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LAGGING BEHIND THE TIMES:
PARENTHOOD, CUSTODY, AND GENDER BIAS
IN THE FAMILY COURT

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LAGGING BEHIND THE TIMES: PARENTHOOD, CUSTODY, AND GENDER BIAS IN THE FAMILY COURT*

CYNTHIA A. MCNEELY**

I. INTRODUCTION	892
II. THE DEVELOPMENT OF AMERICAN GENDER STEREOTYPES AS APPLIED TO MOTHER-FATHER ROLES	896
A. From Colonial America to the Civil War	896
B. The Industrial Revolution	898
C. The 1920s to the 1970s.....	900
D. The 1970s to the 1990s.....	904
III. THE END RESULT: CULTURAL GENDER STEREOTYPES AND MOTHER-FATHER ROLES TODAY	906
A. Lenore Weitzman and the “73% Study”.....	906
B. The Massachusetts Supreme Judicial Court’s Gender Bias Study of the Court System in Massachusetts.....	908
C. Discriminating Against Fathers as Men	912
D. Protecting the “Weaker Sex”: The State as Mr. Right.....	915
E. The Court and the Legislature: The Battle to Control Custody Considerations.....	918
F. When Fathers Are Marginalized	921
IV. THE FOURTEENTH AMENDMENT.....	923
A. The Equal Protection Clause and Gender Discrimination.....	923
1. Intent to Discriminate Is Required.....	926
B. Substantive Due Process: Interference With Fundamental Rights	928
1. The Parent-Child Relationship as a Fundamental Right.....	929
C. Procedural Due Process Requires a Fundamentally Fair Hearing.....	931
V. FLORIDA’S CHILD CUSTODY STATUTE	932
VI. THE FOURTEENTH AMENDMENT AND CHILD CUSTODY.....	934
A. Challenges From Divorcing or Formerly Married Fathers	934
B. Challenges From Unwed Fathers.....	936
1. Equal Protection Challenges in General	936
2. Challenges to Facially Discriminatory Statutes	937
VII. CHALLENGING GENDER BIAS IN CUSTODIAL DECISIONS.....	941
A. Bringing an Equal Protection Challenge	941
B. Bringing a Substantive Due Process Challenge.....	946
C. Challenging Fundamentally Unfair Hearings.....	946
VIII. RECOMMENDATIONS	949
A. End “Selective Discrimination”	949
B. Implement “Courtwatch” Programs to Empirically Examine Contested Custody Decisions.....	950
C. Implement a Statutory Presumption in Favor of Joint Physical or Rotating Custody.....	951
D. Require Judges to Make Specific Findings of Fact When Determining Custody.....	952

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** The author dedicates this Comment to her children, Jade and Jazlyn: “Thou art my child, I love thee best, but could not love thee half as much, loved I not all the rest.” Membership Credo, Fla. Center for Children & Youth, Tallahassee, Fla. The author also thanks her spouse, Rob, for his unconditional love, support, and friendship.

E. Require Clerks of the Circuit Courts to Record Which Parent Receives Primary Residential Custody	952
F. Revise Child Support Guidelines	953
G. Implement True Parity in the Workplace	955
IX. CONCLUSION.....	956

“When by birth a child is subject to a father it is for the general interest of children and really for the interest of the particular infant that the Court should not, except in extreme cases interfere with the discretion of the father but leave to him the responsibility by exercising that power which nature has given by the birth of the child.”¹

In separate Broward cases, one deadbeat dad was found hiding behind a shower curtain; another in a bedroom closet.

In Daytona Beach, a helicopter and police canines helped track down a father who had fled into woods behind his home when authorities arrived. In Pensacola, one deadbeat dad eluded authorities at his doorstep, only to be captured at the state tax office as he was trying to argue his way out of payments.

“We stalled him until the deputies came to arrest him,” [a Florida Department of Revenue spokeswoman] said. “He even tried to run away as he was led out.”

....

“The difference with this roundup is that it was statewide, and merely the first in what will be many Florida-wide efforts,” [the spokeswoman] said.²

I. INTRODUCTION

Society’s view of fathers has changed dramatically since the days when courts rarely intervened between the father-child relationship. The transformation can be traced to several sources, most notably the Industrial Revolution, which required fathers to remove their labor from the home to a remote facility.³ Mothers, viewed as physically and temperamentally weaker, were deemed incapable of adapting to the rigorous demands of the workplace and were singularly charged with the management of the domestic sphere.⁴ The

1. LORNA MCKEE & MARGARET O’BRIEN EDS., *THE FATHER FIGURE* 28 (1982) (quoting *In Re Agar-Ellis*, 24 Ch. D. 317 (1883) (England)).

2. David Beard, *Statewide Sweep Jails Hundreds of Deadbeat Parents*, FT. LAUD. SUN SENT., Mar. 25, 1995, at B1.

3. See DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 12-18 (1995).

4. See Mimi Abramovitz, *Regulating the Lives of Women*, in *POVERTY LAW: THEORY AND PRACTICE* 28, 28-29 (Julie A. Nice & Louise G. Trubek eds., 1994).

feminization of the homefront resulted in mothers replacing fathers as the “primary and irreplaceable caregivers” in both “law and custom,” effectively leading to a “progressive loss of substance of the father’s authority and a diminution of his power in the family and over the family.”⁵ The stereotypical images of fathers as familial breadwinners and mothers as domestic caretakers and primary childrearers were born.⁶

With the reemergence of feminism in the early 1970s,⁷ many women realized that they needed a man about as much as “a fish needs a bicycle.”⁸ Justifiably, the male-female relationship was long overdue for a reconfiguration. However, in the quest to throw off the shackles that commonly constrained women in marriage, women, the state, and society overlooked the reality that children needed—and still need—the love and support of their fathers about as much as a fish needs water.⁹ Only lately have we begun to understand that children suffer serious negative consequences when fathers are marginalized.¹⁰

Despite continuous efforts from the feminist and fathers’ rights movements to modify these stereotypical images, they still persist

5. BLANKENHORN, *supra* note 3, at 13 (footnote omitted); see also ALLAN C. CARLSON, *FROM COTTAGE TO WORK STATION: THE FAMILY’S SEARCH FOR SOCIAL HARMONY IN THE INDUSTRIAL AGE* 4 (1993) (describing the “great divorce of labor from the home” as “one of the defining factors in American domestic life since the 1840s”). This Comment in no way suggests that fathers should have authoritarian power over the family today.

6. See, e.g., RICHARD A. WARSHAK, *THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE* 29 (1992).

7. In the United States, the women’s movement first emerged in the mid-nineteenth century. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 48 (1981) (discussing the 1848 Seneca Falls women’s rights convention, led by Elizabeth Cady Stanton and Susan B. Anthony). A societal backlash ensued that caused the movement to subside until it was resurrected in the early 1910s as part of the suffrage movement. See *id.* at 49. The National Woman’s Party organized in 1916, followed by a nationwide Equal Rights Amendment campaign and calls for equal pay and better work conditions. See *id.* Consciousness raising groups and birth control advocates also emerged, women won the right to vote, and some states passed equal pay laws. See *id.* at 49-50. However, before long, society, led by religious groups and the media, reared its oppressive head and through the use of smear tactics and other tyrannical measures, succeeded in instigating a sharp decline in the women’s rights movement. See *id.* The women’s rights movement did not forcefully reemerge until the early 1970s. See *id.* at 55.

8. Linda Chavez, “I Want You:” Uncle Sam as Mr. Right?, 19 *HARV. J.L. & PUB. POL’Y* 739, 741 (1996) (quoting Gloria Steinem).

9. See, e.g., JAMES A. LEVINE WITH EDWARD W. PITT, *NEW EXPECTATIONS: COMMUNITY STRATEGIES FOR RESPONSIBLE FATHERHOOD* 26-27 (1995) (explaining that nurturing father-involvement during infancy dramatically improves a child’s cognitive, intellectual, and social development throughout childhood); see also WARSHAK, *supra* note 6, at 46, 47 (noting that researchers have concluded that “the best way to predict who will become an empathic adult is to measure the amount of time spent with the father while growing up,” and that boys with fathers at home demonstrate higher levels of “moral maturity”—understanding right versus wrong behavior—than boys from father-absent homes); *infra* Part III.F.

10. See *infra* Part III.F.

today.¹¹ In no greater sphere do these outdated gender roles persist than in our nation's family court system.¹² There, the state frequently not only denies the capability and desire of many men to participate actively and meaningfully in the care of their children,¹³ but also perpetuates the subjugation of women as mothers by deeming them weak and incapable of survival without the support of a man.¹⁴ This state-instituted romantic paternalization of mothers, combined with the narrowed view of the role of fathers, is largely responsible for the wholesale destruction of the post-divorce, father-child relationship.¹⁵ Consequently, the state creates increased psychological, educational, behavioral, and health disorders for children, and crime and violence for society.¹⁶

Paradoxically, society maintains its insistence that it wants to promote women's independence by setting them free of the constraints of a bad marriage through state-sanctioned marital dissolu-

11. See *infra* Parts III.B-F.

12. See *infra* text accompanying note 108 (noting that mothers receive primary residential custody of children approximately 90% of the time).

13. See *infra* note 108 and accompanying text; Part VI.

14. See, e.g., Anne P. Mitchell, Address at the 1995 Convention of the National Congress of Fathers and Children (visited Mar. 19, 1998) <<http://www.vix.com/free/testimony/nccfspeech.html>> [hereinafter Mitchell Speech]. Ms. Mitchell noted that:

the vocal feminist front, in its current incarnation, has no desire for there to be even a semblance of equality in this [family law] system, and is in fact coercing today's woman out of the workforce and back into the nursery.

. . . .

Of course, this can only mean that women must be primary caretakers, which in turn means that men must be their financial benefactors.

Or, put more simply: women get the kids, men get to pay.

One would think, given the countless contemporary women who have proven that women are in fact capable of sustaining a career as well as having children, that to define women back into dependency on the very actors who have for generations oppressed them, namely men and the state, would be nothing short of heresy.

Id. Notably, Ms. Mitchell is a divorced, custodial mother. See Anne P. Mitchell, Testimony Before the California Focus on Fathers Summit (visited Mar. 19, 1998) <<http://www.vix.com/free/testimony/summitapm.html>> [hereinafter Mitchell Testimony].

15. See, e.g., Michael Stephens, Joint Custody, *THE IRISH TIMES*, July 25, 1996, at 13:

It is morally wrong that when . . . marriages end, the father's role in the lives of his children is reduced to such an extent that he becomes, at best, an avuncular figure on the periphery of his family. The destruction of the father/children relationship does not only apply in exceptional circumstances, but is standard practice when custody disputes are referred to courts for settlement.

Not only must divorced fathers frequently contend with state-induced parental alienation, but some are also confronted with parental alienation spurred by the child's mother. See Michael R. Walsh & J. Michael Bone, Parental Alienation Syndrome: An Age Old Custody Problem, *FLA. B.J.*, June 1997, at 93 (describing parental alienation syndrome, first identified by Richard A. Gardner, as one parent "brainwashing" the child to reject the other parent); see, e.g., Justin Catanoso, Visitation Case Raises Questions About Child Rights, *GREENSBORO NEWS & REC.*, July 13, 1997, at A1 (noting that the child psychologist found that the mother influenced the fourteen-year-old child into rejecting her father).

16. See *THE NATIONAL FATHERHOOD INITIATIVE, FATHER FACTS* (1995) [hereinafter *FATHER FACTS*]; *infra* Part III.F.

tion,¹⁷ while at the same time operating a system that expects, permits, and maintains the outdated role of women as the weaker and dependent sex, primarily responsible for caregiving and incapable of economic self-sufficiency.¹⁸

The state's treatment of divorced fathers has become a self-fulfilling prophecy. By sending a distinct message to divorced fathers that they are not essential to the raising of children beyond supplying a percentage of their paychecks to the mother of their children, and perhaps a couple of hours a week of "visitation" with their children, the state has encouraged divorced fathers to abandon true fatherhood.¹⁹ Yet, society looks on with bewilderment and disdain when divorced fathers fade from a meaningful relationship with their children.²⁰ No one should be surprised that the situation has been reduced to cornering some non-custodial fathers behind shower curtains and chasing them with police dogs and helicopters.²¹

Part II of this Comment traces the origin of gender stereotypes and their incorporation into family law. Part III disputes recent studies used to argue that courts do not favor mothers over fathers in deciding child custody. It also examines current gender-based cultural stereotypes and the state's continued overwhelming placement of children with mothers when awarding primary residential custody, often despite statutes specifically requiring equal consideration of both parents when making custody determinations. Part IV provides an overview of the Fourteenth Amendment, especially regard-

17. See FALUDI, *supra* note 7, at 26 ("[I]n national surveys, less than a third of divorced men say [they sought] divorce, while women report they . . . actively [sought] divorce 55 to 66 percent of the time.").

18. See Mitchell Speech, *supra* note 14.

19. See Mitchell Testimony, *supra* note 14; Testimony of Cynthia L. Ewing, Senior Policy Analyst, Children's Rights Council, Before the U.S. House of Representatives Committee on Ways and Means Subcommittee on Human Resources (Feb. 6, 1995), <<http://www.peak.org/~jedwards/crc.htm>> [hereinafter Ewing Testimony]:

First, as a direct result of our country's archaic child custody laws, judicial practices and bureaucratic policies, millions of fit, loving, and dedicated parents have been literally pushed away from their children. The misguided notion that upon divorce or separation of their parents, children need only ONE parent, permeates our country's judiciary, legislative bodies and social service agencies. Because of this attitude, we typically assign complete ownership and control of these children to ONE parent – the custodial parent. We relegate the OTHER parent, regardless of his/her fitness or demonstrated history of responsibility, to the status of "visitor" and "non-custodian," whose primary function is to send money. The first disincentive to being a financially responsible parent is provided at the onset of this process. Stripping a parent of his/her parental rights, referring to him/her in denigrating terms, and treating him/her as only a financial resource is a highly effective DEMOTIVATOR! Congress must recognize that parental rights and responsibilities go hand in hand and that any policy it formulates or supports which diminishes the role of either parent will be counterproductive to its child support and child welfare initiatives.

20. See Mitchell Testimony, *supra* note 14.

21. See Beard, *supra* note 2.

ing parent-child relationships, and Part V reviews Florida's child custody statute. Part VI reviews cases brought by fathers claiming violations of the Fourteenth Amendment. Part VII discusses challenges to the practice of predominantly awarding mothers primary residential custody of children, and whether the practice violates a father's constitutional right to equal consideration as the primary residential custodian, his equally fundamental right to raise his children, and his protected right to a fundamentally fair hearing. Part VIII recommends solutions to genuinely provide for the best interests of children in the post-divorce state by rectifying the disparate treatment of fathers in family court, and of mothers in the workplace. This Comment concludes that in the best interests of children, courts must truly consider both parents equally when making custody determinations, and should seek to maximize the active and substantial involvement of both fits parents in the lives of their children.

II. THE DEVELOPMENT OF AMERICAN GENDER STEREOTYPES AS APPLIED TO MOTHER-FATHER ROLES

Men, more than women, are culture-made. Fatherhood, in particular, is . . . a "metaphysical idea"—an imperfect cultural improvisation designed not to express maleness but to socialize it. It derives less from sexual embodiment than from a social imperative: the need to obligate men to their offspring. Consequently, ideas about masculinity and fatherhood are inextricably rooted in social functions.²²

A. From Colonial America to the Civil War

The newly forming American society imported English practices regarding marriage and children, giving fathers an "absolute right to custody."²³ As part of the marriage contract, women were legally deemed the property of men.²⁴ "As Blackstone put it, when a man and a woman married they acquired a 'unity of person.' This 'unity' was interpreted to provide the husband with extensive rights to his wife's property, and to deny the married woman the power to contract or engage in litigation."²⁵ In exchange for denying women personal

22. BLANKENHORN, *supra* note 3, at 17.

23. JEAN R. STERNLIGHT, A BRIEF HISTORY OF FAMILY LAW IN FLORIDA AND THE UNITED STATES: INSIGHTS REGARDING AN ATTEMPT TO SIMPLIFY DIVORCE PROCEDURES 60 (1995) (on file with author).

24. See Katherine M. Schelong, Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking, 78 MARQ. L. REV. 79, 86 (1994).

25. STERNLIGHT, *supra* note 23, at 59 (citations omitted).

rights, women were provided with "male protection" and financial support.²⁶

The patriarchal American society mirrored the English practice of designating the father as the natural protector of children because he had the ability to provide for their financial support.²⁷ Women were seen as incapable of handling legal or financial matters and were believed to lack the necessary sophistication and skill with which to properly school children in practical, worldly matters.²⁸ American courts adopted these perceptions; thus, in the rare divorce case, fathers were awarded custody of children.²⁹ Courts, during a time when the culture was agrarian and children worked in the fields, upheld this action by finding that the father's financial support of his children entitled him to the benefits of their labor.³⁰ Thus, in the extremely rare circumstance that a father did not receive custody, he was not required to financially support his children because he would not benefit from their labor.³¹

By the mid-1800s, society began to perceive children as needing special consideration and treatment.³² In furtherance of this perception, Congress implemented the Talfourd Act of 1839³³ to legislate the presumption that courts should award custody of children under age seven to the mother.³⁴ This presumption became known as the "tender-years doctrine," which legalized for the first time the belief that mothers were better suited to raise children than fathers.³⁵ Courts interpreted the Talfourd Act to be a temporary guideline, and many children were returned to their father's custody once they reached the age of four or five.³⁶ The Talfourd Act, and the belief that fathers should ultimately have custody of their children, prevailed in family courts throughout the mid-1800s.

By the late 1800s, fathers began working in droves away from the home in the factories and plants of the Industrial Revolution.³⁷ This unprecedented and significant change facilitated a changed cultural

26. See WARSHAK, *supra* note 6, at 28-29.

27. See *id.*

28. See *id.*

29. See BLANKENHORN, *supra* note 3, at 13.

30. See WARSHAK, *supra* note 6, at 29; Dorothy Miller, Women and Social Welfare, in *POVERTY LAW: THEORY AND PRACTICE* 358, 359 (Julie A. Nice & Louise G. Trubek eds., 1994).

31. See WARSHAK, *supra* note 6, at 29.

32. See Carol Sanger, Separating From Children, 96 *COLUM. L. REV.* 375, 402-04 (1996); WARSHAK, *supra* note 6, at 29.

33. 2 & 3 *Vict. Stat.*, ch. 54 (1839).

34. See WARSHAK, *supra* note 6, at 29.

35. See *id.*

36. See *id.*

37. See *id.* at 31 ("Fathers were increasingly employed away from home. And mothers could no longer participate in the material support of the family while staying at home, as in preindustrial times."); see also Abramovitz, *supra* note 4, at 28-29.

expectation of the role of fathers. Developing family law followed suit.

B. The Industrial Revolution

Post-Civil War America ushered in the age of the Industrial Revolution and showed the door to the agrarian culture. Because fathers usually provided the family's sole income through their employment away from the home, this absence advanced the fathers' "long march from the center to the periphery of domestic life."³⁸

Simultaneously, mothers were charged with the role of chief child caretakers and home managers largely because of their cultural and legal exclusion from the workplace.³⁹ Although society sentimentalized motherhood, the task was nonetheless arduous, as "[m]others bore the weight of this exhausting assignment. The project required them to 'maintain a constant moral vigilance over their progeny from infancy until that critical period when, in early adulthood, they left the parental home.' Moreover, maternal satisfaction in the enterprise was not part of the calculation."⁴⁰ Ministers, politicians, journalists, and popular culture warned mothers of the consequences of failing to put children first: "The care of children requires a great many sacrifices, and a great deal of self-denial, but the woman who is not willing to sacrifice a good deal in such a cause, does not deserve to be a mother."⁴¹ Thus, the mother was seen as "[p]ious, inferior, subordinate, and confined to the home The terms of women's role in the new industrial family ethic elevated marriage, motherhood, homemaking, and the overseeing of family life to new ideological heights."⁴²

Experts believe that while no absolute reason can be pinpointed as the cause of the shift toward an indelible preference for mother-custody, the Industrial Revolution figured prominently in this transformation.⁴³ Requiring fathers to work away from the home ensured the diminution of their role in the family. As the family unit experienced physical separation like never before, the role of fathers as protectors and guides for their children began to diminish.⁴⁴ This cul-

38. BLANKENHORN, *supra* note 3, at 14 (noting that child rearing manuals, which had previously been addressed primarily to fathers, now addressed mothers and lamented the decreasing role of the father in the family unit).

39. See Abramovitz, *supra* note 4, at 29.

40. Sanger, *supra* note 32, at 401 (footnote omitted).

41. *Id.*

42. Abramovitz, *supra* note 4, at 31 (noting that this expectation applied only to upper and middle class women; poor and minority women were not expected to remain in the home, but instead worked due to necessity, many as domestics in the homes of more financially secure white women); see also Sanger, *supra* note 32, at 389.

43. See WARSHAK, *supra* note 6, at 30.

44. See *id.* at 31.

tural change, coupled with decades of the tender years doctrine, resulted in an upward extension of the age of “tender years.”⁴⁵ Eventually, “the tender-years presumption became the rationale for awarding custody of children of all ages to the mother on a permanent basis.”⁴⁶

By the late nineteenth and early twentieth centuries, “the legal pendulum swung away from fathers” in custody cases.⁴⁷ Moreover, a cultural reverence for motherhood began creeping into judicial opinions in child custody disputes. The Washington Supreme Court observed in 1916:

Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and moreover, a child needs a mother’s care even more than a father’s. For these reasons courts are loathe to deprive the mother of the custody of her children, and will not do so unless it be shown clearly that she is so far an unfit and improper person to be intrusted with such custody as to endanger the welfare of the children.⁴⁸

In 1918, the North Dakota Supreme Court found motherhood to be “the most sacred ties of nature” and declined to disrupt those ties by awarding a father custody only “in extreme cases.”⁴⁹

A dissenting justice of the Mississippi Supreme Court was so taken aback by a now-unusual award of custody to the father that he wrote:

The natural mother love of a mother for her child is such, in my opinion, that no other person on earth can administer to the care and welfare of her child the same as she can and would. There is peculiarly no limit to the love and affection of a mother for her child; and I believe that, even though she be handicapped with poverty and human weaknesses, her care and protection of her offspring is more naturally efficient than that of any other person who might be more fortunately situated and endowed. It is harsh and cruel to forcibly separate a mother from her child, and it should not be done, in my judgment, except in certain cases, where there can be no reasonable doubt that the welfare of the child requires such separation.⁵⁰

Such strong societally created sentiments convinced many fathers to forego custody challenges.⁵¹ Furthermore, the inception of child labor laws provided a disincentive for some fathers to seek custody be-

45. See *id.*

46. *Id.*

47. *Id.*

48. *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916).

49. *Random v. Random*, 170 N.W. 313, 314 (N.D. 1918).

50. *Duncan v. Duncan*, 80 So. 697, 703 (Miss. 1919) (Holden, J., dissenting).

51. See WARSHAK, *supra* note 6, at 32.

cause children could not provide income to their father to compensate for childrearing costs.⁵²

Thus, in but a few generations and driven largely by cultural and economic determinations of male and female roles, custody of America's children when their parents divorced changed from decisions based on oppressive economic realities to ones based on oppressive social mythologies. As America continued into the twentieth century, the reverence for motherhood over fatherhood deepened.

C. The 1920s to the 1970s

Along with a fundamental modification of the economic structure and a consequential change in the location where fathers performed their labor, the Industrial Age ushered in an integral transformation in the way mothers and fathers viewed themselves, and how society viewed them. Prior to the Industrial Age, men primarily received self-validation through the successful raising of skilled, morally sound children.⁵³ The transition to non-agrarian work encouraged men to seek external validation to confirm their maleness.⁵⁴ By the 1920s, economic ambition and professional achievement replaced effective fatherhood as the correct yardsticks by which to measure a good father.⁵⁵ Consequently, fathers toiled in remote locations not only to support their families but to receive societal validation as good fathers.⁵⁶ Woe to the father who was incapable of financially supporting his family, because he would be deemed a failure not only as a father, but as a man.⁵⁷ While society permitted fathers economic independence, it ensured that divorce courts stereotypically viewed fathers as devoid of ability and interest in actively raising children, thereby handicapping men in custody considerations and depriving children of meaningful relationships with their fathers.⁵⁸

While men were programmed to equate their external economic productivity with their maleness and value as fathers, middle class women were programmed by society to accept subservient roles and, to be viewed as good mothers, to stay at home to care for their children.⁵⁹ Devoting one's life to childrearing ensured external societal

52. See *id.* at 30.

53. See BLANKENHORN, *supra* note 3, at 15.

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.*

59. See FALUDI, *supra* note 7, at 52. The only period prior to the 1970s during which women were told by society that they could work while simultaneously having a family occurred during World War II, when women were needed in the workplace. See *id.* After the war, the media bombarded women with the message that careers were "unattractive" and good mothers remained at home. See *id.* Society ensured that women chose childrearing over work by valuing female-identified employment (e.g., teaching, secretarial, nursing,

validation and, subsequently, personal confirmation of female self-identity.⁶⁰ Consequently, although women were denied economic independence in the work force, they held greater leverage in custodial decisions,⁶¹ resulting in financial awards in the form of child support to ensure that they remained out of the employment arena. While effective fatherhood ceased to be an indicator of the validity of one's maleness, effective motherhood continued to serve as the standard by which a woman's worth was measured.⁶² Woe to the mother who did not choose to selflessly and altruistically place her children above all else, for she would be deemed a failure as a mother, and as a woman.⁶³

These societally imposed roles ensured the continued economic subjugation of women by requiring their dependence on men for economic survival, following divorce in the forms of alimony and child support, as social etiquette demanded that mothers not work.⁶⁴ Courts promoted society's prescribed stereotype of the women who did work as weak and in need of state-instituted protection by upholding workplace legislation designed to restrict women from working beyond a certain amount of hours, frequently in industries deemed unhealthy to their alleged gentler constitutions, or from working in particular jobs.⁶⁵ In custody decisions, courts continued to

and child care positions) less than male-identified jobs through the assignment of lower wages. See Teresa L. Amott & Julie A. Matthaei, *The Transformation of Women's Wage Work*, in *POVERTY LAW: THEORY AND PRACTICE* 304, 306-09, 322-24 (Julie A. Nice & Louise G. Trubek eds., 1994).

60. See Abramovitz, *supra* note 4, at 31.

61. See WARREN FARRELL, *THE MYTH OF MALE POWER* 46 (1993) (noting that "discrimination in favor of men at work meant discrimination in favor of their wives at home").

62. Significantly, however, effective maternity was seen as less valuable than material-based successes such as those obtainable only through access to the workplace, and therefore only available to males. See *id.*

63. See Abramovitz, *supra* note 4, at 31.

64. See *id.* The contemporary cultural subjugation of women as home-bound childrears—whether or not they want that role—is illustrated by the deliberate closure of a church-run child care facility in Berryville, Arkansas:

In a letter that followed [the announcement of the closure], the church said that while it was sensitive to the plight of single parents, it could not continue the center because its existence encouraged mothers to work outside the home.

"God intended for the home to be the center of a mother's world," the church said. "In Titus 2:5, women are instructed to be 'discreet, chaste, keepers at home, good and obedient to their own husbands . . .'"

Paisley Dodds, *Day Care Closes to Keep Moms at Home*, *TALL DEM.*, Apr. 5, 1997, at A3.

65. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 417 (1908) (challenging an Oregon statute that forbid the employment of women in any mechanical establishment, factory, or laundry for more than 10 hours per day). The Court stated:

[t]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring,

promote the image of the mother as venerated and worthy of sentimental safeguarding. Mothers were called “God’s own institution for the rearing and upbringing of the child.”⁶⁶ One court beamed:

[I]n her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental⁶⁷

One court went so far as to poeticize the mother-child relationship by noting that “[t]here is but a twilight zone between a mother’s love and the atmosphere of heaven.”⁶⁸

By implementing stereotypical ideals of women into their decisions, courts furthered “romantic paternalism”⁶⁹ and the “motherhood mystique.”⁷⁰ Consequently, by the 1920s, mother-custody preference was firmly rooted in the family court system.⁷¹

In furtherance of these ideals, psychological studies were conducted that purportedly legitimized the special role of the mother in custody decisions.⁷² The father’s role was not similarly examined, and

the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421. During the same era, the Supreme Court struck down similar legislation designed primarily to protect men. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a New York law capping bakery employee work hours at 60 per week as inconsistent with the liberty to contract).

66. *Hines v. Hines*, 185 N.W. 91, 92 (Iowa 1921).

67. *Jenkins v. Jenkins*, 181 N.W. 826, 827 (Wis. 1921).

68. *Tuter v. Tuter*, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938).

69. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (“[Sex discrimination] was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”).

70. WARSHAK, *supra* note 6, at 36 (defining the mystique in terms similar to romantic paternalism).

71. See BLANKENHORN, *supra* note 3, at 68.

72. See *id.* at 19. A prime example is a 1951 study commissioned by the World Health Organization and conducted by John Bowlby, a preeminent psychoanalyst. Bowlby set up a study to follow the effects of maternal deprivation. Paternal deprivation was not studied. Yet, Bowlby felt confident enough to report that “the child’s relation to his mother . . . is without doubt in ordinary circumstances, by far his most important relationship.” Bowlby’s findings were widely implemented by child care institutions and reinforced court findings that children should be kept with mothers at all costs. Consequently, to reduce the toddler-mother “separation anxiety” as reported by Bowlby, psychologists recommended that fathers be denied overnight visitation. Studies such as these have been incorporated into our family court system and have become unquestioned aspects of our family law. See WARSHAK, *supra* note 6, at 35-36; see also Martha J. Cox & Blair Paley, *Families as Systems*, 48 ANN. REV. PSYCHOL. 243, 244 (1997) (noting that child development studies have focused on the role of the mother-child relationship); *infra* text accompanying note 162 (noting that as late as 1996, the guidelines in Florida’s Twelfth Judicial Circuit provided that a noncustodial parent—almost always the father—could not have overnight visitation with a child until the child turned two years old).

thus the definition of fatherhood became diffused and unspecified.⁷³ With greater attention focused on the stereotypical role of mothers, and less attention on fathers, fathers became even more culturally unimportant and relegated to an insignificant and secondary role in the family unit.⁷⁴

Eventually, the tender years doctrine was replaced by the “best interests of the child” standard.⁷⁵ This standard purported to focus attention away from the gender attributes of the parents and toward the custody situation deemed best for the child. In application, however, there was little difference in the two standards because of the comparatively low expectations regarding the role of fathers in child rearing and the nearly fanatical mythologies surrounding women’s roles in child care. This result should not have been surprising: a test focusing on a child’s “best” interests is an inherently subjective test that will naturally include, both consciously and subconsciously, a judge’s understanding of the contemporary culture’s determination of “best.”⁷⁶ For example, while stating that the “welfare of the children is the controlling consideration” in custody litigation, the Florida Supreme Court in 1945 held that “[o]rdinarily, in the case of children of tender years such welfare is not best promoted . . . by taking them from the mother, unless it be shown that she is not a fit and proper person to have them.”⁷⁷ Thus, the “best interests of the children” standard continued to assume it was best for young children to remain with their mothers upon divorce.

Another cultural perversion of the best interests standard arose from the “all things being equal” standard. Courts faced with equally skilled and loving parents continued to firmly apply the motherhood

73. See LEONARD BENSON, *FATHERHOOD: A SOCIOLOGICAL PERSPECTIVE* 12 (1968) (“Father is not a very impressive figure in American life, and, in slighting him, American social theorists may simply confirm the fact that the behavioral sciences can be influenced by cultural predispositions.”).

74. See BLANKENHORN, *supra* note 3, at 19.

75. See, e.g., *Green v. Green*, 137 Fla. 359, 361, 188 So. 355, 356 (1939) (“We are committed to the doctrine that the welfare of the child is the principal feature in determining custody, and that a very large discretion is allowed the chancellor in this respect.”). The Green court added that “[n]ature has prepared a mother to bear and rear her young and to perform many services for them and to give them many attentions for which the father is not equipped.” See *id.*, 188 So. at 356.

76. See, e.g., Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 56 (1994) (“Absent some empirical basis for a ‘best interests’ determination, after all, the court’s decision must manifest little more than idiosyncratic and subjective conclusions about what living arrangements are ‘best’ for children.”).

77. *Jones v. Jones*, 156 Fla. 524, 527, 23 So. 2d 623, 625 (1945) (citations omitted). This concept still exists in Florida’s family court system today; Florida’s Fifth District Court of Appeal recently noted that “there remains a temptation for many judges to consider the right to custody as the mother’s to lose and unless her fitness is legitimately challenged, the father’s right of equal consideration is often ignored.” *Ayyash v. Ayyash*, 700 So. 2d 752, 754 n.3 (Fla. 5th DCA 1997).

mystique to custody decisions. For example, while giving lip service to the best interests of the children, the Alabama Supreme Court in 1930 concluded: "Other things being equal, this court by numerous precedents holds the mother of infants of tender years best fitted to bestow the motherly affection, care, companionship, and early training suited to their needs."⁷⁸

Ironically, while courts devalued the importance of fathers upon divorce—or followed the cultural devaluation of them—some social policies recognized the critical importance of fathers. In the early years of World War II, for example, fathers were the last men to be conscripted for military service.⁷⁹ Moreover, early television programs portrayed the father as—in addition to out of the home during the day—omniscient.⁸⁰ A cultural schizophrenia of fatherhood developed: married fathers were revered even though they were mostly absent and disengaged from meaningful childrearing while financially supporting the family; unmarried fathers, however, were positively disposable.⁸¹ That stereotype invaded the family court system, and continues today.

D. The 1970s to the 1990s

The 1970s phase of the women's movement is generally credited with bringing feminist ideals to the forefront of the American culture.⁸² As women increased their consciousness of feminist issues, the attendant change in traditional mother roles forced many fathers to reevaluate their positions within the family. Many women decided that they would rather work outside the home than perform domestic labor that forced them to be financially dependent on their husbands.⁸³ Simultaneously, many women were forced into the workplace due to a change in household economics caused by "the collapse of the fathers' ability to support their families solely on their earn-

78. *Gayle v. Gayle*, 125 So. 638, 639 (Ala. 1930). Note how the traits of "affection, care, companionship, and early training" were defined as "motherly."

79. See BLANKENHORN, *supra* note 3, at 51. Fathers with children born on or before the attack on Pearl Harbor on December 7, 1941, were not conscripted into military service. The ban lasted until October 1943, when the requirement for more troops carried the day over father deferments. Even then, however, fathers were treated special, as the director of the Selective Service promised to order local draft boards to "first exhaust the pool of available unmarried men, and next the pool of married men without children, before fathers would be called." *Id.* at 50-52 (citation omitted).

80. Television programs such as *The Adventures of Ozzie and Harriet*, *Father Knows Best*, and *Leave It to Beaver* are prime examples.

81. For an excellent overview on the special custodial issues of unwed fathers, see Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV 391 (1998).

82. See FALUDI, *supra* note 7, at 55.

83. See *id.* at 53; ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA* 222 (1993).

ings.”⁸⁴ As women began to free themselves from stereotypical, secondary, and dependent roles within the family economic structure—whether because of family economics or feminism⁸⁵—men increasingly found themselves judicially “liberated” from the family as women sought divorce in record numbers.⁸⁶ This increase in divorce promoted the marginalization of fathers far more extensively than the Industrial Revolution because divorce literally severed the father from the home on a permanent basis. Many fathers resigned themselves to continuing their role primarily as financial providers for their children and their now ex-wives, and adjusted to seeing their children approximately four days each month.⁸⁷

Confronted with the realization that it was very difficult to balance work with parenting, some still-married mothers demanded that fathers share more substantively in child care.⁸⁸ The National Organization for Women (NOW) issued a press release that stated child care was not singularly a maternal responsibility.⁸⁹ However, this call for sharing parental responsibility did not always include divorced fathers, as a national study indicated that 40% of custodial mothers admitted that they had refused to allow fathers to exercise visitation as a retributive measure, while 20% believed that fathers should be totally cut out of the lives of their children and sought to achieve such an end.⁹⁰ Rarely did courts intervene to enforce visitation.⁹¹

Because they were excised from their roles as family breadwinners and “heads of households,” many fathers were forced to seek a

84. GRISWOLD, *supra* note 83, at 222.

85. See *id.* at 237, 245 (“Changes in the household economy and the reemergence of feminism have been the two most critical forces changing fatherhood.”).

86. See FALUDI, *supra* note 7, at 97.

87. Every other weekend visitation arrangements were—and remain—fairly common. See, e.g., *Russenberger v. Russenberger*, 654 So. 2d 207, 218 (Fla. 1st DCA 1995), *aff’d* 669 So. 2d 1044 (Fla. 1996) (upholding the imposition of a “liberal and reasonable” visitation schedule of every other weekend, noting that such arrangement was the lower court’s “standard visitation schedule”).

88. See GRISWOLD, *supra* note 83, at 245.

89. See *id.*

90. See *id.* at 262.

91. Responding to visitation interference problems, the Florida Legislature enacted the Visitation Rights Enforcement Act of 1996, providing judges various discretionary options to enforce improperly denied court-ordered visitation and requiring them to order make-up visitation. See Visitation Rights Enforcement Act of 1996, ch. 96-183, § 5, 1996 Fla. Laws 454, 456 (codified at FLA. STAT. § 61.13(4)(c) (1997)). The Legislature intended that the law:

(b) Discourage custodial parents from improperly denying court-ordered visitation and . . . encourage such custodial parents to allow the noncustodial parent or grandparents to make up any visitation which has been denied, without court intervention.

(c) Indicate the clear intent that the Legislature does not support the power of a custodial parent to improperly deny court-ordered visitation.

Id. at § 2(1)(b)-(c), 1996 Fla. Laws at 454.

redefinition of self-identity. Fathers struggled to understand the societal message that they were still perceived as providers yet without the full-time family and attendant benefits. Frustrated and confused by state relegation to an even-more-undefined existence, some divorced fathers instead chose to cut off all contact with their children rather than deal with the pain of being alienated from them.⁹² Like women before them, some formed support groups to deal with the bitterness and anger, and to analyze mixed cultural messages of what their proper roles were to be.⁹³ Many decided that the traditional father roles taught to them by their fathers were no longer valid in an era of rampant divorce. Some realized that society, particularly divorce courts, nonetheless compelled them to remain in the outdated role as aloof financial caretakers, and they began to question and confront this gender bias.

III. THE END RESULT: CULTURAL GENDER STEREOTYPES AND MOTHER-FATHER ROLES TODAY

As the twentieth century concludes, this country seems no closer to resolving child custody issues free of gender bias than it did in the days of the 1800s when fathers automatically received custody. Despite more than 150 years of evidence that custody decisions have been based largely on prevailing social and cultural roles and mandates for men and women, child custody in America today continues to be decided with only lip service to the holistic needs of children. Unfortunately, the child custody debate is hampered by a second layer of gender bias: gender-biased, results-oriented studies. Rather than contributing to the debate about how best to provide for children of divorce or never-married parents, these studies seek to preserve the status quo by denying the existence of gender bias in the first place or finding that gender bias in family courts is a uniquely female dilemma.

A. Lenore Weitzman and the “73% Study”

The classic example of such a study is the now-discredited work of sociologist Lenore Weitzman.⁹⁴ In 1985, Weitzman, reported that women suffered a 73% drop in their standard of living following divorce while men experienced a 42% increase in theirs.⁹⁵ Her findings were trumpeted in the news media and various publications as proof that divorce laws actually favored men and that more economic pro-

92. See GRISWOLD, *supra* note 83, at 268.

93. See *id.* at 261-62.

94. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

95. See FALUDI, *supra* note 7, at 20.

tections had to be given to women of divorce.⁹⁶ The problem was that Weitzman's numbers were woefully inaccurate, a conclusion shared by independent researchers, feminist researchers, and, eventually, even Weitzman herself.

For example, as recounted by feminist author Susan Faludi, Weitzman purported to base her study on a methodology advanced by Saul Hoffman, an economist at the University of Delaware, and Greg Duncan, a social scientist.⁹⁷ Upon learning of Weitzman's claims, Hoffman and Duncan attempted to contact her to discuss the discrepancies in their own findings that, using the same methodology, post-divorce women suffered a much smaller and temporary decline in their standard of living of 30%.⁹⁸ The two also found that divorced women's standards of living actually rose within five years to a figure higher than that obtained while married to their former husbands.⁹⁹ After sidestepping Hoffman and Duncan for more than four years, Weitzman finally supplied her data to them, but the data were disorganized and unreviewable.¹⁰⁰

Accordingly, Hoffman and Duncan ran the data supplied by Weitzman in her book, and they still received a figure closer to their much lower number.¹⁰¹ When they published their findings demonstrating that the Weitzman figures were "almost certainly in error," "suspiciously large," and inconsistent with her own information, this news was hardly reported by the news media at all.¹⁰² Even as late as 1996, despite the study's refutation, the erroneous figures were still being incorporated into public policy.¹⁰³

The U.S. Census Bureau later confirmed in a study that Weitzman's 73% number was wrong and inconsistent with her own information.¹⁰⁴ Eventually, Weitzman herself acknowledged her study was erroneous.¹⁰⁵

Yet the damage was done. Many policy makers and judges failed to recognize the clear error of Weitzman's work and conclusions; this failure, in retrospect, made sense: her study told them what they wanted to hear. She confirmed the prevailing cultural bias that

96. See *id.* at 19-20; Associated Press, *Huge Gap Reported in Post-Divorce Standard of Living a Mistake* (May 16, 1996) <http://www2.nando.net/newsroom/ntn/nation/051696/nation2_5387.html> (noting references to the study in 175 news stories, 348 social science articles, 250 law review articles, 24 appeals courts and Supreme Court cases, and even in President Clinton's 1996 budget) [hereinafter *Huge Gap Mistake*].

97. See FALUDI, *supra* note 7, at 21.

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.* at 22.

102. *Id.*

103. See *Huge Gap Mistake*, *supra* note 96.

104. See FALUDI, *supra* note 7, at 22.

105. See *Huge Gap Mistake*, *supra* note 96.

women were the “weaker sex” and, accordingly, in need of paternalistic government intervention and protection. She also confirmed the prevailing cultural bias that men did not need such protection. This attitude, demonstrated here in economic considerations, likewise prevails in custody considerations. A 1989 study conducted by the Massachusetts Supreme Judicial Court, which incorporated some of Weitzman’s findings, is a prime example.

B. The Massachusetts Supreme Judicial Court’s Gender Bias Study of the Court System in Massachusetts

Although allegedly implemented “to determine the extent, nature, and consequences of gender bias in the judiciary and to make remedial recommendations to promote the fair and equal treatment of men and women,”¹⁰⁶ the 1989 Gender Bias Study of the Court System in Massachusetts is a prime example of a results-oriented study ironically reeking of gender bias.¹⁰⁷ Despite evidence demonstrating that mothers receive primary residential custody of children approximately 90% of the time that custody is first determined by the court,¹⁰⁸ this study offered the following remarkable conclusion to demonstrate that gender bias against fathers in child custody determinations was a myth, unworthy of further study or policy changes: “[F]athers who actively seek custody obtain either primary or joint physical custody over 70% of the time.”¹⁰⁹ This conclusion is often cited to discredit continuing claims by fathers and fathers’ rights organizations of gender bias in child custody matters.¹¹⁰ An analysis of

106. MASSACHUSETTS SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS (1989), reprinted in 24 NEW. ENG. L. REV. 745, 745 (1990) [hereinafter MASSACHUSETTS STUDY].

107. See, e.g., *id.* at 746 (noting that “women face discriminatory attitudes and actions” regarding child custody, but failing to recognize that men face discriminatory attitudes and actions regarding child custody); *id.* at 748, 830 (reporting that “perceptions of gender bias may discourage fathers from seeking custody and stereotypes about fathers may sometimes affect case outcomes,” but failing to examine either the perceptions or the stereotypes and how they affect fathers so that, by their own data, 93.4% of the time mothers receive primary residential custody); *id.* at 829 (suggesting that it is appropriate for mothers to overwhelmingly receive custody because of, in part, “the unequal sacrifice of earning potential these women make in order to be primary caretakers,” yet failing to examine gender bias against men who are culturally forced into the “provider” role).

108. See, e.g., 134 CONG. REC. S10896-01 (daily ed. Aug. 4, 1988); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 155-56 (1989); Stephen J. Bahr et al., Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?, 28 FAM. L.Q. 247, 255 (1994) (“Some have argued that the number of fathers gaining sole custody has increased in recent years but these data indicate that only a small percentage of fathers are awarded sole custody while mothers continue to be awarded sole custody in a large majority of custody cases.” (footnote omitted)).

109. MASSACHUSETTS STUDY, *supra* note 106, at 830.

110. See Krista Carpenter, Comment, Why Are Mothers Still Losing: An Analysis of Gender Bias in Child Custody Determinations, 1996 DET. C. L. REV. 33, 41 (1996) (noting that fathers “are successful seventy percent of the time” when they seek custody); see also

the methodology underlying this conclusion, however, demonstrates fundamental flaws that seem to confirm a results-oriented analysis.¹¹¹

First, the study's methodology in the area of child custody was entirely subjective; that is, it was based on interviews rather than hard data from court files.¹¹² Second, the study dodged the hard questions of gender bias it purported to address. For example:

In most cases, mothers get primary physical custody of children following divorce. In general, this pattern does not reflect judicial gender bias, but the agreement of the parties and the fact that in most families mothers have been the primary caretakers of children. In some cases, however, perceptions of gender bias may discourage fathers from seeking custody, and stereotypes about fathers may affect case outcomes.¹¹³

Joan Zorza, *Protecting the Children in Custody Disputes: When One Parent Abuses the Other*, CLEARINGHOUSE REV., Apr. 1996, at 1113, 1117 ("Despite men's claims that fathers are discriminated against in custody disputes, in actuality fathers who fight for custody in America win sole or at least joint custody in 70 percent of these contests." (Note how the receipt of joint custody is referred to as a "win" for fathers.))

111. This conclusion of a flawed analysis should not be surprising, given the study's statement of motivations on this issue: "Our work in the subcommittee studying family law issues was motivated in part by the growing statistical evidence that women suffer tremendous negative economic consequences following the dissolution of a marriage." MASSACHUSETTS STUDY, *supra* note 106, at 762 (citing, in part, the Weitzman study, discussed *supra* in Part III.A). From this premise sprang the following results-oriented examinations:

While committee members realize that the negative consequences of divorce are felt by both husband and wife, the task before the Committee was to examine whether the consequences of divorce have a disproportionately negative impact on either men or women. Members of the Subcommittee on Gender and Economics examined court practices regarding custody, child support, alimony, and property division to isolate patterns of behavior that disadvantage women and to examine the results of this behavior on the economic status of women.

Id. at 763 (first emphasis in original; others added).

Lacking from the study was any objective analysis to determine whether the fundamental premise of women suffering "tremendous negative economic consequences" from divorce was true. Also lacking was any objective analysis to isolate patterns of behavior that disadvantaged men regarding their roles with and access to their children.

112. The study reported sending surveys to family law attorneys, general attorneys, and probate judges. See *id.* at 826. The study also convened focus groups, took testimony, and interviewed attorneys. See *id.* In other words, in an effort to confirm or refute anecdotal evidence that fathers suffered gender bias in family courts regarding child custody determinations, the study sought and compiled only more anecdotal evidence.

113. *Id.* at 825. In a statement remarkable for its lack of objective or follow-up analysis, the study reported, in a footnote, that "[d]espite the absence of statutory or decisional authority for a maternal preference for children of tender years, it is possible that in practice, judges exercised such a preference (Pearson and Handler, 1987)." *Id.* at 827 n.47. Elsewhere, the study stated that nearly a quarter of family law attorneys reported that sometimes or often where custodial mothers worked outside of the home a change of custody was "granted to fathers who remarry women who are home full time." *Id.* at 833. This latter result was seen as gender bias against mothers by holding them to different and higher standards than fathers. See *id.* at 832. Incredibly, the result was not seen as gender

Clearly the study missed an opportunity to explore whether out-of-court gender bias led to situations in which mothers were predominantly the primary caretakers, the stated basis for mothers' success in court.¹¹⁴ It did not look at the forces at play underlying "the agreement of the parties" regarding custody.¹¹⁵ Most problematic, however, was its total absence of follow up on the speculation of how gender bias discouraged fathers from seeking custody and how stereotypes about fathers affected outcomes.

Thus, ignoring these potential gender biases against fathers allowed the study to conclude that "fathers who actively seek custody obtain either primary or joint physical custody over 70% of the time."¹¹⁶ However, based on its own data and not ignoring potential gender bias against fathers, the study could also have trumpeted any of the following results, leading to far different conclusions:

- Mothers get primary residential custody 93.4% of the time in divorces.¹¹⁷
- Fathers in divorce get primary residential custody only 2.5% of the time.¹¹⁸
- Fathers in divorce get joint physical custody only 4% of the time.¹¹⁹
- Fathers in divorce get primary or joint physical custody less than 7% of the time.¹²⁰

bias against fathers who had to find and financially support another woman in their home before being awarded custody.

114. By contrast, it did not miss an opportunity to explore out-of-court gender biases that affected women in court, such as lack of employment opportunities. See *id.* at 784-85.

115. See *id.* at 747. The Commission dismissed the fact that "mothers more frequently get primary physical custody of children following divorce" as not reflecting bias, but due to "agreement of the parties and the fact that, in most families, mothers have been the primary caretakers of children." *Id.* at 747-48. This conclusion is in stark contrast to the tremendous increase in fathers' rights groups over the last decade. See Sally Kalson, Dad's in Charge, *PITT. POST-GAZETTE*, Mar. 16, 1998, at A1. If fathers were agreeing to mothers obtaining custody, then why would fathers form these groups to fight gender bias against fathers, and to seek change in the family court system?

116. MASSACHUSETTS STUDY, *supra* note 106, at 825.

117. The study reported that the survey of family law attorneys showed 12,000 divorces involving dependent children in two years, and 2100 cases in five years in which fathers sought custody. See *id.* at 831 n.54. It concluded, without elucidation or citation to authority, that the percentage of fathers seeking custody "increased recently" and that half, instead of two-fifths, of the cases in which fathers sought custody occurred in the most recent two years. See *id.* Accordingly, even accepting these unsupported assumptions, the total number of divorces in the five-year period studied would be 24,000, meaning fathers sought custody in 8.75% (2100) of them. See *id.* Of these 2100 cases, the study reported that fathers received primary custody in 29% (609) of the cases and joint physical custody in "an additional 65%" (969). *Id.* at 831. Thus, of 24,000 divorces in a five-year period involving dependent children, mothers received custody in 93.4% (22,422) of the cases, fathers received primary custody in 2.5% (609), and joint physical residency was awarded in 4% (969) of the cases.

118. See *id.*

119. See *id.*

120. See *id.*

- Where fathers actively seek custody, they receive primary residency in less than one out of three cases (29%),¹²¹ and joint physical residency in less than half (46%).¹²²

Unfortunately, the preceding five conclusions did not seem to fit with the pre-conceived effort to “isolate patterns of behavior that disadvantage women and to examine the results of this behavior on the economic status of women.”¹²³

Finally, the foundation for the “70% solution” theory advanced by the study is hopelessly weak. The number implies that if a father wants custody, 70% of the time he will get either primary or joint physical residency. The number does not explain, for example, in how many of those cases mothers actually agreed that primary or joint physical residency was best for their children. It does not explain how many of those cases were contested cases where the judiciary determined custody after a hearing on the merits. Nor does it explain in how many of those cases the mother actively rejected custody or was unavailable to care for the children. In short, problems in the methodology underlying the 70% figure and basic failures to explore other possible explanations, render the figure utterly useless in concluding a lack of gender bias against fathers.¹²⁴ Indeed, analyzed

121. Although not providing any cross-referencing of cases, the study noted that this same number (29%) of fathers seeking custody were also fathers who were primary caretakers. Perhaps the study could have also trumpeted a more obvious fact: Judges tend to side with pre-divorce primary caretakers in divorce-related child custody decisions. Then the study could have explored the gender-based myths behind the primary caretaker standard, and perhaps advanced, rather than set back, the cause of gender equality and neutrality in determining children’s futures. See, e.g. WARSHAK, *supra* note 6, at 166.

122. See MASSACHUSETTS STUDY, *supra* note 106, at 825.

123. *Id.* at 763.

124. See Cathy Young, Do Fathers Have the Edge in Divorce?, *DETROIT NEWS*, Dec. 10, 1996, at A11:

[T]he high success rate of men in custody battles is yet another contender for the Phony Statistics Hall of Fame. The figures do not refer to contested cases. . . . The work from which the Gender Bias Study gathered its numbers did not separate contested and uncontested custody bids, but showed that mothers filing for sole custody received it 75 percent of the time

A Stanford study of more than 1,000 California couples divorced in the 1980s suggests conventional wisdom is right. If both parents requested sole custody when filing for divorce, it was awarded to mom in 45 percent and to dad in 11 percent of the cases, with joint physical custody for the rest. (When she asked for sole custody and he for joint custody, the odds were 2-1 in her favor.)

The Massachusetts Study also attempted to prop up its 70% figure with two other studies that purported to show “paternal success” in child custody matters. See Massachusetts Study, *supra* note 106, at 831-32. In reality, the studies confirmed both the flawed methodology and failure to examine potential gender bias that forced fathers not to seek custody. One study of 700 cases in Middlesex County, Massachusetts, between 1978 and 1984 “confirmed” that fathers received primary physical custody in two-thirds of the cases in which they sought it. See *id.* Put another way, the Middlesex study cited by the Massachusetts Study showed that mothers received primary residency 94.3% of the time; fathers received primary residency 5.4% of the time; and joint physical residency was awarded 0.3% of the time.

fairly, the data underlying the figure strongly suggest social and cultural forces at play beyond a holistic analysis of children's best interests. It cannot be fairly concluded through the analysis of these data that those forces are based on gender bias against fathers, but it can be fairly concluded that the study does not refute such gender bias.

C. Discriminating Against Fathers as Men

Much has been written about and many studies conducted regarding gender stereotypes and sex-based discrimination against women. Comparatively, little attention has been focused on gender stereotypes and sex-based discrimination against men.¹²⁵ Yet, as Professor Leo Kanowitz wrote nearly twenty years ago:

Centuries of sex-role allocation, based on "habit, rather than analysis," simply disabled Americans of either sex from restructuring the duties of military service, family support, and protections in the work place so as to permit men and women to share the burdens and benefits of social existence more equitably. Viewed in this light, the apparent power of men to change their sex-based roles in the past can be seen as being more theoretical than real. In this respect, men were as powerless as any other discrete, insular minority; past discrimination against them was invidious in every sense of the word.¹²⁶

One expert noted that "[i]n sum, over the past two hundred years, fatherhood has lost, in full or in part, each of its four traditional roles: irreplaceable caregiver, moral educator, head of family, and family breadwinner."¹²⁷ Thus, particularly since the inception of the Industrial Revolution, the role of the father in the father-child dynamic has become unclear and undefined. Yet, compared to mothers, little focus has been placed on understanding the role of fathers and diminishing discrimination against them. Instead, more effort has seemingly been placed in disseminating anti-father propaganda that

A third study cited by the Massachusetts Study involved 500 cases from Middlesex County from 1978 to 1981. See *id.* at 832. The study was referred to as concluding that when fathers sought sole custody they received it 41% of the time and joint custody (no definition of legal or physical custody was offered) in 38% of the cases. See *id.* Given that fathers in that study sought sole custody only 8% of the time--compared to 8.14% in the other Middlesex County study and an estimated 8.75% in the Massachusetts Study--another interpretation of the same data is that mothers received sole or primary custody in 93.8% of the cases, compared to fathers receiving sole custody in 3.2% or joint custody in 3%.

125. For example, a cursory search of the Florida State University's computerized library index lists 2182 publications on feminism and 236 on motherhood, compared to 19 on fathers' rights and 50 on fatherhood.

126. Leo Kanowitz, "Benign" Sex Discrimination: Its Troubles and Their Cure, 31 *HASTINGS L.J.* 1379, 1402 (1980).

127. BLANKENHORN, *supra* note 3, at 16.

devalues fathers. For example, Joan Zorza, an author who writes about domestic violence, noted in a recent article that:

[a]fter separation, fathers tend to fade from their children's lives, even when they have joint custody and are strongly encouraged to stay involved. Not only do separated fathers have less physical contact with their children, but also they become less altruistic over time, less likely to pay child support, and further likely to disengage from their children.¹²⁸

Even though this article purportedly focused on domestic violence among mothers and fathers, Zorza transcended the original premise to make broad comments about the inferiority of fathers in general, "whether or not abusive."¹²⁹ Although numerous studies show that fathers with joint custody are much more likely to pay child support,¹³⁰ Zorza stated that "[j]oint legal custody does not increase the father's compliance with child support orders, does not result in his assuming greater child-rearing responsibilities, and does not increase the amount of time he spends visiting with his children."¹³¹ Many experts disagree with these conclusions.¹³² Clearly, Zorza uses domestic violence as a springboard from which to attack fathers in general, a practice she implements in other articles as well.¹³³

128. Zorza, *supra* note 110, at 1123 (citing as an example David Scheff, *If It's Tuesday, It Must Be Dad's House*, N.Y. TIMES MAG., Mar. 26, 1995, at 64-65).

129. *Id.* at 1120.

130. See, e.g., Bahr et al., *supra* note 108, at 258 (noting that a recent Census Bureau study found that 90% of fathers with joint legal custody paid child support, compared to 79% of fathers with visitation privileges and 45% of fathers who had neither joint custody nor visitation privileges); JUDITH A. SELTZER, *FATHER BY LAW: EFFECTS OF JOINT LEGAL CUSTODY ON NONRESIDENT FATHERS' INVOLVEMENT WITH CHILDREN* 17 (Center for Demography and Ecology NSFH Working Paper No. 75, 1997) (finding that joint legal custody increased adherence to child support payments and contact with children, and concluding that "[a]t least on the dimension of increased contact between nonresident fathers and children, joint legal custody may, as advocates claim, make the lives of children after divorce more similar to their lives before divorce or to the lives of their peers in two-parent households").

131. Zorza, *supra* note 110, at 1124.

132. See, e.g., Bahr et al., *supra* note 108; SELTZER, *supra* note 130, at 17; Mitchell Testimony, *supra* note 14 (noting that divorced fathers who are allowed to remain significantly involved with their children are more likely to pay child support); Madonna E. Bowman & Constance R. Ahrons, *Impact of Legal Custody Status on Fathers' Parenting Postdivorce*, 47 J. MARRIAGE AND FAM. 481, 481-88 (1985) (reporting that joint legal custody increased the amount of time fathers spent with children).

133. See, e.g., Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273 (1995). Again, while purporting to address battered women, Zorza assailed fathers at large:

Joint custody awards do not improve the lot of the children. In fact, most children in court-imposed joint custody (not just those with abusive fathers) do poorly and are more depressed and disturbed than children in sole custody, even when the parents genuinely choose joint custody. Furthermore, joint custody results in lower child support awards, which fathers are no more likely to pay than awards made when the mother has sole custody. Joint custody does not even result in the father spending any more time with his children.

These generalized distortions encourage the anti-father attack and promote the limitation of the father's role to financial provider and insignificant caretaker. Viewed from the opposite end of the twentieth century, the continuous refrain throughout the last one hundred years has been that when it comes to childrearing, fathers are not that important.¹³⁴ Consequently, "In most parts of the country, only if the mother is grossly negligent or abusive does the father have a chance of keeping custody. Even then, the cards of the family court system are stacked against him."¹³⁵

Conversely, since the 1960s, society has made a significant effort to assist women with throwing off the shackles of societally imposed gender stereotypes, most notably by passing much-needed laws to protect women seeking economic self-sufficiency.¹³⁶ However, because of persistent stereotypical beliefs that women are not as efficient as

Id. at 279 (citations omitted). In addition to Zorza, other legal scholars have negatively generalized the role of fathers. For example, a University of Florida College of Law Professor began her article with the following language:

Fathers parent less than mothers. Both within and outside of marriage, they nurture their children (and step-children, and children in general) far less than mothers (and other women) do. Not only do fathers parent less, they abandon their children to a remarkable extent, again far exceeding such conduct by women.

Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 523 (1996) (citing NANCY E. DOWD, *IN DEFENSE OF SINGLE PARENT FAMILIES* (1997)). Imagine an article stating, for example, that "mothers are far less qualified to work in professional positions than fathers. They take off more time to have and care for children, and suffer from a lack of business acumen due to the fact that they are more emotional and prone to hysteria." Such writing would rightfully be labeled as inflammatory, stereotypical, gender-based discrimination. Why should Dowd's article be seen as anything less? Undoubtedly, our culture currently condones a double standard when it comes to evaluating female/male attributes: it is acceptable to communicate generalized, discriminatory comments about men, but in turn it is unacceptable—and in some cases, downright illegal—to communicate discriminatory comments toward women. Others have noted the trend toward disparaging men. See, e.g., Warren Farrell, *Men as Success Objects*, *UTNE READER*, May-June 1991, at 81-82 ("A visit to the bookstore turns up titles like *No Good Men*. Imagine *No Good Women* or *No Good Jews*.").

The first Zorza article cited in the above text was distributed to students participating in a Florida State University College of Law program that trains students to work with allegedly battered women. Many of these students will eventually practice in the area of family law. Such anti-father rhetoric will likely influence their perceptions of fathers, and thus the manner in which they respond to the role of the father in their future practices.

134. See BLANKENHORN, *supra* note 3, at 70-83.

135. WARSHAK, *supra* note 6, at 32.

136. See, e.g., 42 U.S.C. § 2000e-2(a)(1) (1994) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ."). Title VII includes the Pregnancy Discrimination Act. See 42 U.S.C. § 2000e(k) (1994) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ." (emphasis added)).

men in traditional male-dominated jobs, or that women are not the primary familial breadwinners,¹³⁷ women still earn only 71.5% of every dollar a man earns for the same job.¹³⁸ Moreover, while white men are a minority in the total work force (47%) and in the number of those with college degrees (48%), they hold the top jobs in nearly every field.¹³⁹

For the most part, however, our culture and laws have, within the last twenty-five years, encouraged women to enter into traditional male territories such as the workplace.¹⁴⁰ At the same time, though, our culture has continued to assure women that they will be recognized and protected as the primary caregivers of children, even when women trade their traditional roles as home-dwelling caretakers for workplace laborers.¹⁴¹ By contrast, our culture and our laws have not uniformly promoted father involvement in the home and with children. Accordingly, most men have not been permitted by society to likewise alter their roles to fully participate in childrearing.¹⁴²

D. Protecting the "Weaker Sex": The State as Mr. Right

Society views women as weaker than men and in need of protection, whether by a man or by society when no man is available.¹⁴³ Traditionally, this protection was provided by a woman's connection to a man through the marriage contract.¹⁴⁴ However, with the increase in divorce, the state has taken it upon itself to act as the guardian of women.

This movement toward protection of women is a reaction to the success of the notion that women, as individuals, could be freed from dependence on men At a more general level, the women's movement is clamoring to build some sort of safety net or shield for women. The movement wants to return women to a position where their biological differences are taken into account. But rather than do this through the informal structures that traditionally performed this role, rather than allow men and women to form con-

137. See, e.g., FALUDI, *supra* note 7, at 388-93 (discussing *Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). In *Johnson*, Diane Joyce, a widowed mother of four, was harassed by male co-workers, who claimed she was "taking a man's job away" because she was the first woman to seek and receive a road dispatcher position. See *id.* at 390.

138. See *Affirmative Action for the Federal Government: Hearings on S. 1085, The Equal Opportunity Act*, Before the Committee on Labor and Human Resources, 104 Cong. Rec. 63 (1996) (testimony of Marcia D. Greenberger, Co-President, National Women's Law Center), available in 1996 WL 10162842.

139. See *id.*

140. See Chavez, *supra* note 8, at 740.

141. Others might note that women are not necessarily "recognized and protected" as primary caregivers as much as they are forced into the role through culturally and state-instituted measures that assure women assume this position. See *supra* Part II.

142. See, e.g., *supra* note 108 and accompanying text.

143. See Chavez, *supra* note 8, at 741.

144. See *id.*

tracts in marriage and work out an arrangement that provides some security and protection for women, the movement asks the state to take on the role of protector.

This approach has placed Uncle Sam in Mr. Right's shoes. The state places formal rules, laws, and regulations where informal systems of social control formerly existed. Laws insist that women be provided for through equal pay where social structures used to provide the means of survival. Laws command men to behave in a certain way with respect to women, because the informal controls that used to define the boundaries of behavior have been destroyed.¹⁴⁵

In some cases this protection is appropriate, such as when legal protection is provided to battered women and women sexually harassed in the workplace. Yet, in custody determinations, women receive a clear and unequivocal advantage over men when they receive primary residential custody of children approximately 90% of the time.¹⁴⁶ This result assures mothers great power over fathers largely due to stereotypical beliefs that mothers must be primary caretakers—a belief promoted and protected by the courts who award mothers custody in overwhelming numbers.¹⁴⁷ Mothers are further advan-

145. *Id.* This governmental oversight, which strictly regulates the role of non-custodial parents in the post-divorce state, contrasts quite significantly with government's oversight of intact families. Cynthia L. Ewing, Senior Policy Analyst with the Children's Rights Council, vividly describes what can happen when parents divorce and the state steps in to enforce prescribed parental responsibilities:

I have a husband and children and our family is intact. My husband becomes involuntarily unemployed and may go many, many months without a job. He is not able to support our children and may not be able to for a long time. How would each of you characterize this situation? Unfortunate or sad? What will you call my husband? A dead-beat? How is my government going to interfere in our family relationships? Will my government interfere with his ability to find a new job by revoking his driver's license or trade license? Will he be thrown in jail for not supporting our kids? Of course not! But, if my husband and I legally separate or divorce, everything is different. If he loses his job and cannot support our children, the government intrudes into our lives in a major way. I will likely be awarded custody of our children, he will be allowed to "visit" them per a schedule and he will be ordered to provide financial support. If he does not support our children, regardless of the fact that he has lost his job, he will be labeled a "deadbeat," have his trade license and driver's license revoked, and he may even be thrown in jail.

Ewing Testimony, *supra* note 19.

146. See *supra* note 108 and accompanying text.

147. See, e.g., Kanowitz, *supra* note 126, at 1394. Professor Leo Kanowitz notes ways in which protections for women have caused discrimination against men:

[A] casual glance at the treatment males have received at the hands of the law solely because they are males suggests that they have paid an awesome price for other advantages they have presumably enjoyed over females in our society. Whether one talks of the male's unique obligation of compulsory military service, his primary duty for spousal and child support, his lack of the same kinds of protective labor legislation that have traditionally been enjoyed by women, or the statutory or judicial preference in child custody disputes that has long been accorded to mothers vis-a-vis fathers of

tagged because custody commonly is accompanied by a child support order (which does not have to be accounted for to fathers),¹⁴⁸ the familial residence, and the primary decisionmaking power regarding the children. As primary custodians, mothers are also awarded the opportunity to spend significantly more time with the children, thereby having a greater influence on their children's growth and development.

Some have begun to recognize that when society protects women, that is, when it places women upon "pedestals" and awards them a custody advantage, it is confining women within an overly sentimentalized "cage."¹⁴⁹ By requiring mothers to be the primary caregivers of children, whether or not they desire to be, society continues to communicate to mothers that they must choose their children over all else or risk being labeled a failure as a mother, and as a woman.¹⁵⁰ Thus, women who voluntarily relinquish primary custody are frequently seen by society as "misguided, selfish, unnatural."¹⁵¹ This refrain continues, despite the fact that numerous opportunities, nota-

minor children, sex discrimination against males in statutes and judicial decisions has been widespread and severe.

Moreover . . . it is clear that males have been subjected to massive social and economic discrimination. The general social expectation that men will perform the breadwinner's role, the equanimity with which men's exclusive liability for military service is regarded by the general population, even during times of violent combat, the philosophy that a man's life is less precious than that of a woman, as expressed in the tradition of "women and children first" when ships are about to go beneath the sea, and the raised eyebrows at the prospect of a male who, breaking the shackles of his traditional sex role, determines to expend most of his daily energies in caring for his children and doing what have traditionally been regarded as wifely chores within the home, all suggest that men at all ages have been victims of virulent sex discrimination comparable to the kinds of discrimination that women as a group have suffered.

Id. (footnotes omitted).

148. See, e.g., FLA. STAT. § 61.30 (1997) (failing to provide any requirement that child support recipients account for how the support is spent); Ewing Testimony, *supra* note 19:

[T]here is the issue of accountability for child support. The simple fact that financial resources are being transferred from one parent to the other without any accounting of how this money is being spent is a disincentive [to paying child support]. In many cases, it is blatantly obvious that so-called child support money is not being used for the benefit of the child. Just as there is a basic accountability requirement for anyone acting in a fiduciary capacity, there should be an accountability requirement placed on custodial parents for the use of the financial resources that are provided for the benefit of the child.

149. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.") (citation omitted).

150. See GEOFFREY L. GREIF & MARY S. PABST, *MOTHERS WITHOUT CUSTODY* 147-49 (1988).

151. Sanger, *supra* note 32, at 377 ("Separating from one's child—even temporarily, even for sensible reasons—is now often viewed as the worst thing a mother can do. It is often taken as proof that she is not a good mother at all and should not be allowed to resume the status she has abandoned.")

bly in education and employment, have opened up to women over the last thirty years.¹⁵²

Yet although opportunities for women have grown outside of the home, the beliefs that people hold about how women should act inside the home have not necessarily kept pace. Many people believe that it is good that women have more choices than before, so long as the changes do not take away from their time with their children. . . . The new opportunities they have achieved have not extended to permission to live away from their children. Thus, a divorced mother is in a precarious position—encouraged to pursue life outside the home but discouraged from doing so without her children. Thus, women are penalized if they are mothers.¹⁵³

This double-bind furthers the continued subjugation of women: “tethering mothers to children by discouraging separations . . . also serves less felicitous functions, such as keeping women out of the labor force, securing their services for free at home, and sustaining a comforting set of social relationships.”¹⁵⁴ Although women may seek to free themselves from the constraints of marriage and also perhaps their role as the primary caretakers of children when they serve as such, gender bias imbedded in the court system ensures that women remain in this role even after divorce, whether or not they want to continue in that role, and whether or not the imposition of that role is truly in the best interests of the child. Despite the efforts of legislatures to extract this gender bias from the exercise of custody determinations, courts have nonetheless clung to traditional perceptions of women as primary caretakers of children in need of state protection.

E. The Court and the Legislature: The Battle to Control Custody Considerations

Adhering to the motherhood mystique, courts, many of which are presided over by judges raised in traditional homes consisting of fathers as breadwinners and mothers as caretakers,¹⁵⁵ have resisted letting go of the tender years doctrine and the all things being equal doctrine, occasionally doing battle with legislatures over the child

152. See Chavez, *supra* note 8, at 740.

153. GREIF & PABST, *supra* note 150, at 2-3.

154. Sanger, *supra* note 32, at 384-85 (noting that the act of separating from children “threatens the welfare of those for whom the institution of motherhood provides an important sense of identity (many mothers) and an important source of comfort (everyone else).”

155. See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 406-07, 433-37 (1996) (noting that the judges in the empirical study that she conducted in New York were overwhelmingly male and “sixtyish”); A. Yasmine Rassam, Note, “Mother,” “Parent,” and Bias, 69 IND. L.J. 1165, 1170-73 (1994) (noting that “a judge’s background can influence the decision-making process”).

custody issue. For example, in 1971 the Florida Legislature amended Florida's child custody law in an effort to repeal the tender years doctrine: "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody."¹⁵⁶ Nonetheless, the Florida Supreme Court reaffirmed the principles behind the tender years doctrine four years later in concluding that the all things being equal doctrine was not changed by the 1971 statute.¹⁵⁷ In 1982, the Florida Legislature responded by specifying that fathers and mothers were to be given equal consideration despite the age of the child.¹⁵⁸ Yet, some courts continued to resist the change.¹⁵⁹ In 1991, the Legislature responded again, saying neither the age nor sex of the child made a difference as between fathers and mothers in custody considerations.¹⁶⁰

The message seemed to finally reach judges who wanted to apply either of the two outdated doctrines, when, in 1995, a Florida appellate court stated that "[t]he tender years doctrine is not a relevant fact, but an impermissible gender-based preference favoring the mother as custodian of a young child."¹⁶¹ Nonetheless, some judicial circuits in Florida established "visitation guidelines" that reincorpo-

156. Act effective July 1, 1971, ch. 71-241, § 15, 1971 Fla. Laws 1319, 1325 (codified at FLA. STAT. § 61.13(2)(b)(1) (1997)).

157. See *Anderson v. Anderson*, 309 So. 2d 1, 3 (Fla. 1975) ("The district court apparently considered the general rule, still viable despite the 'equal consideration' set forth in F.S.A. s 61.13(2), that, other essential factors being equal, the mother of infants of tender years should receive prime consideration for custody. 'Equal consideration' to a father resulting in a finding of 'other factors being equal' still invokes the traditional rule for prime consideration being given the mother for custody of infants of tender years.").

158. See Act effective July 1, 1982, ch. 82-96, §§ 1, 4, 1982 Fla. Laws 233, 233 (codified at FLA. STAT. § 61.13(2)(b)(1) (1997)).

159. See, e.g., *DeCamp v. Hein*, 541 So. 2d 708, 709-10 (Fla. 4th DCA 1989):

[W]e note the provision in section 61.13(2)(b)(1) that "the father of the child shall be given the same consideration as the mother in determining the primary residence of the child irrespective of the age of the child." . . . This statutory language at first blush appears to abolish the tender years doctrine, as indeed the Fifth District believes it has. Yet, this very same section also provides that the equal rights provision only applies "after considering all relevant facts." . . . Relevant facts should obviously include, at least in part, some consideration of the tender years doctrine. It is true that the doctrine can no longer be dispositive because the 1983 amendment to the statute added the "irrespective of age" language; however, we do not believe the doctrine has been totally abolished. For example, a six-month-old baby being nursed by her mother should obviously be in her mother's custody, unless the judge found her unfit. In the case at bar, there is no mention of whether the one-year-old was being nursed by the mother. Nonetheless, our version of common sense suggests that, under the facts of this particular case, the one-year-old female infant and her three-year-old sister preferably should reside with the mother.

Id. (citing, but refusing to follow, *Kerr v. Kerr*, 486 So. 2d 708 (Fla. 5th DCA 1986), which found that section 61.13(2)(b)(1) unequivocally abolished the tender years doctrine).

160. See Act effective July 1, 1991, ch. 91-246, § 4, Fla. Laws 2408, 2411 (codified at FLA. STAT. § 61.13(2)(b)(1) (1997)).

161. *Cherradi v. Lavoie*, 662 So. 2d 751, 752 (Fla. 4th DCA 1995).

rated the tender years doctrine. For example, as late as 1996, the guidelines in the Twelfth Judicial Circuit provided that a noncustodial parent—almost always the father—could not have overnight visitation with a child until the child turned two years old.¹⁶² Despite clear evidence about the importance of father involvement in early childhood development,¹⁶³ the guidelines provided noncustodial parents actual physical access to their child for less than 5% of their child's first twenty-four months of life. In 1996, the Florida Legislature responded once again, overturning the guidelines by amending the law to read: "If the court orders that parental responsibility, including visitation, be shared by both parents, the court may not deny the noncustodial parent overnight contact and access or visitation with the child solely because of the age or sex of the child."¹⁶⁴

Nonetheless, the presumption in favor of mother-custody continues to prevail inside and outside of Florida:

In the past two decades, most states have abandoned as unconstitutional the formal presumption in favor of mothers being awarded custody, and a number of states use language encouraging shared parenting in their custody statutes. However, gender is still a statutory consideration in several jurisdictions.

The child's best interests standard ostensibly considers more direct criteria of parenting capacity and patterns. Nevertheless, decisions favor mothers in a number of ways. Joint custody laws still prefer mothers as physical custodians. The primary caretaker standard, adopted explicitly in West Virginia and Minnesota, and implicitly in a number of other jurisdictions, may be a thinly veiled return to the maternal preference standard. Even in states in which the formal maternal presumption is absent, judges may make decisions as though such a presumption still exists, or may exhibit strong biases against awarding custody to fathers. Moreover, as an empirical matter, mothers obtain sole custody in an overwhelming proportion of cases.¹⁶⁵

162. See FLORIDA S. JUDICIARY STAFF, A REPORT ON CIRCUIT COURT STANDARD VISITATION SCHEDULES 7 (1996).

163. See WARSHAK, *supra* note 6, at 35-50; *infra* Part III.F.

164. Act effective July 1, 1996, ch. 96-183, § 5, 1996 Fla. Laws 454, 457 (codified at FLA. STAT. § 61.13(8) (1997)). In 1997, the Florida Legislature amended chapter 61 to state that "[t]he court may order rotating custody if the court finds that rotating custody will be in the best interest of the child." Act effective July 1, 1997, ch. 97-242, § 2, 1997 Fla. Laws 4436, 4437 (codified at FLA. STAT. § 61.121 (1997) (emphasis added)). It is too early to tell whether this permissive amendment will have much effect on custody considerations. However, it is noteworthy that the Florida Legislature is actively moving in the direction of recognizing and promoting the role of both parents in raising their children through mutually significant and substantial involvement.

165. Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1075-78 (1996) (footnotes omitted); see also WARSHAK, *supra* note 6, at 234. Regarding the primary caretaker standard, Warshak states:

I do not believe it makes any sense to equate the amount of time a person spends with a child with that person's importance in the child's life. Research

F. When Fathers Are Marginalized

Sociologists, psychologists, criminal justice experts, and others have begun to closely examine the issue of fatherhood in our American culture and how and why fathers came to be ousted from a significant role in childrearing. Statistics clearly show that children without fathers are more likely to suffer increased psychological, educational, behavioral, and health disorders, and our society is more likely to suffer increased crime and violence. For example, a 1988 United States Department of Health and Human Services study found that at every income level except the very highest (over \$50,000 a year), children living with never-married mothers were more likely than their counterparts in two-parent families to have been expelled or suspended from school, to display emotional problems, and to engage in antisocial behavior.¹⁶⁶ Children in single-parent families are two to three times as likely as children in two-parent families to have emotional and behavioral problems.¹⁶⁷ They are also more likely to drop out of high school, to get pregnant as

indicates that we cannot even assume that, the more time a parent interacts with a child, the better their relationship will be. In fact, we all know of parents who are too involved with their children, so-called smothering parents, who squelch any signs of their child's independence. . . . Is the primary caretaker the parent who does the most to foster the child's sense of security, the person to whom the child turns in time of stress—the role most often associated with mothers? Or is it the parent who does the most to promote the child's ability to meet the demands of the world outside the family and to make independent judgments—the role most often associated with fathers? We really have no basis for preferring one contribution over the other. Both are necessary for healthy psychological functioning.

Id. Indeed, if many fathers are behaving according to their societally prescribed roles as primary familial breadwinners, then it is patently unfair to deprive them of a meaningful relationship with their children simply because they spend their day in the workplace to provide for their children, rather than in the home caring for their children in person. Both forms of caretaking are essential to raising children, and one should not be perceived as more worthy than the other. Moreover, it is important to note that in this age, frequently both parents work. See Kathleen A. DeLaney, Note, A Response to "Nannygate": Untangling U.S. Immigration Law to Enable American Parents to Hire Foreign Child Care Providers, 70 *IND. L.J.* 305, 327 (1993) (citing WOMEN'S BUREAU, U.S. DEPT OF LABOR, EMPLOYERS AND CHILD CARE: BENEFITING WORK AND FAMILY 1 (1989) ("The typical family during the first half of the twentieth century included a father who was breadwinner and a mother who stayed home to care for the children and do the housework. Today both parents usually work outside the home.")). By necessity, when both parents work, both parents usually share "child care and household responsibilities." Phyllis T. Bookspan, A Delicate Imbalance—Family and Work, 5 *TEX. J. WOMEN & L.* 37, 77 (1995). Thus, the determination of exactly who is the "primary caretaker" is even more difficult. Furthermore, when parents divorce, frequently the number of mothers who work increases. See Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 *ARIZ. L. REV.* 431, 444 (1990) (noting that the percentage of divorced mothers in the workplace ranges from 69% to 83% depending upon the ages of their children). Therefore, when both parents work, the presumption that the mother is nearly always the primary caretaker is further weakened.

166. See FATHER FACTS, *supra* note 16, at 30 (citation omitted) (compiling statistics from a variety of governmental and private sources).

167. See *id.*

teenagers, to abuse drugs, and to be in trouble with the law.¹⁶⁸ Eighty percent of adolescents in psychiatric hospitals come from broken homes.¹⁶⁹ Three out of four teenage suicides occur in households where a parent has been absent.¹⁷⁰ Compared to children living with both biological parents, children living apart from their biological fathers experience more accidental injury, asthma, frequent headaches, and speech defects.¹⁷¹ Children who live apart from their fathers are more than four times more likely to smoke cigarettes as teenagers than children growing up with a father in the home.¹⁷² Seventy-two percent of adolescent murderers grew up without fathers.¹⁷³ Sixty percent of America's rapists grew up in homes without fathers.¹⁷⁴

The one factor that most closely correlates with crime is the absence of the father in the family.¹⁷⁵ This relationship is so closely related that controlling for family configuration erases the relationship between race and crime and between low income and crime.¹⁷⁶

In response to these and other significant findings, groups promoting the recognition of the father's role in childrearing have met, brainstormed, and implemented programs intended to encourage and

168. See *id.* at 31.

169. See *id.* at 32.

170. See *id.* at 33.

171. See *id.* at 36.

172. See *id.*

173. See *id.* at 24. Notably, Mitchell Johnson, the 13-year-old who allegedly participated in the March 1998 murders of four children and one adult in Jonesboro, Arkansas, had remarked in recent weeks that he had been missing his father, who remained in Minnesota after the boy and his mother moved to Arkansas one year earlier following his parents' divorce. See Ellen O'Brien, "A Sense of Innocence Was Lost," Jonesboro Buries Shooting Victims and Tries to Heal, *BOSTON GLOBE*, Mar. 28, 1998, at A1.

174. See *FATHER FACTS*, *supra* note 16, at 24.

175. See *id.* at 23.

176. See *id.* On the other hand, some feminist writers have claimed that the alleged correlation between fatherlessness and issues such as crime, violence, and teenage pregnancies are simply an attempt to degrade single mothers. For example:

We speak of the "broken" family, the "disintegration" of the family, the "crisis" in the family, the "unstable" family, the "decline" of the family, and, perhaps inevitably from some perspectives, the "death" of the family. Underlying such labels is the specter of single motherhood—statistically on the upswing—pathological and disease-like, contaminating society, contributing to its destruction and degeneration.

Single motherhood has been designated as the source of other social phenomena such as crime and poverty. Indeed, in the public's mind, and despite overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother

Martha L. Fineman, *Images of Mothers in Poverty Discourses*, in *POVERTY LAW: THEORY AND PRACTICE* 351, 355 (Julie A. Nice & Louise G. Trubek eds., 1994) (citations omitted). While some may indeed blame single mothers for the wealth of social ills that plague our society, the focus should instead be on what is in the best interests of children. Children need, want, and are entitled to all of the love and support that they can get, and fathers should be encouraged to fully participate and care for their children, whom they have an equal right to parent. See *infra* Part IV.

promote fathers' involvement in their children's lives.¹⁷⁷ Nonetheless, despite plenty of evidence that children need integral and consistent love and support from their fathers as well as mothers, many family courts fail to ensure that fathers play a meaningful role by awarding the children significant time with both parents in addition to joint legal responsibility for the children. At times, however, a ray of enlightenment does appear. In 1996, a Florida court stated:

With the focus of so much recent statewide and national attention on the absentee parent and the deadbeat dad, we should do everything within our power to encourage responsible parenthood, which consists not only of the legal obligation of financial support but also the maintenance of a meaningful relationship with the child. We should encourage the noncustodial parent, who is often the father, to view the relationship with his child not as an obligation which he fights every inch of the way, but as a responsibility he rushes to embrace. The ability of the noncustodial parent to develop and maintain a meaningful relationship with the child inures to the benefit of not only the parent, but also the child.¹⁷⁸

While some courts are moving toward recognizing the importance of encouraging divorcing fathers to remain integrally involved in the lives of their children, awarding them primary residential custody, or even rotating custody, is another issue. Overwhelmingly awarding mothers sole or primary residential custody of children may not only be grossly unfair to fathers and children, but the practice may violate fathers' constitutional rights to equal protection of the laws, and their fundamental right to parent their children.

IV. THE FOURTEENTH AMENDMENT

A. The Equal Protection Clause and Gender Discrimination

The Fourteenth Amendment, enacted by Congress in 1868, states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁷⁹ Congress intended to ensure that racial minorities received the same degree of personal and property rights as enjoyed by white persons

177. For example, in 1996, the Florida Legislature created the 25-member Commission on Responsible Fatherhood, the first legislatively created commission on fatherhood issues in the nation. The Commission's purpose is:

to raise awareness of the problems created when a child grows up without the presence of a responsible father, to identify obstacles that impede or prevent the involvement of responsible fathers in the lives of their children, and to identify strategies that are successful in encouraging responsible fatherhood.

Act effective July 1, 1996, ch. 96-175, § 67, 1996 Fla. Laws 320, 398 (codified at FLA. STAT. § 383.0112 (1997)).

178. *Wiley v. Wiley*, 683 So. 2d 647, 651 (Fla. 4th DCA 1996).

179. U.S. CONST. amend. XIV, § 1.

(usually men).¹⁸⁰ At first, the Supreme Court interpreted the Equal Protection Clause to apply only to racial equality and no other classification.¹⁸¹ Thus, in a case decided the day after the Slaughter-House Cases,¹⁸² the Court denied a woman's request for a license to practice law.¹⁸³ The Court later upheld a statute that prohibited women from working in factories for more than ten hours per day.¹⁸⁴ In subsequent direct challenges on equal protection grounds, the Court likewise upheld statutes denying women equal protection of the law.¹⁸⁵

By 1971, however, the Court recognized that statutes designed primarily to restrict women to stereotypical roles should be subject to

180. See HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 150-51 (1977). The Civil Rights Act had been passed to empower the Thirteenth Amendment to address post-Civil War Black Codes, which were enacted by many southern states to forbid African Americans from such activities as appearing in public, owning property, or testifying in court against a white man. See STONE ET AL., *CONSTITUTIONAL LAW* 482 (1991).

181. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (stating that the Court doubted "very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision"); STONE ET AL., *supra* note 180, at 676-77.

182. 83 U.S. (16 Wall.) 36 (1873).

183. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873). While Justice Bradley suggested in his dissent in the Slaughter-House Cases that a non-black class might be covered under the Equal Protection Clause, he made it clear in *Bradwell* that this possibility did not include women:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

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 women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Id. at 141-42; see also STONE ET AL., *supra* note 180, at 676-77.

184. See *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (stating that the "inherent difference between the two sexes" justified restricting a woman's right to contract). But see *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that the statute prohibiting bakers, mostly men, from working more than 60 hours per week was forbidden by the liberty of contract implicit in the due process clause); see also STONE ET AL., *supra* note 180, at 677.

185. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding a Michigan statute that required a woman bartender to be the wife or daughter of the male owner); *Hoyt v. Florida*, 368 U.S. 57, 69 (1961) (refusing to strike down a jury selection system that excluded women who did not proactively indicate a desire to serve). In *Hoyt*, Justice Harlan wrote that a "woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." *Id.* at 62.

stricter review.¹⁸⁶ The Court struck down a statute that preferred male estate administrators over female administrators as a violation of the Equal Protection Clause.¹⁸⁷ The Court stated that it was applying the rational relation test,¹⁸⁸ but because it rejected the state's administrative reason for the discrimination, the court actually applied a heightened level of scrutiny. In *Frontiero v. Richardson*,¹⁸⁹ the Court explicitly stated that gender-based classifications are inherently suspect and should be subject to strict scrutiny.¹⁹⁰ However, in the next gender-based challenge reviewed by the Court,¹⁹¹ it re-

186. The Court uses three standards of review. First, strict scrutiny is applied to any statute based on a suspect classification or fundamental right. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[C]ourts must subject [all legal restrictions that curtail the civil rights of a single racial group] to the most rigid scrutiny.”) Government must show a necessary and compelling reason for burdening a specific race, national origin, or alienage. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 24 (1972).

Second, intermediate scrutiny is applied to any statute based on the quasi-suspect classes of gender. See *Reed v. Reed*, 404 U.S. 71, 75 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (citation omitted)). The Court uses this level of review for invidious (intentionally harmful) or benign (intending to help women or redress past discrimination against them) discrimination. See *STONE ET AL.*, *supra* note 180, at 679-82, 713-18. Government must show a substantially related interest to an important governmental objective. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

Third, the rational relation test is applied to any statute not based on a suspect or quasi-suspect class; the government action must bear a rational relationship to an acceptable goal sought by the government. See *JOHN E. NOWAK ET AL.*, *CONSTITUTIONAL LAW* 524 (3rd ed. 1986). The statute will be upheld as long as it bears a rational relationship to a legitimate governmental objective, which is almost always the case. See *id.* Prior to 1971, the Supreme Court reviewed gender classifications using the rational relation test. See *HERMA HILL KAY, SEX-BASED DISCRIMINATION* 26-27 (2d ed. 1981). In 1971, the Court began to use a heightened level of scrutiny when reviewing gender-based statutes. See *id.*; *Reed*, 404 U.S. at 75.

187. See *Reed*, 404 U.S. at 77.

188. See *id.* at 74.

189. 411 U.S. 677 (1973).

190. See *id.* at 682 (stating that classifications based on sex are “inherently suspect and must therefore be subject to strict judicial scrutiny”). Notably, Justice Brennan wrote:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.” And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that sex characteristic frequently bears no relation to ability to perform or contribute to society.

Id. at 686 (emphasis added).

191. See *Craig v. Boren*, 429 U.S. 190 (1976) (reviewing an Oklahoma statute that forbade the sale of 3.2% beer to males under the age of 21 while females over 18 could purchase the beer).

treated to an intermediate level of scrutiny for reviewing gender-based classifications.¹⁹²

Intermediate scrutiny is also applied when the Court reviews statutes or policies enacted to remedy past discrimination against women.¹⁹³ These remedial statutes or policies frequently result in "benign discrimination" against men; that is, they were not enacted with the express intent to discriminate against men but do so as a byproduct of the government action.¹⁹⁴ Nonetheless, if the statute or policy is narrowly tailored to be substantially related to an important government interest that is remedial in nature, it will likely be upheld.¹⁹⁵

1. Intent to Discriminate Is Required

For a plaintiff to prevail in a claim that a government act violates the Equal Protection Clause, the plaintiff must demonstrate that the government intended to discriminate.¹⁹⁶ Intent can be proven by

192. See *STONE ET AL.*, *supra* note 180, at 680-82. Despite the heightened level of scrutiny, the Court has nonetheless continued to uphold some statutes that discriminate against either gender. See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 475 (1981) (upholding a statute subjecting men but not women to statutory rape charges when they engage in sex with a partner under the age of 18); *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (upholding the male-only draft); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (sustaining a federal statute that granted female navy members a longer time period in which to achieve a mandatory promotion); *Kahn v. Shevin*, 416 U.S. 351, 356 (1974) (upholding a Florida statute that provided a property tax exemption for widows but not widowers); *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (upholding California's exclusion of pregnancy-related disabilities under the state's disability insurance program). Consequently, the Court has sent mixed messages as to exactly which level of scrutiny would be used when reviewing equal protection challenges to laws. See *STONE ET AL.*, *supra* note 180, at 681-82.

193. See, e.g., *Kahn*, 416 U.S. at 354.

194. See *STONE ET AL.*, *supra* note 180, at 713-18.

195. See *Califano v. Webster*, 430 U.S. 313, 317 (1977) (upholding a federal social security scheme that provided better benefits to women than men as an appropriate remedial statute designed to redress "society's longstanding disparate treatment of women" rather than one intending to restrict women to stereotypical female roles, or intentionally discriminatory toward men) (citation omitted). But see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982) (striking down a state university's policy of precluding men from its nursing school as unrelated to remedial goals). Notably, Justice O'Connor wrote that by restricting men the University perpetuated a stereotype that only women should be nurses. See *id.* at 736.

196. See *Washington v. Davis*, 426 U.S. 229, 236 (1976) (holding that while a test given to police officers may have had a discriminatory impact against African Americans, discriminatory impact alone does not prove a discriminatory intent). The Court compared the Equal Protection Clause to Title VII of the Civil Rights Act and noted that a Title VII plaintiff could prove an intent to discriminate by proving a disparate impact, from which an intent to discriminate would be inferred. See *id.* at 238. Thus, a plaintiff can more easily prove intent under Title VII than under the Equal Protection Clause. See *id.*; *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) ("[I]n order for the Equal Protection Clause to be violated, the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.") (citation omitted).

showing that the law is facially discriminatory,¹⁹⁷ that the law is administered in a discriminatory manner,¹⁹⁸ or that although the law is facially neutral and appears to be applied in a non-discriminatory manner, discrimination can be proven through an examination of the legislative history or other evidence that clearly indicates a discriminatory intent.¹⁹⁹ Frequently, statistics are used to prove intent to discriminate.²⁰⁰

However, in *Rogers*, the Court noted that *Washington and Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), "recognized that discriminatory intent need not be proved by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.'" *Rogers*, 458 U.S. at 618 (quoting *Washington*, 426 U.S. at 242). "Thus determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* (quoting *Arlington*, 429 U.S. at 266). Note that these cases involved race-based rather than gender-based challenges, to which strict scrutiny rather than intermediate scrutiny is applied. See also *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (adding that the discrimination must be "because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."). In *Feeney* the Court upheld a state statute awarding a hiring preference to veterans, a group that consisted of 98% men. See *id.* at 282.

197. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (striking down a state law preferring men over women as estate administrators).

198. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that a facially neutral San Francisco ordinance violated the Equal Protection Clause where all members of a class were denied permission to operate a business and almost all non-class members were awarded a license). Since *Feeney*, however, proving discrimination through disparate administration of a facially neutral law requires a nearly 100% impact against a suspect class. Interview with Steve Gey, John W. & Ashley E. Frost Professor of Law, Florida State University College of Law, in Tallahassee, Fla. (Oct. 16, 1996). Consequently, impact alone will not usually determine intent to discriminate. The Court will look for other evidence that proves the intent to discriminate. See GERALD GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 365 (4th ed. 1986).

199. See *Rogers*, 458 U.S. at 627-28 (holding that a facially neutral at-large county election system violated the Equal Protection Clause because it had a discriminatory impact on African American citizens and had been maintained by the Legislature for a discriminatory purpose). In *Rogers*, the fact that no African American had ever been elected to the Board did not prove discrimination by itself. See *id.* at 627. However, a review of racial discrimination inherent in the local and state political process, as well as local elected officials' discriminatory behavior, allowed the Court to infer an intent to discriminate through maintenance of the election system. See *id.* It is important to note that besides race, this case involved the right to vote, which is recognized as a fundamental right that must be equitably distributed. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (stating that the right to vote "is a fundamental matter in a free and democratic society. . . . [A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

200. See GUNTHER, *supra* note 198, at 354; NOWAK ET AL., *supra* note 186, at 528-29 (noting that statistical evidence is especially influential when a plaintiff claims that administrative officials are discriminating when engaging in an individual selection process). Additionally, courts are less likely to defer to the subjective decisions of officials than to legislative acts. See GUNTHER, *supra* note 198, at 529. When the selection process does not require officials to exercise discretion, however, statistical data is frequently insufficient to establish discrimination. See *id.*

B. Substantive Due Process: Interference With Fundamental Rights

The Fourteenth Amendment contains the provision that "no state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."²⁰¹ This clause has been interpreted as limiting the substantive power of states to regulate specific areas of individuals' lives deemed to be protected by a fundamental right.²⁰² The Court first recognized a fundamental right under the Equal Protection Clause in *Skinner v. Oklahoma*.²⁰³ In *Skinner*, the Court struck down a state statute that allowed the sterilization of certain criminals, thus interfering with what the Court deemed to be the fundamental right to have children.²⁰⁴ Other areas such as voting²⁰⁵ and interstate migration²⁰⁶ have been recognized as fundamental rights protected by the Fourteenth Amendment. An unreasonable intrusion into these areas is deemed to interfere with a person's liberty.²⁰⁷

In a fundamental rights challenge, courts will first examine whether the right at issue is fundamental or non-fundamental.²⁰⁸ Two classes of fundamental rights exist: those that are explicitly guaranteed by the United States Constitution under the fundamental rights provision of the Equal Protection Clause,²⁰⁹ and those not specifically constitutionally enumerated but recognized by the Court as implicitly guaranteed by the Constitution under the Fourteenth

201. U.S. CONST. amend. XIV, § 1.

202. See *STONE ET AL.*, *supra* note 180, at 815.

203. 316 U.S. 535 (1942).

204. See *id.* at 536 (stating that "[t]his case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring").

205. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down a poll tax because it interfered with the fundamental right to vote).

206. See *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (striking down as a violation of the fundamental right to travel a state statute denying welfare benefits for one year to people entering a new jurisdiction).

207. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The court held as follows:

[The liberty guaranteed by the Due Process Clause of the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . [This] liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.

Id. at 399-400 (emphasis added) (citations omitted).

208. See *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

209. See, e.g., U.S. CONST. amend. I (assuring the right to freedom of religion, speech, the press, to peaceably assemble, and to petition the government for a redress of grievances).

Amendment's protection of fundamental rights.²¹⁰ If the right is deemed to be non-fundamental the courts will use the rational relation test to determine if states are pursuing a legitimate governmental objective; this analysis almost always leaves the government action intact.²¹¹ If the right is deemed fundamental, however, courts will use the strict scrutiny standard and the government will have the burden to show it has a necessary and compelling interest justifying its interference with the plaintiff's fundamental right.²¹² The court will also examine whether there are less restrictive means that could be implemented.²¹³

1. The Parent-Child Relationship as a Fundamental Right

The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment.²¹⁴ The Court has affirmed that related parental interests falling under this original premise are similarly constitutionally protected. For example, a parent's right to educate his or her children in the manner he or she chooses has been recognized as a substantive due process fundamental right.²¹⁵ The Court based its

210. See, e.g., *Griswold*, 381 U.S. at 484 (1965) (recognizing that in prior cases the Court determined that "specific guarantees in the Bill of Rights have penumbras, formed by emanation from those guarantees that help give them life and substance"). The *Griswold* court concluded that the First, Third, Fourth, Fifth, and Ninth Amendments thus guaranteed the plaintiffs the fundamental right to privacy, although the right to privacy is not specifically enumerated in the United States Constitution. See *id.* at 483-84.

211. See Mary M. Krupnow, Note, *M.L.B. v. S.L.J.: Protecting Familial Bonds and Creating A New Right of Access in the Civil Courts*, 76 N.C. L. Rev. 621, 631-32 (1998).

[T]he "Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Such rights are held to be "fundamental," and if a statute threatens a fundamental right, the Court allows it to stand only if the government can demonstrate a compelling interest. If a statute does not interfere with a fundamental right, then the Court is deferential, examining the statute only for a rational relationship between the statute and a legitimate state interest.

Id. (footnotes omitted).

212. See *id.*

213. See *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) ("[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" (citation omitted)).

214. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (striking down a state parental rights termination procedure as violative of the Fourteenth Amendment's right to due process). The Court further added that, even where parents have not been model parents or have lost temporary custody of their child to the state, the parental right protected by the Fourteenth Amendment does not evaporate. See *id.* at 753.

215. See *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) (striking down a state statute requiring children to attend only public schools because it interfered with the parents' right to determine their children's education).

decision on the “liberty of parents and guardians to direct the upbringing and education of children under their control.”²¹⁶

Like the United States Supreme Court, the Florida Supreme Court has also recognized that substantive due process protection must be given to parents pursuant to the fundamental liberty interest that parents have in the care, custody, and management of their children.²¹⁷ As a Florida Supreme Court justice noted:

The right of the parents to the custody, care and upbringing of their children is one of the most basic rights of our civilization. The emphasis upon the importance of the home unit in which children are brought up by their natural parents is one of the great humanizations of western civilization as contrasted with the ideologies of some nations where family life is not accorded primary consideration.²¹⁸

The following year, while addressing a grandparents’ rights statute, the court noted that:

The extent to which the government should be involved in settling disputes within the family is a relatively new question in the law. There are, though, certain established principles. We have stated that “this Court and others have recognized a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism.” The fundamental liberty interest in parenting is protected by both the Florida and federal constitutions. In Florida, it is specifically protected by our privacy provision.²¹⁹

Thus, under both the U.S. Constitution and the Florida Constitution, the court should recognize that both parents have a fundamental right to parent their child.

216. *Id.* at 512.

217. See *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 966 (Fla. 1995), cert. denied sub nom *G.W.B. v. J.S.W.*, 116 S.Ct. 719 (1996) (noting that the Supreme Court has found that natural parents have a fundamental liberty interest in the care, custody, and management of their children, but that interest is limited regarding unwed fathers who do not “demonstrate[] a full commitment to the responsibilities of parenthood by coming forward to participate in raising [their] child”); *In re E.H.*, 609 So. 2d 1289, 1290 (Fla. 1992) (recognizing that a “constitutionally protected interest exists in preserving the family unit and in raising one’s children”); *Padgett v. Department of HRS*, 577 So. 2d 565, 570 (Fla. 1991) (affirming the “longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism”).

218. *In re EAW*, 658 So. 2d at 983 (Anstead, J., dissenting) (citations omitted); see also *Foster v. Sharpe*, 114 So. 2d 373, 376 (Fla. 3d DCA 1959) (determining that the right to raise one’s child is one of the most fundamental rights held by a parent and thus it must be protected).

219. *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996).

C. Procedural Due Process Requires a Fundamentally Fair Hearing

In custody determinations, fundamentally fair procedures are required by the Fourteenth Amendment's procedural due process requirement, which protects "life, liberty, or property" interests.²²⁰

In a related procedure, a state-instituted termination of parental rights proceeding, the U.S. Supreme Court noted that the parents had a substantive due process right to fair proceedings because the parent-child relationship is protected as a fundamental right:

[P]arents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.²²¹

It is well-recognized that "[a] fundamentally fair hearing requires the procedural steps of notice, an opportunity to be heard, the opportunity to present evidence which is relevant and material, and arbitrators who are not infected with bias."²²² In *Johnson v. Johnson*,²²³ an Illinois appellate court invalidated a change of custody to a father because the judge demonstrated bias against the mother and refused to grant a change of venue that had been waived in a settlement agreement.²²⁴ The appellate court found that the settlement agreement would waive the mother's right to a fair and impartial judge, a constitutional right that cannot be contravened.²²⁵

220. U.S. CONST. amend. XIV ("[N]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.")

221. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (emphasis added) (footnote omitted). Although *Santosky* dealt with the termination of parental rights by the state, custody proceedings similarly involve state interference with a parent's right to determine the care, custody, and management of his or her child, particularly the right of the non-custodial parent. It is likewise essential that a custody determination provide both parents with a fundamentally fair procedure. The exercise of gender bias through subjective determinations is not a fundamentally fair procedure. The task thus centers on how to exercise gender bias from the custody determination process.

222. *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1416 (N.D. Okla. 1996) (citation omitted) (emphasis added).

223. 340 N.E.2d 68 (Ill. App. Ct. 1975).

224. See *id.* at 74-75.

225. See *id.* at 75, 78 (ordering that the mother's request for change of venue be granted due to the judge's bias); see also *In re N.C., C.P., and C.P.*, 479 So. 2d 200, 202 (Fla. 1st DCA 1985) (noting that the trial court's refusal to consider evidence when determining custody of the children violated the mother's and the children's rights to a fundamentally fair hearing).

V. FLORIDA'S CHILD CUSTODY STATUTE

It is well-recognized in Florida that the controlling consideration in a custody determination is the best interests of the child.²²⁶ Section 61.13, Florida Statutes, provides that the court shall consider and evaluate all factors affecting the welfare of the child, including but not limited to:

- (3)(a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.
- (b) The love, affection, and other emotional ties existing between the parents and the child.
- (c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home.
- (f) The moral fitness of the parents.
- (g) The mental and physical health of the parents.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- (j) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
- (k) Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to s. 741.30.
- (l) Evidence of domestic violence or child abuse.
- (m) Any other fact considered by the court to be relevant.²²⁷

The statute further states that:

[i]t is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing. After considering all relevant facts, the father of the child shall be given the same consideration as the mother in

226. See FLA. STAT. § 61.13(2)(b)(1) (1997) ("The court shall determine all matters relating to custody of each minor child of the parties in accordance with the best interests of the child . . .").

227. *Id.* § 61.13(3).

determining the primary residence of a child irrespective of the age or sex of the child.²²⁸

A representative of the Florida Office of the State Courts Administrator stated that circuit court clerks are not required to report data regarding when mothers or fathers receive custody of children.²²⁹ Therefore, no Florida data currently exists to prove that, as required by section 61.13(2)(b)(1), Florida Statutes, judges equally consider fathers when determining the primary residence of a child. However, a recent U.S. Department of Commerce report stated that of children living with one parent, 87% live with their mothers, while 13% live with their fathers.²³⁰ Thus, while a review of the statutory considerations does not indicate an obvious preference that would result in mothers receiving primary residential custody in overwhelming numbers, by inference, national statistics indicate that Florida follows the trend of primarily awarding custody of children to mothers.²³¹

228. *Id.* § 61.13(2)(b)(1) (emphasis added). Other states have similar statutes that require that both parents be considered equally when making a custody determination. See, e.g., ARIZ. REV. STAT. § 25-403(E) (1997) ("The court in determining custody shall not prefer a parent as custodian because of that parent's sex."); CAL. FAM. CODE § 3040(a)(1) (1997) ("[T]he court . . . shall not prefer a parent as custodian because of that parent's sex."); COLO. REV. STAT. § 14-10-124(3) (1997) ("In considering a proposed custodian, the court shall not presume that any person is better able to serve the best interests of the child because of that person's sex."); MO. REV. STAT. § 452.375(7) (1997) ("As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex, or financial status, nor because of the age or sex of the child."); NEB. REV. STAT. § 42-364(3) (1997) ("[T]he court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit or suitable than the other."); NEV. REV. STAT. § 125.480(2) (1997) ("Preference must not be given to either parent for the sole reason that the parent is the mother or the father of the child."); N.J. STAT. ANN. § 9:2-4 (West 1997) ("In any proceeding involving the custody of a minor child, the rights of both parents shall be equal."); N.C. GEN. STAT. § 50-13.2(a) (1997) ("Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child."); OKLA. STAT. tit. 43, § 112(3)(b) (1997) ("[T]he court shall not prefer a parent as a custodian of the child because of the gender of that parent."); OR. REV. STAT. § 107.137(4) (1997) ("No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father over the mother for the sole reason that he is the father."); VA. CODE ANN. § 31-15 (Michie 1997) ("[A]s between the parents there shall be no presumption or inference of law in favor of either."); WIS. STAT. § 767.24(5) (1997) ("The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian.")

229. Telephone interview with Alene Miller, Statistics Consultant, Florida Office of the State Courts Administrator (Apr. 10, 1997).

230. See STEVE W. RAWLINGS, U.S. DEPT OF COM., HOUSEHOLDS AND FAMILY CHARACTERISTICS MARCH 1993 XV: XVIII 5-7 (1994). Another report similarly notes that 87-88% of all children in single-parent families live with their mothers. See SELTZER, *supra* note 130, at 1. By inference, this indicates that Florida follows the national trend of overwhelmingly awarding primary residential custody to mothers.

231. See *supra* note 108 and accompanying text.

VI. THE FOURTEENTH AMENDMENT AND CHILD CUSTODY

While fathers have raised equal protection challenges to the mother-preference in custody determinations, it appears, at least at the appellate level,²³² that none have been successful—unless the statute states a blatant presumption favoring mothers.²³³ Most challenges appear to have been dismissed either because the court apparently had difficulty understanding the fathers' arguments or because, according to the court, the fathers' attorneys did not properly present valid arguments backed by compelling facts capable of supporting an equal protection claim. Similarly, very few cases claiming that the child custody system violates the fundamental right to the parent-child relationship appear to have reached the appellate level.

A. Challenges From Divorcing or Formerly Married Fathers

In *Ropoleski v. Rairigh*,²³⁴ the Michigan federal district court stated that the father "did not allege that he had been subjected to adverse treatment because he is male, but that his former wife ha[d] been granted preferential treatment, to his detriment."²³⁵ After noting that the father was making an equal protection challenge claiming that a facially neutral policy had been administered unequally, the court stated that the father must show not only that the defen-

232. But see *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 287, 291 (Fam. Ct. 1973) (denying the mother's request for custody based on the tender years doctrine because the evidence in this trial court demonstrated that it was in the children's best interests for the father to receive custody, and following the "at least cursory invocation" of the tender years presumption would violate the father's right to equal protection of the law). The New York statute at issue stated that "[i]n all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness." *Id.* at 287. Research indicates that this is the only case that determined applying a mother-preference under a facially neutral custody statute violated the father's right to equal protection. No appellate level cases appear to have found a violation of a father's right to equal protection in response to a father's claim that the application of the tender years doctrine under a facially neutral custody statute violated that right.

233. See Cheri L. Wood, Comment, *Childless Mothers?—The New Catch-22: You Can't Have Your Kids and Work for Them Too*, 29 *LOY. L.A. L. REV.* 383, 392 (1995) ("Considering it violative of the Equal Protection Clause of the Fourteenth Amendment, courts no longer applied the maternal custody preference for children of tender years.") Wood also notes that because "ninety percent of children went to the custody of their mothers[,] the maternal custody preference "was cited as statistical evidence of discrimination" and "sexual stereotyping." *Id.* (emphasis added) (footnote omitted).

Interestingly, a recent, successful, equal protection challenge involved a Pennsylvania statute that required non-custodial parents to pay their children's college tuition. See *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995). The court struck down the statute as a violation of the Equal Protection Clause because married parents were not likewise required to pay their children's college tuition. See *id.* at 269.

234. 886 F. Supp. 1356 (W.D. Mich. 1995). The court noted that the parties were in federal court due to "an action for deprivation of various civil rights under color of state law." *Id.* at 1359.

235. *Id.* at 1363.

dants' conduct had a discriminatory effect, but that discriminatory purpose was also a motivating factor.²³⁶ The court further noted that “[d]iscriminatory purpose’ implies that the decisionmaker selected a course of action because of its detrimental effects on an identifiable group. Error, mistake in judgment or arbitrary administration in applying a facially neutral policy does not violate equal protection.”²³⁷ The court then addressed the challenge:

Plaintiff has alleged, baldly, that [two court administrators], both men, discriminated against him purposefully, pursuant to custom or policy, because he is a man. The complaint provides no factual detail in support of the claim. Plaintiff has not identified the discriminatory policy or custom with any specificity. His allegations offer no explanation as to why defendants’ alleged lenient or preferential treatment of his former wife should give rise to a reasonable inference that intention to injure him in his relationship with his daughter, because he is a man, is the primary motivating factor. Not only is the claim not supported by factual details, but, even when viewed in the abstract, it is not supported by reasoned sense.

Though gender based discrimination is suspect, plaintiff as a male, is not a member of a group whose interests have traditionally been under-represented in the political process. Based on the facts alleged, the notion that plaintiff’s injury is the result of gender based discrimination—rather than, for instance, an erroneous or even arbitrary exercise of discretion—is implausible. Plaintiff’s equal protection claim is subject to dismissal as one “whose factual contentions are clearly baseless.” To countenance such a claim under the alleged facts would be to invite disgruntled parents everywhere to embroil the federal courts in child custody and support disputes, matters traditionally and appropriately entrusted to the state courts . . . simply by alleging gender discrimination. This, the Court refuses to do.²³⁸

The court then dismissed the equal protection claim.²³⁹

In *Fariello v. Rodriguez*,²⁴⁰ the father, appearing pro se, claimed that numerous named defendants deprived him of equal protection under the law.²⁴¹ The court stated that a review of the “voluminous complaint” provided no evidence that any government official interpreted any statute to single out the plaintiff.²⁴² The court added that

236. See id.

237. Id. (citations omitted).

238. Id. (citations omitted).

239. See id.

240. 148 F.R.D. 670 (E.D.N.Y. 1993).

241. See id. at 677.

242. Id.

no such action could foreseeably occur, either, and dismissed the action with prejudice.²⁴³

B. Challenges From Unwed Fathers

1. Equal Protection Challenges in General

Equal Protection claims raised by unwed fathers generally arise in the contested-adoption context. While adoptions are frequently handled by family courts, they are usually governed by statutes separate from those addressing custody when parents divorce.²⁴⁴ Nonetheless, many of the custodial issues are similar and provide interesting insight into equal protection challenges. In particular, contested adoption or out-of-wedlock custody cases demonstrate the enormous differences in treatment between unwed mothers and unwed fathers.²⁴⁵

In Wyoming, a father adverse to placing his child for adoption claimed an equal protection violation had been committed when the mother of the child was allowed to place the child for adoption without his consent.²⁴⁶ The Court restated what it believed to be the gist of the father's argument: that the court was "inferring that a young man cannot take care of his child, while a young woman who does not want her child, can and is fit because she is a woman."²⁴⁷ The Court stated that the father was arguing that "[i]f he was a woman, the Court would very likely give the child to him."²⁴⁸ Apparently confused by the father's argument, the court wrote:

GWJ [the father], of course, has no authority to assert BGH's [the child's] right to equal protection. His standing does not permit him to assert the rights of another. BGH's guardian ad litem represents her interest, and the guardian ad litem stated: As the child's guardian ad litem, the undersigned asserts that her right to equal protection under the laws has not been violated in any way, but has, on the contrary, been zealously protected by the District Court in these proceedings. As to his own right, GWJ's argument is at best obscure. We understand the gist to be that, because the court did not rule in his favor, he was denied his right to equal protection. GWJ does not attack the [relevant statutes] as being facially

243. See *id.* at 678. Fariello tried to bring an equal protection claim again in *Fariello v. Campbell*, 860 F. Supp. 54 (E.D.N.Y. 1994), alleging that his rights and those of similarly situated divorced males had been violated. The court dismissed the claim with prejudice and sanctioned Fariello for bringing a frivolous suit. See *id.* at 71.

244. For example, in Florida, child custody issues arise generally under chapter 61, whereas adoptions are handled under chapter 63.

245. For a review of some interesting cases highlighting the differences in treatment between unwed fathers and unwed mothers, see Craig, *supra* note 81, Part II.B.

246. See *In re the Adoption of BGH*, 930 P.2d 371, 373 (Wyo. 1996).

247. *Id.* at 380.

248. *Id.* at 380-81.

unconstitutional or encompassing a discriminatory motive. We are not able to discern any discrimination. . . . The adoption statute . . . does not favor one class over another, and it does not endorse mothers over fathers or women over men or adoptive parents over birth parents. There can be no valid argument that the statute is facially unconstitutional or encompasses a discriminatory motive.²⁴⁹

The court concluded that “GWJ fail[ed] to make any logical argument in support of this claim of error.”²⁵⁰ It added that the father failed to point to any portion of the record evidencing a denial of his right to equal protection.²⁵¹ Quoting the district court, the appeals court noted that mother was identified as:

“the most sensible and mature of the two biological parents, but in addition she is the most credible. . . .” Our examination of the record does not permit us to conclude the district court was biased or prejudiced against GWJ on gender grounds in this case. His right to equal protection of the law was not violated, and his argument must fail.²⁵²

2. Challenges to Facially Discriminatory Statutes

Arizona has a statute that declares the mother of a child born out of wedlock the child’s legal custodian until paternity is established.²⁵³ In *Arizona v. Bean*,²⁵⁴ after being convicted of custodial interference for failing to return his child to the child’s mother following a visitation, a father challenged the statute as a violation of the Fourteenth Amendment’s and the Arizona Constitution’s Due Process and Equal Protection Clauses because it created a statutory distinction between biological mothers and fathers.²⁵⁵ The father also argued that statu-

249. *Id.* at 381.

250. *Id.*

251. *See id.*

252. *Id.* at 381-82 (citation omitted).

253. *See* ARIZ. REV. STAT. § 13-1302(4)(B) (1997). The statute states: “If a child is born out of wedlock, the mother is the legal custodian of the child for the purposes of this section until paternity is established and custody and access is determined by a court.” *Id.* An unmarried father may initiate proceedings to establish his paternity by filing a verified complaint. In the alternative, the parents of a child born out of wedlock can voluntarily acknowledge paternity by filing with the clerk of the superior court either a birth certificate signed by the mother and father, or an affidavit signed by both parents acknowledging paternity. *See id.* § 25-812. The mother of the child does not have a similar affirmative duty to establish paternity, presumably because she gave birth to the child. It is important to note that once one parent has been deemed the legal custodian of a child, it is very difficult to change this designation. Florida has a similar “natural guardian” statute. *See* FLA. STAT. § 744.301(1) (1997) (“The mother of a child born out of wedlock is the natural guardian of the child.”).

254. 851 P.2d 843 (Ariz. Ct. App. 1992).

255. The father submitted *Lehr v. Robertson*, 463 U.S. 248 (1983), in support of the premise that “the state may not subject men and women to disparate treatment when

torily embodied unequal treatment afforded to married, unmarried, separated or divorced fathers similarly amounted to constitutional violations.²⁵⁶

The court disagreed with the father's argument that "there is no difference in the importance between the maternal and paternal roles" and that therefore no compelling state interest existed warranting a distinction based on gender.²⁵⁷ The court first attacked the argument by noting that although the Supreme Court has recognized an unmarried father's constitutionally protected interest in a relationship with his child,²⁵⁸ the Court "also recognized, however, that such a right is not absolute and that protection of the child is also an important state interest."²⁵⁹ The court explained:

Thus, the importance of the paternal role in a child's development notwithstanding, we cannot say that equal custody rights between all unmarried fathers and mothers effectuate the best interests of the child. To the contrary, as suggested by one writer, such a practice could have "disastrous consequences" for the child. See Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. Cal. L. Rev. 10 (1975). As the statutory presumption at issue here operates to preserve the child's interest in stability, it is not without a compelling state interest such as referred to in *Lehr*. Moreover, because the presumption is operative only until paternity and custody in the child's best interest are established by a court, it does not go substantially beyond the protection of that interest.²⁶⁰

The father also argued that because he was similarly situated to the mother he was entitled to protection equal to that provided to the child's mother as well as to married, divorced, and separated fathers.²⁶¹ Again, the court disagreed:

there is no substantial relation between the disparity and an important state interest." Bean, 851 P.2d. at 844.

256. See Bean, 851 P.2d. at 845.

257. *Id.* at 844-45.

258. See *id.* at 845 (referring to *Stanley v. Illinois*, 405 U.S. 645 (1972)). In *Stanley*, after the death of the children's natural mother, Illinois tried to remove the children from the unwed father. The father claimed that Illinois' failure to award him a fitness hearing because he was an unwed father violated the Due Process Clause of the Fourteenth Amendment. The Supreme Court held that the denial of the hearing violated the Fourteenth Amendment. See *Stanley*, 405 U.S. at 658.

259. Bean, 851 P.2d at 845. The court here is inferring that the protection of the child is best served by presuming that mothers are more fit than fathers to serve as legal custodians. This is gender discrimination.

260. *Id.* Bodenheimer's then 17-year-old law review article argued that despite *Stanley*, unmarried fathers should not receive custody rights equal to the mothers', because it "would have disastrous consequences for the child." Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 58 (1975). Like many courts, Bodenheimer presumed *de facto* that it is in the best interests of all children for all mothers to have custody.

261. See Bean, 851 P.2d at 845.

As in *Lehr*, we conclude that the parents here are not similarly situated. The testimony at trial established that, while the mother provided daily supervision, care and financial support for the child from the time of his birth, defendant lived with the mother only sporadically, living at times in another city, and provided what at best can be described as minimal financial support. The evidence was undisputed at trial that defendant never took any steps whatsoever to establish his paternity or exercised any custodial or visitation rights and was not living with the mother and child in a de facto family relationship at the time of the abduction. . . . The defendant was never the caregiver or provider for the child. Thus, defendant and the natural mother were similarly situated [only] in a biological sense²⁶²

Despite recognition of the mother's fundamental right to parent the child because of giving birth to the child, the *Bean* court noted that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."²⁶³ The court added that because the father had not taken "a single step as required by statute to establish his paternity, he cannot be said to be similarly situated with all married, divorced and separated fathers."²⁶⁴ The court noted that the Supreme Court had specifically recognized that the "mere existence of a biological link' does not create parental rights deserving of protection under the due process clause."²⁶⁵

Concluding, the Arizona appellate court affirmed the trial court's declaration that the statute is substantially related to an important state interest and is not a gender-based equal protection violation.²⁶⁶

262. *Id.* at 845-46. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Supreme Court had noted that:

the significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262. In essence, Arizona is forcing the parents into a wrestling match over the child if the parents cannot parent together. To obtain custody in most cases, the father would have to show that the mother is unfit to have custody of the child. Moreover, if a mother and child live with a relative who primarily cares for the child while the mother spends little or no time with the child, the mother would not likely lose custody of the child. Conversely, if a father does not proactively and significantly care for the child, he will likely never receive custody.

263. *Id.* at 846 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). Arizona's statute, however, clearly provides the mother with a parental right because of her biological connection to the child. All that is required of her to become the legal guardian is to give birth to the child. See *supra* note 253.

264. *Bean*, 851 P.2d at 846.

265. *Id.* (quoting *Lehr*, 463 U.S. at 261).

266. See *Bean*, 851 P.2d at 847.

A Utah appeals court reviewed the issue of whether requiring the father to register an acknowledgment of paternity violated the Equal Protection Clause.²⁶⁷ The father argued that:

the similarly situated parents of an illegitimate child are given different legal rights solely on the basis of their sex since the mother's consent is required prior to any adoption of the child regardless of whether she is willing to fulfill her parental responsibilities while the father has the right to consent to the child's adoption only if he files an acknowledgment of paternity indicating his willingness and intent to support the child.²⁶⁸

The court stated that the statute was designed to readily determine the paternity of illegitimate children so as to "facilitate immediate and continuing physical care of and emotional bonding opportunities for such children."²⁶⁹ The father argued that the statute was based on gender differences not reasonably related to these purposes, in that:

the statute defeats its objective by failing to require the mother of an illegitimate child to take action to identify herself as a willing parent as fathers are required to do since an unfit and indifferent mother can prevent the adoption of her child and, thus, fail to provide appropriate physical care and emotional bonding opportunities for the child.²⁷⁰

The father further argued that:

the statutory objective is also defeated because it results in gender-based discrimination against "identified, present, and willing fathers" who would, in fact, provide the necessary care and bonding opportunities for the child, and that an indifferent mother can arbitrarily deprive such a father of his parental rights under the statute.²⁷¹

The court responded by noting that the Utah Supreme Court held that the statute did not violate the equal protection rights of an unwed father because he had the same rights as the mother or the father of a legitimate child, if he timely filed an acknowledgment of paternity pursuant to the statute.²⁷² Therefore, the court added, when the father failed to timely file an acknowledgment of paternity or develop a substantial relationship with the child, the Equal Protection Clause did not preclude the state from terminating his parental

267. See *Swayne v. L.D.S. Soc. Servs.*, 761 P.2d 932, 936(Utah Ct. App. 1988).

268. *Id.* at 937. In reality, however, many fathers are not aware that they must file an acknowledgment of paternity. Many believe that simply being listed on the birth certificate is sufficient, but at least in Florida, it is not. See FLA. STAT. § 742.10(1) (1997).

269. *Swayne*, 761 P.2d at 937 (citation omitted).

270. *Id.*

271. *Id.* at 937-38.

272. See *id.* at 938.

rights.²⁷³ The court noted that the state's interest is to promptly identify fathers who will acknowledge parental responsibilities, and to make children speedily available for adoption.²⁷⁴ As did the court in *Bean*, this court dismissed the father's "mere" biological link to the child:

[F]athers who have "fulfilled a parental role over a considerable period of time are entitled to a high degree of protection," whereas unwed fathers "whose relationships to their children are merely biological or very attenuated" are entitled to a lesser degree of protection. . . . When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection.²⁷⁵

The court recognized that unwed mothers were "automatically identified by virtue of their role in the process of birth," but that if a mother was shown to be unfit, the state could terminate her parental rights.²⁷⁶ The court concluded that the gender differences in the statutory classifications were reasonably related to the statutory purposes.²⁷⁷

VII. CHALLENGING GENDER BIAS IN CUSTODIAL DECISIONS

A. Bringing an Equal Protection Challenge

Fathers seeking to bring an equal protection challenge in court face many hurdles. Perhaps the biggest hurdle is proving that the

273. See *id.* (citing *Caban v. Mohammed*, 441 U.S. 380, 394 (1979)). In *Caban*, the Supreme Court struck down a New York statute that allowed unmarried mothers to withhold their consent to an adoption but not unmarried fathers, even those who had established a "substantial relationship" with their children. The Court held the statute violated the Equal Protection Clause, and stated:

The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. [The statute] both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.

Caban, 441 U.S. at 395.

274. See *Swayne*, 761 P.2d at 938.

275. *Id.* (quoting *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199, 203 (Utah 1984), *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983), and *In re J.P.*, 648 P.2d 1364, 1375 (Utah 1982) (emphasis added)).

276. *Id.* (quoting *Wells*, 681 P.2d at 203).

277. See *id.*

court intended to discriminate when it awarded custody of the children to the mother because of gender discrimination.

In child custody statutes involving divorce cases, statutes that delineate the mother as the primary custodian violate the Equal Protection Clause because they are facially discriminatory and the intent to discriminate is obvious. Most states have repealed such laws for this reason.²⁷⁸

When the statute is not facially discriminatory but purports to treat both parents equally, as does Florida's statute,²⁷⁹ the challenge will be much more difficult. A father seeking to prove that his right to equal protection of the law was denied must present evidence that the law was administered in a discriminatory manner by the trial judge.²⁸⁰ As demonstrated in the Ropoleski case, this is a difficult standard to meet. Most judges do not state that they are awarding custody to the mother because she is the mother; instead, they may base their decision on a finding that the mother is the more fit parent due to her role as the primary caretaker and that it is in the child's best interests to remain with her.²⁸¹ Some states do not require courts to make specific findings of fact for the record when determining custody, and courts in these states do not have to articulate any reasons for their decisions. Florida is one of these states. The failure to require specific findings on the record makes it highly difficult to prove exactly what motivated the judge's decision, and thus

278. See *supra* note 197 and accompanying text.

279. See FLA. STAT. § 61.13(2)(b)(1) (1997) ("After considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child").

280. See *supra* note 196.

281. As noted above, the primary caretaker standard may be a thinly veiled mother-custody preference. See *supra* note 165 and accompanying text (discussing reasons why awarding custody based on a party's designation of "primary caretaker" will not necessarily meet the best interests of a child). Interestingly, a state task force examining whether gender bias exists in mother-preference custody presumptions found that despite the statutory eradication of this presumption, "some trial judges continue to enforce the presumption as before, automatically placing young children with their mothers irrespective of other facts and circumstances." THE MISSOURI TASK FORCE ON GENDER AND JUSTICE, REPORT OF THE MISSOURI TASK FORCE ON GENDER AND JUSTICE (1993), reprinted in 58 MO. L. REV. 485, 561 (1993). Despite confirming that "gender neutrality must be observed in all child custody cases, so that each case is decided on its objective merits," the task force nonetheless found that the primary caretaker presumption was an acceptable standard upon which to base custody determinations, even though "[t]he necessary result . . . will be placement with the mother in most cases where both parents seek custody and both are fit." *Id.* at 562-63. The task force found that this presumption "would not constitute gender bias against fathers; it would merely reflect a general societal pattern upon which people agree during the stability of marriage." *Id.* at 563. But see MINN. ST. § 518.17(13) (1997) ("The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.").

opens the door for the court to interject gender biases favoring mother-custody when making a custody determination.²⁸²

In 1991, the Georgia Commission on Gender Bias in the Judicial System released a report listing “[c]ulturally based gender-biased beliefs that influence some judges and disadvantage fathers.”²⁸³ The Commission found that these beliefs included:

- A. The belief that a mother is a better parent than a father.²⁸⁴
- B. The belief that children, especially young children, need to be with their mothers.²⁸⁵
- C. The belief that a father cannot work outside the home and be a nurturing parent.²⁸⁶
- D. The belief that because a mother is presumed to be the better parent, fathers must prove the mother “unfit” in order to gain custody.²⁸⁷
- E. The belief that if a court grants custody to a father, it brands the mother as “unfit” and “unworthy.”²⁸⁸

The Commission noted that in addition to the actual application of these biases by judges, “perceptions of gender bias discourage fathers from seeking custody by creating a ‘chilling effect,’” thus convincing fathers that it is not worth their effort to even seek custody.²⁸⁹

282. See Garrison, *supra* note 155, at 401 (“Judges today have more discretion in divorce cases than in any other field of private law.”).

283. COMMISSION ON GENDER BIAS IN THE JUD. SYS., GENDER & JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM (1991), reprinted in 8 GA. ST. U. L. REV. 539, 657 (1992) [hereinafter *GEORGIA STUDY*].

284. *Id.* at 657-58 (noting that “American society has tended to assume that mothers, rather than fathers, should and do have primary responsibility for raising children”).

285. *Id.* at 659 (listing public commentary, including testimony from a father who noted that he had heard the judge ask an attorney in a custody matter, “How many times have you seen a judge award custody of a five-year-old to the father?” to confirm that “the ‘tender years’ presumption is alive and well in Georgia courts” (footnote omitted)).

286. *Id.*

287. *Id.* (noting that: “[a]n attorney from South Georgia testified that in her experience the test is not what is in the best interest of the child, but rather whether or not the mother is fit. If the mother is fit then the father will not be awarded custody, and this is gender bias against fathers”). Other attorneys testified that “a fit mother would not lose custody no matter how appropriate it might be to give custody to the father,” and one testified that he had “been told by judges in pretrial conference[s] that he will not get anywhere in the custody battle unless he has some ‘dirt’ on the mother.” *Id.* at 659-60 (footnote omitted).

288. *Id.* at 660 (noting that despite extensive evidence that a mother was psychologically unstable and that it would not be in the best interests of the children to remain with her, the judge nonetheless awarded custody to the mother because “it does something to a mother” to lose her children).

289. *Id.* The report also lists “culturally based gender-biased beliefs that influence some judges against mothers.” *Id.* at 662. These beliefs include “[t]he belief that an older boy needs to be with his father” and “the belief that a mother who works outside the home, whether because of ambition or economic necessity, is less fit to be awarded custody than a man . . . because these women are not good mothers.” *Id.* Such gender-biased beliefs likewise have no place in the family court system because they are not only patently unfair to

To address the problem of gender bias in Florida's custody determinations, during the 1998 legislative session Senator Katherine Harris²⁹⁰ introduced a bill that would require judges to state in writing the findings of fact upon which they based their custody decision.²⁹¹ The bill includes findings that state:

[S]ome residents of this state have a perception that, despite the gender neutrality of [the custody statute], the law is being applied by trial courts in a gender-biased manner, and

[S]uch a perception, if grounded in fact, is unacceptable, is contrary to children's best interest, and is contrary to the public policy of this state, and

....

[A] lack of a record of trial court proceedings can prevent meaningful review or other analysis of trial court action²⁹²

The legislation seeks to ensure that trial courts adhere to the legislative policy of considering both parents equally when making a custody determination.²⁹³

A father or fathers could also claim that, as a group, fathers have been denied equal protection of the law as a collateral effect of a custody policy, rather than through the application of express discrimination by a state actor (here, the trial judge). Notably, however, in *Personnel Administrator of Massachusetts v. Feeney*²⁹⁴ the Supreme Court required that the group whose rights were infringed upon demonstrate that nearly all of its members were discriminated against to prove that the state intended to discriminate.²⁹⁵

Thus, absent express gender-bias by a trial judge, fathers alleging that the law is applied in a discriminatory manner may be required to demonstrate an absolute preference for mothers over fathers; that is, at the trial level no fathers receive custody. In one particular courtroom or in some small, remote counties this may be the case, and then a plaintiff may actually be able to prove a 100% impact. A particular judge might never award custody to fathers, and may even

the rights of mothers to equally parent their children, but they can result in custody awards that are not truly in the best interests of the children.

290. Repub., Sarasota.

291. See Fla. SB 1812 (1998) (proposed amendment to FLA. STAT. § 61.13(2)(b)(1)). The bill states:

If a judicial determination of parental responsibility, residential responsibility, or both is made by the trial court after a hearing on the merits and based on the factors set forth in subsection (3), the court shall state in writing the findings of fact based on competent substantial evidence found in the record and the conclusions of law on which its decision is based.

Id.

292. Id.

293. See id. The bill died in the Senate Judiciary Committee.

294. 442 U.S. 256 (1979).

295. See id. at 282 (finding that a nearly 100% impact is required to constitute an equal protection violation).

make comments indicating that, as a rule, he or she never awards children to fathers because, for example, "Children belong with their mothers." A "mere" disparate impact on fathers, however, will not likely be enough to prove an equal protection violation.²⁹⁶ Invidious discrimination must be demonstrated.²⁹⁷ It may be inferred from a totality of the facts, including the fact that the law bears more heavily on one group than another.²⁹⁸ Thus, as depicted in *Rogers v. Lodge*,²⁹⁹ a voting rights case involving racial discrimination, a statistical showing of the impact is key to the claim.³⁰⁰

Because the gender of the parents is at issue, a reviewing court should apply intermediate scrutiny to determine if there is a violation of the Equal Protection Clause.³⁰¹ The state must show that its interest is substantially related to an important governmental interest.³⁰² In a custody case, that interest is to further the best interests of the child.³⁰³ A court that has an overt or covert policy of awarding children to mothers would have to show that this policy is substantially related to the governmental interest of meeting the best interests of the child. There is a wealth of information which states that children need both fit parents to be significantly involved in their upbringing.³⁰⁴ Thus, a child's needs would be better met by an award of joint physical or rotating custody where the parties reside within the same locale and can reasonably cooperate regarding the arrangement.³⁰⁵ Where the parties do not reside within the same locale, or where the parties are unable to cooperate, and one party must be deemed the primary residential caretaker, the best interests of the child are met not by following a policy that awards children to moth-

296. See *supra* note 196.

297. See *supra* note 196.

298. See *supra* note 196.

299. 458 U.S. 613 (1982).

300. See *supra* note 196. Notably, however, *Rogers* involved racial discrimination, which receives strict scrutiny rather than intermediate scrutiny. Also, no African Americans had ever been elected within the relevant district, which was a 100% impact on the protected group. See *Rogers*, 458 U.S. at 623.

301. See *supra* note 186.

302. See *supra* note 186.

303. See FLA. STAT. § 61.13(2)(b)(1) (1997) ("The court shall determine all matters relating to custody of each minor child of the parties in accordance with the best interests of the child . . .").

304. See, e.g., *Zummo v. Zummo*, 574 A.2d 1130, 1136 (Pa. 1990) ("The demise of gender stereotypes, and a wide and growing body of research indicating the importance of both parents to healthy child development have caused courts to reconsider the efficacy of the sole custody/visitation concept of post-divorce allocation of parental authority." (footnote omitted)); *supra* Part III.E (listing statistics from a variety of governmental and private sources that conducted research which showed that children suffer when both parents are not actively and meaningfully involved in their lives).

305. Section 61.13(3) states that courts should consider which parent "is more likely to allow the child frequent and continuing contact with the nonresidential parent." FLA. STAT. § 61.13(3) (1997). Joint physical or rotating custody would more sufficiently meet this requirement.

ers solely because they are women, but by a careful analysis of who is the overall more fit parent regardless of gender.

B. Bringing a Substantive Due Process Challenge

A father may also bring a cause of action based on state interference with a substantive due process fundamental right. While this issue has arisen in the contested-adoption context,³⁰⁶ it should also apply to divorced fathers when the state discriminatorily provides custody to mothers.

A claim that fundamental rights have been violated requires the reviewing court to apply strict, rather than intermediate, scrutiny. Thus, the state would need to show a necessary and compelling interest to justify its interference with the father's fundamental right. This argument might best be raised in a situation where both parents are fit, reside in the same community, and are suitable for rotating or joint physical custody, yet the trial court awards the mother primary residential custody and the father visitation of every other weekend.³⁰⁷ When an activity is constitutionally protected, as is the fundamental right to parent, a state must choose the least restrictive means possible to achieve its goal.³⁰⁸ Absent good cause, it would appear that the court, in this situation, would be interfering with the father's fundamental right to parent his child; the father, then, should be entitled to a review of strict scrutiny.

If the appellate court finds that the trial court did interfere with the father's fundamental right to parent his child without a compelling state interest, the court could remand the case and order that the father's right to parent his child be reflected through rotating or joint physical custody, or through a greater award of visitation. However, the appellate court could make such a determination itself.

C. Challenging Fundamentally Unfair Hearings

The failure to provide a fundamentally fair hearing is a violation of procedural due process, a constitutionally protected right.³⁰⁹ Procedural due process requires that the party whose interest is threatened be provided with a meaningful opportunity to be heard.³¹⁰ In-

306. See *supra* Part IV.B.1.

307. See *supra* note 87 and accompanying text (noting that an award of every other weekend visitation is still the "standard visitation schedule").

308. See *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) ("[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" (citation omitted)).

309. See *supra* Part IV.C.

310. See *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1416 (N.D. Okla. 1996).

herent in this right to be heard is a right to a fair proceeding;³¹¹ the interjection of gender bias into a proceeding violates the requirement that the hearing be fair.³¹² Thus, judges who make custody determinations not on a record basis, but on the basis of gender bias, violate procedural due process.³¹³

Ideally, a father bringing a claim should be supported by a transcript from the trial court proceeding that evinces discriminatory comments made on the record.³¹⁴ However, even this evidence of judicial discrimination can be ignored by the reviewing court. For example, in *Dalin v. Dalin*,³¹⁵ the North Dakota Supreme Court denied the father's claim that the roughly equal custody arrangement that had been modified to allow the mother to have custody for nearly nine and a half months of the year was motivated in part due to gender bias.³¹⁶ The court reviewed the trial court transcript, which contained questions demonstrating that the trial court had used stereotypical caretaking roles in making its decision.³¹⁷ After stating that "[g]ender bias in judicial proceedings is wholly unacceptable,"³¹⁸ the court noted that:

if the trial court assumed that fathers, as a group, are incapable of adequately raising their daughters, it would be relying on an improper factor to determine custody. Trial courts should not "perpetuate the damaging stereotype that a mother's role is one of caregiver, and the father's role is that of an apathetic, irresponsible, or unfit parent."³¹⁹

Nonetheless, because the father had admitted that the child's grandmother assisted him with "training that might best be done by a woman,"³²⁰ the court found that his request for permanent sole custody was appropriately denied,³²¹ although the father had had sole custody for four months prior to the custody modification, and had presented evidence that the mother had a history of alcohol abuse and an unstable life.³²²

311. See *id.*

312. See *Johnson v. Johnson*, 340 N.E.2d 68, 76-77 (Ill. App. Ct. 1975).

313. See *Prudential*, 929 F. Supp. at 1416.

314. See *Johnson*, 340 N.E.2d at 78 (finding that the mother's and the children's rights to a fundamentally fair hearing were denied by reviewing discriminatory comments made on the trial court transcript).

315. 512 N.W.2d 685 (N.D. 1994).

316. See *id.* at 689.

317. See *id.*

318. *Id.* (citations omitted).

319. *Id.* (quoting *In re Dubreuil*, 629 So.2d 819, 828 (Fla.1993)).

320. *Id.*

321. See *id.* at 691.

322. See *id.* at 687-88. The dissenting justice said that he "was convinced that if the gender of the parties had been reversed, the result would have been the opposite." *Id.* at 691 (Sandstrom, J., dissenting).

A father may challenge gender bias by claiming that the court has violated his right to equal protection of the laws, his fundamental right to parent his child, and his procedural due process right to a fair hearing. Ideally, any claims should be supported by discriminatory comments recorded in a transcript. Absent this proof, a father may choose to research custody records within a particular clerk of the court's office to determine whether any fathers have been awarded primary residential custody by a particular judge.³²³ Because of cases such as Feeney, the unfortunate fact is that claimants will likely need to show a nearly 100% impact on the affected group.

In any event, it is hoped that fathers raising this challenge will be able to call to the court's attention the serious breach of their rights when fathers are discriminated against in custody decisions because of their gender. An increase in these claims may put courts on notice that fathers intend to see that their constitutional rights are upheld, and that courts absolutely must, for the best interests of children, fairly and justly weigh both parents equally when primary residential custody must be determined.

Fathers may have greater success with claims that trial courts have violated their fundamental right to parent their children. Because it is well-established that the right to parent one's child is a fundamental, constitutionally protected right, strict, rather than intermediate, scrutiny should be applied by the appellate court.³²⁴ The state must have a compelling reason for interfering with the fundamental right.³²⁵ In the least, it is hoped that this type of appeal will allow a father to acquire a significantly increased amount of time with his child, if not rotating or joint physical custody. Some fathers may be able to impress upon the trial court the sanctity of the parent-child relationship, and the seriousness with which custody determinations must be approached to ensure that the fundamental right to parent is minimally infringed upon.

Regarding a father's right to a fair hearing, a transcript is almost certainly essential to prove to an appellate court that the custody hearing was not fundamentally fair. Thus, whenever possible, fathers should have court reporters record custody proceedings. In conjunction with the requirement that states require judges to submit their custody awards in writing, with detailed findings of fact,³²⁶

323. Until courts are required to report which parent has been awarded custody to the clerks of the circuit courts, the only way to obtain this information is for one to conduct one's own research. See *infra* Part VIII.E (recommending that courts be required to report this information to prove that, as required by facially neutral statutes, fathers are being considered equally when custody is determined).

324. See *supra* Part IV.B.

325. See Krupnow, *supra* note 211, at 631-32.

326. See *infra* Part VIII.D.

it is hoped that the increased use of trial transcripts will help to root out gender bias which results in fundamentally unfair proceedings.

VIII. RECOMMENDATIONS

A. End "Selective Discrimination"

Misandry has been defined as "the attribution of negative qualities to the entire male gender."³²⁷ Today, it is politically correct within our culture to belittle and berate men, although the very same treatment toward women could result in a civil lawsuit.³²⁸ This is selective discrimination.

While the male power structure undoubtedly deserves criticism, males alone do not defend and uphold its principles; indeed, many women support male values, such as individualism, liberty, production, and competition. Moreover, as evidenced in family court, for example, males can be victimized by the male power structure, which perpetuates the myth that, to be recognized as valuable, fathers must economically provide for their families.

However, to discriminate against individual men because they are men is an entirely different matter. As women and minorities have argued for the last thirty years regarding their particular interests, men, too, should be evaluated on an individual, non-discriminatory basis, especially when it comes to custody of children. To do otherwise extinguishes the ability to fairly evaluate and administer the placement that is in the best interests of children.

In 1996, NOW issued National Conference Resolutions announcing that the organization was preparing a counterassault against all fathers' rights groups because their recent successes—primarily legislation that inched fathers minimally forward to permitting them to spend more time with their children—threatened "all women."³²⁹

What is so wrong with fathers spending more time with their children? For many women, this change presents a threat in the only arena in which they clearly have an advantage: the family court. On the one hand, it is hard to blame women for fighting tooth and nail to maintain every inch of the status quo they enjoy within our legal system. But because women have fought for—and won—the right to enter into traditional male domains, women should therefore understand what it feels like to be subject to oppression, based on a physical characteristic. Instead of judging all males "in the form of universals, rather than in the form of particulars of individual parents' ex-

327. PATRICK M. ARNOLD, *WILDMEN, WARRIORS, AND KINGS* 52 (1991).

328. See FARRELL, *supra* note 61, at 294-96.

329. NOW, NOW Action Alert on "Fathers' Rights" (visited Mar. 20, 1998) <<http://www.now.org/organiza/conferen/1996/resoluti.html>>.

periences,”³³⁰ women must recognize the important role most fathers play in the lives of their children. Furthermore, women should take this recognition one step further:

Theoretical literature depicts “mothering” as an activity exclusive to women. Fathers will continue not to be custodial parents as long as societal divisions of child care responsibility persist. Feminist theory could do much toward exploding the myth that parenting is a sex-linked trait, and toward fostering an understanding of how men can nurture and take on child care responsibilities.³³¹

Indeed, many women might ask “Why should we encourage fathers to care for and seek custody of children when it will leave us as second class citizens in the workplace and at home?” Because welcoming fathers into the childcare sphere benefits women as well as children, in that it frees women of oppressive stereotypical roles and allows men to explore and incorporate traditionally female-identified characteristics, making both women and men better people; because it is undoubtedly in the best interests of children to have the maximum amount of love and care from both fit parents; because having been subjugated by gender bias, women should know better and thus should be true to female values, such as communitarian inclusion, rather than tyrannical oppression. Discrimination against fathers not only unjustly harms fathers, but even more significantly, harms children who suffer when their fathers are treated as insignificant, disposable factors unessential in the lives of their children.

B. Implement “Courtwatch” Programs to Empirically Examine Contested Custody Decisions

Problematically, many gender bias studies gather their data through subjective surveys, questionnaires, and personal testimonies rather than through empirical examinations of the actual custody-making decision in the courtroom.³³²

Objective data regarding custody awards should be gathered to determine whether the gender-biased application of gender-neutral laws is occurring. Legislatures should either fund their own studies, fund studies by the judiciary, or contract out to private organizations to develop a methodology for tracking, categorizing, and analyzing custody awards in selected, representative areas. Moreover, until trial judges are required to provide written findings supporting their

330. Levit, *supra* note 165, at 1078.

331. *Id.* at 1078-79 (citations omitted). This is particularly true considering that for decades a major complaint of many women has been that men need to become more nurturing and empathic. Encouraging fathers to assume caretaking roles develops these attributes through hands-on caring for children.

332. See generally MASSACHUSETTS STUDY, *supra* note 106; GEORGIA STUDY, *supra* note 283.

reasons for awarding custody or primary residency to one parent over another,³³³ a courtwatch program should be funded and implemented to monitor the way courts, witnesses, and experts treat mothers and fathers in custody litigation.

Implementing these two recommendations should inform policy-makers of what is truly considered when family courts make custody decisions.

C. Implement a Statutory Presumption in Favor of Joint Physical or Rotating Custody

Recognizing that children need both parents, some states have passed legislation that presumes that parents will share parental responsibility of children.³³⁴ In some states, statutes invoke a presumption that joint custody is in the best interests of children when both parents agree to it.³³⁵

In 1997, the Florida Legislature passed a bill stating that rotating custody is a viable option for judges to consider when determining custodial arrangements.³³⁶ Rotating custody means that parents who live within the same community can split custody of the child fifty-fifty, such as where the child lives one week with one parent, and a subsequent week with the other parent.

Florida, and all states, should establish a rebuttable presumption in favor of not only shared parental responsibility but also joint residential or rotating custody when both parents are fit and live within the same community. The presumption should be defeated only if independent, corroborated facts demonstrate clearly that rotating custody is not in the best interests of the child.³³⁷ The presumption should not be defeated merely because the parent likely to be the custodial parent does not want to engage in rotating custody. An opportunity to opt out merely by choice places noncustodial parents,

333. See *infra* Part VIII.D.

334. See, e.g., FLA. STAT. § 61.13(2)(b)(2) (1997) ("The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.")

335. See, e.g., ALA. CODE § 30-3-152(5)(c) (1997) ("If both parents request joint custody, the presumption is that joint custody is in the best interest of the child. Joint custody shall be granted in the final order of the court unless the court makes specific findings as to why joint custody is not granted."); CAL. FAM. CODE § 3080 (West 1996) ("There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child . . . where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child.")

336. See Act effective July 1, 1997, ch. 97-242, § 2, 1997 Fla. Laws 4436, 4437 (codified at FLA. STAT. § 61.121 (1997)) ("The court may order rotating custody if the court finds that rotating custody will be in the best interest of the child.") (emphasis added).

337. See, e.g., *O'Brien v. Crumley*, 695 So. 2d 881 (Fla. 5th DCA 1997) (upholding an award of rotating custody because "[t]he evidence reflected that the child had adjusted well to the rotating custody that had been in effect prior to the trial court's order; in fact, there was evidence that the child thrived in the arrangement").

usually fathers, at the mercy of the custodial parent. This result favors the mother because if she declines to support rotating custody she has a much greater chance of receiving primary residential custody.

D. Require Judges to Make Specific Findings of Fact When Determining Custody

In Florida, the law currently does not require judges to make specific findings as to why they are awarding primary residential custody to one parent over another.³³⁸

Chapter 61 should be amended to require that when making primary residential custody determinations, judges must state on the record specific findings as to why they are awarding primary residential custody to a particular parent.³³⁹ Presently, most judges simply state that they find it is in the best interests of children that the mother receive primary residential custody, without specifically stating why they are making that finding. Requiring these findings to be made in detail and on the record would better indicate whether judges are truly considering the statutory criteria of gender neutrality when making custody determinations. This requirement would also help to demonstrate when judges are abusing their discretion and exercising gender bias when making their determination. Finally, specific findings stated on the record would better preserve the issue for appeal. Under the current practice, an appellate court is highly unlikely to reverse a judge's custody determination because the statute allows judges to exercise broad subjective discretion and reviewing courts usually award great deference to trial court judges' decisions.

E. Require Clerks of the Circuit Courts to Record Which Parent Receives Primary Residential Custody

Although Florida's child custody statute states that "[a]fter considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child,"³⁴⁰ statistics are not being kept by the clerks of the circuit courts to confirm that courts are adhering to this statutory requirement. There is currently no evidence that fathers are being considered as primary residential custodians to the same degree that mothers are considered.

338. See FLA. STAT. § 61.13(2) (1997).

339. See, e.g., MINN. STAT. § 518.17(13) (1997) ("The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child").

340. FLA. STAT. § 61.13(2)(b)(1) (1997).

Indeed, the evidence appears to indicate that Florida follows the national trend of awarding primary residential custody to mothers in overwhelming numbers. Therefore, in order to enforce adherence to the statutory requirement that fathers be considered equally when custody is determined, either the legislature or the supreme court should require circuit courts to report whether the mother or the father receives primary residential custody during the initial custody determination of the divorce proceeding.

F. Revise Child Support Guidelines

Although the very troublesome topic of child support is beyond the scope of this Comment, courts should note that United States General Accounting Office statistics demonstrate that two-thirds of all fathers with child support arrearages are incapable of paying the amount ordered.³⁴¹

More often than not, these “guidelines” are adhered to as the absolute law rather than simple guidelines. States should realize that child support can be an impediment to the father-child relationship.³⁴² For example, when fathers reside a significant distance away from their children, excessive child support can interfere with the father’s ability to spend time with his children due to transportation costs. Additionally, child support guidelines do not take into account that fathers must set up separate residences requiring furnishings and other accommodations and supplies for children. For example, the report on which Florida’s current child support guidelines are based states that the author drafted the guidelines according to a two-parent intact family model, rather than incorporating the reality

341. See U.S. GEN. ACCT. OFF., CHILD SUPPORT AND ALIMONY, GAO/HRD-92-39FS 10 (1992); Ewing Testimony, *supra* note 19 (“A number of studies, including at least one funded by the Federal government, have found that a parent’s recent employment status and ability to pay [are] . . . important predictors of noncompliance.”). Ewing also notes that:

According to a GAO review of the Census Bureau data, 66 percent of noncompliance was reported by custodial mothers themselves as being because the fathers were unable to pay. However, noncustodial parents are not provided the AFDC-safety net as are custodial parents. If we define a “deadbeat” as a parent who does not contribute financially for one’s child (whether willfully or not), we not only have “deadbeat dads” who are the ones that are degraded in the media, but a lot of “deadbeat moms,” the ones that are on welfare. There is quite a disparate treatment of impoverished parents based upon either gender, who has won custody of the child, or who has been designated as the child support obliger.

Id.

342. See, e.g., FLORIDA COMM’N ON RESPONSIBLE FATHERHOOD, ANNUAL REPORT, LEGISLATIVE RECOMMENDATIONS Attachment V (1997) (noting that “Florida’s child support guidelines may be an obstacle or barrier to the involvement of otherwise responsible fathers in their children’s lives”).

of two separate households.³⁴³ Second household set-up and maintenance costs were intentionally excluded.³⁴⁴ With the move toward joint and rotating custody of children, the need to include these costs within the child support formula becomes even greater. The exclusion of such costs is not only patently unfair to noncustodial parents, but to children as well who suffer when their noncustodial parent is subject to actual, or near abject, poverty, or cannot provide an additional home that parallels the quality of the home offered by the mother. As Cynthia L. Ewing, a Senior Policy Analyst with the Children's Rights Council noted:

[F]or a child support system to work, the levels of child support must be reasonable and based on the TRUE costs of raising children. In practice, the child support guidelines are none of the above. Child support guidelines must reflect the basic fact that it costs more to maintain two households than one. Excessive child support awards which force obligors to work 2 or 3 jobs in order to meet their support payment are NOT serving the best interests of our children. Parents caught in this trap simply do not have the time to parent, to provide the emotional support and guidance which our children desperately need. Excessive support awards which drive obligors themselves into poverty or homelessness are NOT serving the best interests of our children. While the media is quick to note that many custodial parents, primarily mothers, are living in poverty, they fail to report that the same may also apply to noncustodial parents. A University of Wisconsin study found that 58% of non-custodial parents are living below the poverty level. Congress must recognize the unfortunate fact that children of divorced or separated parents may never exist at the same standard of living they enjoyed as an intact family. Congress must accept that the overwhelming majority of children of unwed parents will likely be raised at a standard of living at or below the poverty level, regardless of the bureaucracy's success at collecting child support.³⁴⁵

States should implement study commissions composed of genuinely unbiased members including custodial and non-custodial fathers and mothers who can redesign child support guidelines to include costs necessary to set-up and maintain both households.

Moreover, non-custodial parents with fifty-fifty custody should not be required to pay child support as long as the child's reasonable needs are met in both households. Women should recognize the dishonesty of arguing for social equality yet voluntarily submitting

343. COMMITTEE ON FAMILY LAW AND CHILDREN, CHILD SUPPORT GUIDELINES INTERIM PROJECT REPORT 1 (1997) (noting that the Florida Legislature must review the guidelines to determine whether they are an "accurate estimate of the expenses of an 'intact' family").

344. See *id.* at 35 (noting that Policy Studies, Inc., the group which computed the guidelines, stated that visitation costs are not included "in any way").

345. Ewing Testimony, *supra* note 19.

themselves to the traditional experience of extracting financial support from men to support children when it is not necessary to support the reasonable needs of the children.³⁴⁶ In most cases, responsible fathers who are allowed to remain involved in their children's lives will financially contribute directly to the child's care as they did prior to the divorce. Funding for needs beyond those which are reasonable should not be routed through mothers via state-instituted wealth transfers.

G. Implement True Parity in the Workplace

In the end, the most effective way to correct the post-divorce inequities between the sexes is simple: correct pay inequality in the work force. If the wage gap were wiped out between the sexes, a federal advisory council concluded in 1982, one half of female-headed households would be instantly lifted out of poverty.³⁴⁷

Women, and men, should proactively seek eradication of the glass ceiling and should pursue true economic and social values parity for women in the workplace. True parity, however, does not mean that women should be expected to adopt the male-norm in the workplace; instead, the workplace should fully integrate behavior culturally identified as female-based:

Women have tried too long and too hard to be like men. The second stage of the social transformation must be for men to become more like women. The traditional male power base in the workplace no longer simply can bring women on board, and expect them to thrive and prosper because they are there. Rather, the workplace must become more humane and inviting for all. It must recognize that workers have personal lives and that families require time and attention, and integrate these factors into the workplace.³⁴⁸

With the transformation in gender roles so that now both parents are expected to care for children and work, quality, inexpensive day-care, preferably on workplace premises, is essential. Both parents should be equally and actively encouraged by employers to play a significant role in the lives of their children. Employers should permit parents to engage in alternative work hours or to work from the home via telecommuting. Fathers, as well as mothers, should take leave from work when necessary to care for their children. These are

346. See, e.g., *Finley v. Scott*, 1998 WL 29648, at *4 (Fla. Jan. 29, 1998) (finding appropriate the consideration of the actual "bona fide needs" of the child when determining the amount of child support, resulting in a lower award than provided for in the child support guidelines).

347. FALUDI, *supra* note 7, at 25.

348. Booksman, *supra* note 165, at 76-77 (listing factors companies should take to assume more family-friendly environments, including recognizing that fathers have parental and domestic responsibilities).

just a few examples of ways in which employers should actively incorporate behavior culturally identified as female within the workplace.

IX. CONCLUSION

The evidence is overwhelming and demands that we re-examine the wisdom of conventional custody. Unless you believe that a father's value to his children diminishes after divorce, it is hard to justify a custody policy that routinely and automatically disrupts the divorced father's relationship with his children. The notion that only mothers are important to their children is false; it is time to jettison it from custody policy.³⁴⁹

If the treatment fathers receive in the family court occurred in the workplace, an affirmative action plan would likely be implemented to rectify the pervasive discrimination and barriers fathers encounter as they seek meaningful access to their children in family courts. Ample evidence exists to prove that children need loving fathers to substantively care for them. Many fathers stand ready and willing to take on this charge, despite societal messages that "real men don't take care of children." As Florida's Fourth District Court of Appeal noted in *Willey v. Willey*,³⁵⁰ courts should do all that is possible to encourage fathers to embrace their fatherhood, rather than interject barriers and gender bias to confine fathers to insignificant child care roles. In turn, mothers should encourage the father-child relationship, and should seek and expect true parity in the workplace that incorporates culturally female-identified values.

As the twentieth century concludes, both mothers and fathers, and all members of society, including judges, must work actively to discard outdated gender stereotypes that are no longer relevant and that oppress both men and women at home, in the workplace, and in family court. The health and well-being of children depend on the ability of both parents, and all others, to work cooperatively to achieve this critical goal.

349. WARSHAK, *supra* note 6, at 50.

350. 683 So. 2d 647, 650 (Fla. 4th DCA 1996).