employers, unions, or employment agencies with twenty-four employees or less. It also exempts the federal government, corporations owned by the U.S. government, state and local governments, bona fide membership clubs, religious and educational institutions, and Indian tribes. . . . Furthermore, the designation of the EEOC as "enforcement agency" of Title VII is deceptive. The Commission has no enforcement powers. It handles charges through investigation and conciliation.

Comment, *supra* note 11, at 270 n.57.

40. The bill, H.R. 7152, was first introduced by Congressman Celler in June, 1963. Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 676 (1968).

41. *Id.*

42. 110 CONG. REC. 2583 (1964).

43. It passed 168 in favor, 133 opposed. Note, *supra* note 40, at 676-77.

ment which the legislators intended, they must be afforded the options necessary to pursue these employment opportunities. Such options include the freedom to decide who should work and who should remain home. An employment policy which provides parental leaves of absence only to women effectively discriminates against women in their pursuit of careers and employment opportunities, since they are in effect being told that their proper place is in the home with the children.[44] Furthermore, since the terms of the statute are gender-neutral, it is intended to ensure equal opportunity and benefits in employment for *both* men and women. Therefore, such a gender-based employment policy clearly discriminates against men and women in their "terms, conditions or privileges of employment"[45] within the meaning of Title VII.

In *Ackerman v. Board of Education of the City of New York,*[46] the plaintiff Ackerman alleged a violation of Title VII when his application for a leave of absence without pay for purposes of child care was denied by the New York City Board of Education.[47] Ackerman was informed that under the By-Laws of the Board of Education, "the leave was available only to the Board of Education's female employees."[48] When Ackerman took a "maternity leave" anyway, the school board considered it to be a de facto resignation. Although Ackerman's suit raised the possibility of a Title VII violation, there was no final adjudication of the issue, since Ackerman's teaching license was terminated for other reasons. The Court believed its choice of remedies was therefore significantly narrowed. It now could not prevent the New York City Board of Education from either discharging Ackerman as a teacher, or denying him the requested leave of absence for child care.[49] Furthermore, the by-law in issue was subsequently amended to provide parental leaves "to a natural or adoptive parent upon

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44. *See* Comment, *supra* note 11, at 286: "Many courts, employers, legal experts, and legislators doggedly insist that a woman's place is in the home (footnote omitted). For the females who have strayed outside this domain into the labor force, pregnancy becomes an excuse to send them back where they belong and keep them there."

45. 42 U.S.C. § 2000e-2(a) (1) (1976).

46. 372 F. Supp. 274 (1974), *aff'd*, 387 F. Supp. 76 (S.D.N.Y. 1974).

47. The applicable part of § 107 of the By-Laws of the Board of Education provided: "As soon as any regular or non-regular employee in the teaching staff shall become aware of *her* pregnancy, *she* shall apply for a leave of absence for the purpose of maternity and child care." 372 F. Supp. at 276, 387 F. Supp. at 78 (emphasis added).

48. 372 F. Supp. at 276.

49. *Id.* at 277.

application."[50] Thus, Ackerman's action for declaratory and monetary relief had effectively been mooted, and the Court never had to deal with the issue of whether the gender-based policy violated Title VII.

Significantly, Title VII does not require that an employer offer parental leave benefits to employees. The fact that an employer's benefits do not include parental leaves does not, therefore, create any type of gender-based discrimination.[51] However, when an employer *does* offer these benefits, both men and women must be eligible to receive them, since Title VII prohibits "arbitrary distinctions between mothers and fathers."[52] As with health care and other medically related benefits, parental leaves must be made available to both male and female employees.[53]

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50. *Id.*

51. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the Supreme Court held that the exclusion of pregnancy from the disabilities covered by an employment benefits plan does not violate Title VII. The Court reasoned that "gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive" and that "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* at risks." *Id.* at 138-39 (emphasis in original). In 1978, Congress passed the Pregnancy Discrimination Act of 1978, which effectively reversed the Supreme Court's narrow interpretation of Title VII in *Gilbert*. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978). The Act amended Title VII to require employers to provide the same coverage of pregnancy under their health care plans as they provide for any other temporary medical disability, since sex discrimination unmistakably includes discrimination based on pregnancy. The Report of the House Committee on Education and Labor indicated that

> the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs. H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.

H.R. REP. No. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4751. Under this Act, employers must now provide the same coverage of pregnancy under their health care plans as they provide for any other temporary medical disability.

52. *See* Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L. J. 805, 847 (1975). *See also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 334 n.112 (1979).

53. The issue of parental leaves can be distinguished from the issues in Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir. 1977). In *Stroud*, a female plaintiff alleged a violation of Title VII because Delta Air Lines refused to hire any married women as flight attendants. However, since only women held these positions, the court determined that the no-marriage rule discriminated on the basis of marriage rather than sex. No sex discrimination therefore existed, and Title VII did not apply. Conversely, the discrimination concerning parental

III. BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

Title VII of the Civil Rights Act of 1964 makes an exception to its general rule of prohibiting sex discrimination in employment. The statute specifically allows sex discrimination in hiring that can be justified "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[54] By adding this "bona fide occupational qualification" (bfoq) clause, Congress acknowledged that inherent physical and cultural differences between men and women would sometimes necessitate different hiring patterns on the basis of sex.[55] Since hiring patterns sometimes need to be different, there might be some cases in which the employment benefits need to be different as well. However, child care leave benefits are not within this category. The Equal Employment Opportunity Commission[56] has promulgated rules to interpret the bfoq exception,[57] and it has stated that the bfoq should be narrowly construed,[58] so that sexual characteristics, rather than characteristics which correlate with one sex or another, are the basis for the bona fide occupational qualification exception.[59] Therefore, the fact that an employer may correlate child care with the female sex will not sustain, under the bfoq exception, the distribution of child care benefits only to female employees.

Clearly, the bfoq is not a license for employers to re-establish

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leaves is based solely on sex. If women with young children are permitted to take parental leaves of absence, while men with young children are not so permitted, the resulting sex-based discrimination is obvious.

54. 42 U.S.C. § 2000e-2(e) (1976).

55. Examples of such inherent differences include an elderly woman desiring the services of a female nurse, an all-male baseball team, and a masseur. The exception also applies where the specific physical characteristics of one sex or the other are needed for the purpose of genuineness or authenticity, such as in the employment of actors, actresses, and fashion models. Phillips v. Martin Marietta Corp., 400 U.S. 542, 546-47 (1971) (Marshall, J., concurring). *See also* Comment, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1176 (1971); Comment, *supra* note 11, at 267 n.42 ("While there are jobs for which the sex of an employee is so essential that no member of the opposite sex could do them, they are few in number.").

56. Hereinafter cited as "EEOC."

57. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.1, 1604.2 (1981).

58. 29 C.F.R. §1604.2(a) (1981); *accord*, Comment, *supra* note 55.

59. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971).

forbidden sex-based generalizations. In *Phillips v. Martin Marietta Corporation,*[60] the Supreme Court, in a per curiam opinion, misinterpreted the meaning of the bfoq clause. The Court ruled that an employer may not refuse to hire women with pre-school age children if the employer is hiring *men* with pre-school age children. However, it went on to remark that the "existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than a man, could arguably be a basis for distinction under § 703(e) of the Act" and that it is a "matter of evidence tending to show that the condition in question 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.' "[61] This remark implies that if just about all women with young children were unable to perform efficiently at work, then such a policy would be valid under the bfoq exception.[62]

In his concurring opinion in *Phillips,* Mr. Justice Marshall pointed out that the bfoq clause was not intended to "swallow the rule" about sex discrimination.[63] It should not promulgate generalizations about the characteristics of women as a class, nor should it support views about those practices which are more common to women, as being legitimate bases for such discrimination. He concluded that when "performance characteristics of an individual are involved, *even when parental roles are concerned,* employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant."[64] The "bona fide occupational qualification" was not intended by Congress to permit "ancient canards about the proper role of women to be a basis for sex discrimination."[65] Therefore, the assumption that most women take principal responsibility in caring for pre-school age children does not merit discriminating against all women with pre-school age children under the bfoq exception. Logically, then, the inference that most men with pre-school age children do not assume such responsibility does *not* justify denying them parental privileges.

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60. 400 U.S. 542 (1971) (per curiam).
61. *Id.* at 544.
62. *See* Comment, *supra* note 55, at 1178 n.61.
63. 400 U.S. at 545 (Marshall, J., concurring).
64. *Id.* at 545, 547 (emphasis added).
65. *Id.* at 545.

There has been some debate as to whether Congress intended the bfoq defense to apply only to the initial hiring process, and not to the conditions, privileges, and terms of employment:

> It is arguable that the bfoq exception is applicable solely to the initial hiring process. The exception provision, section 703(e), states that it is not unlawful to "hire and employ" on the basis of sex, where sex is a bona fide occupational qualification, but no explicit mention is made of terms, conditions, or privileges of employment. . . . One might conclude that the limited reference to hiring was deliberate, and that Congress did not intend application of a bfoq defense to a charge of discrimination in the terms of employment.[66]

The EEOC, on the other hand, has seemed to accord a broader scope to the bfoq exception and has claimed, as an example, that an employer's suspension of a female employee going into her seventh month of pregnancy might in some cases be justified as a bfoq, but only if the employer could prove that virtually all women could not perform safely and effectively in this condition.[67] In order to utilize the bfoq exception in this situation, the employer would have an extremely heavy burden of proving a factual basis for believing that most pregnant women cannot perform their jobs well.[68] Nevertheless, when applying the bfoq exception to the terms and conditions of employment, the benefit of parental leaves could never qualify as a bfoq, since there is no reason why men cannot perform the duties of child care as aptly as do women.

The regulations of the EEOC[69] provide that the bfoq excep-

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66. Comment, *supra* note 11, at 265. *See also* Larson, *supra* note 52, at 848 (the bona fide occupational qualification applies only to discrimination in the act of hiring, not to the "terms, conditions, and privileges" of employment).

67. Comment, *supra* note 11, at 265, 267; *see also* Comment, *supra* note 55, at 1176 n.46.

68. Comment, *supra* note 11, at 265-67.

69. The regulations of the Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (1981) provide in pertinent part:

> (a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other. (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men. (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment and that women are less capable of aggressive sales-

tion may not be applied to refuse to hire an individual based on stereotyped characterizations of the sexes.[70] Extending this standard to the conditions and privileges of employment,[71] neither does the bfoq exception justify allocating job related benefits on the basis of stereotypes and commonly accepted characterizations about either sex. Just as an airline cannot require female cabin attendants who become mothers to resign or change to ground duty positions, while not imposing such restrictions on their male counterparts who become fathers,[72] they cannot deny fathers leave time for child care while at the same time offering it to mothers. Clearly, prohibition of sex discrimination in employment is intended to eliminate the "entire spectrum of disparate treatment of men and women resulting from *sex stereotypes*."[73]

The EEOC's regulations also provide that the bfoq may not be applied to refuse to hire a woman based on her sex, on account of "assumptions of the comparative employment characteristics of women in general."[74] Consequently, an employer may not refuse to

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manship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group. . . . (2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, *e.g.*, an actor or actress.

70. 29 C.F.R. § 1604.2(a)(1)(ii) (1981). A company may not refuse to hire women on the premise that women are the "weaker sex" and not physically qualified for the heavy lifting and vigorous work involved. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971). Similarly, an airline may not refuse to hire men as flight attendants simply because women have a reputation for being more adept than men at reassuring anxious passengers and attending to their "psychological" needs. Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 387 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *See also* Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969):

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.

Id. at 236.

71. *See* Comment, *supra* note 11, at 266.

72. *In re* Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142 (7th Cir. 1978), *rev'd in part*, 102 S.Ct. 1127 (1982).

73. Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (emphasis added).

74. 29 C.F.R. § 1604.2(a)(1) (1981).

offer the same privileges of employment to both men and women on the basis of general predictions about the class as a whole, even if it is possible to prove that those predictions or generalizations are usually true. For example, an employer cannot require female employees to pay larger contributions to a pension plan on the basis that women as a class tend to live longer than men, and therefore are likely to receive the same retirement benefits for a longer period of time than their male co-workers. In *City of Los Angeles Department of Water and Power v. Manhart*,[75] the Supreme Court ruled that such a generalization is not a valid basis for discrimination:

> An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different."[76]

Accordingly, each employee must be treated on an individual basis, rather than on the basis of characteristics generally attributed to the entire group.

The issue of parental leaves is analogous to the policy at issue in *Manhart*. An employment policy that denies parental leaves of absence to an entire class of employees, simply because they are men rather than women, is also in "direct conflict with both the language and the policy"[77] of Title VII. Even if the generalization (that most women take care of children and most men do not) can be proven to be true, parental leave privileges cannot be arbitrarily determined on this basis.

Attributes which are culturally more prevalent among one sex than the other therefore cannot be used to justify sex discrimination,[78] and will not support a bona fide occupational qualification exception. The stereotype of the woman as the full-time mother and homemaker cannot be used as a basis for denying women equal employment opportunity,[79] nor for denying men equal em-

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75. 435 U.S. 702 (1978).

76. *Id.* at 711 (footnote omitted).

77. *Id.*

78. *In re* Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1146 (7th Cir. 1978), *rev'd in part*, 102 S.Ct. 1127 (1982).

79. "[F]reedom to be a mother should not include the larger role of housewife, a role commonly associated with motherhood, but not essential to basic female identity." Note,

ployment privileges, such as the privilege of parental leaves.[80] None of these theories can therefore be advanced by employers as reasons for denying parental leaves of absence to male employees in any situation where such leaves are provided for female employees.

IV. THE FOURTEENTH AMENDMENT

While Title VII governs any alleged discrimination with respect to private employment,[81] the Fourteenth Amendment to the United States Constitution[82] applies to government employment (federal, state, or local), or to any function in which the state is significantly involved.[83]

The Supreme Court has repeatedly demonstrated its commitment to the maintenance of family relationships.[84] Although family law issues are usually regulated by the states,[85] the Supreme Court will sometimes intervene on constitutional grounds when there is the possibility that state statutes will diminish the vitality of the family relationship.[86]

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supra note 40, at 693.

80. Moreover, customer preferences and increased costs do not justify discriminatory treatment under the bfoq exception. *See* Larson, *supra* note 52, at 848; Comment, *supra* note 11, at 266; Comment, *supra* note 55, at 1174, 1176-77.

81. *See supra* note 39.

82. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

83. In order for the Fourteenth Amendment to apply, there must be some governmental involvement. The "Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). *See also* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1085, 1121 (1960): "The principle that the State and not the private individual is the addressee of the fourteenth amendment continues to be the law today . . . . Only those 'private' interests that have been involved in a governmental function or have exercised extraordinary powers under law have been identified with the state."

84. Comment, *The Doctrine of Family Integrity: Protecting the Parental Rights of Unwed Fathers Who Have Substantial Relationships With Their Children*, 13 CONN. L. REV. 145, 145 (1980).

85. Sosna v. Iowa, 419 U.S. 393, 404 (1975).

86. Comment, *supra* note 84, at 145-46 & n.4.

A. *Due Process*

The Due Process Clause of the Fourteenth Amendment provides that no person shall be deprived of "life, liberty, or property" without due process of law.[87] The freedom to raise one's children in the manner one chooses has been established as a liberty protected by the Due Process Clause.[88] The Supreme Court has recognized that parents have a constitutional right to be primarily responsible for the care and upbringing of their children and that, before this right can be interfered with, the government must show a rational basis for policies that abridge or interfere with this right.[89]

The Supreme Court first acknowledged this parental right in *Meyer v. Nebraska*[90] and *Pierce v. Society of Sisters*.[91] In both cases the Supreme Court invalidated state laws imposing limitations on the ability of parents to control their children's education.[92] In doing so, the Court recognized that statutes mandating certain means of raising children unconstitutionally infringed upon the liberty of the individual to "establish a home and bring up children,"[93] and to "direct the upbringing and education of children under their control."[94] The Court asserted that these rights "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state" and that "[t]he child is not the mere creature of the state."[95]

These constitutional principles are relevant to the issue of parental leaves. Just as the state may not dictate how a child is to be

87. *See supra* note 82.

88. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980) ("The Supreme Court has long recognized the right of parents to the care, custody and nurture of their children as a liberty interest protected by the Fourteenth Amendment.").

89. *See* Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 488 (1982).

90. 262 U.S. 390 (1923).

91. 268 U.S. 510 (1925).

92. The statute in *Meyer* prohibited the teaching in any school, whether public or private, of any subject in a language other than English. The challenged law in *Pierce* required that all children between the ages of eight and sixteen years be educated in a public school.

93. Meyer v. Nebraska, 262 U.S. at 399.

94. Pierce v. Society of Sisters, 268 U.S. at 534-35.

95. *Id.* at 535.

educated, it cannot formulate policies that have the effect of determining which parent will stay home during a child's formative years. When state or federal government employers arbitrarily decide which of their employees will receive parental leave benefits, they are effectively deciding this and, in the process, are deciding a matter which only the parents have the right and duty to decide.

In *Cleveland Board of Education v. LaFleur*,[96] a school board policy requiring pregnant school teachers to take unpaid maternity leaves of absence five months before the expected date of childbirth, and return to work not earlier than the beginning of the next full semester after the child reached the age of three months, was found to violate the Due Process Clause.[97] The Supreme Court ruled that the Cleveland School Board's policies impermissibly employed "irrebuttable presumptions"[98] about pregnancy, thereby penalizing a pregnant school teacher for her decision to bear a child. The Court acknowledged that the freedom of family life is one of the "basic civil rights of man"[99] and, therefore, protected by the Due Process Clause. The Fourteenth Amendment requires that a rule such as this one "not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."[100] Just as overly restrictive maternity leave policies penalize women for their decision to bear and raise children, limited parental leave policies that pertain only to women penalize men for *their* decision to stay at home to raise their children. Under the Due Process Clause, one has a right to be free from governmental inter-

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96. 414 U.S. 632 (1974).

97. Rule No. 72-777 of the Cleveland School Board, *reproduced in* 414 U.S. 635 n.1 provided as follows:

> Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay. APPLICATION A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.* REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the* regular school semester which follows the child's age of *three (3) months. A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal.* (Emphasis in original).

98. 414 U.S. at 648.

99. *Id.* at 640 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

100. *Id.* at 640.

ference in the decision to have children and to raise a family.[101] One also has the same right to be free from such intrusion into the matters of how and by whom that child will be raised.[102]

The rights of all fathers to have input into how their natural children are raised were explicitly recognized by the Supreme Court in *Stanley v. Illinois*.[103] The petitioner Stanley challenged the Illinois statutory scheme which mandated that children of unwed parents became wards of the state upon the death of the mother. Although a hearing on parental fitness was required before all mothers and previously married fathers could be deprived of their children, no such hearing was required for unwed fathers. Unwed fathers were therefore presumed to be unfit to raise their children, whereas all other parents were given the benefit of parental fitness. When the mother died, Stanley's children were taken from him and placed with court-appointed guardians. There was never any sort of hearing on his fitness, nor any proof of parental neglect. Stanley consequently claimed a violation of his rights under the Fourteenth Amendment.[104]

The Supreme Court ruled that as a matter of due process, Stanley was entitled to a hearing on his fitness before being deprived of the custody of his children. The Court emphasized that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[105] Because of the magni-

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101. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

102. *See, e.g.*, Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980) where the court stated:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter . . . . The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

See also Keiter, *supra* note 89, at 488-94.

103. 405 U.S. 645 (1972).

104. *Id.* at 647.

105. *Id.* at 651. *See also* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d. Cir. 1977): "It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' . . . and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent . . . ." [citations omitted].

tude of the interest involved, the state may not presume that all unwed fathers are unfit to raise their children "solely because it is more convenient to presume than to prove."[106]

In this case, the Supreme Court has clearly demonstrated its definitive position on the rights of natural fathers. The interests of *all* natural fathers in their children merit "deference" and "protection."[107] The logical implication of this reasoning is that a father's rights to parental leaves should not be restricted solely on the basis of sex. To deny parental leaves to men effectively abridges their fundamental right to control the upbringing of their children.

B. *Equal Protection*

In order to be permissible under the Equal Protection Clause of the Fourteenth Amendment,[108] a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[109] Using this standard, the Supreme Court has repeatedly struck down statutes which arbitrarily discriminated on the basis of sex.[110] Employment policies which provide parental leave privileges only to women[111] should be struck down for the same reason.

In *Orr v. Orr*[112] the Supreme Court ruled that Alabama's gender-based alimony statute, which made alimony available to wo-

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106. 405 U.S. at 658.

107. *Id.* at 651.

108. *See supra* note 82.

109. Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

110. In *Reed*, 404 U.S. at 76, 77, the Supreme Court ruled that an Idaho statute which gave automatic preference to men over women in the same entitlement class for appointment as administrators of decedents' estates was a violation of the Equal Protection Clause. In Stanton v. Stanton, 421 U.S. 7 (1975), a Utah statute mandating different ages of majority for men and women (resulting in the appellee's obligation to support his son to the age of 21, but his daughter only to the age of 18) was held to be unconstitutional for the same reason. In Craig v. Boren, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977), the Supreme Court decided that Oklahoma's statute, prohibiting the sale of 3.2% alcohol content beer to men under the age of 21, and to women under the age of 18, was not substantially related to the state's objective of reducing drunk driving and the number of traffic accidents.

111. *See, e.g., infra* note 122 (maternity leave policy of Board of Higher Education in Danielson v. Board of Higher Educ., 358 F.Supp. 22 (S.D.N.Y. 1972).

112. 440 U.S. 268 (1979).

men but not to men, was unconstitutional.[113] The Court stated that the gender distinction involved was gratuitous and tended to reinforce stereotypical ideas about "the 'proper place' of women and their need for special protection."[114] Similarly, an employment policy based on sexual stereotyping is merely a reflection of stereotypical ideas. Men should no more be automatically ineligible for parental leaves of absence than for receipt of alimony or support payments.

In the recent case of *Caban v. Mohammed*,[115] the appellant Caban challenged the constitutionality of section 111 of New York's Domestic Relations Law. This statute permitted an unwed mother to block the adoption of her child simply by withholding consent. The unwed father, on the other hand, could prevent the adoption only be demonstrating that the adoption would not be within the child's best interests.[116] Caban's two natural children were adopted by their mother (with whom Caban had lived for five years) and her husband, thereby resulting in the termination of Caban's parental rights.[117] His own petition for adoption was denied because the mother had withheld her consent. Caban contended that the distinction drawn by the statute between unwed

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113. ALA. CODE § 30-2-51 (1975) provided in pertinent part that if "the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family." 440 U.S. at 270 n.1. In Davis v. Davis, 279 Ala. 643, 644, 189 So.2d 158, 160 (1966), the Alabama Supreme Court declared that "there is no authority in this state for awarding alimony against the wife in favor of the husband . . . . The statutory scheme is to provide alimony only in favor of the wife." *Id.* at 270 n.1. The statute has been amended to conform with the Court's decision. ALA. CODE §30-2-51 (1981).

114. 440 U.S. at 283.

115. 441 U.S. 380 (1979).

116. N.Y. DOM. REL. LAW §111 (McKinney 1977) provided in part that "consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock . . . ." 441 U.S. at 385. Absent abandonment, relinquishment of rights, or parental incompetence (in which cases parental consent for adoption is unnecessary), an unwed mother had the authority under this law to block the adoption of her child by withholding consent. An unwed father had no similar powers, even when his relationship with his child had been substantial. *Id.* at 385-87. The statute has been amended to conform with the Court's decision. N.Y. DOM. REL. LAW § 111 (McKinney 1980).

117. N.Y. DOM. REL. LAW § 117 (McKinney 1977) provided that "[a]fter the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated." 441 U.S. at 384 n.2.

fathers and all other parents violated his rights to equal protection.

The Supreme Court found the statute to be another example of an overly broad generalization. The disparate treatment of unwed mothers and unwed fathers bore no relationship to the state's purported interest in promoting the adoption of illegitimate children. The Court declared that the effect of the statute was to discriminate impermissibly against unwed fathers even when their identity was known, and when they had demonstrated a significant parental interest.[118] The Court thereby concluded that the different treatment of unwed mothers and unwed fathers concerning the adoption of their children was not shown to be substantially related to an important state interest and therefore violated the equal protection of the laws under the Fourteenth Amendment.[119] Similarly, a state's different treatment of mothers and fathers in the conferral of parental leave benefits would also violate the equal protection of the laws, since it is not substantially related to any important interest.[120]

V. THE PRESENT LAW

Both Title VII of the Civil Rights Act of 1964 and the United States Constitution require that men and women be treated equally, and be afforded equal treatment and privileges in employment. Leave for child care is one such benefit which must be equally distributed to all employees. If child care privileges are

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118. The Court stated:

> The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers.

441 U.S. at 394.

119. *Id.* at 382, 394.

120. In addition to invalidating discriminatory state laws, the Supreme Court has also struck down on equal protection grounds federal statutes which provided for dissimilar treatment of men and women. By so doing, the Court has affirmed that generalizations about traditional family structure are not sufficient to sustain statutes based solely upon gender. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (spouses of both male and female members of the uniformed services held eligible for support benefits); Califano v. Westcott, 443 U.S. 76 (1979), *aff'd on reh'g*, 443 U.S. 901 (1979) (unemployment benefits for needy families with dependent children apply where either the mother or father is unemployed); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (widows and widowers of deceased workers held eligible for survivors' benefits).

made available to women employees, but not to men employees, the effect is discriminatory to women as well as men, since such a policy restricts a woman's choice to either staying home from work to care for the child, or incurring expenses for assistance from third parties.

This is the problem which the plaintiffs in *Danielson v. Board of Higher Education*[121] faced. In that case, Ross Danielson, a lecturer of sociology at City College, City University of New York, and his wife Susan, a lecturer at Lehman College, another branch of the City University of New York, challenged on equal protection grounds the constitutionality of the University's maternity leave policy, which was reserved exclusively for women.[122] When Susan became pregnant in 1970, the couple carefully considered their alternatives. They decided that she would retain her teaching position while he remained at home and assumed principal responsibility for the care of their newborn child.[123] Accordingly, Ross Danielson applied for a "parental leave of absence."[124] This request was either denied or ignored.[125] Danielson took a leave of

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121. 358 F. Supp. 22 (S.D.N.Y. 1972).

122. At the time of the lawsuit, Article XIII, Section 13.4 of the By-Laws of the Board of Higher Education provided in pertinent part:

> *Maternity Leave.* a. As soon as a member of the instructional staff shall become aware of *her* pregnancy, *she* shall forthwith notify the president and *may* apply for a leave of absence. Such leave shall begin on February 1 or September 1, unless the conditions of the pregnancy require that the leave begin sooner. The duration of the leave shall be at least one full semester . . . . An extension of maternity leave shall be permitted on request for a period not in excess of one year from the end of the original leave. No further extentions [sic] shall be permitted.
>
> b. Maternity leaves shall be granted without pay during the period of the leave, including the vacation period concomitant to the leave . . . .

358 F.Supp. at 24-25 (emphasis added). The parties agreed that this provision did not *compel* women to take maternity leave. *Id.* at 25.

123. 358 F. Supp. at 24.

124. *Id.* The request was in the form of different letters to the Acting Chairman of the Department, the President of City College, the Chancellor of the City University of New York, and the Chairman of the Board of Higher Education.

125. The Acting Chairman of the Department rejected the requested leave, stating that no leave of absence for any reason could be provided for persons without tenure (*but see* Brief for Defendants at 18, Danielson v. Board of Higher Educ., 358 F. Supp. 22 (S.D.N.Y. 1972), wherein defendants assert that "Ross Danielson might have obtained a leave for special purposes under Section 13.6 if he so requested, for the purpose of taking care of his child." This section provided for special leaves for personal emergencies for a maximum of 10 days with pay at the President's discretion. 358 F. Supp. at 27). The Acting Chairman warned Danielson that his letter would be considered to be a resignation as of January 31,

absence in the spring semester of 1971 to undertake his child care obligations, at which time his superiors considered his action to be tantamount to a resignation. Although Danielson was later rehired, the computation of his continuous service time that is required to be considered for tenure was adversely affected. Danielson brought suit, claiming that the Board's maternity leave policy discriminated against him on account of his sex, in violation of the Equal Protection Clause of the Fourteenth Amendment. He asserted that "[t]here can be no equal rights for women without equal rights for men."[126]

The District Court for the Southern District of New York denied the defendant Board's motion to dismiss, deciding that Danielson had presented at least a "colorable constitutional claim."[127] However, the court never adjudicated Danielson's claim because the Board of Higher Education subsequently changed its policy to make leaves of absence available to both men and women.[128]

So far, only one other reported case, *Ackerman v. Board of Education of the City of New York*,[129] has directly addressed this issue. In that case the District Court for the Southern District of New York also never adjudicated the plaintiff's claim of discrimi-

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1971. The President of City College, along with his Review Committee, rejected Danielson's request without offering a reason. Danielson's subsequent appeals to the Chancellor of the University and the Chairman of the Board of Higher Education were ignored. 358 F. Supp. at 25.

126. Letter of November 10, 1970 to the President of City College, quoted in Danielson v. Board of Higher Educ., 358 F. Supp. at 25. The letter further stated: "If not granted a leave of absence, a husband who wishes to care for a young infant must suffer greater hardship (such as termination of employment and loss, even with reappointment, of certain contract provisions, tenure credits, etc.) than a woman who may take a leave of absence; therefore the non-application of the maternity leave provision to men is unfair to men." *Id.*

127. *Id.* at 28.

128. The relevant portion of the former policy of the By-Laws of the Board of Higher Education (*supra* note 122) was subsequently revised as follows:

> Section 13.5 LEAVES FOR SPECIAL PURPOSES . . . c. Special leaves for the purpose of caring for a newborn child shall be granted to a member of the instructional staff upon notification to the president and application for such leave, provided the applicant has legal responsibility for the care and/or support of said child. Such leave shall, insofar as is practicable, begin on February 1, or September 1, unless the date of the birth of the child is such as to render these times inappropriate . . . . Special leaves for the purpose of caring for a newborn child shall be granted without pay during the period of the leave including the vacation period concomitant to the leave.

Section 13.5(c), By-Laws of the Board of Higher Education, as amended.

129. 372 F. Supp. 274, *aff'd*, 387 F. Supp. 76 (S.D.N.Y. 1974).

nation, which he brought when he was denied a leave of absence for child care. As in *Danielson*, the gender-based by-law was later amended to provide parental leaves to *all* employees who were parents, whether natural or adoptive, upon application.[130]

The subsequent adoption of the gender-neutral policies concerning child care leaves in these two cases reflects these employers' recognition of the previous discrimination in the policies. Furthermore, society's attitudes concerning such policies are gradually changing, so that more private[131] and public[132] employers are changing their policies to make child care leave privileges available to both men and women.

Clearly, many changes will still have to be made before parental leaves are offered to and utilized by both men and women. The changes will necessarily have to occur in the attitudes towards and structure of both the family and professional worlds. In the family itself, the responsibility of child care can be shared as equally as possible by both parents,[133] and this will necessitate a shift in

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130. The amended section provided parental leave "to a natural or adoptive parent upon application." Ackerman v. Board of Educ., 372 F. Supp. at 276. *See supra* notes 46-50 & accompanying text.

131. *See, e.g.*, Collins, *Paternity Leave: A New Role for Fathers*, N.Y. Times, Dec. 7, 1981, at B18, col. 2, which states that one way to get men more involved in child care is by

> establishing paternity-leave programs like those at the American Telephone and Telegraph Company, Procter & Gamble, CBS Inc., the Ford Foundation and the Security Pacific Bank in California. The two-year-old program at New Jersey Bell permits both women and men to take up to six months' "newborn child" leave, without pay, and guarantees them a job of the same status and the same salary upon their return.

Id. at col. 2-3.

132. *See, e.g.*, Memorandum from Joseph A.F. Valenti, President, Civil Service Commission to New York State Departments and Agencies (January 28, 1982), on the subject of leave for pregnancy, childbirth and child care, which provides that "[e]mployees, regardless of sex, are entitled to leave without pay for child care for up to seven months following the date of delivery." *Id.* at 2.

133. *See* Rossi, *A Biosocial Perspective on Parenting*, 106 DAEDALUS 1 (1977):

> Infants may respond to anyone who provides stable loving caretaking, but the predisposition to respond to the child may be much greater on the part of the mother than the father, a reflection of the underlying dual orientation of the female to both mate and child, a heritage that links mating and parenting more closely for females than males, and one rooted in both mammalian physiology and human culture. If a society wishes to create shared parental roles, it must either accept the high probability that the mother-infant relationship will continue to have greater emotional depth than the father-infant relationship, or institutionalize *the means for providing men with compensatory exposure and training in infant and child care* in order to close the gap produced by the phys-

traditional sex-role behavior and attitudes, as well as much effort by both spouses.[134] Changes will also have to be made in the present structure of the occupational world, which basically discourages an interest in family life in favor of a total commitment to work and success.[135] A man's professional work is expected to take precedence over his family life, and if he wishes to deviate from that standard, he must face the reality that his superiors and peers will neither share these values, nor support him in his endeavors.[136] In a study in which an accountant requested a month's leave of absence to care for his three children, the researchers discovered that employers were considerably less likely to approve the request when made by a male, and more likely to interpret the request as an indication of the male's unsuitability for employment with the company.[137]

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iological experience of pregnancy, birth, and nursing.

Id. at 18 (emphasis added).

134. One husband and father realized from his personal experience that equality or communality is not achieved once and for all, but must continually be striven for and worked at. He desired to increse significantly his responsibilities in the home in order to lessen his wife's burden. However, in relating his own degree of involvement, he admitted:

> I assume no responsibility for major household tasks and family activities . . . . True, I help in many ways and feel responsible for her having time to work at her professional interests. But I do partial, limited things to free her to do her work. I don't do the basic thinking about the planning of meals and housekeeping, or the situation of the children. Sure, I will wash dishes and "spend time" with the children; I will often do the shopping, cook, make beds, "share" the burden of most household tasks; but that is not the same thing as direct and primary responsibility for planning and managing a household and meeting the day-to-day needs of children.

After critically examining his level of involvement, he realized that "[w]hat is needed is a reconsideration of what is required in parenthood and in running a household . . . . Some agreement on a minimum, satisfactory level of household care and some efficiency and sharing in performing it are important for a couple." Miller, *The Making of a Confused Middle-Class Husband*, 2 Soc. Pol'y, July-Aug. 1971, 33, 37, 38.

135. Bear, Berger & Wright, *supra* note 3, at 193-94.

136. *Id.* at 193-95. "[M]en seeking to escape from the 'breadwinner' trap must deal with the social reality that they are working for and with other men who are not concerned with, or who reject the idea of, more egalitarian sex-role relationships." *Id.* at 194. *See also* Collins, *supra* note 131, who relates that where one father was concerned, there was "a certain amount of teasing with a sharp edge" from co-workers, and "unkind comments by mothers in the park who saw Mr. Parisi taking care of the baby." *Id.* at col. 4, 5.

137. Bear, Berger & Wright, *supra* note 3, at 195. One article observed that law firms, for example, are

> dragging their feet when it comes to offering child-care benefits to men . . . . [T]he "paternity leave" taken by most men doesn't exceed their vacation time, and few men are active in seeking more liberal child-care policies at their law

Even in company programs where such leaves are offered to both male and female parents, far fewer men than women have utilized the benefit.[138] For example, the paternity-leave program offered by the New Jersey Bell System has, since December 1981, been utilized by only one male employee, who took a six-month leave of absence to care for his newborn daughter.[139] Another example is found in Sweden's Parental Insurance Program, considered to be the most comprehensive government policy in the world, which offered Swedish mothers and fathers nine months of paid leave at 90% of their previous salary.[140] The program has been utilized by less than 10% of all the men who could have taken advantage of the benefit; and of those, most used it for only a few days, rather than for the full nine months.[141]

CONCLUSION

It is evident that employers may not legitimately discriminate between men and women in their distribution of parental leave benefits. Title VII prohibits such discrimination in private employment, even under the bona fide occupational qualification exception, since caring for children does not depend upon any inherent physical and cultural characteristics of either men or women. Furthermore, under the Fourteenth Amendment, government employers may not make such distinctions between male and female parents, since to do so would violate the principles of family and parental autonomy[142] under the Due Process and Equal Protection Clauses.

Before parental leaves are customarily offered by all employers to all employees who are parents, attitudes and traditions will have to change. The language and effect of all employment policies should reflect this change by being made gender-neutral. In statutes, by-laws, or policies referring to leaves of absence for child

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firms. The result is that many firms have policies governing maternity leaves only — which, when they exceed the period of physical disability, may give rise to claims of sex discrimination.

Goldfarb, *Make Room For Daddy*, THE AMERICAN LAWYER, November 1980, at 53.

138. Collins, *supra* note 131, at col. 4-5.

139. *Id.* at col. 4.

140. *Id.* at col. 4-5.

141. *Id.* at col. 5.

142. *See generally* Keiter, *supra* note 89; Comment, *supra* note 84.

care, any terminology referring to gender should be eliminated. The term "parental leave" should be used whenever possible and appropriate, replacing such classifications as "maternity leave" and "paternity leave." Only then will legal equality in this area be assured, and manifest sex-based discrimination in the distribution of the benefits hopefully avoided.

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