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# BEYOND EQUAL OPPORTUNITY: A NEW VISION FOR WOMEN WORKERS

MARY ANN MASON\*

## I. INTRODUCTION

Although its political campaign for an official equal rights amendment to the U.S. Constitution failed, the second wave of feminism<sup>1</sup> has achieved substantial progress toward implementing equal rights in the workplace. Title VII of the Civil Rights Act of 1964,<sup>2</sup> the Equal Pay Act of 1963,<sup>3</sup> and the many court decisions which have both enforced and broadened the scope of these acts have established the principle, at least, of equal opportunity for women in the workplace.

In spite of the many equal rights triumphs, the condition of working women has demonstrably deteriorated on several counts over the past twenty-five years. Women still earn about sixty-four cents to every dollar earned by men, just as they did in 1956,<sup>4</sup> before the advent of the Equal Pay Act or Title VII, and yet, combining their work inside and outside the home, they are working about six hours longer each week than they were in 1959.<sup>5</sup> Moreover, women are losing ground compared with their European counterparts. America lags far behind

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1. The first wave, officially launched by the Seneca Falls Convention in 1848, insisted upon certain limited legal rights, particularly property rights for married women and later, suffrage. By the beginning of the twentieth century this wave of feminism had broadened to include advocacy for poor working women and children, which included some protective workplace legislation. The second wave of feminism exploded in the late 1960s, this time with a definite demand for strict equal rights with men in all spheres.

2. 42 U.S.C. §§ 2000e-1-17 (1988).

3. 29 U.S.C. § 206(d)(1) (1989). The EPA is an amendment to the Fair Labor Standards Act, 29 U.S.C. § 201-219 (Supp. III 1990).

4. There is continuing controversy about this figure. In 1985, a Rand Study put the figure at 62¢ to the male dollar, while in the same year the National Research Council reported the figure was 59¢ to the dollar. The U.S. Census reported this figure at 70¢ in 1987. None of these studies, however, takes into consideration the huge numbers of women who work part time. This would lower the figure considerably.

5. Victor R. Fuchs, *Sex Differences in Economic Well-Being*, 232 Sci. 459, 460 (1986).

other industrialized countries in maternity leave, child care, vacation time, and family sick leave policies. American women also trail their European counterparts in wages earned compared to men.<sup>6</sup>

It is the premise of this article that the success of equal opportunity has, in some important ways, promoted failure for women in the workplace. The ideology of equality has limited the vision of women when, for the first time in history, most women are required to participate in the workplace. A strict equal opportunity policy does not take into account the fact that the majority of women workers today are mothers. This policy holds mothers to a male model of competition when they are not in an equal position to compete. Nor does the male model of the workplace allow any special accommodation for the needs of children.

This article will first, critically analyze the impact of an equal rights strategy on the lives of working women, and second, suggest new policy initiatives that will broaden the scope of strategies for women in the workplace and consider the needs of children as well. These initiatives will be placed in the historical context of the first wave of feminism, with its broader focus on women's rights, rather than equal rights. Finally, an argument will be made for a return to the more flexible standard of women's rights.

## II. THE LIMITATIONS OF TITLE VII AND THE EQUAL PAY ACT

Title VII of the Civil Rights Act of 1964 was not originally intended to include women, but rather to eliminate employment discrimination against Blacks and ethnic minorities. An amendment which included sex was added almost as an afterthought.<sup>7</sup> Although Title VII and the Equal Pay Act of 1963 (EPA) represent the major legislative weapons in women's fight for an equal position in the marketplace, it is clear, more than twenty-five years later, that they fall far short of that goal.

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6. In Italy women's wages in 1982 were 86% of men's, in Denmark 86%, in France 78%, in Sweden 74%, and in West Germany 73%. See SYLVIA ANN HEWLITT, *A LESSER LIFE* 73 (1986).

7. The House of Representatives did not amend Title VII Bill to prohibit sex discrimination until two days before voting on it. Until then, the Title VII did not mention sex at all: "The intolerable practice of failing or refusing to hire a qualified job applicant or otherwise discriminating against an employee as to compensation, terms, conditions, and privileges of employment solely because of race, color, religion, or national origin . . . is wrong and must be made legally wrong." H.R. 7152, 88th Cong., 2d Sess. (1964).

These laws fit the equal rights model, but they fail to take into account the realities of women's work patterns. Except for the issues of pregnancy discrimination and maternity leave, the concept of motherhood or even the words children or family are very rarely, if ever, mentioned in judicial opinions or legislation relating to the workplace.<sup>8</sup>

Title VII mandates that an individual's sex (gender is the more recent term), race, color, religion, or national origin shall not be grounds for discrimination in hiring, discharge, compensation, and terms of conditions of employment.<sup>9</sup> Basically, Title VII mandates that women and minorities be given an equal opportunity to compete with white males in matters relating to employment and the EPA directs that they receive the same compensation as white males when they perform equal tasks.<sup>10</sup>

Until recently, the Supreme Court liberally interpreted Title VII to the advantage of women and minorities.<sup>11</sup> Although the law was narrowly written, with no provision for affirmative action, the court allowed, with restrictions, the development of this important tool.<sup>12</sup> Even when the court

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8. Even in its several rulings on pregnancy discrimination the Supreme Court mentioned family or children only once. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *California Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). Marshall, writing for the majority in *Guerra*, noted, "By 'taking pregnancy into account,' California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs." *Guerra*, 479 U.S. at 289. The case, however, was decided as a federal pre-emption issue.

9. 42 U.S.C. § 2000e 2(a) (1989).

10. See MARY ANN MASON, *THE EQUALITY TRAP* (1988). In this book, I discuss the limitations of Title VII and the EPA in dealing with female dominated occupations. These laws were enacted to force entry into male occupations, not to aid women who work in female occupations. In a sense these two pieces of legislation are conservative in nature since they require no structural changes in the workplace, such as pregnancy leaves or institutionalized part-time work, but simply permit women to compete in the existing structure. See generally *id.* chs. 1, 4, 5.

11. In a trio of 1989 decisions, the Supreme Court altered this trend with three cases that somewhat narrowed the scope of Title VII, particularly with regard to affirmative action. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 469 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989).

12. See generally Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation — Survival Against the Odds*, 62 TUL. L. REV. 681 (1988). Title VII expressly states that preferential treatment is not required merely because of statistical imbalance with a group of employees compared to the available work force. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1980). An employer is under no obligation to hire a woman to balance the ratio between the sexes, nor to establish that the male hired is more qualified

took a sharply conservative turn in 1989, they offered the notable exception of *Price Waterhouse v. Hopkins*,<sup>13</sup> which further expanded the effectiveness of Title VII by putting the burden in some cases on the employer to show that gender discrimination was not the cause of denying promotion.<sup>14</sup>

### III. THE WAGE GAP AND FEMALE OCCUPATIONS

The judicial successes of Title VII, however, mask the fact that women are still doing very poorly in the marketplace compared with men. In 1956, a full-time working woman earned sixty-three cents to every dollar earned by a man. In 1986 the figure was sixty-four cents.<sup>15</sup> There have been slight fluctuations during these thirty years, but by and large the wage gap has proved stubbornly intractable.

The most important change in the workplace is not that women are entering male dominated occupations, but that women are entering the workforce in unprecedented numbers,<sup>16</sup> and that most of these women are working in female dominated occupations. Employed women are clustered into four industry groups with almost seventy percent in services and retailing and state and local government.<sup>17</sup> As the economy shifts from a manufacturing to a service base, most of the newly created jobs have gone to women. What these jobs have in common is that they are generally lower paying and less well

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than the female not hired, nor to hire the female rather than an equally qualified male.

13. 490 U.S. 228 (1989).

14. *Id.* at 261. The Court disagreed as to whether this shifting of the burden to the defendant was following precedent or taking a new turn. The plurality stated it was not a new interpretation, while Justice O'Connor, in a concurring opinion, stated: "*McDonnell Douglas* and *Burdine* assumed that the plaintiff would bear the burden of persuasion as to both these attacks, and we clearly depart from that framework today. Such a departure requires justification, and its outlines should be clearly drawn." *Id.* at 270 (O'Connor, J., concurring). Justice O'Connor went on to note that before the burden of proof could be shifted to the employer, "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable fact finder could draw an inference that the decision was made 'because of' the plaintiff's protected status." *Id.* at 278.

15. See Gail G. Kaplan, *Pay Equity or Pay Up: The Inevitable Evolution of Comparable Worth Into Employer Liability Under Title VII*, 21 LOY. L.A. L. REV. 305, 306 n.2 (1987).

16. In 1960, 23 million women were in the workforce; in 1986, 52 million were participating. See BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN 20* (1986).

17. See Kaplan, *supra* note 15, at 306-07 n.3.

benefitted than jobs in the manufacturing sector.<sup>18</sup> Therefore the wage gap persists.

Title VII and the EPA have been fairly successful tools for breaking down the barriers to male professions and attaining equal pay and promotions once inside, but they have been nearly useless in dealing with the low pay inequities of female dominated occupations. Title VII focuses on individual discrimination in hiring, not institutional inequities in setting pay. Employers do not often discriminate against women when they hire retail clerks, word processors, or nurses. They do, however, offer them lower pay than male dominated occupations with similar skill. As discussed below, the courts have interpreted this wage setting as outside the range of protection of Title VII.<sup>19</sup>

#### A. *Integration Theory and Comparable Worth*

There are two prominent theories on how to tackle the problem of low pay in female-dominated occupations. The first is the integration theory. According to this theory, if the discrimination barriers to male occupations are removed, women will pour into male occupations. The consequent shortage of workers in female occupations will force the wages up, luring men into the jobs formerly held by women. With this free market approach, the distinctions between male and female occupations will fall naturally.<sup>20</sup>

In spite of Title VII and its expansion into affirmative action, this has not occurred.<sup>21</sup> The great majority of women have not entered male occupations and remain rooted in the low paying female occupations. Although more women have entered male occupations, even larger numbers have entered female occupations and the occupational profile has changed little.

The second approach to solving the problem of the persistent low wages of female occupations is to focus on elevating their low wage base rather than trying to equalize the gender

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18. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WOMEN IN THE AMERICAN ECONOMY* 15 (Nov. 1986). According to the Department of Commerce, 50.7% of all women work in only 19 of the 503 occupational categories. *Id.* at 18 (Table 8). All except three of the 19 occupations in which women are concentrated are 60% or more female and 15 of the 19 predominantly female occupations pay in the bottom half of 421 ranked earnings. *Id.* at 23.

19. See *infra* notes 32-37 and accompanying text.

20. See Kaplan, *supra* note 15, at 314.

21. See *supra* note 10.

make-up of the occupations. This theory has become known in America as comparable worth or pay equity. Title VII has made some inroads into integrating the work force, but there are strong reasons why most women still choose women's occupations. The largest increase of new recruits to the labor market since 1970 has been mothers. In 1970, only 27.3% of women with children under the age of three were in the workforce; in 1985 the figure was more than 50%.<sup>22</sup> Female dominated occupations provide some of the conditions that make the work lives of mothers (or fathers who are the primary caretakers) possible. For the most part they provide, as male dominated occupations often do not, regular hours, little or no overtime, and the ability to leave and return to accommodate pregnancy or the needs of children.<sup>23</sup> More of these jobs are closer to home and daycare.

Comparable worth, or pay equity, the popular American woman's issue of the eighties, represents a serious shift away from the integrationist goal of the seventies. Comparable worth is based on a realization that for whatever reasons (certainly motherhood prominent among them), most women will continue to work in women's occupations rather than move into male occupations. Therefore, these occupations must be forced to pay a fair wage. The idea is technically complex,<sup>24</sup> but the basic concept is that employers can and should pay wages according to the intrinsic value of a given job rather than market or other forces. The Supreme Court, in the *County of*

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22. See BERGMANN, *supra* note 16, at 25 (Table 2-3).

23. There is a lively debate on this subject. See, e.g., HENRY J. AARON & CAMERAN M. LOUGY, *THE COMPARABLE WORTH CONTROVERSY* 13-15 (1986); MASON, *supra* note 10.

24. Comparable worth analysis varies depending on the economic model used. For a discussion of neoclassical (I have referred to it as the integration theory) and institutional theories, see SARA M. EVANS & BARBARA J. NELSON, *WAGE JUSTICE* 46-53 (1989) [hereinafter *WAGE JUSTICE*]. Briefly, the neoclassical theory uses an individualistic model that assumes perfectly mobile workers, competitive capitalists, and costless information. In this model, workers choose their occupations and competition among firms with equalized wages. Earnings differentials can be explained in part by discrimination based on workers' individual characteristics, including schooling, training, and previous participation in the workforce. The institutional approach, on the other hand, focuses on the organizational and institutional forces involved. Two important premises of this model are the difficulty of determining individual workers' contributions and the inequality of occupations themselves. This model focuses on occupational segregation, its historical roots, and how institutional factors contribute to wage differentials. One conclusion is that the gender make-up of an occupation is a key indicator of earnings.

*Washington v. Gunther*,<sup>25</sup> defined comparable worth as a theory under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.<sup>26</sup> This theory is different than the EPA's "substantially equal" work doctrine, which the Supreme Court interpreted in *Corning Glass Works v. Brennan*<sup>27</sup> as occurring when an employer pays unequal wages to male and female employees for equal or substantially equal work requiring equal skill, effort, and responsibilities under similar working condition. The EPA, therefore, offers no relief for adjusting wages between jobs that are very different in nature. Comparing a maintenance person, for example, with a secretary is beyond the legislative vision of the EPA.

Title VII, a far broader act, seemed for a while to hold more promise to comparable worth advocates. There are two theories available to a plaintiff in proving a Title VII case: disparate treatment and disparate impact. Under a disparate treatment analysis, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin."<sup>28</sup> Proof of a discriminatory motive or intent to discriminate is critical to a disparate treatment claim, although in some situations it may be inferred from the mere fact of differences in treatment.<sup>29</sup> By contrast, the disparate impact theory is not concerned with an employer's intent, but rather, focuses on the effects of an employer's practice.<sup>30</sup> Disparate impact occurs when an employer relies on a facially neutral practice that has a disproportionately adverse impact on members of a particular protected group.<sup>31</sup>

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25. 452 U.S. 161 (1981).

26. *Id.* at 166.

27. 417 U.S. 188, 195 (1974). To be actionable under the EPA, sex-based wage discrimination must occur within a single establishment. *See* 29 C.F.R. § 1620.9 (1991).

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

29. *Id.*

30. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The *Griggs* Court stated that: "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups." *Id.* at 432.

31. *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. 1982). In *Pouncy*, the court stated: "This theory of recovery under Title VII is used to attach employment selection criteria that are facially neutral yet fall more harshly on a protected class of employees." *Id.* at 799.



Thus far, attempts to force the courts to accept comparable worth as gender-based discrimination under the protective umbrella of Title VII have failed. The Supreme Court in the 1981 *Gunther* decision distinguished comparable worth claims from other claims of intentional discrimination which are actionable under Title VII and decided the case on grounds other than a comparable worth theory.<sup>32</sup> Justice Brennan particularly noted that the Court had not decided whether a comparable worth claim is sufficient to establish a prima facie case of sex discrimination.<sup>33</sup> To date the Supreme Court has still not decided, leaving the issue for the lower courts to struggle with.

The lower federal courts have been distinctly unsympathetic to comparable worth. For a brief period a United States district court judge from Washington state, Judge Tanner, gave hope to comparable worth proponents when he found that the existence of wage disparity, as evidenced by the job evaluation study of 15,500 male and female employees in Washington state, established a prima facie case of wage discrimination under either a disparate treatment or a disparate impact theory.<sup>34</sup> The Ninth Circuit Court of Appeals, however, overturned the district court's ruling two years later. The reversal was on several grounds, but the prominent theme that pervaded the decision was that wages that are set by the marketplace are not necessarily discriminatory on either a disparate treatment or a disparate impact theory.<sup>35</sup> The court held: "Absent a showing of discriminatory motive, which has not been made here, the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington's employees."<sup>36</sup>

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32. *County of Wash. v. Gunther*, 452 U.S. 161, 180-81 (1981).

33. *Id.* at 166 n.8.

34. *AFSCME v. Washington*, 578 F. Supp. 846, 864 (S.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985). The Court held that, under a disparate impact theory, the objective facially neutral practice was the defendant's system of compensation. *Id.* The Court found that "[t]he evidence is overwhelming that there has been historical discrimination against women . . . and that discrimination has been, and is manifested by direct, overt, and institutionalized discrimination." *Id.*

35. *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985). The circuit court of appeals emphasized that "the decision [of the State of Washington] to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for a disparate impact analysis." *Id.* at 1406 (citing *Spaulding v. University of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984)).

36. *Id.* at 1408.

Other federal courts have followed a similar line of reasoning; it is not enough to demonstrate that employees of different genders receive different compensation for comparable work of equal intrinsic value.<sup>37</sup> Rather, a plaintiff must show that there was intentional discrimination in the wage-setting.<sup>38</sup> A showing of comparability accompanied by wage disparities is never enough unless accompanied by additional circumstantial evidence of an employer's discriminatory conduct. One court ruled that female workers are permitted to seek employment in higher-paying job classifications, and wage disparities, therefore, must reflect the relative market value of the jobs.<sup>39</sup>

The courts are correct in their analysis that Title VII was not intended, nor can it be stretched, to cover the fundamental problem of persistently low wages in female dominated occupations. In fact, as noted, the act was not originally drafted to cover the problems of women at all.<sup>40</sup> Title VII is based on a free market model of individualistic liberty that presents the view that if the impediments of discrimination are knocked down, men and women (as well as minorities) will be able to compete on equal footing. This equal competition will promote job integration<sup>41</sup> so that women and minorities will no longer be segregated into low paying, limited clusters of jobs. With fewer women available, the former women's occupations will be forced to raise their wages, thereby attracting both men and women.

The concept of comparable worth is in direct opposition to the concept of individualistic liberty put forth by Title VII.<sup>42</sup> Comparable worth offers a non-competitive model of fairness or equity, achieved not through competition with men in men's occupations, but by elevating the depressed wages of women's occupations. Implicit in the argument (although rarely mentioned) is the recognition that most women are not going to push to integrate male occupations. The free market model of

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37. See, e.g., *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1126 (7th Cir. 1987); *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 726-27 (7th Cir. 1986).

38. *American Nurses' Ass'n*, 783 F.2d at 726-27.

39. *Colby*, 811 F.2d at 1126.

40. See 29 U.S.C. § 206(d)(1) (1989).

41. See *supra* notes 20-21 and accompanying text (discussing integration theory).

42. Arguably, if one turned around the language of Title VII, comparable worth may be seen as reverse discrimination since the effect of reclassifying jobs has a disparate impact on men. It can also be argued that reclassification constitutes disparate treatment since the intention of reclassification is to boost the low pay of women's jobs.

Title VII severely limits the ability of the courts both in finding discrimination as the basis of depressed female wages and in imposing changes in the wage structure. Unless intentional discrimination can be proved under a disparate treatment theory, the courts must recognize a free market wage setting defense. Even if intentional discrimination were found, the court, following the lead of *Gunther*, would be unlikely to generalize their finding to support an institution-wide re-classification system, but would most probably limit its ruling to adjusting that specific job classification.<sup>43</sup>

Arguably, it is the role of the legislature, not the Court, to initiate reforms which have a widespread effect on the marketplace. In fact, the idea of tampering with the so-called free market<sup>44</sup> in order to achieve fairness is already prominent in the American system. Historically, Congress has intervened in the marketplace by setting the minimum wage, legislating child labor laws, guaranteeing collective bargaining, and passing such acts as the Fair Labor Standards Act.<sup>45</sup> In the case of comparable worth, it is the appropriate role of Congress to rectify the severe limitations of Title VII and the EPA and guarantee equal pay for jobs of comparable value. Since 1982, the House of Representatives has compiled voluminous testimony and congressional representatives in both houses have introduced bills on the subject of comparable worth during every session.<sup>46</sup> The Reagan administration, however, following the lead of the private sector opposition, became increasingly hostile to the concept. In 1985, the Reagan-appointed Civil Rights Commission voted to reject comparable worth as a remedy for sex bias in the workplace and two months later the Equal Employment Opportunity Commission voted unanimously to

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43. *County of Wash. v. Gunther*, 452 U.S. 161 (1981). The County of Washington conducted internal and external studies which indicated that female prison guards should be paid 95% of the salary paid to male correction officers, yet the county paid females 70% of their job's value and the men 100%. *Id.* at 180-81. The Court here decided that the county had violated its own salary survey and discriminated by treating men more advantageously than women. *Id.*

44. See Kaplan, *supra* note 15, at 315.

45. See *id.* See generally FRANK C. MORRIS ET AL., JUDICIAL WAGE DETERMINATION . . . A VOLATILE SPECTRE: PERSPECTIVES ON COMPARABLE WORTH (1984) (discussing the economic controversies regarding wage setting and free market theories).

46. See, e.g., H.R. No. 41, 101st Cong., 1st Sess. (1989) (Pay Equity Technical Assistance Act).

reject pure comparable worth cases where there was no evidence of intentional discrimination.<sup>47</sup>

In the absence of a congressional model, states have increasingly taken strong steps toward pay equity. By 1987, ten states had implemented some form of pay equity policies<sup>48</sup> and twenty-seven states and 166 localities had begun comparable worth studies.<sup>49</sup> A pay equity policy is defined as a compensation goal of equal pay for work of comparable value for state employees. These policies have been promoted by governors, legislatures, public employee unions, and women's interests groups. Their enactment has sometimes come about through state or local legislation and sometimes through labor union negotiations.<sup>50</sup> So far their reach has been limited to public sector jobs.

Among states that have taken action, Minnesota has most completely adopted and implemented a comparable worth scheme for public employees.<sup>51</sup> Its experience serves as a model to other states. In 1984, it passed a State Employees Pay Equity Act<sup>52</sup> and in 1985 a Local Government Pay Equity Act.<sup>53</sup> The process clearly revealed the depth of the connections between jobs and gender. Ninety percent of the employees eligible for pay equity increases were working in thirteen occupations: secretaries, other clerical employees, teacher aides, other school aides, cooks, other food service employees, non-nursing medical employees, nurses (RN, LPN), social services employees, library employees, city clerks, clerk treasurers, and liquor store employees. The great majority of workers in these jobs were women.<sup>54</sup> Although some of these jobs received

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47. WAGE JUSTICE, *supra* note 24, at 41.

48. States with pay equity policies include Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Ohio, Oregon, Washington, and Wisconsin. See Kaplan, *supra* note 15, at 362 n.360. As of 1987, only Arkansas, Georgia, and Idaho have taken no action at all on this issue at the state level. *Id.*

49. The following states have pay equity studies: Arizona, California, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Kaplan, *supra* note 15, at 362 n.361.

50. *Id.* at 363 n.370. Of the ten states which have pay equity policies, seven were established by legislation, two by administrative policy and one by executive order.

51. For a complete discussion of Minnesota's experience in passing comparable worth laws, see WAGE JUSTICE, *supra* note 24, at 69-91.

52. MINN. STAT. ANN. §§ 43A.01-.47 (West 1988).

53. MINN. STAT. ANN. §§ 471.991-.999 (West Supp. 1992).

54. WAGE JUSTICE, *supra* note 24, at 159.

healthy boosts in pay following reclassification, the spectre of financial doom that had been predicted by comparable worth opponents did not materialize in Minnesota. There was some variation between counties, but the average cost of implementation was 2.6% of the county's payroll.<sup>55</sup>

Comparable worth is a critical strategy in closing the wage gap between men and women workers. It addresses the real pattern of women's work lives. One of the major reasons that women continue to work in female occupations is that most women at some time must balance the duties of motherhood and work,<sup>56</sup> and often choose jobs which make this balance easier. These choices are for the benefit of children as well as mothers. Comparable worth also addresses the fact that employers have exploited this choice in the past and paid women less than a fair wage. Title VII allows this practice to continue since Title VII gives women an equal opportunity to compete for higher wages in men's occupations, but women are given no relief if they remain in women's occupations.

Relief will be obtained only through strong new comparable worth legislation both at the federal and state level, eventually embracing both public and private sector jobs. Drawing on the successful experience of Minnesota, and other governmental entities, pay equity legislation would normally consist of two phases. In the first phase, all government jobs would be evaluated by a single job-evaluation system which measures in detail the skill, effort, responsibility, and working conditions of every job classification and combines to produce a single score for every classification. For instance, in the widely used Hay evaluation system, a supervisor of keypunch operators received a total of 268 points: 152 for know-how, 50 for problem solving, and 66 for accountability. The job receives 152 points for know-how because the job classification requires advanced vocational training, the job is first-line supervision of a single function, and the job involves proficiency in human relations.<sup>57</sup>

The second phase would be to readjust federal employee wage scales to reflect the completed evaluations. With evaluations in hand it is possible to compare the value of a highway technician with a clerk stenographer and determine if their cur-

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55. *Id.*

56. It is estimated that 85% of all working women will become pregnant during their working life. See Nancy E. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 *FORDHAM L. REV.* 699, 701 (1986).

57. Ronnie Steinberg & Lois Haignere, *Separate but Equivalent Pay for Work of Comparable Worth*, in *GENDER AT WORK* 25 (Women's Research and Education Institute ed., 1984).

rent salary fairly reflects their job, compared to other jobs. All workers holding jobs of equal value would not necessarily be paid the same wages since seniority, merit, or quantity of work accomplished could still be used to differentiate among workers. The Minnesota experience, with its average increase of 2.6% in payroll per county<sup>58</sup> suggests that a wage scale based on pay equity will not cause undue hardship. Ultimately, in the same spirit of fairness which prompted the Minimum Wage Act and the Equal Pay Act, pay equity should be federally mandated for private businesses as well.

### B. *Part-Time Workers*

The special demands of motherhood are most clearly evident among female part-time workers.<sup>59</sup> The voluntarily part-time workforce is made up largely of women, most of whom are primarily responsible for the care of their children.<sup>60</sup> In 1983, the Department of Labor noted that the "general profile" of a part-time worker was that of a woman with school-age children who was married to a full-time worker.<sup>61</sup> Approximately one-quarter of working women work part-time, but they represent about seventy percent of the part-time workforce.<sup>62</sup>

In addition to the fact that the majority are women, part-time workers have at least two major characteristics in common. They are paid significantly less than full-time workers on a pro rata basis,<sup>63</sup> and they are distinctly clustered in wholesale and retail trade and service sectors in which full-time workers tend to be poorly paid.<sup>64</sup> Most often they represent female enclaves within female occupations, sharing the experience of depressed wages that is the product of sex-based occupational segregation. In addition to earning less, part-time workers within these female-dominated occupations tend to have even

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58. WAGE JUSTICE, *supra* note 24, at 159.

59. Since 1948, the Bureau of Labor Statistics has set a standard of 35 hours per week to distinguish full-time work from part-time work. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS 1 (Jan. 21, 1948) (Series P-50, No. 3).

60. See Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 715 (1986).

61. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS 36, 37-38 (1983) [hereinafter HANDBOOK ON WOMEN WORKERS].

62. See Earl F. Mellor & George D. Stamas, *Usual Weekly Earnings: Another Look at Intergroup Differences and Basic Trends*, 105 MONTHLY LAB. REV. 15, 21 (Apr. 1982).

63. See Chamallas, *supra* note 60, at 715 n.32.

64. See HANDBOOK ON WOMEN WORKERS, *supra* note 61, at 37-38 n.122.

less status and receive fewer benefits than full-time workers.<sup>65</sup> A 1982 study found that only 18.59% of part-time employees received health insurance, as compared to 74.3% of full-time employees.<sup>66</sup> If part-time women workers were taken into account, the wage gap between men and women would be significantly wider than is now reported.<sup>67</sup> However, while feminists and unions have recently devoted their attention to raising the wages of female dominated occupations through a comparable worth analysis, very little notice has been given to reforming the low wage, underbenefitted structure of part-time work.

One of the explanations for the lack of attention to part-time work may be that part-time work for women is perceived as a second income, a pin money job for mothers. This perception, however, belies the economic reality of the changing wage structure, where a single wage very often can no longer support a family.<sup>68</sup> It also does not take into account the current reality of divorce,<sup>69</sup> which means many part-time workers are single parents and sole breadwinners. For some women the inadequacy of childcare forces them to work part-time when they would otherwise choose full-time jobs. A second explanation is that it is only recently that feminists and unions have moved away from the integrationist model of Title VII and realized that the solution for all women will not be to join male occupations.<sup>70</sup> This acceptance should now extend to the concept of part-time work.

Title VII and the Equal Pay Act present even more limitations for reforming the part-time wage structure than they do for raising the depressed wages of full-time women workers. As discussed above, the EPA prohibits payment of lower wages to women who perform work "substantially equal"<sup>71</sup> to work performed by men in the same establishment.<sup>72</sup> Most part-time women workers are working in female-dominated occupations

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65. See Chamallas, *supra* note 60, at 718-19.

66. Colien Hefferan, *Employee Benefits*, 1 FAM. ECON. REV. 6, 10 (1985).

67. In 1981, women constituted 69% of the part-time work force. Part-time workers are paid 51% of full-time male workers. See Chamallas, *supra* note 60, at 714-15 n.60.

68. Between 1973 and 1985, the average weekly income of the typical worker fell by 13%. Frank Levy, *Are the Rich Getting Richer?; Actually We Are All Growing Poorer*, N.Y. TIMES, May 3, 1987, at C2.

69. Nearly half of all marriages entered into today are projected to end in divorce. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* xvii (1985).

70. See *supra* notes 43-51 and accompanying text.

71. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 n.92 (1971).

72. 29 U.S.C. § 206(d)(1) (1989).

where it is far more likely that they are receiving proportionally lower wages for "substantially equal work" performed by other women, working full time, not men. This is not actionable discrimination under the EPA. If, in fact, a woman can present a prima facie case that she is receiving lower wages for "substantially equal work" performed by a man, she still must face the affirmative defenses on the part of the employer that are allowed by the EPA. These defenses specify that unequal pay is authorized if the disparity is the result of (1) a seniority system, (2) a merit system, (3) a system measuring earnings by quantity or quality of production, or (4) if the disparity is based on any factor other than sex.<sup>73</sup>

Under this fourth affirmative defense, the Department of Labor issued guidelines which presumptively excluded employees who work twenty or fewer hours from the protection of the EPA.<sup>74</sup> This fourth defense has been the subject of a great deal of controversy,<sup>75</sup> particularly as to how the EPA is to be integrated into a broader Title VII claim. The most recent Supreme Court decision on this issue, *County of Washington v. Gunther*, however, incorporates the four affirmative defenses of the EPA into Title VII.<sup>76</sup> This leaves little hope for the part-time worker of fewer than twenty hours per week who wishes to establish a claim under the EPA or Title VII.

A comparable worth analysis under Title VII also presents particular problems for part-time workers. Traditional comparable worth analyses evaluate all full-time job classifications for both men and women workers in terms of factors such as knowledge, skill, and mental and physical demands, and compares the wage rates.<sup>77</sup> Comparing the jobs of part-time workers with other part-time workers is unlikely to bring relief since the great majority will be other women workers in similarly wage depressed jobs. In order to bring relief, part-time workers must be considered a subset of the full-time job grouping in which they work (if there is one). Even if this concept was

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73. 29 C.F.R. § 1620.26 (1990). This interpretation covers temporary workers as well as part-time workers. The interpretation uses one month of employment as a rule of thumb to determine whether employment is in fact temporary.

74. See Chamallas, *supra* note 60, at 740.

75. A new interpretation which would have deleted part-time and temporary defenses was proposed by the Carter Administration, but never adopted. See *id.* at 739 n.175, 740 n.176.

76. See *County of Washington v. Gunther*, 452 U.S. 161, 168-71 (1981).

77. See WAGE JUSTICE, *supra* note 24, at 142-44.



established, part-time workers face the same rejection by the courts that full-time employees have experienced.

For the reasons discussed,<sup>78</sup> the EPA and Title VII are not likely to bring relief through the courts for part-time workers. A better solution is legislation in which part-time work would be considered as a discrete part of a pay equity law. There is some legislative precedence for seeking equity with full-time workers. Congress has established pro-rated health benefit plans for federal employees,<sup>79</sup> and in 1978 Congress passed the Federal Employees Part-time Career Employment Act of 1978.<sup>80</sup> The Act required every federal agency to set annual goals and timetables for establishing part-time career employment positions within the federal civil service. In recent years the interest and initiative in this issue has flagged, however, and little or no commentary appears on the subject.

Part-time work that is fairly paid and benefitted could provide an attractive solution for mothers, children, employers, and society. Mothers benefit because it would allow them to earn a decent wage while better managing the obligations of family; relying less on the vicissitudes and expense of paid childcare. Children benefit because they would have more access to their mothers, and society benefits because the children's welfare is being looked to. Employers could benefit also by having access to well-qualified employees who might otherwise stay out of the workforce entirely.

#### IV. STRUCTURAL CHANGES IN THE WORKPLACE

##### A. *The Mommy Track*

While the huge numbers of part-time women workers in female occupations have been largely ignored, there has been a growing interest in initiating a voluntary part-time track in male dominated occupations; this concept is sometimes referred to as the "Mommy Track."<sup>81</sup> Many women have come to realize that motherhood and the male career model are often not compatible. Rather than considering it their personal problem,

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78. See *supra* notes 43-51 and accompanying text (discussing comparable worth and the courts).

79. See Chamallas, *supra* note 60, at 717 n.47.

80. *Id.* at 723 n.90, citing Federal Employees Part-Time Career Employment Act of 1978, 5 U.S.C. §§ 3401-3408 (1989).

81. A great media controversy was generated upon the publication of Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65. Schwartz reviews the failure of management women to combine motherhood and career and suggests a reduced hour track, or "Mommy Track."

women are now seeking a social solution to what is in fact a social problem. Women in many male-dominated professions, such as law, medicine, and the academic world are already fairly well organized. It is a matter of setting priorities and not being afraid to challenge the male model. For instance, women lawyers (or men if they chose), could initiate an optional partnership track where they could work twenty or thirty hours a week for a period up to ten years of child raising before being considered for partner.<sup>82</sup> In professions which demand exceptionally long hours, part-time work may be as much as forty hours a week, on a regular schedule. Or women could initiate a permanent part-time track where they would gain a permanent position, perhaps an associate partnership, after a number of years, but not full partnership rights. Job-sharing may be an option for some women in some firms. This model could be adapted for the university and the medical professions as well. Similar initiatives could be taken by women's organizations in the business world.<sup>83</sup>

Many feminists fear this approach is walking straight back into the special preference trap. By acknowledging that women need special consideration to handle motherhood, opponents of the Mommy Track feel that women unnecessarily take themselves out of the male competitive game. They become second string players, not likely to reach the top of their profession. There is also concern that employers will refuse to hire them at all since they require special arrangements and do not carry a full load.<sup>84</sup> For many women, however, the choice is not between getting to the top or working part-time. The choice is between working part-time or dropping out of the profession entirely. Once a player drops out of a professional, male dominated occupation, such as law, medicine, or academics, the chances of reentry anywhere close to the same level are slim. Having the option, but not the compulsion, to take a slower track can only enlarge the range of choices available for women, especially in the professions.

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82. In California, the California State Bar's Committee on Women in the Law has taken up the issue of part-time employment for women with children. In a survey of Los Angeles firms with more than 20 attorneys, 11 firms have women working half to three-quarters time. These were accommodations on an individual basis, not a general firm policy. The criterion was that the woman has previously been a valued employee or was considered to be someone very special. See RECORDER, Apr. 25, 1986, at 1.

83. MASON, *supra* note 10, at 166.

84. Jenifer A. Kingson, *Women in the Law Say Path is Limited by "Mommy Track,"* N.Y. TIMES, Aug. 8, 1988, at A1.

In the Mommy-Track controversy, as with others dealing with equal treatment versus special consideration, the well-being of the third party, the child, is rarely addressed. Surely it is better for a child if the mother works thirty rather than sixty hours a week. Surely it is better for a society to acknowledge this and to encourage employers to create career tracks that are not simply to accommodate women's differences, but are to support families. Fathers could be eligible for these tracks as well, avoiding the equal protection issue. This is not an issue like custody where one must lose if the other wins. In fact, however, it is far more likely that women will take advantage of these tracks more often than men since women remain the primary caretakers.<sup>85</sup>

The creation of part-time career tracks in male dominated professions will not come about through Title VII suits. Title VII in fact endorses the current male model of the workplace and offers relief only for those who are wrongfully barred from joining it. In the public sector, legislative initiatives such as the Federal Employees Part-time Career Employment Act of 1978<sup>86</sup> may be expanded to include high level management. In the private sector it will require sustained efforts on the part of organized women through their professional associations (and interested men) to create and institutionalize career paths that work for mothers or fathers and their children.

### B. *Maternity/Family Leaves*

The great majority of recent arguments which pit equal consideration against special consideration in the workplace have focused on the specific act of birth, not only because that is the one issue in which there is a clear-cut physical difference between men and women which has implications in the workplace, but also because, according to many feminists, it is the only incidence in which men and women differ in the workplace. Equal rights advocates attempt to minimize this difference by claiming that it is just another short-term disability.<sup>87</sup>

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85. The New York City Board of Education, which has offered paternity leaves since 1973, regularly grants about two thousand leaves each year to mothers and four or five leaves to fathers. See CARL N. DEGLER, *AT ODDS* 466 (1980).

86. Federal Employees Part-Time Career Employment Act of 1978, 5 U.S.C. §§ 3401-3408 (1989).

87. Pregnancy Discrimination Act, Civil Rights Act of 1964, 701(k), amended by 42 U.S.C. § 2000e(k) (1981). The amendment provides, in part: 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

Congress has adopted the disability theory with the Pregnancy Discrimination Act of 1978.<sup>88</sup> This law requires employers to make available to pregnant women only what they make available for men with short-term disabilities. These standards vary widely from state to state.

To treat pregnancy as a short-term disability is a mistake for both mother and child. First, it takes no notice of the baby, which should have access to its mother during its first weeks.<sup>89</sup> By refusing to consider the needs of children at birth as a workplace issue, the pattern becomes set to ignore the needs of children at all stages of their development. Childcare, flexible hours, and family sick leave become individual problems and not recognized as social problems of the workplace. Second, by reducing the significance of childbirth to a disability, the rights of the mother as well as the child are curtailed. Short-term disabilities are not handled in a manner that accommodates the effects of pregnancy. Benefits are usually for a few weeks in duration, and beyond that the right to return to the same or equivalent job is canceled.<sup>90</sup> Childbirth requires an absence of several months for the well-being of both child and mother, but this is often only available at the expense of an assured level of income maintenance, which is also needed.<sup>91</sup> By reducing the motherhood issues in the workplace to a short period and defining it as a disability, the employer is freed from considering any other employment issues related to motherhood. Disability policies do not include family illness or family emergencies within their scope.

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related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

*Id.*

88. *Id.*

89. The Pregnancy Discrimination Act gives no consideration to the needs of infants. By emphasizing that pregnancy and childbirth should be treated as other disabilities, it precludes consideration of children's needs.

90. See *California Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). The dispute was over the right of return to the same or comparable job after four months of maternity leave. This right of return was *not* guaranteed for disabilities.

91. Sweden provides a model of parental leave that includes substantial income maintenance. Each family is allowed a nine-month leave (to be taken by the mother or father, or split between them) at 90% pay, and an additional three months at a further reduced rate of pay. See MASON, *supra* note 10, at 138.

Considering pregnancy as a short-term disability is once again yielding to a male model of the workplace.<sup>92</sup> This is surely to the employer's advantage since the cost of disability benefits are far less than those of a continuing family support program. It is true that historically, employers used pregnancy as an excuse to keep women in low level jobs or to force them out of the workplace entirely. Less than thirty years ago many employers would not hire married women, or would not hire married women with children. If a woman became pregnant her choices were limited. Most often she was expected to quit, and if she did not, she was fired.<sup>93</sup> Many states had mandatory leave policies that were unrelated to a woman's ability to work. If a woman insisted upon returning to work after childbirth, her hospital costs were not covered by medical insurance, her maternity leave was not covered by disability insurance or sick leave, and her job was not waiting for her when she returned.<sup>94</sup> The job she returned to, if she were allowed to return at all, would often be one with less responsibility and few advancement possibilities since she was now considered an unreliable worker.

The Pregnancy Discrimination Act amendment to Title VII,<sup>95</sup> offers an equal treatment solution which is a limited improvement over old policies. It requires that employers provide for women only the same disability policy that they already provide for men. Very few of these policies are adequate to meet the needs of pregnancy. Most women are entitled to no more than six to eight weeks of pre- and post-natal leave, some far less.<sup>96</sup> This restriction can force women to return to work prematurely in order to save their job, possibly endangering their health and the health of their child. With some employers, the woman may not be allowed continuing benefits, such as medical insurance during the time of the leave. Paid leave, when it is allowed, is rarely with full pay, and usually for less time than the total leave time. For women who are a major or

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92. This is the same approach as Title VII which allows women to compete with men on a male model. See *supra* notes 9-13 and accompanying text.

93. See ALICE KESSLER HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* 234-35, 254-59, 296-97 (1982).

94. Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118, 1124 (1986).

95. 42 U.S.C. § 2000e(k) (1989).

96. See Finley, *supra* note 94, at 1125.

sole contributor of family income, this may be an intolerable burden.<sup>97</sup>

After two false starts in *Geduldig v. Aiello*<sup>98</sup> and *General Electric Co. v. Gilbert*,<sup>99</sup> the Supreme Court in *Guerra* moved in the correct direction when it endorsed California's maternity leave legislation giving mothers significantly more leave time with job protection than standard disability allowed.<sup>100</sup> It is, however, still a state option, and most states are not likely to be as generous. The Family Leave Act (which has been building up support in Congress for several years, but at this writing has not yet passed),<sup>101</sup> is a mixed blessing. It recognizes childbirth as an event entitled to special consideration, but it provides no form of wage support. An unpaid leave is a desperate burden for many mothers. In addition, the Family Leave Act, in its effort to be gender-neutral, ignores the primary role of the mother in childbirth. Pregnancy and childbirth are not events in which mother and father can participate equally. The mother must recover from the fatigue of childbirth, and the mother breastfeeds the baby, if anyone does. By ignoring the primacy of motherhood at its beginnings, the model is set for ignoring the problems of the working mother as the child grows.

Mothers still have primary responsibility for children most of the time. Unless the conflict of work and parenting is recognized as largely a women's issue, there can be no real understanding of, or solutions to the exploitive nature of female dominated occupations and part-time work. Women must lead the battle to re-structure the workplace to include paid maternity and caregiver leaves, optional part-time tracks, child care

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97. *Id.* at 1126.

98. 417 U.S. 484 (1974). At issue in *Geduldig* was California's disability insurance program for private employees who were temporarily disabled by an injury or illness not covered by workers' compensation. The plan was challenged on equal protection grounds because it excluded disabilities attributable to normal pregnancies. The Supreme Court upheld the plan's constitutionality, finding that "[t]here is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." *Id.* at 496.

99. 429 U.S. 125 (1976). This case involved an insurance plan similar to the disability plan in *Geduldig*, but the challenge was based on a claim of discrimination under Title VII. The Court held that *Geduldig* was on point in holding that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136. The plan withstood the Title VII challenge. *Id.* at 145-46.

100. *California Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987).

101. S. REP. No. 951, 101st Cong., 1st Sess. (1989).

support, and other family support policies. It is desirable to design changes in the structure of the workplace which will allow fathers to participate more fully in child raising, but this should be in addition to, not at the expense of, motherhood issues.

## V. CONCLUSION

This analysis of the limitations of equal opportunity in dealing with the problems of working women, suggests both a large new vision and specific strategies. A new vision for working women must go beyond the equal opportunity model to include the central reality of family responsibilities in the everyday life of working women. Equal rights and equal opportunity are stirring concepts which evoke an emotional call to arms, but the battle is too narrowly drawn. This model demands only the opportunity to compete with men in a male-defined workplace. A competitive model which asks for no special favors may be good for business, but it is bad for women with children. It sets up women for failure and fails to take responsibility for the needs of children.

A better vision for women is the broader, more flexible concept of women's rights rather than equal rights. A women's rights strategy can go beyond the issue of equality with men when necessary and recognize and promote the role of motherhood and the family in the lives of women. The idea of women's rights and the tension between this concept and that of equal rights is not a new issue. When Alice Paul's Woman's Party first introduced the Equal Rights Amendment in Congress in 1926, the great majority of women who had campaigned for and successfully won suffrage in 1920 considered it a betrayal of their ideals. Feminist leaders, including Carrie Chapman Catt, Florence Kelley, and Jane Addams were outraged. They claimed it would strike down the much-needed legislation which protected women from ghastly working conditions in factories.<sup>102</sup> Obtaining protective legislation had been a lifelong struggle for many of these women. This legislation included maximum hour and minimum wage laws for women and special safety requirements. The courts were unwilling to grant such protection to men, arguing that it interfered with "freedom of contract," but were willing to grant it to women because of their special position as mothers or potential mothers.<sup>103</sup>

102. See DEGLER, *supra* note 85, at 359.

103. LOIS W. BANNER, *WOMEN IN MODERN AMERICA* 101, 102 (1974).

Today, the "freedom of contract" theory has been abandoned and safety legislation is routinely passed for both men and women. Safety is no longer a women's issue, as indeed it never was, since dangerous conditions do not recognize gender.<sup>104</sup> Contemporary workplace issues which do concern the special needs of women: maternity leaves, flex-time, part-time tracks, and childcare arrangements, are being presented as gender neutral issues, while in reality they are still women's issues since women bear the greater burden, both biologically and socially. Moreover, more than a quarter of all families with children under eighteen are currently headed by single parents, and the single parent is the mother nine times out of ten.<sup>105</sup> The major impact of labelling these issues as gender neutral is to assure that neither gender is willing to fight for them.

An important characteristic of a women's rights vision should be more emphasis on women's collective activity, and less on the existing legal system. Title VII and the EPA, even if fully enforced, are not adequate to meet the needs of women workers. As shown in this article, the wage gap is not really addressed by these laws. Title VII permits women to compete with men in male dominated professions, but it provides little relief for women in female dominated occupations where discrimination is not the issue. The EPA provides relief only in the limited cases where men and women are performing the same job, not where women are performing tasks of comparable value.

As demonstrated in this article, the courts will not enforce a comparable worth solution under a Title VII claim. Legislatively mandated pay equity on both the state and federal levels will only come about through persistent collective pressure. Thus far, comparable worth legislation has been propelled by the pressure of labor unions with a very high percentage of working women. The American Federation of State, County, and Municipal Employees (AFSCME), and the Service Employees International Union (SEIU), two of the largest activists for comparable worth, are both in the highly feminized service sector, which suffers low wages for female workers. Organized professional women in female-dominated occupations such as

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104. Toxic workplace restrictions against women, such as those ruled against by the U.S. Supreme Court in *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991), are often compared to the protective legislation of the early twentieth century. In fact, these restrictions involve the more complicated fetal rights issue, which is not the scope of this article.

105. See *Playing Both Mother and Father*, NEWSWEEK, July 15, 1985, at 42-43.



nursing and teaching have also made comparable worth claims. For example, librarians at the University of California at Berkeley conducted a study which showed that librarians earned twenty-five to twenty-seven percent less than persons (most of them males) in academic non-teaching positions.<sup>106</sup>

Collective action on the part of organized women can also help women secure family support systems, for example, parental leaves, part-time tracks, flex-time, and day care. Changes in the structure of the workplace to accommodate women with children is of concern to women who work in both female and male dominated occupations. Most women professionals in male dominated occupations are not represented by labor unions. It is up to them, through their professional associations, such as those available now to most women lawyers, doctors, and other professionals, to promote family support systems in workplaces not controlled by collective bargaining arrangements.

Organizing women workers was one of the major goals of the first wave of feminism. Two important organizations, the National Consumer's League and the Women's Trade Union League, were established by middle-class feminists to help working women. The original purpose of the Consumer's League was to raise the level of wages and improve the conditions of work for young women in department stores. This purpose soon expanded to include a variety of other women's occupations. The Women's Trade Union League was prominent during the great organizing strikes in the New York City garment industry in 1909 and 1910.<sup>107</sup> Its members walked picket lines, represented women workers in court, and acted as organizers for the striking workers.

A contemporary women's rights strategy could re-capture some of the flexibility of the first wave of feminism and extend its scope. Today's women workers make up close to half of the workforce and are therefore in a much stronger position to restructure the workplace to their advantage than women were at the beginning of the century. Rather than being haunted by the specter of sexual stereotyping, women can both assert their special needs and press for higher wages and family support systems collectively without fear of being driven out of a workplace that is now dependent upon their labor.

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106. See WAGE JUSTICE, *supra* note 24, at 33.

107. See DEGLER, *supra* note 85, at 318-19.