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Discrimination Against Unwed Mothers as Prohibited Sex Discrimination Under Title VII and the Constitution

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It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.[1]

I. INTRODUCTION

The role of the American woman in employment has changed radically since the United States Supreme Court upheld a decision by the Illinois Supreme Court denying Myra Bradwell's application for a license to practice law solely because she was a female.[2] In 1976, adult women accounted for more than one-half of the total employment gain in the United States, and today they comprise over one-third of the labor force.[3] The change in the composition of the labor force can be attributed to a number of economic, sociological, psychological, and legal factors. Undoubtably, the mechanization of the home has greatly reduced the need for women to concentrate their energies managing a household. In addition, industrialization has made more jobs available, primarily in the service category (traditionally containing a high percentage of females), and has brought additional jobs within the capacity of women, in terms of both physical competency and personal desirability. Changing attitudes within society concerning the role of females in the labor force has also contributed (although perhaps gradually) to higher work-force participation rates of women.

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

[2]*Id.*, *aff'g In re* Bradwell, 55 Ill. 535 (1869).

[3]Bednarzik & St. Marie, *Employment and Unemployment in 1976*, 100 MONTHLY LAB. REV., Feb. 1977, at 4.

Arguably, the existence of state and federal legislation offering relief to females who are the object of discriminatory employment practices has increased the participation of women in the labor force.[4] Although state labor laws affecting the employment rights of women were traditionally of a "protective" nature (*i.e.*, minimum hours and limitations on weight lifting), forty states have enacted some form of fair employment legislation prohibiting sex discrimination in employment as of this writing. An additional six states have enacted equal pay legislation. Not surprisingly, current state as well as federal legislation has displaced many of the traditional protective statutes, resulting in only a handful of operative protective acts.[5] Federal legislation designed to alleviate sexually discriminatory employment practices includes Title VII of the Civil Rights Act of 1964[6] and the Equal Pay Act of 1963.[7] In addition, section 1983 of the Civil Rights Act of 1871[8] has been held to be applicable to claims of

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[4]*See* text accompanying note 2 *supra.* It is noteworthy that with the increase in the number and percentage of women in the labor force, women as a class are still employed in low-paying, traditionally female occupations. For example, in 1975 females accounted for 97% of all registered nurses, 85.4% of all elementary school teachers, 96.6% of typists, and 91.1% of all waiters and waitresses. L. HOWE, PINK COLLAR WORKERS 21 (1977). In addition, women's median earnings for full-time work in 1957 were $3,000, while men earned $4,750. By 1973, the disparity was even greater with women's earnings at $6,500 and men's at $11,500. Moreover, recent data indicate that during periods of unemployment women as a class traditionally experience higher rates of unemployment than men. Thus, in 1975, the average unemployment rate for women was 9.3% of the labor force, as compared to 7.9% for men. Furthermore, studies show that once they are unemployed, women are less likely to end a spell of unemployment by finding a job than their male counterparts. Approximately two-thirds of the men seeking jobs end their spells of unemployment by finding jobs while somewhat less than half of all women seeking jobs become employed. Garfinkle, *The Outcome of a Spell of Unemployment*, 100 MONTHLY LAB. REV., Jan. 1977, at 54.

[5]8A LAB. REL. REP. (BNA) 451:151-154 (1977).

[6]42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). *See* note 12 *infra* and accompanying text.

[7]29 U.S.C. § 206(d) (1970). This act makes it unlawful for an employer covered under the statute to pay wages "at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsiblity, and which are performed under similar working conditions." *Id.* § 206(d)(1). The Equal Pay Act only focuses on wage differentials based on sex. Differentials based on race, color, religion, and national origin, although prohibited by Title VII, are not subject to claims under the Equal Pay Act. Coverage of the Act is restricted to those employers subject to the minimum wage provisions of the Fair Labor Standards Act of 1938. *Id.* § 206(a) (incorporating minimum wage provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975)).

[8]42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisidction thereof to

sex discrimination.[9]

Clearly the paramount destiny and mission of women is no longer considered to be that of "wife and mother" by the legislatures or the courts. However, this is not to assert that women, many of whom are wives and mothers, are free of employment discrimination. Indeed, a problem being encountered by an increasing number of the female labor force concerns the employment status of a woman once she has voluntarily or involuntarily become an unwed mother.[10] Recent case law demonstrates that employers in both the private and public sector have engaged in various forms of discrimination against women who have fostered children out of wedlock.[11] This Article will examine the potential remedies provided by Title VII and the Constitution for women who have experienced employment discrimination because of their status as unwed mothers. Part I will focus on Title VII. After reviewing the structure of the statute, the analysis will focus on the theories of employment discrimination generally available to females claiming discrimination based on their unwed parent status. The defenses available to the employer under the statute will also be considered. Part II will focus primarily on a due process and equal protection analysis under the Constitution. The traditional and current standards of review

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the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[9]*See, e.g.*, Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (state action required for cause of action under § 1983); League of Academic Women v. Regents of the Univ. of Cal., 343 F. Supp. 636 (N.D. Cal. 1972). *See also* Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973); Labor Management Relations Act, 29 U.S.C. §§ 141-197 (1970 & Supp. V 1975) (this Act may, under limited circumstances, provide a remedy for sex discrimination); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65 Compilation), *as amended by* Exec. Order No. 11,375, 3 C.F.R. 684 (1966-70 Compilation) (sex discrimination by federal contractors prohibited).

[10]In 1975, there were approximately 450,000 illegitimate births in the United States, compared to approximately 407,000 in 1973. Yager, *Out of Wedlock*, Wall St. J., Sept. 12, 1977, at 1, col. 1. *See* 1 U.S. DEPT. OF HEALTH, EDUCATION, & WELFARE, VITAL STATISTICS OF THE UNITED STATES at 1-29 (1973).

[11]Discrimination against pregnant employees has generally been manifested in four areas: Hiring, fringe benefits, forced termination, and the right to a maternity leave of absence. *See* Note, *Title VII and the Pregnant Employee*, 49 NOTRE DAME LAW. 568 (1974). These traditional forms of discrimination are especially prevalent against unmarried pregnant females. *See* Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977) (constructive discharge); Andrews v. Drew Mun. Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975) (failure to hire, discharge); Leechburg Area School Dist. v. Pennsylvania Human Relations Comm'n, 19 Pa. Commw. Ct. 614, 339 A.2d 850 (1975) (denial of maternity leave); Wardlaw v. Davidson, 10 Fair Empl. Prac. Cas. 891 (Tex. Dist. Ct. 1975) (transfer to non-classroom position).

applied by the Supreme Court in sex discrimination cases will be considered, followed by a comparison of sex discrimination criteria under the Constitution and Title VII with special emphasis on the case of the unwed parent.

II. Employment Discrimination Against Unwed Mothers as Prohibited Discrimination Under Title VII.

A. Background

Title VII of the Civil Rights Act of 1964, as amended in 1972,[12] explicitly prohibits employment discrimination in hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. Since 1972, the Act has applied to employers engaged in an industry affecting commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceeding calendar year.[13] It also applies to employment agencies procuring employees for such an employer[14] and to most labor organizations.[15] The 1972 amendments also extended coverage to all state and local governments, government agencies, political subdivisions (except for elected officials, their personal assistants,

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[12]Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). *Id.* § 2000e-2(a) to (c) provides in part:

(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 . . . because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees . . . 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.

. . . .

(c) Labor organization practices.

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership . . . 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; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[13]*Id.* § 2000e(b) (Supp. V 1975).

[14]*Id.* §§ 2000e(c), 2000e-2(b) (1970 & Supp. V 1975).

[15]*Id.* § 2000e-2(c) (Supp. V 1975).

and immediate advisors), and the District of Columbia department and agencies (except where subject by law to the federal competitive service).[16]

Any person claiming to be aggrieved under the statute may file a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC is vested with the authority to investigate individual charges of discrimination, to promote voluntary compliance with the statute, and to institute civil actions against parties named in a discrimination charge.[17] The Commission cannot adjudicate claims or impose administrative sanctions. Rather, the statutory scheme designates the federal courts as the main enforcement agency and authorizes the courts to issue injunctive relief and to order such affirmative action as may be appropriate.[18]

Under Title VII, discrimination based on religion, sex, or national origin is regulated by a statutory standard differing from that applied to race or color. Employment discrimination with respect to religion, sex, or national origin is permitted where religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business.[19] Accordingly, the statute mandates a two-step analysis in employment discrimination cases. First, the court must find that the employer has engaged in discrimination under one of the prohibited classifications as outlined in the statute. Only after the court has made a determination that a prohibited form of discrimination has occurred will the court consider step two,

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[16] *Id.* §§ 2000e(a), (f), 2000e-16.

[17] *Id.* §§ 2000e-5, 2000e-6(e).

[18] *Id.* § 2000e-5(f), (g).

[19] *Id.* § 2000e-2(e) provides:

> Notwithstanding any other provision of [the Act], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ an individual in any such program, on the basis of his religion, sex, or national origin 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 . . . .

It is noteworthy that this section does not permit a BFOQ exception with respect to "race," and the legislative history of Title VII indicates that the exclusion was intentional. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND TITLE XI OF THE CIVIL RIGHTS ACT OF 1964 at 3183-85, 3191-92 (1968); H.R. REP. NO. 914 & S. REP. NO. 872, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355.

wherein the employer has the option to demonstrate that the discrimination was justified as a BFOQ.[20]

B. Theories of Sex Discrimination

Title VII was drafted primarily to deal with discrimination based on race, national origin, and religion. The amendment adding "sex" as a prohibited employment criterion was passed one day before the House of Representatives approved Title VII. It was inserted in the 1964 Act on the floor of the House by Representative Howard Smith of Virginia who stated that he wanted to prevent discrimination against the "minority sex."[21] Congressman Smith had actually opposed the passage of Title VII and was accused by some of wishing to sabotage its passage by his inclusion of the sex-based amendment.[22] In any event, little legislative history exists to aid the courts in interpreting the meaning and scope of such a complex and evasive phenomenon as sex-based discrimination.[23] Moreover, the statute itself does not define "discrimination."

Notwithstanding the lack of legislative history and statutory guidelines, the EEOC and courts have made it clear that discrimination must be manifested in conduct, not merely in a state of mind.[24] When presented with a claim that some employment-related conduct, such as the discharge or transfer of an unwed mother, is prohibited by Title VII, the courts have initially had to resolve the issue of whether such conduct is discriminatory and whether the discrimination is "on account of sex" for purposes of the statute. In analyzing the decisions, it is again important to keep the statutory framework in mind, for there is often a tendency to examine the

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[20]42 U.S.C. § 2000e-5(b) (Supp. V 1975).

[21]110 CONG. REC. 2577-84 (1964). *See also* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975).

[22]110 CONG. REC. at 2581-82.

[23]H.R. REP. NOS. 92-238 & 92-899, S. REP. NOS. 92-415 & 92-681, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137.

[24]*See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 67 (1972). In order of their historical development, Blumrosen discusses three theories concerning the nature of discrimination: (1) Discrimination consists of acts causing economic harm to an individual that are motivated by personal antipathy to the group of which that individual is a member. Proof of discrimination requires evidence of acts, motive (a mens rea), and harm. (2) Discrimination consists of causing economic harm to an individual by treating members of his minority group in a different and less favorable manner than similarly situated members of the majority group. Proof involves evidence of differential treatment and harm. A defense of justification is available. (3) Discrimination consists of conduct that has an adverse effect on minority group members. A defense of justification for compelling reasons of business necessity is recognized.

employment criterion of illegitimacy to reason that there is no apparent business justification for such a classification and to therefore conclude that the conduct is prohibited under Title VII. As indicated above, the statute provides that a practice must first be found to be discriminatory before the statutory BFOQ exception may be considered. Thus, in attacking an employment policy that adversely affects unwed mothers, it is important to formulate a theory that such conduct is in fact gender-based discrimination. The cases indicate that the courts and the EEOC have evolved three theories in resolving whether discrimination against unwed mothers (or parents) constitutes sex-based discrimination under the statute: (1) Disparity of treatment, (2) disparate impact, and (3) conditions peculiar to female physiology.

At this stage it is important to distinguish between "disparate treatment" and "disparate impact" as theories of discrimination under Title VII. As stated by the Supreme Court in *International Brotherhood of Teamsters v. United States*,[25] with respect to disparate treatment—that is, treating an individual less favorably because of race, color, etc.—proof of discriminatory motive is required, although such a motive can be inferred from the mere fact of differing treatment. Disparate impact involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory."[26]

1. Disparity of Treatment.—Disparity of treatment is perhaps the most easily understood and widely used theory of discrimination, and it has been suggested that this theory was Congress' common understanding of discrimination when Title VII was drafted.[27] Thus, discrimination occurs when the employer treats people less favorably than others because of their race, color, religion, sex, or national origin. For example, in *Phillips v. Martin Marietta Corp.*,[28] the Supreme Court held that persons of like qualifications must be given employment opportunities irrespective of sex, and absent a showing of business justification the statute would not permit one hiring policy for women (*i.e.*, refusing to accept job applications from

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[25]431 U.S. 324, 335 n.15 (1977).

[26]*Id.* (citations omitted).

[27]*See, e.g.*, 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualification, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States."). *See also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 & n.6 (BNA Books 1976).

[28]400 U.S. 542 (1971).

women with pre-school age children) and another for men—each group having pre-school age children.

In *Wardlaw v. Austin School District*,[29] a district court held that the transfer of a general education teacher after becoming pregnant without intending to marry was not the result of discrimination on account of sex. The court found no disparate treatment because plaintiff had not presented any evidence that male teachers who became parents out of wedlock were treated differently from female teachers who became parents of children out of wedlock. Although the court recognized that such evidence probably would not be available because male teachers do not normally reveal their fatherhood of illegitimate children, it nevertheless concluded that a male teacher who did advise the school administration that he was an unwed parent and that he planned to share this information with his students would presumably be treated the same. The discrimination, reasoned the court, lay in the knowledge available to the administration and not in any disparate treatment of males and females. Such discrimination, concluded the court, was in the availability of knowledge and consequently must be charged to "nature" and not to the school authorities.[30] Likewise, in *Omaha Public Schools v. Brown*,[31] plaintiff, an unwed pregnant teacher, alleged sex-based discrimination inasmuch as no unmarried male teacher in the school system had ever been terminated for being a putative father. Citing the absence of any authority that would allow it to repeal the "biological laws of nature," the Nebraska court found no impermissible discrimination.

The rationale of *Wardlaw* and *Brown* was rejected in *Leechburg Area School District v. Pennsylvania Human Relations Commission*.[32] In *Leechburg*, the school district required teachers to begin a maternity leave without pay at the end of the sixth month of pregnancy. In addition, the school district limited maternity leave to *married* teachers. Consequently, the effect of denying maternity leave to an unwed pregnant female was to terminate her employment. The Pennsylvania court had little trouble in deciding that the mandatory maternity leave policy was discriminatory under the Pennsylvania Human Relations Act.[33] However, the court voiced dif-

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[29]10 Fair Empl. Prac. Cas. 892 (W.D. Tex. 1975). *Wardlaw* was argued under Title VII, the first, ninth, and fourteenth amendments of the United States Constitution, the Texas Constitution, and a Texas statute. For a general discussion of the differing standards applied to constitutional and Title VII claims, *see* notes 150-179 *infra* and accompanying text.

[30]10 Fair Empl. Prac. Cas. at 894.

[31]13 Fair Empl. Prac. Cas. 767 (Neb. Dist. Ct. 1976).

[32]19 Pa. Commw. Ct. 614, 339 A.2d 850 (1975).

[33]Pennsylvania Human Relations Act of 1965, § 3, PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1977). The statute provides in pertinent part:

ficulty in finding that the limitation of maternity leave to married teachers amounted to sex discrimination under the state statute. The court reasoned that limitation of maternity leave eligibility to married teachers would appear to be discriminatory on the basis of marital status rather than sex, and discrimination based upon marital status per se is not prohibited sex discrimination under the statute.[34] Nevertheless, the court concluded that the effect of the policy was to penalize the unwed female employee in absence of evidence that the school had adopted a mandatory termination policy for unwed male teachers who had fathered illegitimate children or had otherwise participated in extramarital sex.[35]

In contrast to *Leechburg*, the *Wardlaw* court held that such a policy was not discriminatory in absence of any evidence that the school superintendent would treat unwed male teachers who admitted that they were fathers differently from unwed female teachers.[36] The *Wardlaw* court effectively established the *presumption* that discrimination against unwed mothers is not gender-based discrimination unless the plaintiff demonstrates that the employer *would* treat the sexes differently with respect to the status of becoming an unwed parent. However, the *Wardlaw* approach effectively precludes a finding of sex-based discrimination unless (1) an unwed father voluntarily admits his status to school authorities, or (2) the school maintains an efficient investigative force that is capable of discovering the parental status of its male teachers. Aside from constitutional problems, it is difficult to imagine what methods a school-sponsored investigative force would use to determine the paternity status of its unwed male teachers. Furthermore, it strains credulity to premise the validity of a legitimacy policy on the notion that those males who do come forward and announce their status as unwed parents will be treated the same as women. Although such a policy facially purports to treat both males and females alike, the application of the policy demonstrates that such is clearly not the case. Accordingly, the courts have utilized a

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> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . (a) For any employer because of the . . . sex . . . of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual or otherwise to discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is best able and most competent to perform the services required.

[34]The court noted that the questions whether such a classification would contravene the requirement of substantive due process of equal protection were questions not then before the court. 19 Pa. Commw. Ct. at 616, 339 A.2d at 852.

[35]*Id.* at 616, 339 A.2d at 853.

[36]10 Fair Empl. Prac. Cas. at 894.

"disparate impact" theory in finding legitimacy policies discriminatory.

2. Disparate Impact.—Even if an employer purports to treat males and females alike under a policy whereby *all* unwed parents are discharged, such a policy can, nevertheless, be found to be discriminatory on the basis of sex. The *Leechburg* court appeared to indicate that adoption of a policy that applied to all unwed parents would still be actionable as discriminatory, since the brunt of the policy would be directed solely at unmarried female teachers due to the obvious physiological visibility of their pregnant condition.[37] Although members of each sex should be treated the same with respect to the actual terms of the policy, a disparate impact would appear once the policy was applied or enforced, thus resulting in sex-based discrimination.

In the general context of sex discrimination, the Supreme Court, in *Dothard v. Rawlinson*,[38] applied a disparate impact rationale in finding that Alabama's statutory minimum height and weight requirements for a position of correctional counselor[39] violated Title VII. The Court found that a 5-foot-2-inch height minimum operated to exclude 33.29% of the women in the United States between the ages of 18 and 79, while excluding only 1.28% of the men in the same group. Furthermore, the 120-pound weight requirement excluded 22.29% of the women and 2.35% of the men in this same age group.[40] In finding these hiring requirements to be discriminatory, the Court reaffirmed its decision in *Griggs v. Duke Power*:[41]

> [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question."[42]

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[37]19 Pa. Commw. Ct. at 617, 339 A.2d at 853. The court further stated: "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class." *Id.* (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

[38]433 U.S. 321 (1977).

[39]ALA. CODE tit. 55, § 373(109) (Supp. 1973).

[40]433 U.S. at 329.

[41]401 U.S. 424 (1975) (requirement of general intelligence test as prerequisite for hire held discriminatory where test operated to disqualify a higher percentage of black than white applicants). *See also* Gregory v. Litton Syss., Inc., 472 F.2d 631 (9th Cir. 1972) (arrest records).

[42]433 U.S. at 329 (quoting Griggs v. Duke Power Co., 401 U.S. at 432).

The Court further stated: "If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in "efficient and trustworthy workmanship."' "[43]

In *McDonnell Douglas Corp. v. Green*,[44] the Supreme Court addressed the order and allocation of proof in a Title VII action challenging employment discrimination on account of race. The Court held that the complainant must carry the initial burden of establishing a prima facie case of racial discrimination. This may be done by proving the following facts: (1) That complainant belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.[45]

Moreover, in *McDonald v. Sante Fe Trail Transportation Co.*,[46] the Supreme Court interpreted *McDonnell Douglas* as only requiring that the complainant show that race was but one factor, not the sole cause, of an employer's adverse action. Thus, once plaintiff has made out a prima facie case, the burden then shifts to the employer to articulate some legitimate nondiscriminatory reason for respondent's rejection of the applicant. Furthermore, even though an employer offers some legitimate reason for imposing some adverse action on complainant, the complainant, nevertheless, is afforded a fair opportunity to demonstrate that respondent's reasons are pretextual.[47] Although *McDonnell Douglas* involved race discrimination, the same rule generally applies by analogy to sex discrimination cases.[48]

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[43]*Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973))). The Court went on to rule that the defendant failed to rebut plaintiff's prima facie case; however, the majority held that excluding women from certain body contact positions fit the bona fide occupational qualifications to the proscription of sex discrimination. Justice Stewart, writing for the majority, reasoned that the "jungle atmosphere" of the Alabama prison system warranted the exclusion of women from the position of correctional counselor in the male maximum security institution. 433 U.S. at 334-36.

[44]411 U.S. 792 (1973).

[45]*Id.* at 802.

[46]427 U.S. 273, 282 n.10 (1976).

[47]McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[48]In this regard, *see* East v. Romie, Inc., 518 F.2d 332 (5th Cir. 1975); Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975); Jurinko v. Edwin Weigand Co., 477 F.2d 1038 (3d Cir. 1973) (remanded for further consideration in light of *McDonnell Douglas*); Davis v. Weidner, 421 F. Supp. 594 (E.D. Wis. 1976); White v. Bailar, 14 Fair Empl. Prac. Cas. 383 (E.D. Wis. 1976). *But see* King v. New Hampshire Dep't of Resources &

The courts and the EEOC have readily used the "disparate impact" theory in finding sex-based discrimination in those cases where a rule is facially neutral, proscribing the employment of any parent, male or female, of an illegitimate child. In *Andrews v. Drew Municipal Separate School District*,[49] a federal district court held that a rule banning parents of illegitimate children from employment in a school[50] was unconstitutional because it amounted to sex-based discrimination against women. The court stated that although the policy professed to be neutral, such a rule could not possibly operate in a neutral fashion, as evidenced by the fact that only unmarried females had been prohibited from employment under the policy. Indeed, "[u]nless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire."[51] It is noteworthy that the court found the policy to be discriminatory despite the school's emphatic assurance that the policy would be applied equally to both male and female employees.[52]

The EEOC similarly applied the disparate impact theory in finding that refusal to hire an unwed mother discriminated against the applicant on the basis of sex. In a 1970 decision,[53] the EEOC ruled that such an legitimacy-of-birth standard for employment, even if sought to be applied equally to unwed fathers, had the foreseeable and certain impact of depriving females, but not similarly situated males, of employment opportunities.[54]

Economic Dev., 562 F.2d 80, 83 (1st Cir. 1977), in which the court cited McDonnell Douglas Corp. v. Green, 411 U.S. at 802 n.13, for the proposition that "listed specifications for prima facie proof would not necessarily apply in different factual situations." The *King* court held that the applicant had established a prima facie case, notwithstanding the fact that the job position did not remain open. *Id.*

[49]371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975).

[50]No consideration was given to the subsequent marriage of the parent, to the length of time elapsed since the illegitimate birth, or to a person's reputation in the community. The court found such a presumption to be "patently absurd," "mischievous," and "prejudicial." 371 F. Supp. at 34.

[51]*Id.* at 35.

[52]*Id. See also* discussion of Flores v. Secretary of Defense, 355 F. Supp. 93 (N.D. Fla. 1973), notes 193-196 *infra* and accompanying text.

[53][1973] EEOC Decisions (CCH) ¶ 6164 (1970).

[54]In another 1970 decision, the EEOC held that an employer's policy of limiting maternity leave to "married" women discriminated against females because of sex, at least in absence of evidence that provision had been made for termination of an unmarried father under the collective bargaining agreement. [1973] EEOC Decisions (CCH) ¶ 6184 (1970). Whether such a showing would have saved the policy is open to speculation. Even if the illegitimacy standard had been applied to unmarried males, it still would have had the foreseeable impact of depriving females, but not similarly placed males, of employment opportunities.

3. Conditions Peculiar to the Female Physiology.—In *Jane Doe v. Osteopathic Hospital*,[55] a federal district court held that the discharge of a female employee by a hospital because the employee was pregnant and unmarried was prohibited by Title VII. The hospital argued that since it had not discriminated in favor of "pregnant, unmarried men," plaintiff should not be entitled to relief.[56] The court reasoned that since the condition of being visibly pregnant and unwed was a "condition peculiar to the female physiology alone," and since there was no evidence that the plaintiff's marital state of pregnancy had any relationship to the performance of her duties, the hospital was guilty of discrimination.[57]

Likewise, in *Jacobs v. Martin Sweets Co.*,[58] the Sixth Circuit Court of Appeals held that an employer had violated Title VII by constructively discharging an unwed pregnant female. In *Jacobs*, the defendant-employer argued that it had not discriminated within the meaning of Title VII because plaintiff had failed to demonstrate that she would have received different treatment if she had been a male expectant parent. In addition, defendant argued that there had been no showing that plaintiff would have received different treatment if her premarital sexual activity had not resulted in pregnancy. Both arguments were rejected by the Sixth Circuit. With respect to the first argument, the court stated that the employer was attempting to equate a female's pregnancy with the condition of an expectant male parent. Since pregnancy is a condition unique to females, the termination of employment based on pregnancy necessarily had a disparate and invidious impact upon the female sex. The main point with respect to the employer's first argument, the court noted, was that there must be men and women similarly situated who are treated in a disparate manner before the statute is violated. However, as the court cogently reasoned, to accept this argument would effectively exclude pregnancy from all Title VII cases,[59] a proposition recently rejected by the Supreme Court.[60]

With regard to the second argument, the court reasoned that the district court had found that the discharge occurred because plaintiff was unmarried and pregnant, not because of her premarital sexual activity. As stated by the Sixth Circuit, the second argument suggests that Title VII prohibits " 'artificial, arbitrary, and unnecessary barriers to employment' in the case of unwed pregnancy,

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[55]333 F. Supp. 1357 (D. Kan. 1971).

[56]*Id.* at 1362.

[57]*Id.*

[58]550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977).

[59]*Id.* at 370-71.

[60]*See* discussion of Nashville Gas Co. v. Satty, 98 S. Ct. 347 (1977), in note 88 *infra* and accompanying text.

while declaring such barriers lawful in the case of a wed pregnancy."[61] However, there was no evidence that the *Jacobs* classification had any rational relationship to the normal operation of the business.[62]

In concluding that the legitimacy-of-birth policies at issue were discriminatory under Title VII, the *Doe* and *Jacobs* courts appeared to base their decisions on the fact that pregnancy is a condition unique to the female physiology. In this regard, two points are especially noteworthy. First, although the result in both decisions would appear to be correct, the *Doe* opinion failed to clarify whether the discharge was discriminatory merely because it was based on a condition "peculiar to the female physiology," or because the condition of being an unwed female had no relation to job performance.[63] Arguably, the *Doe* district court may have examined the criteria of "visibly pregnant" and "unwed," found that there was no evidence that either affected plaintiff's job performance, and thus concluded that there had been discrimination.[64]

As indicated earlier,[65] even if the employment criterion of legitimacy is demonstrably unrelated to job performance, the use of such a criterion is not prohibited by Title VII unless it is first found to be a form of discrimination prohibited by the statute, which in most cases will be sex-based discrimination.[66] It is also noteworthy

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[61]550 F.2d at 371 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[62]*See* discussion of Jacobs v. Martin Sweets Co., 550 F.2d at 371, in text accompanying notes 58-59 *supra*.

[63]The *Doe* court may have applied a "disparate impact" theory in finding that the discharge was sex-based discrimination. Quoting *Sprogis*, the court stated:

> The scope of [the statute] is not confined to explicit discrimination based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the . . . sex stereotypes. . . . The effect of the statute is not to be diluted because discrimination adversely affects *only* a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy.

333 F. Supp. at 1362 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d at 1198) (emphasis supplied by *Doe* court).

[64]The court further stated that it was irrelevant that there had been no other known females discharged by defendants because the statute prohibits discrimination against any individual. 333 F. Supp. at 1362. In addition, the court noted that if plaintiff was discharged by defendants because she failed to give notice of her pregnant condition, such a termination would likewise constitute unlawful discrimination "in that she was dismissed for failure to exercise an arbitrary duty not imposed upon any member of the male sex, and totally unrelated to job performance." *Id.* at 1363.

[65]*See* note 17 *supra* and accompanying text.

[66]It is noteworthy that discriminatory treatment against unwed mothers has been successfully attacked as race discrimination. In Cirino v. Walsh, 321 N.Y.S.2d 493 (Sup. Ct. 1971), a Puerto Rican mother of eight children by five different fathers was denied the position of crossing guard by the police department because she lacked good

that not all policies that affect or are based on conditions unique to female physiology are necessarily prohibited under Title VII.[67] For example, in *General Electric Co. v. Gilbert*,[68] the Supreme Court held that it was not gender-based discrimination for an employer to exclude pregnancy-related disabilities from its general disability program.[69] Although pregnancy is unique to female physiology, the *Gilbert* court stated: "[I]t is in other ways significantly different from the typical covered disease or disability."[70] Accordingly, merely asserting that a legitimacy policy affects conditions "unique to the female physiology" may not be sufficient grounds for concluding that the policy is discriminatory for purposes of Title VII. Although the *Doe* and *Jacobs* courts appeared to base their decisions on a female physiology theory of discrimination, a female attacking an employer's legitimacy policy after *Gilbert* should also focus on the disparate impact of such a policy.

In *Nashville Gas Co. v. Satty*,[71] a case decided subsequent to *Gilbert*, Nashville Gas, the petitioner-employer, had initiated a policy of requiring pregnant employees to take a formal leave of absence. Although sick pay was generally available to employees disabled by reason of nonoccupational sickness or injury, no benefits were available for disability or sickness due to pregnancy. In addition, an employee returning after a pregnancy leave was denied all accumulated seniority. An employee who wished to return to work was placed in any open permanent position for which she was qualified and for which no current employee was bidding. Until such a permanent position became available, the employer attempted to find temporary work for the employee. If the employee acquired a permanent position, she regained previously accumulated seniority for purposes of pension, vacation, and the like, but did not regain it for the purpose of bidding on future job openings.

The Supreme Court held that the policy of denying accumulated seniority to female employees returning from pregnancy leave

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character. Citing a *New York Times* study, the court noted that one out of four Puerto Rican births are illegitimate as compared to one out of fifteen for the population as a whole. To deny plaintiff the position because of her children was discrimination on the account of race as well as sex. In *Cirino*, the court found that sex discrimination could result "if the fact of children is more easily discovered about the mother who looks after them than the father who does not." *Id.* at 495. Likewise, the EEOC has held that the failure to hire a black unwed mother had a discriminatory effect on blacks as a class when it was shown that at least 80% of the illegitimate births occurring within the area are born to nonwhite females. [1973] EEOC Decisions (CCH) ¶ 6164 (1970).

[67]*See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974).

[68]429 U.S. 125 (1976).

[69]*See* notes 82-84 *infra* and accompanying text.

[70]429 U.S. at 136.

[71]98 S. Ct. 347 (1977).

violated section 703(a)(2) of Title VII.[72] Justice Rehnquist, writing the opinion for the Court, stated that Nashville's decision not to treat pregnancy as a disease or disability for purposes of seniority retention was not on its face a discriminatory policy even though pregnancy is confined to women, because "it is in other ways significantly different from the typical covered disease or disability."[73] The Court reasoned that unlike the contested policy in *Gilbert*, Nashville had "not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer."[74] In this regard, the Court further stated that the distinction between benefits and burdens is more than one of semantics. As explained by Justice Rehnquist:

> We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their different roles in the scheme of existence." But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.[75]

Accordingly, the Court invalidated Nashville's loss-of-seniority policy.[76]

Justice Stevens, concurring in the judgment, noted that the effect of Nashville's seniority plan was significantly different from the General Electric plan in *Gilbert*. He suggested that "although the *Gilbert* Court was unwilling to hold that discrimination against pregnancy—as compared with other physical disabilities—is discrimination on account of sex, it may nevertheless be true that discrimination against pregnant or formerly pregnant employees—as compared with other employees—does constitute sex

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[72]42 U.S.C. § 2000e-2 (1976). *See* note 12 *supra*.

[73]98 S. Ct. at 350 (citing General Elec. Co. v. Gilbert, 429 U.S. at 136).

[74]98 S. Ct. at 351.

[75]*Id.* (quoting General Elec. Co. v. Gilbert, 429 U.S. at 139 n.17). As noted by Justice Stevens in his dissenting opinion, the Court suggested that its analysis of the seniority plan was different because that plan was being attacked under § 703(a)(2) of Title VII, whereas the plan in *Gilbert* was found to be violative of § 703(a)(1). Stevens noted that although § 703(a)(1) refers to "discrimination" and § 703(a)(2) does not, this distinction is not relevant since the Court itself recognizes that a violation of § 703(a)(2) occurs when a facially neutral policy has a "discriminatory effect." 429 U.S. at 161 n.4 (Stevens, J., dissenting).

[76]With respect to Nashville's exclusion of pregnancy-related disabilities from its sick-pay policy, the Court remanded the issue to the district court for a determination of whether the policy violated Title VII based upon a discriminatory effect theory. 98 S. Ct. at 353.

discrimination."[77] Justice Stevens further noted that the General Electric plan and the Nashville seniority plan could be pragmatically distinguished as to whether the employer has a policy which adversely affects females beyond the term of their pregnancy leaves.[78]

4. Summary.—Notwithstanding the *Wardlaw* decision,[79] an employer will not be able to successfully argue that an employment criterion of illegitimacy is not discriminatory in that it is equally applicable to males and females. As indicated by the *Sprogis* court: "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of seemingly neutral company policy."[80] A legitimacy standard will have the foreseeable and certain impact of depriving females, but not similarly placed males, of employment opportunities. Discrimination that only affects a portion of a protected class will not defeat relief under the statute. An employer will not be able to successfully defend by asserting that it is not discriminatory to treat a subclass (unwed and pregnant females) within a protected class (all females) disparately, for it is now settled that disparate treatment with respect to a subclass of one sex can indeed be sex-based discrimination under Title VII.[81]

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[77] *Id.* at 358.

[78] *Id.*

[79] *See* note 29 *supra* and accompanying text.

[80] Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

[81] The issue of discrimination between different categories of the same sex has been one that has repeatedly occupied the courts. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (failure to hire women with preschool-age children, while hiring similarly situated males was discriminatory, even though the company hired 70 to 75% women); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (grooming regulation applicable to males with long hair not sex-based discrimination since employer applied personal grooming code to all employees); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) (unlawful to restrict employment of married females but not married males, even though most flight attendants were females). The classification of employees on the basis of sex plus some other ostensibily neutral characteristic has generally been termed "sex-plus" discrimination. As stated by the Fifth Circuit in *Willingham:*

> The practical effect of interpreting [42 U.S.C. § 2000e-2] to include this type of discrimination is to impose an equal protection gloss upon the statute, i.e. similarly situated individuals of either sex cannot be discriminated against vis-a-vis members of their own sex unless the same distinction is made with respect to those of the opposite sex. Such an interpretation may be necessary in order to counter some rather imaginative efforts by employers to circumvent [42 U.S.C. § 2000e-2].

507 F.2d at 1089. It is noteworthy that Congress specifically defeated an amendment which would have added the word "solely" to the bill, modifying "sex," 110 CONG. REC. 2728 (1964), thereby providing some legislative support for the inclusion of "sex-plus" discrimination within the proscription of § 703. *See* Willingham v. Macon Tel.

Finally, an additional argument may arise after the recent decision by the Supreme Court in *General Electric Co. v. Gilbert.*[82] In *Gilbert*, a divided Court held that it was not a violation of Title VII for an employer to exclude pregnancy disability from coverage of its general disability benefits plan. Justice Rehnquist, writing for the majority, reasoned that the plan did not operate to discriminate against women in terms of the aggregate risk protection that was provided to employees. Citing *Geduldig v. Aiello,*[83] a similar case involving the exclusion of pregnancy disabilities from the state of California's disability program, the majority stated that discrimination was absent since "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[84]

Publishing Co., 507 F.2d at 1089. In addition, the EEOC has stated in its *Guidelines* that "so long as sex is a factor in the application of the rule [restricting the employment of married women], such application involves a discrimination based on sex." 29 C.F.R. § 1604.4(a) (1976).

While it is clear that not every dissimilarity in employment requirements respectively set for the sexes impinges on Title VII, General Elec. Co. v. Gilbert, 429 U.S. at 135, courts have generally held that those "plus" factors which are based on "immutable" characteristics will warrant a finding of sex discrimination. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 990-91 (D.C. Cir. 1977) (citing Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973)); Fagen v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

In addition, the Supreme Court has held that those differentials that have a significant effect on employment opportunities of one sex will warrant a finding of sex discrimination. Nashville Gas Co. v. Satty, 98 S. Ct. 347 (1977). Moreover, courts are receptive to finding discrimination based on constitutionally protected activities such as marriage or child-rearing because they present insurmountable obstacles to one sex. Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976) (dicta).

[82]429 U.S. 125 (1976).

[83]417 U.S. 484 (1974). *Geduldig* was decided under the equal protection clause of the fourteenth amendment. In that decision the Court held that exclusion of pregnancy-related disabilities under California's disability program did not amount to invidious discrimination under the United States Constitution. The majority reasoned that the state had legitimate interests in maintaining the self-supporting nature of the program, as well as maintaining a contribution rate that was not unduly burdensome on current participating employees.

[84]429 U.S. at 146-160 (citing Geduldig v. Aiello, 417 U.S. at 496-97). Justices Brennan and Marshall, dissenting, argued that General Electric's policy "as a neutral process of sorting risks" and "not a gender-based discrimination" cannot be squared with the facts of the case. The dissent noted that the plan does in fact insure against some risks that are specific to the reproductive system of men for which there exist no female counterparts covered by the plan. *Id.* at 148 (Brennan & Marshall, JJ., dissenting). In addition, the dissent attacked the majority's reading of the EEOC's 1972 interpretative guideline requiring pregnancy to be treated like any other temporary disability, 29 C.F.R. § 1604.10(b)(1972). Brennan found no basis for concluding that the regulation was out of step with congressional intent, 429 U.S. at 156-58, and indeed argued that Congress intended a contrary result from that reached by the majority. *Id.* at 157-58.

Accordingly, the argument can be made that if it is not gender-based discrimination to exclude all females with pregnancy-related disabilities from a general disability program, it is likewise not discriminatory to exclude all *unwed* females with a pregnancy-related disability from such a program. This argument was raised in *Willett v. Emory College*,[85] when a district court, citing *Gilbert*, held that a health insurance plan that only awarded pregnancy coverage to those employees having dependents and therefore did not provide pregnancy benefits to unmarried females would not give rise to a cause of action under Title VII. The court recognized that a prima facie violation of Title VII may be established in some circumstances upon proof that the effect of an otherwise facially neutral plan is to discriminate against females, but the Emory program did not present such a violation, since the contested plan clearly provided benefits for married female employees.[86]

As characterized by the Sixth Circuit in *Jacobs v. Martin Sweets Co.*,[87] this argument essentially reduces to the issue of whether the holding in *Gilbert*—that exclusion of pregnancy from the risks covered by an employer's disability benefits plan is not a violation of Title VII—can be regarded as precedent for excluding pregnancy from protection against invidious employment discrimination, a proposition that was considered and rejected by the *Jacobs* court. Although the result would appear to be correct, the reasoning of the Sixth Circuit in *Jacobs* is arguably suspect. Title VII clearly does not prohibit all forms of invidious discrimination, but only discrimination in employment based on race, color, religion, sex, and national origin. In addition, while it is true that only women can become pregnant, it does not necessarily follow that every classification concerning pregnancy is a gender-based classification for purposes of Title VII. Still, the situation in *Gilbert* can be distinguished from the unwed parent case (exclusion of unwed parents from employment or other employment-related benefits). In *Gilbert*, the line or classification was not drawn between men and women, but rather between women with a pregnancy-related disability and other women and men without that disability. In the unwed parent situation, the de jure classification is between men and women who are parents and unwed, and all other men and women. However, the unwed parent case effectively results in a form of de facto discrimination on account of sex, whereas the *Gilbert* disqualification arose from a disability based on protection from certain risks, and, as stated in *Gilbert*, was not a gender-based classification.

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[85] 427 F. Supp. 631 (W.D. Va. 1977).

[86] *Id.* at 636-37.

[87] 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977).

Stated another way, the distinction is between a "pregnancy-controlled" decision in *Gilbert* and the "sex-controlled" decision in the unwed parent case.

Nashville Gas Co. v. Satty[88] provided further support for the proposition that the *Gilbert* decision does not authorize the exclusion of unwed mothers from employment opportunities. If, as stated by Justice Rehnquist in *Satty*, the policies at issue in *Gilbert* (exclusion of pregnancy-related disabilities from employer's disability program) and *Satty* (denial of accumulated seniority to females returning from pregnancy leave) are to be respectively distinguished on the basis of benefits conferred and burdens imposed,[89] such reasoning arguably supports the proposition than an employer cannot, under Title VII, exclude females from employment opportunities merely because they are unwed mothers. An employment criterion of legitimacy-of-birth may resemble the invalid *Satty* policy in that it deprives females of employment opportunities and adversely affects their status as employees, resulting in a violation of section 703(a)(2) of Title VII.[90] Unlike the situation in *Gilbert*, where there was no showing that a policy of compensating for all non-job-related disabilities except pregnancy favored men over women, a legitimacy standard, even if applicable to both male and female unwed parents, clearly burdens females and not males for the simple reason that male unwed parents are virtually impossible to detect.

C. Discrimination Against Unwed Mothers as a Bona Fide Occupational Qualification

Once it is determined that a legitimacy standard is sex-based discrimination, the employer has the option to demonstrate that the discrimination is justified as a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the business.[91] The BFOQ exception has been narrowly construed by both the EEOC[92] and the courts. For example, in *Diaz v. Pan*

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[88]98 S. Ct. 347 (1977). *See* discussion in notes 71-78 *supra* and accompanying text.

[89]98 S. Ct. at 351. Justice Stevens, in his concurring opinion, found difficulty with this line of reasoning. Characterizing this distinction as illusory, Justice Stevens noted: "Differences between benefits and burdens cannot provide a meaningful test of discrimination since, by hypothesis, the favored class is always benefited and the disfavored class is equally burdened." *Id.* at 357 n.4. As indicated earlier Justice Stevens offered an alternative to the Court's reasoning which, a priori, appeared more sound than that of the majority. *See* notes 77-78 *supra* and accompanying text.

[90]42 U.S.C. § 2000e-2 (Supp. V 1975).

[91]*See* note 19 *supra* and accompanying text.

[92]The EEOC's Guidelines on Sex Discrimination provide in part:

> The commission believes that the bona fide occupational qualification exception as to sex should be interpretated narrowly. Label[s]—"Men's jobs"

American World Airways,[93] the Fifth Circuit Court of Appeals held that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[94] Likewise, in *Weeks v. Southern Bell Telephone & Telegraph Co.*,[95] the same court held that an employer could rely on the BFOQ exception only by showing "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[96] More importantly, in *Dothard v. Rawlinson*,[97] the Supreme Court stated for the first

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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; that women are less capable of aggressive salesmanship. 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.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

(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.

29 C.F.R. § 1604 (1976).

[93]442 F.2d 385 (5th Cir. 1971).

[94]*Id.* at 388 (emphasis in original).

[95]408 F.2d 228 (5th Cir. 1969).

[96]*Id.* at 235. The *Weeks* test—that an employer must show a factual basis for believing that "all or substantially all women would be unable to perform safely an efficiently the duties of the job involved"—has been subjected to criticism for its failure to require an employer to allow for individual testing or, alternatively, to demonstrate that individual testing is impossible. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (Marshall, J., concurring); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (individual testing required); *Developments in the Law—Employment Discrimination and Title VII and the Civil Rights Act of 1964*, *84* HARV. L. REV. 1109, 1179-81 (1971). Notwithstanding the criticism, the Supreme Court cited the *Weeks* test with approval in dictum in Dothard v. Rawlinson, 433 U.S. 321, 333 (1977). The *Weeks* test is arguably sound, for if the BFOQ exception is interpreted to require individual testing, the exception is effectively read out of the statute. Those applicants who fail the ability test can be rejected without regard to the exception. It seems clear that if the BFOQ is to have any substantive meaning, some utilization of the BFOQ defense ought to be permitted, short of proof that 100% of a specific sex are unable to perform a given job.

[97]433 U.S. 321 (1977).

time in a Title VII case that the restrictive language of section 703(e)—the BFOQ exception—commands that the "exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex,"[98] a position to which the EEOC has adhered consistently in its construction of the statute.[99]

In light of the narrow construction given the BFOQ exception by both the courts and the EEOC, it is difficult to defend a legitimacy-of-birth criterion as a qualification reasonably necessary to the normal operation of *any* business, at least in the context of ability to perform a designated job or task. Applying the *Weeks* test, an employer relying on the BFOQ exception would have to factually demonstrate that all or substantially all women who were mothers of illegitimate children would be unable to safely and efficiently perform the duties of the job because of their combined status of being unwed and a mother, an effectively insurmountable burden.[100] Indeed, the cases indicate that rather than trying to defend a legitimacy standard as being directly related to a woman's ability to perform, employers have primarily focused their arguments on the discrimination issues.[101]

In those cases where the BFOQ defense is asserted, employers have attempted to justify their policies under the general cloak of morality, public image, or co-worker preference.[102] For example, in *Leechburg Area School District v. Pennsylvania Human Relations Commission*,[103] the school argued that a legitimacy classification was necessary to maintain the "moral tenor" of the educational environment, a goal that would best be accomplished by discouraging unmarried teachers from becoming pregnant. The court stated that under the BFOQ exception the school would have to establish that all or substantially all unmarried pregnant teachers could not pro-

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[98]*Id.* at 334.

[99]With the exception of the case of state protective legislation, the EEOC's guidelines on sex discrimination have remained virtually unchanged since they were initially issued in November 1965. *Compare* 30 Fed. Reg. 14,926 (1965) (prior version of 29 C.F.R. § 1604) *with* 29 C.F.R. § 1604 (1977).

[100]*See* discussion of Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977), in notes 58-59 *supra* and accompanying text.

[101]Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977); Cirino v. Walsh, 321 N.Y.S.2d 493 (Sup. Ct. 1971); [1973] EEOC Decisions (CCH) 4275 (1970).

[102]Wardlaw v. Austin Independent School Dist., 10 Fair Empl. Prac. Cas. 892 (W.D. Tex. 1975); Andrews v. Drew Mun. Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975); Cirino v. Walsh, 321 N.Y.S.2d 493 (Sup. Ct. 1971); Doe v. Osteopathic Hosp., 333 F. Supp. 1357 (D. Kan. 1971).

[103]19 Pa. Commw. Ct. 614, 339 A.2d 850 (1975). *See also* notes 32-34 *supra* and accompanying text.

vide the proper moral model believed to be necessary for school-age children. Furthermore, the school presented no evidence that a teacher who is unmarried and pregnant could not continue to maintain the respect of her students and serve as "a proper moral polestar to her impressionable charge."[104]

Likewise, in *Doe v. Osteopathic Hospital*,[105] the district court rejected a claim by a hospital that a policy of denying an unmarried female maternity leave (an effective discharge of the employee under the hospital's policy) was necessary to protect the hospital's public image and the morale of its employees. In *Doe*, the court correctly refused to assume that the public image of the hospital would be damaged merely by the retention of an unmarried pregnant female.[106] In this regard, it is noteworthy that the court did not hold that morality or public image concern were impermissible considerations under Title VII. Rather, the court stated that in absence of evidence that the hospital's public image was damaged or that the morale of its employees was adversely affected, a BFOQ would not be established.[107]

In summary, the line of analysis taken by the courts that have considered the claim that a legitimacy standard is privileged under the BFOQ exception is generally consistent with the narrow construction given the BFOQ exception by the courts and the EEOC. As indicated earlier, the Supreme Court had recently stated that the BFOQ exception is meant to be construed extremely narrowly,[108] a view consistent with that of the EEOC.[109] Mere claims that a legitimacy policy is necessary to maintain a proper moral tenor or to satisfy customer or co-worker preferences will not suffice to accord a legitimacy standard refuge under the BFOQ exception. Given this narrow focus, it is understandable why employers have generally tended to argue that a legitimacy policy is not discriminatory rather

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[104]19 Pa. Commw. Ct. at 618, 339 A.2d at 854. In Wardlaw v. Austin Independent School Dist., 10 Fair Empl. Prac. Cas. 892 (W.D. Tex. 1975), a case decided under the United States Constitution, the district court indicated that the composition of the student body may indeed be important when analyzing legitimacy standards. The court found the plaintiff's special education class containing mentally retarded children "might be particularly vulnerable to harm arising from any tension resulting from differences between their parents and their teacher regarding sexuality attitudes and lifestyles." *Id.* at 895. Accordingly, the court found that the decision to transfer an unwed pregnant teacher was based on "legitimate educational concerns" and a desire "to perpetuate public confidence in the educational system." *Id.*

[105]333 F. Supp. 1357 (D. Kan. 1971).

[106]*Id.* at 1360.

[107]*Id.* at 1362.

[108]Dothard v. Rawlinson, 433 U.S. 321 (1977).

[109]EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1604 (1976).

than attempt to justify such a standard as a BFOQ. It is even more understandable why they have generally lost on both issues.

III. The Constitution as a Remedy

A. Introduction

In those cases where state action is present, it is possible to assert a claim of discrimination under the fifth and fourteenth amendments[110] of the Constitution. The concept of sex discrimination under the Constitution is no less evasive and complex than that under Title VII. As in Title VII,[111] one may think of gender-based discrimination under the Constitution as conduct that results in "dissimilar treatment for men and women who are . . . similarly situated."[112] Of course, this is not to assert that all conduct that results in men and women being treated differently on the basis of physical characteristics inextricably linked to one sex necessarily constitutes sex discrimination under the Constitution[113] or even Title

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[110]The fifth amendment is only a limitation upon the actions of the federal government, Public Util. Comm'n v. Pollak, 343 U.S. 451, 461 (1952). Although not explicitly drafted in the language of the fifth amendment, it is settled that the due process clause of the fifth amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497 (1954). The Supreme Court has noted that due process is more than a mere procedural guarantee. "The article is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).

[111]"Virtually all Title VII violations fit an equal protection definition of sex discrimination . . . ." Rafford v. Randle E. Ambulance Serv., Inc., 348 F. Supp. 316, 319 (S.D. Fla. 1972). Indeed, as stated by the Fifth Circuit Court of Appeals, an equal protection analysis of discrimination may be necessary in order to counter some "imaginative efforts by employers to circumvent Sec. 703." Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1089 (5th Cir. 1975). *See* note 63 *supra.*

[112]Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (quoting Reed v. Reed, 404 U.S. 71, 77 (1971)). This definition of sex discrimination merely shifts the focus of analysis to other areas of contention—namely, whether a treatment is "dissimilar" and whether men and women are "similarly situated." the problem is exacerbated when characteristics unique to one sex are involved. *See, e.g.*, Rafford v. Randle E. Ambulance Serv., Inc., 348 F. Supp. 316, 319-20 (S.D. Fla. 1972) (no discrimination present in case of beards and moustaches since case presents situation where there can be no similarly situated individuals). As a way out of the quagmire presented by a "semantic" theory of discrimination, the courts have turned to a disparate impact rationale. *See, e.g.*, Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971) ("Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy.").

[113]*See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974).

VII.[114] However, it is possible that a specific activity may result in gender-based discrimination and yet be a permissible activity under both Title VII[115] and the Constitution.[116] Moreover, it is possible that a classification based on characteristics unique to one sex may violate Title VII but not the Constitution, since Title VII and the Constitution each require a different analysis and test for finding sex discrimination.[117] This section will focus on the analyses and tests for finding prohibited sex discrimination under the due process and equal protection clauses of the Constitution. In addition, the discussion will compare the concepts of sex discrimination under the Constitution and Title VII. Finally, the Constitution as a remedy for discrimination against unwed mothers will be considered.

B. Standard of Review

The concept of equal protection under the fourteenth amendment is essentially a pledge of protection of equal laws. Invariably, however, legislation involves classifications, and the very idea of classifying individuals for various purposes and treating some differently than others is that of inequality. Thus, the potential exists for a challenge alleging disparate treatment under the equal protection clause. Nevertheless, as stated by Professors Tussman and tenBroek: "The Constitution does not require that things different in fact be treated in law as though they were the same."[118] Accordingly, despite a demand for equality, the Supreme Court has not denied the states the right to draw classifications; but at the same time, the Court has not deferred to the legislature when such classifications are clearly arbitrary or have no rational relationship to the object or purpose of the legislation.[119]

In determining whether a particular classification is violative of equal protection, the Court has developed a two-tier approach consisting of the traditional or rational basis test and the active or strict scrutiny approach. Under the traditional or rational basis test,

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[114]*See e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). *See also* notes 82-84 *supra* and accompanying text.

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

[116]*See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974) (upholding Florida's $500 property tax deduction for widows, but not widowers); Schlesinger v. Ballard, 419 U.S. 498 (1975), *reh. denied*, 420 U.S. 966 (1975) (male Navy lieutenant dismissed from service after 9 years without promotion, but female lieutenant given 13 years before mandatory dismissal).

[117]*See* notes 153-158 *infra* and accompanying text.

[118]Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949) (citing Tigner v. Texas, 310 U.S. 141, 147 (1940)). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

[119]*See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942).

the burden of proving that the government acted unconstitutionally rests with the plaintiff.[120] Under this standard, when a government draws classifications that affect different groups of people differently, the classifications must be "reasonable" in order to withstand a constitutional challenge.[121] As stated by the Supreme Court in *Massachusetts Board of Retirement v. Murgia*:[122] "[T]his inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarily a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."[123] Accordingly, in applying the traditional rational basis test, the Court has granted great leeway to the legislature in drafting classifications, and unless the legislation is "wholly unrelated" to its objective, it will likely survive an equal protection attack.[124]

Unlike the traditional rational basis test, the strict scrutiny standard is a more stringent test of determining whether government action violates the equal protection clause. If the Court determines that a statute or governmental action invades a "fundamental" right[125] or discriminates against a "suspect" class,[126]

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[120]*See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40-41 (1973); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

[121]A "reasonable" classification is one that includes "all persons who are similarly situated with respect to the purpose of the law." Tussman & tenBroek, *supra* note 118, at 1077. *See also* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[122]427 U.S. 307 (1976).

[123]*Id.* at 314.

[124]*Id.* In *Murgia*, a three-judge district court enjoined enforcement of a Massachusetts statute requiring a uniformed police officer to retire at age 50, holding that "a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest." 376 F. Supp. 753, 754 (D. Mass. 1974). A divided Supreme Court, applying a traditional rational basis test, held that the statute did not violate the equal protection clause of the fourteenth amendment. The Court agreed with the district court that a rational basis test was the proper standard of review but disagreed with the lower court's determination that the age 50 classification was not rationally related to furthering a legitimate state interest. *Id.* at 312. The majority found that the age 50 criterion was not wholly unrelated to the objective of the statute and, accordingly, upheld its enforcement. *Id.* at 314.

[125]*See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (rights of a uniquely private nature); Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by first amendment); Harper v. Board of Elections, 383 U.S. 663 (1966) (right to vote); Griffin v. Illinois, 351 U.S. 12 (1956) (rights with respect to criminal procedure); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to precreate). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969). Indeed, there is evidence that the Court has lost interest in recognizing further "fundamental" rights. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (rejecting the right to employment); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting education as a fundamental right).

[126]Classifications that have been held suspect include alienage, Graham v. Richard-

the strict scrutiny standard is applied. Under this test, no presumption of constitutionality is accorded the statute, and the burden rests with the government to demonstrate that a compelling state interest exists for drawing the classification[127] and that there are no reasonable means by which to achieve the state's goals that impose a lesser limitation on the rights of the group disadvantaged by the classification.[128] In this respect, it is especially noteworthy that if a statute or government action is subject to strict scrutiny, the statute or governmental action is nearly always struck down.[129]

C. Sex Discrimination and the Constitution—Rational Basis Plus?

The Supreme Court has indicated that when gender-based challenges are presented under the equal protection clause, a "middle-tier" test will usually be applied. Such was not always the case; the Court, until recently, applied the traditional rational basis standard and repeatedly sustained legislative classifications based solely upon sex.[130] Not infrequently, the sustained classifications were based upon stereotyped notions of the proper role of women in an employment setting.[131]

A break in this line of thought came in 1971 when the Supreme Court first invalidated a statute on grounds of sex discrimination. In *Reed v. Reed*,[132] the Court, employing what at that time appeared to be a traditional rational basis test,[133] struck down an Idaho statute

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son, 403 U.S. 365 (1971); race, McLaughlin v. Florida, 379 U.S. 184 (1964); and ancestry, Oyama v. California, 332 U.S. 633 (1948).

[127]*See e.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967) ("very heavy burden of justification" placed upon state); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("most rigid scrutiny").

[128]*See e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[129]*See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

[130]*See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (women not called for jury duty unless they were registered); Goesaert v. Cleary, 335 U.S. 464 (1948) (sustaining a Michigan statute that provided that no woman could obtain a bartender's license unless she was the wife or daughter of the male owner); Radice v. New York, 264 U.S. 292 (1924) (New York statute prohibiting night work by women in restaurants held valid); Muller v. Oregon, 208 U.S. 412 (1908) (upholding an Oregon statute that prohibited women from working in factory or laundry more than 10 hours per day).

[131]For example, in Muller v. Oregon, 208 U.S. 412, 421 (1908), Justice Brewer emphasized that it was obvious that a "woman's physical structure" placed her at a disadvantage in the "struggle for subsistence," and that, "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest." In addition, it was noted that "woman has always been dependent upon man." *Id.*

[132]404 U.S. 71 (1971).

[133]However, in Frontiero v. Richardson, 411 U.S. 677, 684 (1973), Justice Brennan characterized *Reed* as a "departure from 'traditional' rational-basis analysis with

that provided that when two individuals are otherwise equally entitled to appointment as an administrator of an estate, the male applicant should be prefered to the female.[134] The *Reed* Court made it clear that a sex-based classification must be reasonable and must rest upon distinguishing characteristics that have a fair and substantial relation to the object of the legislation.[135]

Decisions subsequent to *Reed* suggest that the Court may be subjecting sex-based classifications to a more critical examination than is usually applied in the traditional rational basis test. In the Term following *Reed*, the Court decided *Frontiero v. Richardson.*[136] Relying on the equal protection component of the fifth amendment, the Court invalidated congressional legislation relating to military pay that allowed a male member of the uniformed services to claim his wife as a dependent without any showing of such a fact but required a female member to show that her husband was in fact dependent on her before she could make such a claim. What is important in *Frontiero* is that four justices[137] joined in holding that

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respect to sex-based classifications." Justice Powell, concurring in Craig v. Boren, 429 U.S. 190, 210 (1976) (footnote omitted), stated: "*Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present."

[134]404 U.S. at 72-73. The Idaho statute established 11 classes of persons that were determinative of the relative rights of competing applicants for letters of administration. One of these classes consisted of "the father or mother," and another section of the statute provided that in such cases males were to be preferred over females. IDAHO CODE §§ 15-312, 15-314 (1948).

[135]404 U.S. at 76.

[136]411 U.S. 677 (1973).

[137]Justice Brennan wrote the majority opinion and was joined by Justices Douglas, White, and Marshall. Justice Stewart, citing *Reed*, concurred in the judgment, stating that the federal statute worked an invidious discrimination in violation of the Constitution. *Id.* at 691 (Stewart, J., concurring) (citing Reed v. Reed, 404 U.S. 71 (1971)). Justices Powell, Burger, and Blackmun, also citing *Reed*, concurred in judgment but refused to hold that all classifications based on sex are inherently suspect. Justice Powell noted that it was unnecessary in the case to make such a characterization with all of the far-reaching implications of declaring sex a suspect classification. Rather, the case should be decided on the authority of *Reed*. 411 U.S. at 692 (Powell, J., concurring) (citing Reed v. Reed, 404 U.S. 71 (1971)).

It is interesting that Justice Powell argued that sex should not be declared a suspect classification, since the proposed Equal Rights Amendment, if adopted, will resolve the substance of the question. 411 U.S. at 692 (Powell J., concurring). The Amendment, now before the states for ratification, provides:

> Section 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.
>
> Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Sec. 3. This amendment shall take effect two years after the date of ratification.

classifications based upon sex, like those based upon race, alienage, and national origin, are inherently suspect and must therefore by subjected to close judicial scrutiny.[138]

H.R. J. RES. 208 & S. J. RES. 9, 92d Cong., 1st Sess., 86 Stat. 1523 (1972).

The ERA's effect on employment has been the subject of much debate. *See, e.g.*, Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Hillman, *Sex and Employment Under the Equal Rights Amendment*, 67 NW. L. REV. 789 (1973); *Symposium—Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 215 (1971).

As stated by Brown and her colleagues:

> The fundamental legal principle underlying the Equal Rights Amendment . . . is that the law must deal with the particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex. This principle, however, does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. . . . So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence, such legislation does not, without more, violate the basic principle of the Equal Rights Amendment.

Brown, *supra* at 893. Thus, under the Equal Rights Amendment, legitimacy standards that effectively combine sanctions to women and not men who possess the status of "unwed parent" are arguably invalid under the Amendment. A priori, there are no unique physical characteristics of unwed pregnant women that would justify imposing sanctions (or witholding benefits) while unwed males who are also parents are not-similarly treated.

In this regard, Brown has noted:

> Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children. . . . A rule excluding single women who become pregnant would not thus be based on physical characteristics, but rather would rest on disapproval of extramarital pregnancy. Such standards must be applied equally to both sexes. Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wedlock would also be discharged. Even in this form such a rule would be suspect under the Amendment, because it would probably be enforced more frequently against women. A court will therefore be likely to strike down the rule despite the neutrality in its terms, because of its differential impact.

Id. at 975-76.

[138]Writing for the *Frontiero* plurality, Justice Brennan argued that the long and unfortunate history of sex discrimination was one factor warranting the treatment of sex as a suspect classification. Because both sex and race are immutable characteristics determined solely by accident of birth and because neither bears any sigificant relationship to the individual's ability to perform in or contribute to society, Brennan advocated that both classifications be subjected to strict scrutiny. Finally, even though the position of women in America has improved markedly, Brennan noted that women still face pervasive discrimination in educational institutions, in the job market, and in the political arena. 411 U.S. at 686.

Notwithstanding *Frontiero*, a majority of the Court has not declared sex a suspect classification.[139] But at the same time, the Court has not applied the traditional rational basis test to sex-based classifications; rather, the Court may be applying a "rational basis plus" standard when sex-based classifications are challenged under the equal protection clause.[140] For example, in *Craig v. Boren*,[141] the Court found that an Oklahoma law prohibiting the sale of 3.2% beer to males under the age of twenty-one and to females under the age of eighteen[142] denied eighteen- to twenty-year-old males equal protection. Reaffirming the proposition that statutory classifications that distinquish between males and females are subject to scrutiny under the equal protection clause,[143] the Court, citing *Reed*, stated: "To withstand constitutional challenge . . . classifications by gender must serve *important governmental objectives* and must be *substantially related to achievement of those objectives.*"[144]

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[139]Whether the similarities between sex and race classifications are sufficient to warrant classifying both as suspect has been the subject of much debate. *See, e.g., Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 n.61 (1969); Comment, *Are Sex-Based Classifications Constitutionally Suspect*, 66 NW. U.L. REV. 481 (1971).

In response to Justice Brennan, *see* note 138 *supra*, it has been argued that, unlike race, sex does not possess the qualities that have led the Court to apply strict scrutiny to classifications based on race, alienage, or national origin. *See* Brief for Appellees at 16, Reed v. Reed, 404 U.S. 71 (1971), *cited in* Frontiero v. Richardson, 411 U.S. at 683 nn.10 & 11. Racial classifications are suspect because minorities have been especially vulnerable to the attempts of the more powerful political forces seeking to deprive them of equal rights. *See* United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938). On the other hand, women are not so classified because they constitute a numerical majority and are not thereby disabled from exerting their political influence. In addition, sex-based classifications, unlike those of race, are not commonly perceived as implying a stigma of inferiority and do not have a disfavored status similar to that of race-type distinctions in constitutional history. *See* Brief for Appellees at 16, Frontiero v. Richardson, 411 U.S. 677 (1973). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (A suspect class is one that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

[140]*See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating under equal protection clause state statute extending majority status to males at age 21 and females at age 18); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (providing widows but not widowers with survivors' benefits while caring for children held violative of equal protection). *See also* the analysis in Geduldig v. Aiello, 417 U.S. 484 (1974) where the Court applied what appears to be a super-rational basis test in finding that the State of California did not violate equal protection in excluding pregnancy-type disabilities from a state disability program.

[141]429 U.S. 190 (1976).

[142]OKLA. STAT., tit. 37, §§ 241-245 (1958 & Supp. 1976).

[143]429 U.S. at 197.

[144]*Id.* (emphasis added). *See also* Califano v. Goldfarb, 430 U.S. 199 (1977), in which the Court reaffirmed this approach.

Justice Powell's concurring opinion in *Boren* is particularly noteworthy because he specifically recognized that the Court, while not treating sex as a suspect classification, nevertheless "subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present."[145] As stated by Justice Powell: "[C]andor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification."[146]

As suggested by Justice Powell, the significance of adopting a "rational basis plus" standard is that governmental action will be subjected to a closer degree of scrutiny when gender-based classifications are drawn. The great leeway granted to the legislature in drawing classifications under the traditional rational basis test[147] will not be similarly accorded under this approach. Although precise congruity between the classification and the legislative purpose will not be required, it seems clear that in order to withstand an equal protection challenge the sex-based classification must closely serve the legislative objective.[148] No longer will sex-related legislation be struck down only if the classification is "wholly unrelated to the objective of the statute"[149]—the standard applied under a traditional basis test.

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[145]429 U.S. at 210.

[146]*Id.* n.*.

[147]*See* text accompanying notes 120-124 *supra.*

[148]In Craig v. Boren, 429 U.S. 190 (1976), the State of Oklahoma offered considerable statistics in support of its argument that its gender-based drinking age statute (prohibiting males under the age of 21 from purchasing 3.2% beer, while the age limit for females was set at 18) was substantially related to its legislative objective. *Id.* at 200-01. Based on those statistics the district court, while noting that "the case is not free from doubt," Walker v. Hall, 399 F. Supp. 1304, 1314 (W.D. Okla. 1975), *rev'd sub nom.* Craig v. Boren, 429 U.S. 190 (1976), concluded that this statistical showing substantiated "a rational basis for the legislative judgment underlying the challenged classification." *Id.* at 1307.

The Supreme Court reversed, stating that the statistics "in our view cannot support the conclusion that the gender-based distinction closely serves to achieve . . .[the traffic safety] objective." 429 U.S. at 200. The Court stated: "While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device." *Id.* at 201. Indeed, Justice Stewart's concurring opinion characterized the gender-based disparity created by the statute as amounting to "total irrationality," *id.* at 215, a conclusion that is certainly questionable under a traditional rational basis test. It appears that the *Boren* Court was applying a "middle-tier" standard that is more exacting than the traditional test applied to social and economic regulation.

[149]Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316 (1976).

D. Sex Discrimination under Title VII and the Constitution—A Comparison

It is important to understand the differing concepts of discrimination under Title VII and the Constitution, for at times an individual may have a cause of action under both. As indicated above, after determining that a particular statute or other governmental action classifies or otherwise discriminates between two groups of individuals, the next step in an inquiry under the equal protection clause is to examine the nature of the classification. If the classification invades a "fundamental" right or discriminates against a "suspect" class, the strict scrutiny standard will be applied.[150] Otherwise, the government need only show that classification is justified by some rational basis. If the classification involves a gender-based distinction, a more stringent showing will be necessary than a mere rational basis.[151] However, unlike the equal protection clause, Title VII does not authorize any "rationality" test. Absent the BFOQ exception,[152] the statute represents a flat and absolute prohibition against all employment discrimination on the basis of race, color, sex, religion, and national origin.

In discussing the theories of finding discrimination under Title VII (disparate treatment, disparate impact, and conditions peculiar to female physiology), cases decided under a constitutional rationale frequently provide a reasoning that is applicable to, although not necessarily dispositive of, finding discrimination under Title VII. However, this is not to assert that the analysis for finding prohibited discrimination under the Constitution can be equated with that required under Title VII. As noted by the Supreme Court in *Washington v. Davis*,[153] constitutional standards for adjudicating claims of invidious discrimination are not identical to standards applicable under Title VII. The important point here is that with respect to understanding the theories of discrimination the rationale provided by courts in constitutional cases may indeed be instructive in formulating theories of discrimination under Title VII.[154] A priori, the statutory and constitutional analysis for finding *sex* discrimination would appear to be different, especially in light of a 1976

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[150]*See* notes 125-129 *supra* and accompanying text.

[151]*See* notes 130-144 *supra* and accompanying text.

[152]*See* note 19 *supra*.

[153]426 U.S. 229, 238-39 (1976).

[154]Accordingly, as a first step in finding "discrimination" under Title VII, the courts often cite selected constitutional cases as illustrative of a disparate treatment or impact theory. This is not to assert that these cases are necessarily good law (especially after Washington v. Davis, 426 U.S. 229 (1976)) or are even dispositive of the discrimination issue.

Supreme Court decision dealing with standards for adjudicating claims of race discrimination. In *Washington v. Davis*,[155] the Supreme Court held that a personnel test that excluded four times more black than white applicants for police officer positions with the District of Columbia was not violative of equal protection solely by reason of its racially disproportionate impact. Justice White, writing for the majority,[156] stated: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."[157] Under *Washington*, disproportionate impact is not irrelevant, but, standing alone, it is not the sole criterion for finding invidious racial discrimination so as to trigger the rule that suspect classifications are to be subjected to strict scrutiny. Rather, a racially discriminatory purpose must be demonstrated in order to make out a cause of action under the Constitution.[158]

With respect to the issue of discriminatory purpose, Justice White noted that the discriminatory racial purpose need not necessarily "be express or appear on the face of the statute,"[159] for "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another."[160] Once a prima facie case is made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have the monochromatic result."[161]

Title VII does not require proof of discriminatory purpose; instead, the mere showing of disproportionate impact alone has been held to establish a prima facie case in Title VII review.[162] Arguably, the effect of this exclusion is to mandate a more rigorous standard under the statute than the Constitution. Focusing on the distinction, Justice White, again writing for the majority in *Washington*, noted that Title VII required a "more rigorous standard" and "more probing judicial review."[163] Accordingly, one would expect a different approach in applying constitutional standards under the equal protection clause than in cases arising under Title VII.

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[155]*Id.*

[156]Justice White wrote the opinion of the Court to which Justice Stevens filed a concurring opinion. Justices Brennan and Marshall filed a dissenting opinion.

[157]426 U.S. at 239.

[158]*Id.*

[159]*Id.* at 241.

[160]*Id.* at 242.

[161]*Id.* at 241 (quoting Alexander v. Louisiana, 405 U.S. 625 (1972)).

[162]Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[163]426 U.S. at 247.

However, as suggested by the district court in *Blake v. City of Los Angeles*,[164] if the application of Title VII standards to local and state agencies brings into play a standard more stringent than that appropriate under the equal protection clause of the fourteenth amendment,[165] serious constitutional questions arise as to the validity of that standard. In considering the proper scope of Title VII as applied to state and local governments, the *Blake* court stated:

> If Congress is seen, as in *Fitzpatrick v. Bitzer*, to have extended Title VII in implementation of the fourteenth amendment, no more stringent standard would be appropriate than that for which the fourteenth amendment calls, i.e., intent. If Congress is alternatively assumed to have acted in the exercise of its power to regulate interstate commerce, one comes to the Supreme Court's decision in *National League of Cities v. Usery*, in which the Court struck down an attempt by Congress to regulate employment decisions of state and local governments under the commerce clause powers of Congress. Without the commerce clause as an appropriate alternative basis, it would appear that Congress's extension of Title VII to state and local governments cannot supplant the intent standard of *Washington v. Davis*, with the more stringent impact standard of *Griggs v. Duke Power Co.*[166]

The district court accordingly applied the *Washington* intent standard in an action brought against the city of Los Angeles under Title VII, citing the holding of the Supreme Court in *Fitzpatrick v. Bitzer*,[167] which held that the authority for the extension of Title VII coverage to state and local governments in the 1972 amendments was the fourteenth amendment and reasoned that no more stringent a standard would be appropriate than that for which the fourteenth amendment calls.[168] As of this writing, the problem is still unresolved.

Illustrative of the analysis taken by the Court where a charge of sex discrimination is at issue is *General Electric Corp. v. Gilbert*,[169]

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[164]15 Fair Empl. Prac. Cas. 76 (C.D. Cal. 1977).

[165]*See* Washington v. Davis, 426 U.S. 229 (1976).

[166]15 Fair Empl. Prac. Cas. at 83 (quoting Scott v. City of Anniston, 430 F. Supp. 508, 515 (N.D. Ala. 1977)) (citations omitted).

[167]427 U.S. 445 (1976).

[168]15 Fair Empl. Prac. Cas. at 83. In this respect it is noteworthy that all courts have not adhered to the reasoning in *Blake*. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (*Washington* intent standard not applied to the state of Alabama in a sex discrimination case argued under Title VII); Scott v. City of Anniston, 430 F. Supp. 508 (N.D. Ala. 1977) (showing of discriminatory purpose, and not just discriminatory impact, necessary to establish prima facie case of Title VII violation by state and local government); Harrington v. Vandalia-Butler Bd. of Educ., 418 F. Supp. 603 (S.D. Ohio 1976) (no requirement of proving intentional acts of discrimination under Title VII even when Title VII claim is asserted against local government).

[169]429 U.S. 125 (1976). *See* discussion in notes 82-84 *supra* and accompanying text.

in which the Court held that it was not a violation of Title VII for an employer to exclude pregnancy disability from coverage of its general disability benefits plan. What is noteworthy in the *Gilbert* decision is the reasoning and analysis employed by the Court in arriving at the result. Justice Rehnquist, writing for the majority, applied an equal protection analysis in evaluating a claim of sex discrimination under Title VII. While recognizing that "there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination that have evolved from court decisions construing the Equal Protection Clause,"[170] Rehnquist nevertheless stated that those decisions "are a useful starting point."[171] He reasoned that with respect to defining the term "discrimination," the constitutional cases "afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar from the concerns which Congress manifested in enacting Title VII."[172] He then concluded that the Court's decision in *Geduldig v. Aiello*[173] was "quite relevant"[174] and "precisely in point"[175] in determining whether the pregnancy exclusion in *Gilbert* was discriminatory under Title VII.

As stated by Justices Brennan and Marshall in their dissent,[176] the implication that the fourteenth amendment standard of discrimination is identical to the Title VII standard is unacceptable, especially in light of a long line of cases and the central holding of *Washington v. Davis*. Equating the analysis of discrimination under the equal protection clause with that required under Title VII effectively changes the focus and meaning of discrimination under Title VII. To satisfy constitutional equal protection standards, discrimination need only be "rationally supportable" (or perhaps "super-rationally supportable" in the case where sex is at issue). Title VII authorizes no "rationality" test but rather prohibits all sex-based discrimination, absent a BFOQ. As indicated by one commentator, what Justice Rehnquist accomplished in *Gilbert* was "the introduction of some of the necessary, but unfortunate uncertainties of Constitutional adjudication into decisions which could and should be made straight forwardly under the statutory language without regard to the Fourteenth Amendment."[177] Fortunately, the analysis

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[170] *Id.* at 133.

[171] *Id.*

[172] *Id.*

[173] 417 U.S. 484 (1974) (California's exclusion of pregnancy-related benefits from a state program did not amount to gender-based discrimination under the equal protection clause).

[174] 429 U.S. at 133.

[175] *Id.* at 136.

[176] *Id.* at 146, 153-55 (Brennan & Marshall, JJ., dissenting).

[177] Edwards, *Labor Law Decisions of the Supreme Court during 1976-77: The Coming of Age of the "Burger Court,"* 95 LAB. REL. REP. (BNA) 329, 336 (1977).

employed by Justice Rehnquist in *Gilbert* has not been applied in two recent Title VII cases where gender-based discrimination was at issue.[178]

The *Gilbert* decision aside, Title VII and the equal protection clause require different formats for analyzing claims of gender-based discrimination. In addition, and analogously to claims of race discrimination, *Washington v. Davis* would appear to mandate that the plaintiff, in order to successfully assert a sex discrimination claim under the equal protection clause, must demonstrate that a "sexually discriminatory purpose" exists. Not surprisingly, the few courts that have considered the issue have invariably required a showing of "intent" when a gender-based claim is asserted under the Constitution.[179]

E. Sex Discrimination and the Constitution—The Unwed Parent Cases

When considering the issue of public employers' promulgation of rules and regulations relating to the employment of unwed parents, two major issues arise. The first issue is whether a public employer possesses the power to enact a morality standard for its employees. If so, the second issue is whether the power has been exercised consistently with the mandates of the due process and equal protection clauses. The courts considering the validity of enacting standards of morality have consistently held that the state may indeed enact rules prescribing the moral standards of its employees.[180] However, this is not to imply that legitimacy-of-birth standards are therefore permissible, since constitutional problems have inevitably arisen when legitimacy standards have been enacted and applied.

In *Andrews v. Drew Municipal Separate School District*,[181] a case subsequent to *Washington v. Davis*, a district court applied a

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[178]Nashville Gas Co. v. Satty, 98 S. Ct. 347 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977).

[179]*See* Harless v. Duck, 14 Fair Empl. Prac. Cas. 1616 (N.D. Ohio 1977) (official act not violative of § 1983 solely because it has a disproportionate impact regardless of whether it reflects a discriminatory purpose; however, evidence demonstrated that employment classification system could have no reasonable purpose other than to intentionally limit the employment opportunities available to women); United States v. City of Chicago, 14 Fair Empl. Prac. Cas. 462 (7th Cir. 1977) (evidence of intention must be established for prima facie case under Constitution; case remanded for determination whether *Washington* intent requirement for claims of racial discrimination also applies to claims of sexual discrimination); Scott v. City of Anniston, 430 F. Supp. 508 (N.D. Ala. 1977) (*Washington* intent standard applicable to all civil rights litigation brought under fourteenth amendment).

[180]*See, e.g.*, Beilan v. Board of Pub. Educ., 357 U.S. 399, 405, 408-09 (1958); Andrews v. Drew Mun. Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975). *See also Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1096-97 (1968).

[181]371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975).

"mere rational basis" test in holding that a school board's policy against unwed parents constituted an impermissible discriminatory classification based upon sex, both inherently and as applied. *Andrews* involved two females who were otherwise qualified to be employed as teachers' aids—indeed, one had already been hired, while the second was an applicant—but were denied employment or discharged pursuant to a policy of not employing unwed parents.[182] The school board had based the offensive policy upon the following unsupported opinions: (1) That the bearing of an illegitimate child is conclusive proof of the parent's immorality or bad moral character, resulting in an improper teacher role model after whom students might pattern their lives; and (2) that the employment of a parent of an illegitimate child for instructional purposes materially contributes to the problem of schoolgirl pregnancies.[183] In addition, the defendant school board argued that when a single woman engages in premarital sexual relations, becomes pregnant, and begets an illegitimate child, she voluntarily places herself in a classification that necessarily cannot include men. Accordingly, they urged, a policy that treats unwed females differently is justified.[184]

The district court found that the policy was "constitutionally defective under the traditional, and most lenient, standard of equal protection" and had "no rational relation to the objectives ostensibly sought to be achieved by the school officials."[185] The poiicy's unconstitutionality stemmed from its conclusive presumption of a parent's immorality from the single fact of a child born out of wedlock.[186] Moreover, the court stated that even if a rational basis

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[182]In effect, the policy was directed solely at employees who were parents of illegitimate children. The rule would presumably not apply to all unwed parents, *i.e.*, divorced parents, a parent whose spouse is deceased, or a single parent with an adopted child. 371 F. Supp. at 29 n.3. The rule's applicability to particular school employees, such as bus drivers, maids, and janitors, was uncertain. *Id.* at 30 n.8.

[183]*Id.* at 30.

[184]*Id.* at 36.

[185]*Id.* at 31.

[186]*Id.* at 33. The court stated:

> By the rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus, no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. . . . The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth.

Id.

existed between the policy and the legitimate educational objectives of the school, the policy created an inherently suspect sex-based classification—single women—that could not survive strict scrutiny. The court noted that although the rule professed to be neutral by proscribing the employment of any parent, male or female, of an illegitimate child, such a rule could not possibly be applied in a neutral fashion. Indeed, under the school's policy, only unmarried females had been barred from employment due to the greater visibility of their out-of-wedlock children and pregnancies.[187] The district court also rejected the school board's argument regarding the voluntariness of the mother's out-of-wedlock classification. Relying on the *Frontiero* Court's refusal to consider a married female officer's "voluntary" decision to marry, the *Andrews* court stated that the voluntariness of inclusion in a given class was not an issue.[188]

It is important to stress that neither the *Andrews* district court nor the affirming court of appeals questioned the legitimacy of the school board's stated objectives—the creation of a scholastic environment conducive to the moral and intellectual development of the students, as well as the minimization of the number of schoolgirl pregnancies. The issue was not whether the school district possessed the power to formulate policies relating to the moral development of the students, but rather whether those policies advanced the objectives of the school board in a manner consistent with considerations of due process and equal protection. In this respect, the court of appeals held that the state's creation of an irrebuttable presumption that an unwed parent is unfit for employment is violative of the equal protection clause as well as the due process clause.[189] Moreover, the Supreme Court stated in *Schware v. Board of Bar Examiners*[190] that if a state designates some form of moral character as a criterion for bestowing a benefit or imposing a burden, it must be based on *present* moral character. Thus, unless the presumed fact of *present* immorality necessarily flows form the status of being an unwed parent, the due process clause will be violated.[191] As characterized by the district court in *Andrews*: "[S]uch a presumption is not only patently absurd, it is mischievous and prejudicial, requiring those who administer the policy to 'investigate' the parental status of school employees and prospective applicants."[192]

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[187] *Id.* at 35.
[188] *Id.* at 36 (citing Frontiero v. Richardson, 411 U.S. 677, 688 (1973)).
[189] 507 F.2d at 614.
[190] 353 U.S. 232 (1957).
[191] 507 F.2d at 614.
[192] 371 F. Supp. at 34.

The morality issue was argued in *Flores v. Secretary of Defense.*[193] In *Flores*, a female member of the United States Navy commenced an action seeking to prevent her own discharge for an unwed pregnancy on moral grounds. Despite her excellent military record, the Navy argued that her retention would necessarily imply that unwed pregnancies are condoned, which, in turn, would eventually result in a dilution of the moral standards set for women in the Navy.[194] The crux of the plaintiff's case was that the Navy took into consideration an unwed pregnancy in determining retention of a women but never took into account a man's actions in fathering children out of wedlock in determining a man's retention in the service. Thus, a different moral standard was applied to women than was applied to men, arguably creating an unjustifiable discrimination under the equal protection standard of the due process clause of the fifth amendment. Although the district court never rendered a definitive holding on the constitutional issue,[195] the court indicated in dictum that such "dual" standards of morality would not be permissible.[196]

F. Summary

The rulings in *Andrews* and *Flores*, as well as the Supreme Court's pronouncement in *Schware*, indicate that a government may not summarily withhold benefits or impose burdens *merely* because a woman is an unwed parent and is therefore considered immoral. Although never faced with the precise issue of excluding unwed parents as teachers or students,[197] the Supreme Court reiterated the

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[193]355 F. Supp. 93 (N.D. Fla. 1973).

[194]*Id.* at 94.

[195]After the suit was commenced, the Navy revised its policies so as to exclude moral character from consideration in determining retention of personnel in the service, thereby mooting the constitutional issue.

[196]355 F. Supp. at 96. *See also* Reinhardt v. Board of Educ., 6 Fair Empl. Prac. Cas. 235 (Ill. Cir. Ct. 1973), *aff'd* 19 Ill. App. 3d 481, 311 N.E.2d 710 (1974), *vacated for lack of administrative findings*, 61 Ill. 2d 101, 329 N.E.2d 218 (1975). In *Reinhardt*, the Illinois Circuit Court held that being unmarried and pregnant would not constitute "immorality" as a matter of law so as to sustain the suspension and firing of a teacher. 6 Fair Empl. Prac. Cas. at 237. Additionally, the court held that the equal protection clause of the Illinois Constitution would be violated if unmarried female teachers could be dismissed from their positions while male teachers who might be responsible for causing such pregnancies might not be dismissed. *Id.* a 238 (citing ILL. CONST. art. 1, § 18).

[197]The issue of a school district's authority to exclude a student from either class or extracurricular activities because of pregnancy or marital status has been a subject of much interest. *See generally* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969); Comment, *Marriage, Pregnancy, and the Right to go to School*, 50 TEX. L. REV. 1196 (1972). Perry v. Grenada Mun. Separate School Dist., 300

constitutional impermissibility of using presumptions that offend traditional due process and equal protection standards in *Stanley v. Illinois*.[198] Under Illinois law, children of unmarried fathers, upon the death of their mother, were declared wards of the state without any hearing on parental fitness and without proof of neglect. The statute conclusively presumed that an unmarried father was an unsuitable and neglectful parent, and such a presumption was declared violative of the principles of both due process and equal protection in *Stanley*.[199]

Again, nothing in the Constitution forbids the formulation of reasonable standards of morality to advance a legitimate governmental interest. However, these standards may not include criteria based on stereotypical notions that an unwed parent is per se immoral. Nor may the standards result in a form of de jure or de facto discrimination. In this regard, it is noteworthy that under the standard mandated by *Washington v. Davis* for finding constitutional discrimination,[200] *Andrews* and *Flores* may still be good law. The "intent" standard of *Washington* may indeed be inferred when, as in *Flores*, a morality standard is only applied to women. Furthermore, even when an "unwed parent" rule is applied equally across the board, a form of de facto discrimination results that may still be redressed. As Justice White noted in *Washington*: "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one . . . [class] than another."[201] The disproportionate effect of a policy of excluding unwed parents from governmental benefits, or alternatively imposing burdens because of such status, is clear. As stated by Justice Burger in *Stanley*: "In almost all cases,

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F. Supp. 748 (N.D. Miss. 1969), is representative of a majority of the holdings dealing with unwed mothers. Following the reasoning of the Supreme Court's decision in *Schware*, the *Perry* court held that a woman could not be excluded from school for the sole reason that she was an unwed mother. The court noted that lack of "moral character" is a legitimate reason for excluding a child from public education; however, considerations under the equal protection clause require that such a child must be readmitted after giving birth to the child, unless the school authorities establish that she is so deficient in moral character that her presence in the school will "taint" the education of the other students. *Id.* at 751 (citing Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)).

[198]405 U.S. 645 (1972). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory maternity leave policy requiring pregnant school teachers to take maternity leave at a specified length of time before delivey was declared violative of due process clause of fourteenth amendment, since it established an irrebuttable presumption concerning physical capacity of teachers to work after a given stage in pregnancy).

[199]405 U.S. at 656-58.

[200]*See* notes 150-158 *supra* and accompanying text.

[201]426 U.S. at 242.

the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate."[202] Rarely, if ever, will an unwed father announce his status, especially when the consequences are the loss of benefits or the imposition of a burden. And indeed, the *Stanley* court never found a case in which a "neutral" policy was actually applied to an unwed father.

Once the intent standard of *Washington* is satisfied so as to find gender-based discrimination under the "rational basis plus" or "middle-tier" approach enunciated in *Craig v. Boren*,[203] the state will have the burden of demonstrating that the classification serves important governmental objectives and is substantially related to achievement of those objectives.[204] It is difficult to imagine a situation where a legitimacy-of-birth criterion serves an important governmental interest and, at the same time, is substantially related to the achievement of that interest. For example, the school district in *Andrews* defended its employment policy by arguing that the presence of unwed mothers in teaching positions would materially contribute to schoolgirl pregnancies. Absent any evidence, other than speculation and assertions of mere opinion, the court had little trouble in ruling that such a classification was totally without any rational basis in fact.[205]

As an alternative to attempting to justify an unwed parent rule based on a *Craig*-type analysis—*i.e.*, requiring evidence that the rule is in fact serving an important governmental objective and is substantially related to achievement of those objectives—the argument has been made that since no person has a constitutional right to public employment in the first instance, a government can subject employment to a legitimacy-of-birth criterion.[206] Cases suggest, however, that such an argument will not withstand constitutional challenge. In *Slochower v. Board of Higher Education*,[207] the Supreme Court observed that "to state that a person does not have

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[202]405 U.S. 645, 665 (1972) (Burger, J., dissenting).

[203]429 U.S. 190 (1976).

[204]*Id.* at 211 (Stevens, J., concurring). *See* notes 143-144 *supra* and accompanying text.

[205]507 F.2d at 617.

[206]Wardlaw v. Austin Independent School Dist., 10 Fair Empl. Prac. Cas. 892, 895 (W.D. Tex. 1975). The leading case establishing the "privilege" doctrine for public employees is Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951) (government employment not "liberty" or "property" for purposes of the due process clause). *See* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 7.11-.13 (2d ed. 1959); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1077-81 (1968).

[207]350 U.S. 551 (1956).

a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by proper authorities."[208] Likewise, in *Keyishian v. Board of Regents*,[209] the Court stated that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[210] In general, the authority of the "privilege doctrine" is waning, and it should not be allowed to justify the denial of benefits based on a capricious standard that can only effectively be applied to women.

IV. Conclusion

An individual discharged or otherwise discriminated against pursuant to a legitimacy-of-birth standard has various available options of redress. Under Title VII, discrimination in employment on the basis of sex is explicitly prohibited. The format required by the statute places the initial burden of demonstrating that a particular employment practice is discriminatory on the plaintiff. Thereafter, the burden shifts to the employer to demonstrate that the discriminatory practice is justified under the bona fide occupational qualification (BFOQ) exception. A plaintiff alleging discrimination under Title VII can readily demonstrate that a legitimacy policy is nothing more than a form of gender-based discrimination prohibited by the statute. Clearly the brunt of such a policy will be placed soley upon unmarried females. The male who sires an illegitimate child invariably escapes sanction. Accordingly, even if an employer can demonstrate that a legitimacy policy is applicable to males and females alike, in absence of evidence that males and females are equally affected once the policy is applied, plaintiff should have little difficulty sustaining a claim of sex-based discrimination. Moreover, the current standards as applied to a claim for justification under the BFOQ exception will favor the unwed plaintiff, since the exception has been given an extremely narrow construction by the EEOC and courts.

The nearly consistent rejection by the EEOC and the courts of an illegitimacy standard as an employment criterion should not be taken to imply that an employer may never legally discharge or refuse to hire an unwed pregnant female. Title VII essentially requires that if an employer is going to apply a legitimacy standard, it must be equally applied and equally effective with respect to both male and female unwed parents. A priori, such a policy will,

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[208] *Id.* at 555.

[209] 385 U.S. 589 (1967).

[210] *Id.* at 605-06.

however, have the certain and foreseeable impact of depriving females, but not similarly situated males, of employment opportunities. Still, an employer may indeed have a valid business interest in maintaining some public image or some standard of morality so as to warrant the use of a legitimacy standard under the BFOQ exception. However, it seems clear from the cases that a mere claim of a morality or public image interest alone will not withstand scrutiny under the current tests applied to the BFOQ defense. An employer will not be permitted to rely upon the BFOQ exception merely by citing the stereotyped characterization that unwed pregnant females as a class are immoral or detrimental to the employer's public image. Absent a BFOQ, Title VII mandates that individuals must be considered on the basis of their individual capacities to perform a specified job and not on any general stereotyped characterizations of morality as related to a legitimacy standard.

Likewise, under the equal protection clause, a plaintiff challenging a legitimacy standard as discriminatory will initially have to establish that the resulting classification is a gender-based classification. Under the standard mandated by the Supreme Court in *Washington v. Davis*, plaintiff must demonstrate that a discriminatory purpose exists in order to find discrimination in the first instance. In this regard, plaintiff should have little difficulty since an impermissible discriminatory purpose may properly be inferred from the mere enactment of a legitimacy criterion. Invariably, such a policy adversely affects females who are unwed parents while their male counterparts escape sanction.

Once plaintiff has established that the classification resulting from a legitimacy policy is a gender-based classification, under the standard applied in *Craig v. Boren*,[211] the state will have the burden of demonstrating that the classification serves important governmental interests and is substantially related to achievement of those objectives. The state may have legitimate interests in promulgating and enforcing some standard of morality. However, the cases are clear that if a state designates some form of morality as a criterion for bestowing a benefit or imposing a burden, it must be based on *present* moral character and not upon any stereotyped presumption that an unwed parent is per se immoral. Moreover, the cases indicate that the resulting standards must be equally applicable, both in terms and in effect, to males and females alike. Accordingly, under the current tests applied by the courts under Title VII and the Constitution, the use of legitimacy-of-birth standards are severely, if not altogether, limited.

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[211]429 U.S. 190 (1976).