

*Sol Wachtler*

The Chief Judge of the State of New York

On May 1, 1988, Judge Kaye of our New York State Court of Appeals and five law assistants employed in our Court's Central Legal Research Staff presented a special Law Day program to the Judges and staff of the Court on Developments in the Law Affecting Women. At my request, their speeches, together with relevant bibliographies, were later compiled and distributed throughout the Court. Because the Judges of our Court believed this material would be of interest to the bench and bar, I asked the Office of Court Administration to prepare and distribute this booklet to you.

Sol Wachtler



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INTRODUCTION TO THE LAW DAY PROGRAM ON DEVELOPMENTS IN THE LAW AFFECTING WOMEN

Judith S. Kaye
May 2, 1988

For three reasons, today's program is a particularly appropriate part of the Court's celebration of Law Day 1988.

First, chronologically, Law Day 1988 falls in the midst of the bicentennial of the signing and ratification of the Federal Constitution. Study of the new developments in the law affecting women deepens our understanding of the fundamental nature of our 200-year-old Constitution as a modern, living document. Women were of course not mentioned in the Constitution, or the Bill of Rights; nor were they thought of 80 years later, with the enactment of the Fourteenth Amendment. Yet, since 1971, an entire body of law affecting the rights of women has evolved under the Federal Constitution, particularly the equal protection guarantee of the Fourteenth Amendment. These developments have been a response to cataclysmic social change and to advances in medical science—especially changes in the workforce, the family, and in reproductive technologies. Our magnificent Constitution has accommodated, amplified, even accelerated the pace of change in society's increasingly enlightened perception of what is encompassed by the immutable ideal of "equal protection." So, as students of the Constitution—as we are—this is properly part of our celebration today.

Second, and wholly apart from the bicentennial, the subject in and of itself embodies new trends in the law, made even more exciting in a time of perceived disintegration of certain values. To use the words of Yale Professor Owen Fiss (*The Death of the Law?*, 72 Cornell L Rev 1, 15):

[t]oday a new cause is taking hold, and it seems to have achieved (at least in New Haven) the momentum that once belonged to the civil rights movement. I am referring to the women's movement, which seems to be on the verge of mobilizing an entire generation of law students. It demands a reexamination of existing social arrangements and has unleashed for this enterprise a remarkable energy. But for feminism to become, like the civil rights movement before it, the instrument of social regeneration the law awaits, we—both the bearers of the cause and the community criticized—must cease to view gender issues as a matter of individual or group interests, and recognize the claim to sexual equality as an expression of the ideals and values we hold in common.

What you will hear today is the outline of a very broad range of issues profoundly affecting not women alone, but all of us. What you will hear is not a monolithic body of thought but discussion of the issues, some of which divide even the most committed feminists, as we all grope for solutions *within the law* to the problems and realities of a markedly changed social order. What better way to celebrate Law Day than by reflecting on a segment of developing legal thought?

"What you will hear today is the outline of a very broad range of issues profoundly affecting not woman alone, but all of us."

Third, this is a project of our Central Staff—a celebration of the bountiful talents of the Court's own counsel. The project has been tackled with the enthusiasm, diligence and professionalism they bring to everything they do for us.

OVERVIEW

By Marjorie S. McCoy

Good Afternoon.

As Judge Kaye indicated, the idea for this program grew out of discussions with her on developments in the law relating to women. Together with Judge Kaye, Barbara, Hope, Eleanor, Suzanne and I decided to focus our presentation on the role of State Courts in declaring and enforcing the law governing gender, in general, and women, in particular.

For ease of discussion, the presentation will be divided into four general areas. Suzanne will discuss Women and the Workplace. Next, Barbara will focus on issues of violence and pornography. Eleanor will discuss developments in family law. Hope will end the program with an overview of issues concerning reproduction.

These categories are somewhat artificial. It is impossible to discuss family law for example, without touching on violence, reproductive technologies, or the intersection of home and work. Moreover, our categories entirely leave out some emerging issues. For example, last winter the National Organization of Women moved this Court for leave to appeal, seeking to challenge an insurance company's use of gender as a factor in setting the price, terms and conditions of life and disability insurance. (You may remember the motion was dismissed as untimely.) Issues such as these, that fall between the lines, must be left to another time.

As each presentation will make clear, there is much debate and disagreement in the legal and feminist communities concerning the issues we will discuss. This is as it should be. As with all aspects of the law, scholars, advocates and litigants do not possess a monolithic viewpoint. The process of resolving these legal issues is, and will remain, a dialectical one.

In the course of preparing this program, we were all struck by the manner in which "appealability" and "reviewability" principles limit the range of women's issues brought before this Court. Accordingly, in addition to identifying how New York and other State Courts have handled developments in the law concerning women, we will highlight particular issues that appear to be insulated from this Court's review.

A discussion of the role of State Courts, and particularly this Court, in declaring the law as it relates to gender is not complete without some analysis of the State Constitution. Many of you have been leaders in alerting the bar, through speeches and articles, to the availability of New York's Bill of Rights as a source of individual rights. Consequently, I thought it would be appropriate to briefly review this Court's use of the State and Federal Equal Protection Clauses in cases involving alleged discrimination on the basis of gender and marital status.

"A discussion of the role of State Courts, and particularly this Court, in declaring the law as it relates to gender is not complete without some analysis of the State Constitution."

Like the Federal Constitution, the New York State Constitution does not contain an Equal Rights Amendment. Accordingly, New York litigants seeking to raise a constitutional challenge to alleged discrimination on the basis of gender have relied on the 14th Amendment to the Federal Constitution, and Article 1, section 11 of the State Constitution.

The Equal Protection Clause of the 14th Amendment declares that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Constitutional scholars have deemed this equal protection guarantee "the single most important concept in the Constitution for the protection of individual rights."^[1]

New York's Equal Protection guarantee was added to the State Constitution in 1938, some time after our State's enactment of its Civil Rights Law. This Equal Protection Clause was apparently proposed to Convention delegates to cure two types of discrimination then perceived to be untouched by the 14th Amendment: first, practices by the State or its subdivisions that had not been held violative of the Federal provision; and, second, cases of discrimination by individuals, deemed not covered by the Federal Constitution at all.^[2] The text of Article 1, section 11, as amended in 1938 and as it reads today, is as follows:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Article 1, section 11 was clearly directed at discrimination against Blacks and Jews.^[3] Note, there is no explicit reference in its text to discrimination on the basis of gender.

During the 1967 Constitutional Convention, some 22 propositions to add gender discrimination to the Clause were advanced, as well as one proposition seeking to add discrimination on the basis of marital status.^[4] The final version of the proposed new Equal Protection guarantee was quite broad:

§ 3. a. No person shall be denied the equal protection of the laws.

b. No person shall, because of race, color, creed, religion, national origin, age, sex or physical or mental handicap, be subjected to any discrimination in his civil rights by the state or any subdivision, agency or instrumentality thereof or by any person, corporation or unincorporated association, public or private. The legislature shall provide that no public money shall be given or loaned to or invested with any person or entity, public or private, violating this provision.^[5]

Of course, this provision did not survive the defeat of the proposed 1967 Constitution.

My research reveals that the first decision of this Court to consider Article 1, section 11 in the context of a gender discrimination case was *Matter of Patricia A.*,^[6] which struck down a provision of the Family Court Act defining a PINS child as "a male less than 16 years of age and a female less than 18 years of age." Chief Judge Fuld, writing for the majority in 1972, emphasized that "lurking behind the discrimination is the imputation that females who engage in misconduct, sexual or otherwise, ought more to be censured, and their conduct subject to greater control and regulation, than males."^[7] The Court in *Patricia A.* assumed, without discussion, that constitutional analysis under the State and Federal Equal Protection guarantees was the same. Relying on the Supreme Court's prior decision in *Reed v. Reed*, Chief Judge Fuld applied a rational basis test and held the

gender classification was irrational.^[8]

Three years later, in *Matter of Malpica-Orsini*,^[9] Judge Cooke's opinion for the majority upheld, against an Equal Protection attack, a classification in DRL § 111 limiting the necessary consent for the adoption of an out-of-wedlock child to the natural mother. The natural father had argued that the statute unjustly discriminated between fathers of out-of-wedlock children and all other parents. Judge Fuchsberg dissented, recognizing the then-ongoing ferment whether gender was a suspect classification under the Federal Constitution, and urged the Court to adopt a stricter protective constitutional standard for New York than that employed by the majority in upholding the statute.^[10] In 1979, in *Caban v Mohammed*,^[11] the Supreme Court took a different view than had this Court, and struck down DRL § 111 as an impermissible form of gender-based discrimination between parents of illegitimate children.

[OVERVIEW continued on next page]

Footnote 1: Rotunda, Nowak and Young, 2 Constitutional Law: Substance and Procedure, at 314.

Footnote 2: VI New York State Constitutional Convention Committee 1938, Problems Relating to the Bill of Rights, at 223. *See generally* Chapter XVI: Racial and Other Forms of Discrimination.

Footnote 3: *Id.* at 223-227.

Footnote 4: *See* 1967 New York Constitutional Convention Record and Index, Subject Index of Propositions, at 185-186.

Footnote 5: Article 1, section 3 of Official Text of Proposed Constitution of the State of New York, in XII Proceedings of the Constitutional Convention of the State of New York, 1967 (Index).

Footnote 6: *Matter of Patricia A*, 31 NY2d 83.

Footnote 7: *Id.* at 88-89.

Footnote 8: *Id.*

Footnote 9: *Matter of Malpica-Orsini*, 36 NY2d 568.

Footnote 10: *Id.* at 591; *see also id.* at 578-591 (dissenting opinion of Judge Jones, advocating use of strict scrutiny).

Footnote 11: 441 US 380.

OVERVIEW [Continued]

A year later, in *People v Whidden*,^[12] then-Judge Wachtler, writing for the Court, adopted the middle level scrutiny standard for reviewing gender-based classifications alleged to violate the State and Federal Equal Protection guarantees. That standard, previously settled by the Supreme Court in *Craig v Boren*,^[13] requires a gender-based statute to serve an important governmental objective and be substantially related to achievement of this objective. The *Whidden* Court held that although the statutory rape provisions of the Penal Law were gender-based, they were not unconstitutional, since the problem of early pregnancy provided ample justification for the legislative decision to deter sexual contact between older males and teenaged girls by imposing criminal sanctions.^[14] In 1981, the Supreme Court upheld a similar California statutory rape law, also using the middle level scrutiny standard.^[15]

This Court has decided only four other challenges to discrimination on the basis of gender or marital status, brought under the 14th Amendment and Article 1, section 11. *Association of Personnel Agencies*^[16] upheld a General Business Law provision prohibiting employment agencies from discriminating on the basis of gender. *People v Onofre*^[17] struck down a Penal Law provision making consensual sodomy a crime because it discriminated on its face between married and unmarried persons. *Matter of Wilson*^[18] held that Equal Protection guarantees are not abrogated by a court's application of neutral trust law principles that neither encourage, promote nor compel private selection in the devise of property.

Finally, in the landmark case of *People v Liberta*,^[19] then-Judge Wachtler, writing for the Court, declared the Penal Law's marital exemption for rape unconstitutional under the 14th Amendment and Article 1, section 11 because no rational basis existed for distinguishing between marital and non-marital rape. Then, using middle level scrutiny, the Court declared the gender-based exemption of females from the rape laws unconstitutional on the ground the People did not meet their burden of showing the existence of an important objective, or a substantial relationship between the discrimination in the statute and that objective.^[20]

None of these cases explicitly addressed the scope of protection under Article 1, section 11, notwithstanding the differences in language of the Federal and State guarantees. In 1985, however, footnote 6 to Chief Judge Wachtler's decision in *Under 21 v City of New York*^[21] rejected the argument that the State Equal Protection Clause could be read to extend protection to victims of discrimination at the hands of private employers who contracted with the City. Over Judge Meyer's sole dissent, predicated in part on the language of Article 1, section 11,^[22] the Court appeared to foreclose an argument that, because of textual differences, the State Constitution could be read to provide broader protection than the Federal provision. The Court emphasized that the equation of the State Equal Protection Clause with the Federal provision extended to the requirement of state action. Consequently, the Court held that state action must be present in order for Article 1, section 11 to be applicable.^[23]

In the 50 years of its existence, the State Equal Protection Clause has had no independent impact in the area

of gender discrimination. It appears that this Court has determined to read the State provision as co-extensive with the Federal. Accordingly, this Court's decisions in challenges to discrimination on gender and marital status grounds have tracked those of the Supreme Court as that court has stated, re-thought, then re-stated federal Equal Protection law. Article 1, section 11 may not get much future play unless—as has occurred in search and seizure law—this Court perceives future Supreme Court decisions to represent a dilution of that established body of Federal law which initially prompted the principle and practice of uniformity in equal protection analysis. ^[24]

"In the 50 years of its existence, the State Equal Protection Clause has had no independent impact in the area of gender discrimination."

In closing, I note that the Annual Convention of the National Committee of Appellate Staff Attorneys—which meets in California in June—is presenting a program entitled "Using the Appellate Process to Overcome Gender Bias In the Courts". The interest shown by the Chief Judge and this Court in the issue of gender bias indicates to me that the appellate process remains an exciting and viable avenue for addressing developments in New York law concerning women.

I now turn the podium over to Suzanne. Thank you.

Footnote 12: 51 NY2d 457.

Footnote 13: 429 US 190.

Footnote 14: 51 NY2d at 461.

Footnote 15: *Michael M. v Superior Court*, 450 US 464.

Footnote 16: *Association of Personnel Agencies v Ross*, 43 NY2d 873.

Footnote 17: 51 NY2d 476.

Footnote 18: 59 NY2d 461.

Footnote 19: 64 NY2d 152, 162-167.

Footnote 20: *Id.* at 167-170.

Footnote 21: 65 NY2d 344, 360. Footnote 6 states:

We have held that the State constitutional equal protection clause (NY Const, art I, § 11) is no broader in coverage than the Federal provision (*see, e.g., Matter of Esler v Walters*, 56 NY2d 306, 313-314) and this equation with the Federal provision extends to the requirement of "State action" in order for the equal protection clause to be applicable (*Dorsey v Stuyvesant Town Corp.*, 299 NY 512, 530-531, *cert denied* 339 US 981). In *Dorsey*, we recognized that the State provision approved at the Convention of 1938 and adopted by the electorate that same year, was designed

simply to " 'embod[y] in our Constitution the provisions of the Federal Constitution which are already binding upon our State and its agencies' " (*id.* at p 530 [quoting from 2 Rev Record of NY State Constitutional Convention, 1938, at 1065]). The dissent's reliance on *Sharrock v Dell Buick-Cadillac* (45 NY2d 152) is misplaced, as that case concerned the interpretation of the due process clause in the State Constitution (art I, § 6), a provision enacted prior to, and containing language materially different from, its counterpart in the 14th Amendment, and thus readily supporting a broader interpretation than the Federal provision. Accordingly, we need only analyze the equal protection issue under the framework of the 14th Amendment.

Footnote 22: *Id.* at 365-366 (Meyer, J. dissenting).

Footnote 23: *See, supra* note 21.

Footnote 24: *See People v P.J. Video*, 68 NY2d 296, 303-307; *People v Johnson*, 66 NY2d 398, 406-407.

CURRENT ISSUES FACING WOMEN IN THE WORKPLACE AND THE ROLE OF STATE COURTS

By Suzanne Aiardo

I. INTRODUCTION

The full-fledged entry of women into the labor market represents one of the most important social changes in the American economy. And yet, statistics show that one-half of all employed women fall into two occupational categories comprising clerical workers and service workers. Although women have entered nontraditional vocations in increasing numbers, occupational segregation still exists and statistics show that approximately four fifths of all women in the workplace are crowded in twenty of the Department of Labor's 427 job categories, and three fifths of these women are in occupations at least three-quarters female.^[1]

For the most part, at least in the last three years, commentators have concentrated on developments in Federal case law and on Federal and State legislative activity in this area. The Supreme Court has handed down significant decisions on affirmative action, comparable worth, sexual harassment and child-care leave. Law-makers on both levels have introduced important proposals which could do much to eliminate pay inequity and workplace discrimination. I'd like to briefly highlight some of these developments, particularly in the areas of parental leave-care, comparable worth, and employment discrimination. I will talk first about family leave. I will then comment briefly on legislative initiatives in the area of comparable worth.

"Although much remains to be done, in the last few years courts and law-makers have moved successfully to eliminate discrimination, pay inequity and other barriers against women in the workplace."

I will conclude by touching on the issue of sexual harassment in the workplace, and the interplay of Federal and State law under Title VII and the Human Rights Law.

II. FAMILY LEAVE

In the area of child care leave, much of the focus in the literature is on movement by Federal and State law-makers toward providing reasonable periods of unpaid leave for disabilities related to pregnancy and child birth. The commentators have also addressed the effect that the Supreme Court's decision in *California Federal Savings & Loan v Guerra*^[2] has had on these efforts.

80% of the 50 million women in the workforce are of childbearing age. Of these, 93% are likely to become pregnant during their working lives.^[3] The traditional family home of two children, a working father and a

mother/homemaker constitutes only 7% of all American families.^[4] One result of the career interruption that occurs with pregnancy and childbirth is that women's careers are perceived as being less valuable than men's.^[5]

The rights of pregnant women is not a new issue, but the sheer number of working women and the importance of their role gives the issue an urgency and universality today that is new.^[6] Even before the passage of the Pregnancy Discrimination Act of 1978^[7] this Court had occasion to address the issue of pregnancy-related benefits. For example, in 1974, in *Union Free School District No. 6 v New York State Human Rights Appeal Board*, this Court held a personnel policy that singled out pregnancy and childbirth for treatment different from that accorded other disabilities was prohibited under the Human Rights Law.^[8]

Nevertheless, it appears that no uniform standard exists today for protecting employees' rights when they must take leave for health or family reasons. A recent study shows that 75 countries, including every industrialized country *except the United States*, provide some period of job-protected leave for pregnant workers, as well as other employees who are temporarily disabled.^[9] Many states have enacted legislation similar to the Pregnancy Discrimination Act, which requires equal treatment in the workplace for pregnant women.^[10] However, several states, among them California, have provided greater protection and require employers to give pregnant workers special treatment that they are not required to give non-pregnant workers. The Supreme Court in *California Federal Savings & Loan* upheld the California statutory scheme determining that it was not preempted by Federal Law.

However, these two different approaches to pregnancy discrimination have sparked vociferous debate. The equal treatment advocates argue that equality for pregnant workers is part of the larger problem of providing adequate health benefits for all workers, and that the effects of pregnancy discrimination will disappear once all workers receive the health benefits they need.

On the other hand, the special treatment advocates believe that pregnancy is not like other temporary disabilities. They believe that special treatment is necessary to combat the economic consequence of pregnancy and childbirth.^[11] Obviously, both views overlook the need to consider the way men are affected by inadequate family leave policies.^[12] Therefore, there is a growing effort to pass legislation requiring employers to grant all workers leave to care for newborns, adopted or ill children.

There are recent developments on both the Federal and State level in this area. Congress is currently considering the Family & Medical Leave Act.^[13] Several bills relating to family and temporary medical leave are also pending before the New York State Legislature. One seeks to establish minimum State-wide standards by mandating that companies with a minimum of fifteen employees provide up to 18 weeks of job-protected unpaid leave over a 27 month period. The leave can be used for the birth or adoption of a child, or to care for a child, spouse or parent with a serious health condition.^[14] One interesting note is that the bills allow prevailing plaintiffs to recover punitive damages and reasonable attorney's fees from intentional violators.^[15]

Although these measures will do much to humanize the workplace, the problem of inequity in salaries between men and women still exists. According to the National Law Journal, a 25 year old man with a bachelor's degree can expect to earn \$1.2 million in his lifetime, compared with \$474,000 for a 25-year old woman with the same degree.^[16]

III. COMPARABLE WORTH

On that point, I'd like to briefly mention legislative initiatives concerning comparable worth, a concept that

has been called the "civil rights issue of the 80's".^[17] To many critics, including high Reagan administration officials, comparable worth is the looniest idea since "Looney Tunes", and in fact Ronald Reagan has dismissed the concept as a "cockamamie idea".^[18]

The Federal Equal Pay Act of 1963^[19] prohibits employers from paying men and women different salaries for identical work if the only justification for the differential is sex. Title VII of the Civil Rights Act^[20] and also New York's Human Rights Law^[21] prohibit other forms of discrimination against women. However, traditionally, an employer in a particular business who treats men and women equally in all respects does not violate these anti-discrimination laws. The theory of comparable worth has been offered as a necessary extension of existing anti-discrimination legislation. The theory is based on the premise that jobs of equivalent worth should be compensated equally even if the jobs are dissimilar in content.^[22]

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Footnote 1: Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U Cin L. Rev. 521, 524 (1987).

Footnote 2: 107 S Ct 683 (1987).

Footnote 3: Women's Economic Justice Agenda; *National Center For Policy Alternatives*, 1987, at 99.

Footnote 4: *Id.*

Footnote 5: Note, *Pregnancy and Equality: A Precarious Alliance*, 60 Southern Cal. L. Rev. 1345 (1987).

Footnote 6: Casenote, *Expanding the Boundaries of Equality: Taking Pregnancy into Account in California Federal Savings & Loan v Guerra*, XVIII Boston College L. Rev. 783 (1987).

Footnote 7: Pub. L. No. 95-955, 92 Stat. 2076 (codified as amended at 42 USC § 2000e[k][1982]).

Footnote 8: 35 NY2d 371 (1974); *see also Matter of Board of Educ. of City of N.Y. v State Div. of Human Rights*, 35 NY2d 675 (1974); *Board of Educ of Union Free School Dist. No. 2 v New York State Div of Human Rights*, 35 NY2d 673 (1974).

Footnote 9: Women's Economic Justice Agenda, *supra*, at 100.

Footnote 10: The Pregnancy Discrimination Act - as interpreted by the Supreme Court in *Newport News Shipbuilding & Dry Dock v EEOC* (462 US 669 [1983]) requires that employers treat pregnancy-related disabilities equally with nonpregnancy-related disabilities for all employment related purposes.

Footnote 11: *See generally* Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986).

Footnote 12: Note, *Fathers and Families: Expanding the Family Rights of Men*, 36 Syracuse L Rev 1265 (1986).

Footnote 13: HR 925, introduced on Feb 3, 1987 by William L. Clay (D-MO) and Patricia Schroeder (D-CO). The Senate counterpart to this bill is entitled The Parental and Temporary Medical Leave Act of 1987 (S249), introduced on January 6, 1987 by Christopher Dodd (D-CT) and Arlen Specter (R-PA).

Footnote 14: See N.Y. A6818 (1988); N.Y. S8190 (1988) available in LRS BT88 data base).

Footnote 15: *Id.*

Footnote 16: *Women's Economic Justice Agenda, supra.*

Footnote 17: *Id.* at 141.

Footnote 18: Rhode, *Gender and Jurisprudence: An Agenda for Research, supra.*

Footnote 19: 29 USC § 206(d) (1982).

Footnote 20: The Civil Rights Act of 1964, Pub. L. No. 88-352, tit. vii, 701-716, 78 Stat. 241, 253-266 (codified as amended at 42 USC § 2000(e)(1982)).

Footnote 21: N.Y. Human Rights Law § 296(1)(a).

Footnote 22: Fischel and Lazear, *Comparable Worth and Discrimination in Labor Markets* 53 U of Chi. L. Rev. 891 (1986).

CURRENT ISSUES FACING WOMEN [Continued]

The leading Supreme Court case in the area, *Gunther v County of Washington*^[23], extended the scope of Title VII beyond the Equal Pay Act by holding that sex-based claims of intentional wage discrimination may be asserted under Title VII without satisfying the equal work standard of the Equal Pay Act. Nonetheless the Court was careful to characterize *Gunther* as a Title VII claim, and declined to endorse a broader comparable worth theory^[24]. To date, most recent litigation has not been successful in furthering the concept of comparable worth^[25], and despite congressional initiatives, no Federal legislation has been enacted^[26]. Most effective recent comparable worth initiatives have been a result of collective bargaining.

Since 1980, 34 states have set up task forces to examine their compensation systems. Twelve states have begun to implement equity adjustments with programs generally calling for phased-implementation over a four-year period.^[27]

In 1985, the report of the New York State Comparable Worth Study was issued. The study concluded that in New York State jobs, female-dominated job classes were underpaid.^[28]

At present, there are bills pending before the State Legislature in relation to implementing a state policy of setting salaries on the basis of comparable worth^[29]. The bills provide for a continuing review by the Civil Service Commission of job titles in the public sector. The goal is to identify segregated titles in state service for which a disparity exists based on comparable worth^[30].

Although these initiatives in pay equity and child-care leave will go far in improving the tangible benefits that many believe have eluded women in the past, a more difficult task is the problem of eradicating other forms of employment discrimination, among them sexual harassment.

IV. EMPLOYMENT DISCRIMINATION—SEXUAL HARASSMENT

Although the Supreme Court decided several affirmative action cases in the last few years^[31], its first decision in the area of sexual harassment, *Mentor Savings Bank v Vinson*^[32] drew much attention. In *Mentor*, the Court held an employer liable for the "hostile environment" acts of harassment by its supervisor.^[33] This decision was hailed as a powerful vindication of the rights of victims of sexual harassment, for the Court explicitly held that Title VII was not limited to "economic" or "tangible" discrimination.^[34] Nevertheless, the *Mentor* Court, in a decision by then Justice Rehnquist, refused to issue a definitive rule on employer liability in cases of this type.^[35] The Court also opened the door in a sense, by condoning the admission of evidence concerning the employee's purported sexually provocative speech and dress, and her publicly expressed sexual fantasies. The Court stated that such evidence could be used to determine whether particular sexual advances were unwelcome.^[36]

This opinion received "mixed reviews" by the commentators, and whether it signals a conservative trend in the Federal law in this area is unclear. For example quite recently the Supreme Court granted certiorari in a case in which the District of Columbia Circuit Court found a Title VII violation. The Circuit court ruled that the selection process to determine partnership decisions at Price Waterhouse was tainted by sexual stereotyping.^[37] That case also included evidence concerning the employee's speech and manner.

Despite the absence of express statutory language, New York provides comparable protection against sexual harassment under the Human Rights Law.^[38] Whether complainants will view the *Mentor* decision as an incentive to prefer the State forum is speculative, especially in light of a lack of State court cases directly addressing the issue,^[39] and this Court's more stringent employer liability standard.^[40] Other factors determining choice of forum may include the type of relief sought. Although compensatory damages are recoverable under the Human Rights Law, the law does not provide recovery for attorney's fees, a potentially expensive item recoverable in a Title VII action. However, currently pending before the Legislature are bills to amend the Human Rights Law to allow recovery for attorney's fees and punitive damages.^[41] Common law tort remedies are available, but there is some question regarding the affect the Workers' Compensation exclusivity provision has on these claims.^[42]

Interesting to note is the potential effect of the Supreme Court's decision in *Kremer v Chemical Constr. Corp.*^[43] on this State's judicial reviewing power in this area. In a 5-4 decision, the Supreme Court determined that state agency decisions upheld in an Article 78 review proceeding are to be given full faith and credit. In arguing the opposite view, the dissent offered some interesting observations about the nature of article 78 proceedings. The dissent noted that because the review is *deferential* in nature,^[44] giving these decisions preclusive effect contravened the congressional intent behind Title VII, which was to "ensure discrimination victims more than bare due process [and to give them] the benefit of a vigorous effort to eliminate discrimination."^[45] The dissent cautioned that the *Kremer* decision would encourage the unsuccessful state discrimination complainant to avoid state judicial review, and called the decision a "perverse sort of comity" by eliminating the reviewing function of state courts in an entire class of cases.^[46]

I'm not sure that the dissent is entirely correct in its assessment of Article 78 review and whether such a review applying the substantial evidence standard can be meaningful. One need only read this Court's most recent employment discrimination decision to know that this perception is not entirely correct.^[47]

Nonetheless, the role of State courts in the fight to end employment discrimination is more important than ever in light of the Supreme Court's conservative trend, as exemplified most recently by its apparent decision to reconsider *Runyon v McCrary*.^[48] Our State courts' role in enforcing laws in all of the areas I have touched on today must not be overlooked.

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Footnote 23: 452 US 161(1981).

Footnote 24: Note, *The Future of Comparable Worth: Looking in New Directions*, 37 Syracuse L. Rev. 1189, 1199 (1987).

Footnote 25: *Id.*

Footnote 26: 1986 Survey of Current Law - Labor Relations 38 Syracuse L Rev. 417, 435 (1987).

Footnote 27: Women's Economic Justice Agenda, *supra*, at 143.

Footnote 28: 1986 Survey of Current Law, *supra*, 38 Syracuse L. Rev., at 436.

Footnote 29: See N.Y. A3641(1988); N.Y. S1522(1988) (Available on LRS BT 88 data base).

Footnote 30: *Id.*

Footnote 31: *E.g.*, *Johnson v Transportation Agency, Santa Clara County*, 107 S Ct 1442 (1987); *United States v Paradise* 107 S Ct 1053 (1987); *Hishon v King & Spaulding*, 467 US 69 (1984).

Footnote 32: 477 US 57 (1986).

Footnote 33: *Id.*

Footnote 34: *Id.*

Footnote 35: *Id.*

Footnote 36: *Id.*

Footnote 37: *Hopkins v Price Waterhouse*, 825 F2d 458 (D.C. Cir. 1987), *cert. granted sub. nom.*, *Price Waterhouse v Hopkins*, 108 S Ct 1106 (1988).

Footnote 38: N.Y. Human Rights Law § 296.

Footnote 39: See *infra* note 40.

Footnote 40: *E.g.*, *State University at Albany v State Human Rights Appeal Bd.*, 81 AD2d 688, *affd* 55 NY2d 896; *Hart v Sullivan*, 84 AD2d 865, *affd* 55 NY2d 1011; see also in the public accommodation context *Matter of Totem Taxi v State Human Rights Appeal Bd.*, 65 NY2d 300, and *State Division of Human Rights v St. Elizabeth's Hospital*, 66 NY2d 684.

Footnote 41: See N.Y. A4512; N.Y. S4130 (available LRS BT 88 data base).

Footnote 42: Workers' Compensation Law § § 11, 29(6). Section 11 states that employer liability for compensable injuries under the Workers' Compensation Law "shall be exclusive and in the place of any other liability whatsoever * * * at common law or otherwise" (emphasis added). Section 29(6) states that the right to Workers' Compensation benefits "shall be the exclusive remedy to an employee [against the employee] * * * when such employee is injured or killed by the negligence or wrong of another in the same employ" (emphasis added). Compare *Hart v Sullivan*, 84 AD2d 865, *affd* 55 NY2d 1011 (claim for intentional infliction of emotional distress against employer and co-workers based on sexual harassment barred where no allegation of employer willfulness) with *Thompson v Maimonides Medical Center*, 86 AD2d 867 (striking workers' compensation defense as to claims for defamation and intentional infliction of emotional distress where complaint alleged employer "authorized, encouraged, or ratified" the conduct) and *Spoon v American Agriculturalist, Inc.*, 120 AD2d 857 (sexual harassment action not barred since factual issue exists as to whether employer authorized intentional tort by inaction); cf. *Crespi v Ihrig*, 99 AD2d 717, *affd* 63 NY2d 716 (exclusivity rule bars co-worker's assault action, notwithstanding that employer aware of employee's violent propensities).

Footnote 43: 456 US 461 (1982).

Footnote 44: *Id.* at 491.

Footnote 45: *Id.* at 498.

Footnote 46: *Id.* at 504-505.

Footnote 47: *Matter of Cottongim v County of Onondaga Sheriff's Dept.*, 71 NY2d 623.

Footnote 48: NY Times, April 26, 1988, at 1, col 6.

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VIOLENCE AGAINST WOMEN

By Barbara Mulé

Suzanne has just discussed with you the problem of sexual harassment in the workplace; unfortunately this problem is not limited to the employment area but confronts women in various aspects of their lives. This part of the presentation will focus on the issue of violence against women, including domestic abuse and pornography. I plan to highlight new approaches being used in New York as well as in other states to try to diminish the incidents of violence and to ensure full protection for women.

Recently much attention has been focused on the issue of domestic violence. It is estimated that over two million American women are severely beaten each year and almost four thousand are killed by either a spouse or live-in partner. The severity of the problem in New York has prompted the introduction of legislation which would amend the penal law to include the crime of domestic abuse. Despite the severity of the problem, however, there appears a hesitancy or unwillingness in the law enforcement and judicial communities to confront the problem. This is most likely due to misconceptions of the nature and effect of the violence. The Women and the Courts Task Force Report recognized the problem of judicial personnel being underinformed about the nature of domestic violence, and hopefully through the implementation of the Report's recommendations, more information will be available to ensure that "traditional" avenues of redress, such as criminal prosecutions and orders of protection, are fully and properly utilized.

"It is estimated that over two million American women are severely beaten each year and almost four thousand are killed by either a spouse or live-in partner."

Because women have usually found the "traditional" avenues of redress unavailing, new approaches are being utilized to combat domestic violence. These approaches include damage suits brought against the batterers as well as against police officers and municipalities. In a number of states, either pursuant to statute or under common law principles, a battered spouse can sue her husband for damages in tort. In New York, pursuant to General Obligations Law § 3:313, this option is available to battered women. More common apparently, are actions brought against police officers for failure to arrest or for failure to respond to domestic violence calls. Because the Court is familiar with these type of tort actions, as it was faced with the issues in both *Bruno v Cotid* and *Sorichetti v City of New York*, I will not discuss them here. Rather, I would like to discuss the constitutional challenges being brought, predominantly in Federal court with pendent state claims. These actions challenge police policies which treat domestic violence incidents differently from other assault cases as a denial of equal protection. The most well known case involving such a challenge is *Thurman v City of Torrington*. In that case, the Federal District Court for the District of Connecticut, on a motion to dismiss, determined that plaintiff's complaint, alleging that the Torrington Police Department's policy which consistently afforded lesser protection to victims of spousal abuse by failing to respond to calls for assistance constituted a denial of equal protection, stated a cause of action. Although all of the reported cases raising such challenges have been decided at the pleadings stage, the likelihood of success at trial appears viable under Supreme Court precedents. The harder

cases will arise when a non arrest policy is not premised on an openly gender-based classification as in *Thurman* but instead is based on a strongly gender neutral policy such as not responding because to do so would be an interference in family privacy. In light of the recent attention given to New York's equal protection clause, such an issue might confront the Court in the near future.

"because of the many roadblocks encountered in working through the law enforcement and judicial systems, some victims of domestic violence resort to killing their batterers to end the violence."

Despite the avenues of redress available to battered women, because of the many roadblocks encountered in working through the law enforcement and judicial systems, some victims of domestic violence resort to killing their batterers to end the violence. A study by the Superintendent of the Women's Division of the Cook County Department of Corrections found that 40% of women in the prison system, convicted of murder or manslaughter, were women who had killed their abusing male partner. Because of the unique circumstances that lead a woman to resort to such violence, the battered woman defendant raises new issues for the courts. One such issue is the defenses or justifications available to the criminal defendant. Although the justification of self-defense is available in those cases where a woman kills her batterer during an incident of violence, such defense is normally not available when the woman kills the batterer after the violence has subsided. Because of the inappropriateness of the traditional self-defense justification in many battering/killing situations, advocates have turned to reliance upon the "battered wife syndrome" as a justification for the women's actions. "Battered wife syndrome" is the term used to describe the pattern or cycle of abuse which lead women to the violent act of killing their spouses. The syndrome involves a decrease in the woman's self-esteem, an emotional dependence on the male and a type of "learned" helplessness, which force the woman to view killing the batterer as the only means to end the violent relationship. Though "battered wife syndrome" has been getting greater recognition in the feminist and scientific community, there is disagreement among the state courts as to whether expert testimony on the syndrome should be admissible in court because it is disputed whether the subject matter is beyond the knowledge of the jury and whether the state of the science is sufficiently developed. Further, there is disagreement as to whether such evidence is relevant to a self-defense justification. To date, the high courts of Washington, D.C., Ohio and Wyoming have rejected the admissibility of such testimony, while the high courts of Maine, Georgia, Washington and New Jersey have held it admissible. Further disagreement appears as to whether exclusion of such testimony where admissible is harmless or reversible error. Research has revealed only one reported New York case which specifically dealt with the issue of the admissibility of expert testimony on "battered wife syndrome". That case is *People v Torres*, a 1985 case from Supreme Court, Bronx County. In *Torres*, the court held that expert testimony on "battered wife syndrome" was admissible because it was central to the justification defense of self-defense, substantially bearing on the defendant's state of mind. In so holding, the court determined that the evidence would serve to dispel ordinary lay perceptions that a woman who remains in a battering relationship is free to leave. Further, the court found that the theory underlying "battered wife syndrome" has passed the experimental stage and has gained a substantial enough scientific acceptance.

Although the admissibility of such evidence is within the sound discretion of the trial court, because this Court may nonetheless be faced with the issue, as it was in *People v Henson* dealing with the admissibility of expert testimony on "battered child syndrome", I would like to point out some of the problems with use of the syndrome. First, it is commonly used in connection with a self-defense justification where the woman kills the batterer after the violence has subsided. Some commentators view such use as diluting the justification of self-defense, improperly turning it into one of excuse. Second, use of the "syndrome" testimony continues to stereotype women as weak and vulnerable, and thus sets them apart as a special class of defendants. To those feminists who believe that true equality will not occur until all distinctions between the sexes are removed, the

reliance on any "syndrome" highlights differences which can only impede the progress of women. Therefore, some commentators recommend that a defense of diminished mental capacity or temporary insanity be used instead. Although the theory underlying "battered wife syndrome" is not without its problems, even if not admissible at trial, it provides the courts and law enforcement officials a deeper understanding of battered women and battered women who kill. Such an understanding is necessary to ensure women full protection under the law.

"To some feminists and commentators, the root of the problem of violence against women ... is pornography..."

I would now like to turn to pornography. To some feminists and commentators, the root of the problem of violence against women, including domestic violence, is pornography because such material depicts women in a manner that enforces notions that they are subordinate and subservient to men. This subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home and battery and rape on the streets. These advocates believe that violence against women will continue, despite available legal remedies, such as rape prosecutions and the issuing of protective orders, as long as pornography remains protected speech. Accordingly, anti-pornography statutes and ordinances have been proposed and/or enacted in a number of localities around the country, including Indianapolis, Minneapolis, Los Angeles and Suffolk County, New York. Such legislation seeks to eliminate pornography by classifying it as a systematic practice of exploitation and subordination based on sex which differentially harms women and thus constitutes a per se violation of their civil rights. The model legislation, drafted by Katherine MacKinnon and Andrea Dworkin, prohibits a person from trafficking in pornography, coercing others into performing in pornographic works or forcing pornography on another. Further, anyone injured by someone who has seen or read pornography would have a cause of action against the maker or seller. Pornography under the legislation is broadly defined as the "graphic sexually explicit subordination of women, whether in pictures or words." Because these statutes and ordinances do not conform to the obscenity standard established by the Supreme Court in *Miller v California*, the statutes have little chance of withstanding a constitutional attack, as was demonstrated in *American Booksellers Association v Hudnut*. In *Hudnut*, the Seventh Circuit struck down the Indianapolis ordinance on the ground that it was an impermissible content based restriction on speech. The Supreme Court affirmed the Seventh Circuit decision without opinion. Despite this setback, it appears that the anti-pornography advocates are continuing in their endeavor to eliminate pornography. Their approach appears to be based upon a refusal to utilize obscenity law to attack pornography, viewing such doctrine as utterly unresponsive to the harms posed to women by obscene materials; to these advocates, obscenity law focuses on abstract moral issues of sexuality whereas anti-pornography measures focus on power relationships and gender equality. These feminists potentially have much to gain if they are successful in persuading jurists of this difference between obscenity and anti-pornography. However, their success appears unlikely.

The anti-pornography movement has spurred lively debate within the feminist community, between those feminists who seek to eliminate all pornography and those who view the ordinances as a form of censorship which perpetuates traditional, stereotypical views of women and their sexuality. The leading opponents of the anti-pornography ordinances are a group called Women Against Censorship. These women find social value in pornography, because it flouts conventional mores and conveys messages to society that sexuality need not be tied to reproduction, men or domesticity; such messages provide women a greater opportunity to gain equality. Further, to these advocates, the ordinances rest upon traditional, stereotypical views disapproving of sex and denying a woman's sexuality, and result in treating women as a special class. Such treatment echoes the protectionist legislation of the past, which provided women no significant benefits but greatly impeded their progress. Most importantly, the ordinances are viewed as overinclusive and tending to lead to self-censorship because they seek to curb much sexually explicit speech that can be reasonably perceived as neither sexist nor violent. To overcome the consequences of pornography, these women advocate an invigorated enforcement of

already existing laws penalizing coercion, sexual harassment, assault, rape and economic exploitation and urge enactment of new laws to ensure job safety for women who choose to work in the pornography industry. If these women prevail, the court in the future may be faced with the pornography issue not through anti-pornography legislation but rather through the enforcement of more general laws.

In conclusion, violence against women is prevalent in our society and is now beginning to receive the recognition necessary to work towards its elimination. With greater information available to the law enforcement and judicial communities, a reduction in the number of incidents can be achieved.

Thank you.

[VIOLENCE AGAINST WOMEN continued on next page]

VIOLENCE AGAINST WOMEN [Continued]

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WOMEN, THE FAMILY AND THE LAW [Continued]**DIVORCE**

I would like to examine this dissonance between legal reform in the direction of gender neutrality, and the impact in practice on the lives of women, in the area of the economic incidents to divorce.

Equitable and Equal Distribution

Although the basis for recent reforms regarding marital property, as this Court has stated, is that modern marriage should be viewed as "among other things, an economic partnership", the female partner usually occupies an inferior economic position.^[17] Noting how many lessons can be drawn about marriage, paradoxically, by an examination of its breakdown,^[18] one commentator points out that this imbalance is most clearly shown in the divorce process and its aftermath, notwithstanding that following the 1978 United States Supreme Court's decision in *Orr v Orr*, sex-based distinctions were eliminated from divorce laws.^[19]

California was the first state to adopt no-fault divorce in 1970; by 1985 all fifty states had integrated into their statutory scheme some form of no-fault divorce.^[20] In California, like seven others a community property state, the reformed statutes, as interpreted by the courts, mandated equal distribution that is a nondiscretionary 50/50 division of marital property between spouses. Equal in theory, the practice turned out quite different. As is true nationwide, in 90% of cases the wife had custody of the children, and so one half the marital assets had to support two, three or more people — the other half, one person. An influential 1985 California study of 3000 divorced couples found that on average, divorced women and the minor children in their households experience a 73% decline in their standard of living in the first year after divorce; in contrast, their former husbands experienced a 42% rise in their standard of living.^[21]²¹

In 1980, New York rejected inflexible equal distribution for an equitable distribution,^[22] relying upon a grant of broad discretion to trial courts to analyze the marriage partnership in light of enumerated factors and fashion fair divisions. While this Court's review of the exercise of this discretion is limited, the Court may want to consider emerging patterns studies expose regarding the division of marital property. A recent study of seventy reported matrimonial decisions done for the Task Force on Women in the Courts, revealed that women, absent extraordinary circumstances, do not receive fifty percent of the marital property. Figures tend to range between twenty-five and forty percent.^[23] When the marital property included a business, this study found that wives were awarded a median of only 18%. The Task Force reported trial courts tended to place an inappropriately low value on homemakers services and permanently lost earning capacity.^[24]

Maintenance

The replacement of alimony with temporary maintenance also had drawbacks for women. For the older homemaker wife of a long-term marriage, the consequences of short-term maintenance awards tend to be most serious; the Task Force found that judges widely abused the concept of rehabilitative maintenance, as applied to older women, considering that the median income of full time year round women workers aged 45-64 is only

\$5,000 per year.^[25] The 1986 amendments to the law regarding maintenance are seen as increasing women's share, by deleting reference to the "reasonable needs" of a party and directing courts to consider the parties' standard of living established during the marriage.^[26]

Child Support Enforcement

For younger women with custody of children, child support awards may not mitigate the financial consequences of divorce. Abuse of the child support system, including long delays in courts hearing support petitions; inadequate awards; failure to impose sanctions for nonpayment; and forgiveness of arrears, led Congress to enact the 1984 Child Support Enforcement amendments, tracked in New York in 1985.^[27] Stronger support enforcement bills are currently pending before our State Legislature, and a pioneer state-guaranteed child support program is in the planning stage.^[28]

A nationwide study of state enforcement of child support awards showed that New York, with one of the highest annual support caseloads, made a collection in a little over one quarter of cases, placing our state sixth in the nation.^[29] Enforcement of support orders is also, of course, almost always beyond the judicial reach of this Court. Perhaps not always, however: only five days ago the United States Supreme Court remanded to the California courts a due process challenge to imprisonment for contempt of an order of support.^[30] In any case, an important part of the New York divorce picture is that a mother is likely to stand only a one-in-four chance of actually collecting support.

This Court's decision in *O'Brien v O'Brien* has been widely hailed by commentators as a landmark for women's equality in divorces where the earning capacity of the husband may be the only marital asset of substance. *O'Brien* analysis has been applied in varying factual settings in New York, including a license to practice accounting, a law practice, an actress' earning capacity, and 1.7 million dollars in lottery winnings,^[31] although not to a bachelor of science degree in marketing.^[32] The *O'Brien* principle has engendered controversy and has been rejected in several sister states. The Supreme Court of Colorado considered and rejected *O'Brien*, holding that an educational degree was "simply an intellectual achievement", as did that of Ohio, holding that a veterinary degree obtained by the husband while supported by his wife was not marital property.^[33] West Virginia courts, rejecting *O'Brien*, consider the homemaker's services one factor in making an award, but not the basis for a property right — and as one West Virginia court stated, a homemaker's frugality should increase her award.^[34] In Oklahoma, an appellate court rejected *O'Brien*, fearing its principle "would reach into nearly every walk of life in our society. If physicians' degrees and estimated future earnings are property subject to valuation and division, why not a plumber's license, an electrician's license, a salesman's experience * * * ?" — a rhetorical question this Court may eventually choose to look at seriously.^[35]

Conclusion

Both practitioners and critics look with hope to the progeny of *O'Brien* and to the statutory amendments regarding maintenance and child support enforcement for a future realignment of the material consequences of divorce, with the law's highest aspirations for genuine equality for women.

[WOMEN, THE FAMILY AND THE LAW continued on next page]

Footnote 17: *O'Brien v O'Brien* (66 NY2d 576, 585); Assembly Memorandum, 1980 Legis Ann, at 129-130.

Footnote 18: Kay, U. Cin. L. Rev., *supra* at 42.

Footnote 19: *Orr v Orr* (440 US 268).

Footnote 20: Kay, *Equality and Difference*, U. Cin. L. Rev. *supra* at 14 n 40.

Footnote 21: Weitzman, *Divorce Revolution*, at xii (1985).

Footnote 22: See *Arvantides v Arvantides* (64 NY2d 1033, 1034); H. Foster, D. Freed & J. Brandes, *Law and the Family* New York at ix.

Footnote 23: Marcus, *supra*, at 71 n 54.

Footnote 24: Task Force Report, *supra*, at 69.

Footnote 25: Note *The New York Equitable Distribution Statute: An Update*, 53 Brooklyn L. Rev. 845.

Footnote 26: Domestic Relations Law § 236(B)(1)(a).

Footnote 27: New York 1985 Support Enforcement Amendments (Family Court Act §§439, 439-a [McKinney's 1983 & Supp 1985]; L 1985, ch 809); *Task Force Report*, at 85.

Footnote 28: See A. 6391 "An Act to amend the domestic relations law, the family court act and the social services law, in relation to determining child support"; *The New York Times*, May 2, 1988, at B2.

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**REPRODUCTIVE RIGHTS/REPRODUCTIVE TECHNOLOGIES
21st CENTURY PROBLEMS OF TODAY**

By Hope B. Engel

The topic I will address this Law Day is "Reproductive Rights/Reproductive Technologies—21st Century Problems of Today". I intend it as an overview—recognizing that vast breakthroughs in medical technology, in particular, reproductive technology, have created, and continue to create, complex legal—and ethical—issues. My discussion will be limited to three general categories:

- (1) Women's Privacy and Autonomy Rights Vis-a-Vis the State's Interest in the Unborn or, what some refer to as "Fetal Rights",
- (2) Abortion and the State's Regulation of Abortion,
- (3) Technology and Conception—which encompasses Artificial Insemination, Embryocryology, In Vitro Fertilization and Surrogacy Arrangements.

"[V]ast breakthroughs in medical technology, in particular, reproductive technology, have created, and continue to create, complex legal—and ethical—issues. * * * [T]hese issues [are] brewing in the lower courts of this State [and] have boiled over in the courts of other jurisdictions."

These issues are controversial and much-debated, touching upon very personal, often-times, very emotional decisions. My purpose, being a limited one, is merely to bring out some of these issues—some of which are brewing in the lower courts of this State, many of which have boiled over in the courts of other jurisdictions.

First, I will discuss women's privacy and autonomy rights and the State's interest in the unborn.

In 1884, then-Massachusetts Supreme Court Justice Holmes held that a 4-5 month-old fetus, born prematurely allegedly due to defendant's negligent maintenance of its highway, could not recover on its own behalf through its administrator because "the unborn child was a part of the mother at the time of the injury, any damage to it * * * was recoverable by her." Almost 100 years later, in the landmark *Roe v Wade* decision, while recognizing a woman's constitutional right to an abortion and while rejecting the notion that the unborn fetus is a "person" under the Constitution, the U.S. Supreme Court nonetheless recognized the *State's* interest, in the latter stages of pregnancy, in protecting the human potential. The conflict is apparent, recognized by the commentators and increasingly by the courts, guarding the interest in the unborn while preserving the woman's constitutional

privacy and autonomy rights.

"The conflict is apparent, recognized by the commentators and increasingly by the courts, guarding the interest in the unborn while preserving the woman's constitutional privacy and autonomy rights."

Particularly, the criminal and tort law areas are reacting to the increasing medical knowledge regarding prenatal care and prenatal development. Less than 100 years ago, most physicians believed that all congenital malformations (gross structural defects) were the result of heredity. Now, the medical community and, accordingly, the legal community, are concerned with teratogens—agents causing abnormal fetal development. In 1985, the San Diego District Attorney's office brought a criminal action against a mother for ignoring her doctor's advice and taking amphetamines during her pregnancy. While this case was ultimately dismissed, tort actions have been sustained in other jurisdictions pitting child against mother for injuries arising from the mother's alleged negligent prenatal care. For example, in Michigan, a mother was found liable to her son for her failure to take proper prenatal care—against advice, she took tetracycline during her pregnancy resulting in tooth discoloration in the child.

Additionally, one New York family court has held that an unborn child is a "child" for purposes of Family Court Act § 1012(b) and in an article 10 proceeding, the court examined a woman's prenatal conduct to establish postnatal neglect. Under a similar child neglect statute, the Michigan Supreme Court agreed with the holding of this Family Court decision.

In even more intrusive fashion, courts in other jurisdictions have forced pregnant women to undergo Caesarean, rather than vaginal, delivery, strenuously relying on the State's interest in the viable fetus. Mentally ill pregnant women, otherwise capable of caring for themselves outside an institution, have been civilly committed in the later stages of pregnancy to protect the unborn child. Numerous other issues arise given the fluid definition of "viability"—the crucial point recognized by the United States Supreme Court as a limit to a woman's right to an abortion.

Now turning to the woman's right to an abortion—this right itself has been evolving. While the United States Supreme Court struck down a State statute requiring a husband's consent to his wife's abortion, the father's interest in the fetus and, thus, his interest in the abortion, is the subject of increasing concern, spawning, of course, lawsuits nationwide to better define that legal interest, if one exists at all.

For example, in April, a husband filed suit in Nassau County seeking a divorce and damages, in part, on the grounds that his pregnant wife had an abortion without his knowledge. Similar lawsuits are pending in Indiana and Utah.

Another area of interest in the field of abortion is in abortion funding. Given the lack of success in the Federal forum, there have been challenges in at least six states—(1) Massachusetts, (2) California, (3) New Jersey, (4) Connecticut, (5) Oregon and (6) Pennsylvania—relying on State constitutional grounds to require State health-care funding for non-therapeutic as well as therapeutic abortions.

Additionally, as with other constitutional rights, other State courts and lower courts in this State have been called upon to regulate and balance the pregnant women's constitutional rights against the First Amendment rights of vocal anti-abortion activists. In a related issue, this Court in 1975 in *Matter of Shulman v New York City Health and Hospitals Corp.*, in a 4-3 decision, upheld a New York City Health Code Provision (§ 204)

requiring hospitals to report terminations of pregnancies, including patients' names, against attacks that this regulation violated the woman's qualified right to an abortion by interfering with her abortion decision. As Supreme Court Justice O'Connor recently predicated, the *Roe v Wade* decision is on a "collision course" with itself. One thing is certain about the future of the law involving abortion—uncertainty.

Uncertainty plays a major role in the last area I will be discussing—reproductive technologies. Reproductive technology, as the state of medical science exists today, encompasses two fundamental procedures. First, in vitro fertilization—which involves the union of sperm and egg outside the body. Generally, after a certain number of cellular divisions, the embryo is then transferred to a woman's uterus. In the rarer instance, the embryo is frozen (cryogenics), to be implanted at a later time. The second procedure involves artificial insemination whereby a fertile female is impregnated with semen. A related "procedure", which I will discuss later, "surrogate parenting" can be accomplished using either, or both, of these technologies.

Some experts estimate that 15-20% of all married couples today of childbearing age are unable to have children through traditional means—either because of male impotency, female sterility or female health problems with carrying a fetus to term. Accordingly, issues involving access to new reproductive technologies abound—involving overshadowing ethical concerns with genetic engineering and selective abortions. Traditional family law concepts previously never hotly debated legal (versus factual) issues—such as who is the "father" and who is the "mother" arise. For example, artificial insemination donors have been recognized in some states as "fathers" and have been granted visitation rights to the child. Other states, through legislation, have sought to define who are the parents of a child produced by artificial insemination—some provide that the husband of the wife undergoing artificial insemination, regardless of the sperm donor, is deemed the lawful father. Even without such legislation, other states have imposed support obligations on such a husband where the donated sperm was not his own—relying on "traditional" estoppel notions or the common law notion that a child born within a marriage is presumed to be the husband's child.

Another major area of legal, philosophical and medical debate is the subject of surrogate parenting. Referred to as heresy by some, surrogacy has its roots as far back as the Bible; in Genesis 16.3, Sarah told her husband Abraham "The Lord has kept me from bearing. Consort with my maid; perhaps I shall have a son through her."

By now, everyone is familiar with the New Jersey Supreme Court's decision in the Baby M. case, declaring surrogacy arrangements contrary to that state's public policy, perhaps illegal, and refusing specific performance of the surrogacy contract—focusing instead on the "traditional" custody inquiry into the child's best interests. Of course, the New Jersey court acted without legislative direction; as often happens, the medical technology evolves, before the Legislature can react.

Indeed, in the New York State Legislature, three bills relating to surrogacy arrangements are pending. These bills parallel three approaches taken by the commentators. First, surrogacy contracts are void, contrary to public policy, illegal and unenforceable. Second, surrogacy agreements are valid and enforceable only for sums paid to the surrogate reflecting actual costs for prenatal care and childbirth. To the extent other fees are generated, they are illegal and are equivalent to unlawful baby-selling. The third bill involves a complex regulatory scheme, including court approval of all surrogacy agreements before the surrogate pregnancy. Of course, the courts of this State will have to interpret this legislation, if passed, against, foreseeable constitutional challenges. Until that time, the courts will have to decide cases as they arise, without legislative guidance. For example, the validity of a surrogacy contract could be brought in the form of a declaratory judgment action. In this regard, one high State court avoided the issue of the validity of a surrogacy contract, holding that the attorney who drew up the contract had no standing to bring the declaratory judgment action.

All of the areas which I have discussed, women's privacy and autonomy rights, the state's and, perhaps, the father's rights in the unborn and other issues involving procreative or abortion decisions are affected by changing medical technologies. In the area of human reproduction, in general, the courts continue to grow more responsive to this raging debate.

In sum, we have focused on issues affecting women in the law—the application of the equal protection

clause to gender-based classifications, issues involving the workplace, the family unit, the breakdown of the family unit, domestic violence, pornography and reproductive choices. To think of these issues as solely women's issues, however, is to misapprehend their nature. They are affected by and reactions to society in general. These issues stir great legal debate which, at a basic level, reflect a debate which rages in the feminist community. The basic tension exists in interpreting the mandate of providing "Equal Protection" of the laws: whether equal treatment requires an *equal distribution* of society's assets and liabilities—rights and duties—or whether in order to treat women equally, biological differences and historical disadvantages must be accounted for. Of course, this dilemma need not and cannot be answered here today. This is, however, an important start—to recognize and consider the dilemma on this Law Day.

Before concluding this presentation, Marge, Suzanne, Eleanor, Barbara and I want to thank you all for allowing us to share our celebration of Law Day with you. Especially, we want to thank Judge Kaye for her inspiration and her direction. Don, for your encouragement and patience; and Marge, as always, we thank you for your guidance and wisdom.

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