FEMINISM'S IDEALIST ERROR

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PREFACE

Sexual equality jurisprudence has produced controversial results. Some courts and commentators addressing women's equality in the context of haz-

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ardous employment have characterized sexual equality as the right of women to subject themselves to employment that is as mutagenic, teratogenic, or carcinogenic as men's employment. Some judges and feminists analyzing women's equality in the context of pregnancy disability leave and benefits have characterized sexual equality as the right of women to be denied pregnancy disability benefits or leave—just as men are. These effects of "equality" indicate that sexual equality jurisprudence often errs by reasoning from a lofty abstract ideal down to a grotesque specific.

Feminists have been among the worst offenders. Much of feminist jurisprudence treats sexual equality as an ideal value—whether of the "equal treatment" or "positive action" sort—and lacks an appreciation of equality's economic consequences for the majority of working women. Court decisions construing Title VII's antidiscrimination provisions and the fourteenth amendment's equal protection guaranty also lack an explicit theory allowing for the appreciation of the economic consequences of current equality theory. These failures of theory, by feminists and the judiciary, produce contradictory and controversial results in both cases.

What the courts, feminists, and legislatures are struggling to comprehend is the meaning of sexual equality under conditions of scarcity. Unless equality theory sheds its idealism and takes into account the material economic necessity posed by such scarcity, it will remain an inadequate tool.

INTRODUCTION

The law has had a class-differentiated effect on women's employment rights. The vast majority of women are still engaged in low-paying work that is performed primarily by women.[1] Only a minority of women have gained

1. Commentators have recognized that advances in women's equality usually benefit only a minority of women. *E.g.*, Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 465 (concentrating on "middle class" women); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 91-93 (noting the dependence of the assimilation model of sexual equality upon the success of token "aspirational" women). To me, this class-differentiated effect is the most important characteristic of the law's treatment of women, and feminism's response to that treatment. As Professor MacKinnon points out, "[w]omen who work are typically secretaries, typists, file clerks, receptionists, waitresses, nurses, bank tellers, telephone operators, factory workers (especially as dressmakers and seamstresses), sales clerks in department stores or cashiers in department stores or cashiers in supermarkets, kindergarten or elementary school teachers, beauticians or cleaning women." C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 10 (1979) (footnote omitted). Facts about the industries in which women are concentrated, the types of jobs they hold within those industries, and the pay disparity between male and female members of the workforce are relatively uncontroversial. For representative compilations of statistics, see U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 13-17 (June 1985); 2 U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S, A CONSULTATION OF THE U.S. COMM'N ON CIVIL RIGHTS, PROCEEDINGS JUNE 6-7, 1984, at 1-47 (1984); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399, 402-15 (1979); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 913-15 (1983); Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 55-61 (1979); Jeffries & McGahey, *Equity, Growth and*

access to professional[2] and entrepreneurial[3] positions and to the skilled trades.[4] For the majority of working women, federal employment law undermines, preempts, and invalidates state and judicial benefits and protections. For the minority, however, privilege and access grow.

Many feminist theories of equality, by either ignoring class[5] or treating all women as a single class, obscure this dual impact of sexual equality jurisprudence upon women's employment rights.[6] Equality theory in general, and the

Socioeconomic Change: Anti-Discrimination Policy in an Era of Economic Transformation, 13 N.Y.U. REV. L. & SOC. CHANGE 233, 256-58 (1985); Scott, *The Mechanization of Women's Work*, SCI. AM. 166, 176 (Sept. 1982); *see also* Note, *Equal Pay for Comparable Worth*, 11 GOLDEN GATE U. L. REV. 801, 803-09 (documenting sex segregation in the workforce from colonial America until today).

2. C. MACKINNON, *supra* note 1, at 12; Comment, *Women Lawyers and Legal Partnerships: Will Title VII Open the Door?* Hishon v. King & Spalding, 19 NEW ENG. L. REV. 647, 652-56 (1984).

3. *See generally Small Business and Capital Ownership Act of 1978: Hearings Before the Subcomm. on Economic Development, Marketing and the Family Farmer of the Senate Select Comm. on Small Business*, 95th Cong., 1st Sess. 8-14, 78-98 (1978) (Testimony of Anne Wexler and Dona O'Bennon).

4. Some of the trades to which women have recently gained access take place in hazardous work environments. *See* C. MACKINNON, *supra* note 1, at 10-11; *cf.* Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (discussing issues of fetal hazards that have arisen in the context of women achieving access to factory jobs of higher pay and greater hazard from which they traditionally had been excluded); Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980) (same); Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981) (same); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981) (same).

5. In this article, I use "class" in its popular sense: I loosely distinguish professional and entrepreneurial occupations from clerical, factory, service and domestic—"working class"—jobs. *Cf.* A. LEONTIEV, POLITICAL ECONOMY, A BEGINNER'S COURSE 14-17 (1976); 1 K. MARX, CAPITAL: A CRITICAL ANALYSIS OF CAPITAL PRODUCTION 167-76 (F. Engels ed. translated from 3rd German ed. 1967) (purchase and sale of labor power distinguishes proletariat from bourgeoisie); MARX & ENGELS, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 331 (Tucker ed. 1972).

6. One example of the feminist tendency to ignore class differentiation among women is the gender neutral approach to equality advanced by Professor Wendy Webster Williams. *See* Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175 (1982). For one example of the practical effect of this ideology upon live controversies, see Brief of National Organization for Women, NOW Legal Defense and Education Fund, National Women's Political Caucus, League of Women Voters of the United States, Women's Legal Defense Fund, National Women's Law Center, Women's Law Project, Coal Employment Project, Ann E. Freedman, Eleanor Holmes Norton, Susan Deller Ross, Nadine Taub, and Wendy Webster Williams, *Amici Curiae*, California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986) [hereinafter cited as Amicus Brief] (opposing California's statute affording reasonable pregnancy disability leave to employees). The tendency in feminist jurisprudence to treat all women as a single class—the middle class—is identified, and repeated, in Karst, *supra* note 1 (applying constitutional law to middle class women). For an identification of feminists who treat all women as a single class—the working class—see MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 525 (1982) (identifying "marxist" feminists who treat all women as working class) [hereinafter cited as *Agenda for Theory*]. Treating all women as a single class and thereby obscuring the needs of working class women, which may conflict with those of professionals, has a long and inglorious history among American

debate over formal and substantive equality in particular, also obscure class-differentiated effects.[7] Feminist equality theory thereby betrays its roots in the equal protection jurisprudence from which it seeks to break: both schools of thought suffer from philosophical idealism.[8]

Class differences form the basis for the class-differentiated effects that any single ideology of equality produces; a materialist appreciation of these class differences should be the touchstone for evaluating the rich and varied debate about equality in feminist jurisprudence.

In this article, I examine the law's effect upon working women and characterize it as a dual model dependent on class. I criticize feminism's idealist approach to sexual equality theory; I note the judiciary's incoherent description of its own equality ideology; I propose the materialist[9] appreciation of freedom and necessity as a more accurate way to evaluate employment law;

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feminists. *See* P. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT 154 (1979) (the Working Women's Association of the 1600s, composed of middle class and wealthy women, justified its high dues and disdain for trade unionism by stating, "we are all workers, and it does not come with any grace for any class to find fault with another because the work is different") (footnote omitted). Other feminist theories of jurisprudence consciously account for the effect of law upon different classes of women. For example, although MacKinnon states that feminism arises from the experience of all women, MacKinnon, *Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y 635, 640 (1983) [hereinafter cited as *Towards a Feminist Jurisprudence*], she considers in her analysis the role of both bourgeois and proletarian women. *See, e.g., Agenda for Theory, supra*, at 516.

7. *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (equality theory obscures the rights analysis on which the decisions are based).

8. I use idealism in the sense it was used by Karl Marx, Frederick Engels, and Vladimir I. Lenin. Engels provides a succinct definition of idealism in his critique of Hegel:

> Hegel was an idealist, that is to say, the thoughts within his mind were to him not the more or less abstract images of real things and processes, but, on the contrary, things and their development were to him only the images made real of the "Idea" existing somewhere or other already before the world existed. This mode of thought placed everything on its head, and completely reversed the real connections of things in the world . . . . [The Hegelian system] suffered, in fact, from an internal and insoluable contradiction. On the one hand, its basic assumption was the historical outlook, that human history is a process of evolution, which by its very nature cannot find intellectual finality in the discovery of any so-called absolute truth; but on the other hand, it laid claim to being the very sum-total of precisely this absolute truth.

F. ENGELS, HERR EUGEN DUHRING'S REVOLUTION IN SCIENCE (ANTI-DUHRING) 30-31 (1972) [hereinafter cited as ANTI-DUHRING].

9. Krieger and Cooney criticize the gender-neutral, "equal treatment" theory of equality for its departure from dialectical materialism. Krieger & Cooney, *The* Miller-Wohl *Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 565-72 (1983). They criticize what they term the metaphysical error of this facet of feminist jurisprudence that caused it to depart from dialectics. Their analysis has helped me formulate my critique that feminism's idealist error causes it to depart from materialism.

Materialism is a world view that contrasts with idealism. "While materialism conceives nature as the sole reality, nature in [an idealist] system represents merely the 'alienation' of the absolute idea, so to say, a degradation of the idea." F. ENGELS, LUDWIG FEUERBACH AND THE OUTCOME OF CLASSICAL GERMAN PHILOSOPHY 17-18 (1941) [hereinafter cited as FEUERBACH]. Both ANTI-DUHRING, *supra* note 8, and FEUERBACH discuss the competing philosophy of idealism and science of materialism. *See also* V.I. LENIN, MATERIALISM AND EMPIRIO-CRITICISM (1927) (furthering this discussion in polemics against his idealist contemporaries);

through this analysis, I seek an alternative and more appropriate means of advancing the rights of the majority of working women.

In Section I, I explore the effect of federal employment and antidiscrimination laws upon working women. For professionals, equality means access to private sector opportunities and benefits. Most working women, however—secretaries, clerical and service workers, sales clerks, and cleaning women—face a rapidly shrinking set of minimum substantive rights. This is the economic basis upon which I evaluate various definitions of equality.

In Section II, I criticize several theories of sexual equality that ignore the relevance of class and thereby obscure the current law's dual impact. The jurisprudence of formal equality of women *to men* fails to account for the differing impact of neutral equality principles on the minority and majority.[10] Recognizing this inadequacy, commentators and courts have sometimes sought to temper the class-differentiated impact of their formal views of equality. Some draw on statutes, such as the Occupational Safety and Health Act ("OSHA"),[11] to procure the minimum safety and choice standards of which equality seems to deprive women;[12] some propose amendments to existing statutes to preserve these minima;[13] some choose judicial extension of beneficial classifications to men to retain the benefits that formal equality would deny to women.[14] None have yet articulated a view of equality itself that justifies this softening of the otherwise harsh economic consequences of formal equality theory for working class women.

"Substantive" equality theories have produced more intuitively satisfying

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Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER, *supra* note 5, at 53 (Marx's early understanding of these competing ideologies).

The materialist looks first at the economic base—the forces of production (level of development of material production) and the relations of production (relations of classes to the productive forces)—to understand the organization of society and the development of ideology. *See* Marx, *Marx on the History of His Opinions*, in THE MARX-ENGELS READER, *supra* note 5, at 3-6; *see also* LENIN, *The Marxist Doctrine: The Materialist Conception of History*, in I V.I. LENIN, SELECTED WORKS 38 (1955) (quoting Marx in part); Jaggar, *Human Biology in Feminist Theory: Sexual Equality Reconsidered*, in BEYOND DOMINATION (Gould ed. 1983)(applying Marxism's recognition of material needs, and of the dialectical development of those needs, to sex differences).

10. *See generally* Littleton, *Reconstructing Sexual Equality* (forthcoming) (On file in the offices of the New York University Review of Law & Social Change).

11. 29 U.S.C. §§ 651-78 (1982); *see also* Note, *Getting Beyond Discrimination: A Regulatory Response to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 579 (1986) (drawing on Toxic Substances Control Act for minimum safety standards).

12. Williams, *supra* note 4 (exploring relationship between OSHA and Title VII; concluding that an employer has a duty to adopt gender neutral policies to protect laborers' future children, unless specific scientific findings show the risk is confined solely to women); *see* Andrade, *The Toxic Workplace: Title VII Protection For The Potentially Pregnant Person*, 4 HARV. WOMEN'S L.J. 71 (1981) (exploring conflict between equal employment and employee safety); Howard, *supra* note 4, at 806 (single-sex studies of women's susceptibility cannot be sole justification of discriminatory exclusion of women from harmful jobs).

13. Furnish, *supra* note 4 (calling for legislation to guarantee pregnant workers the right, and the duty, to transfer away from a hazardous environment).

14. Amicus Brief, *supra* note 6, at 35-43.

results. These theories generally seek, explicitly, to retain or expand benefits and protections for working class women. They fail, however, to satisfy working class women's needs when minimum substantive employment standards are declining. In essence, substantive equality for women becomes as empty as formal equality when the class of which these women are a part is one confronted by scarcity.

Together, these two poles posit a theoretical dichotomy—formal equality or equal treatment vs. substantive equality or positive action—that is limited by philosophical idealism. The dichotomy distinguishes only between sex neutral and sex specific law. These categories arise from a debate over how a theory of equals should be expressed when women and men are different. The feminist equality dichotomy is most unsatisfactory in two types of hard cases:[15] the appropriate treatment of actual, immutable differences between men and women (e.g. the ability to become pregnant), and the appropriate treatment of employment hazards with potentially differing effects upon each sex, such as exposure to toxic substances or radiation.[16] The reason they are so hard is that the struggle in the ideological realm over "equality" within the dichotomy focuses upon ideal constructs of woman and man, rather than upon a recognition of the specific, real needs of women of different classes. Not surprisingly, the internal contradictions in some feminist theories are most apparent in these cases.[17]

In Section III, I address the courts' definitions of sexual equality under the equal protection clause of the fourteenth amendment and under Title VII of the Civil Rights Act of 1964. The courts have had the most difficulty deciding the same two types of cases as the feminists: cases involving actual, immutable differences between men and women and cases involving the factual uncertainty of the effect of various policies and hazards upon men and women. These cases have produced contradictory outcomes. I conclude that judicial theories of sexual equality obscure the effect of these decisions upon the majority and the minority of working women, but that judges have exhibited some

15. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 83 (1978) ("a hard case . . . [is] when no settled rule dictates a decision either way. . ."); Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 415-16 (1985) (defining the hard cases' characteristics).

16. Freedman, *supra* note 1, at 953 (defining the hard cases as those in which society is divided over whether acknowledging particular sex differences is beneficial or burdensome); Williams, *supra* note 6, at 179-80 (defining the hard cases as those that "concern themselves with other, perhaps more basic, sex-role arrangements" such as draft registration and statutory rape); Note (Littleton), *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487 (1981) (change in the law is hardest where gender linked characteristics seem most immutable).

17. *Compare* Freedman, *supra* note 1, at 949 ("[l]egal standards that uphold neutral rules as long as they can be shown to be efficient or functional in terms of current social arrangements fail to take account of the cultural dynamics of sexism") *with* Amicus Brief, *supra* note 6 (to which Freedman is a signatory) (opposing state statutory pregnancy disability leave and promoting neutral policy instead). NOW, also on the Amicus Brief that opposed California's statutory maternity disability leave provision, took a contradictory position after the case was decided. *See* L.A. Times, Apr. 17, 1985, at 3, col. 2 (California president of NOW commends the decision to uphold California's provision of maternity disability leave).

sympathy for economic consequences of the law. The influence has not, however, been articulated as a norm for decision making. The cases therefore remain hard, because equality theory fails to appreciate economic effects.

The question these issues pose is the meaning of sexual equality under conditions of scarcity. My answer is that equality is not an empty idea,[18] just a temporal[19] one. Equality's meaning is bound up with each historical epoch. For example, it meant one thing in the era of *Plessy v. Ferguson*[20] and another in that of *Brown v. Board of Education*.[21] Equality's meaning is also bound up with the class or other critical attributes of its proponents. It meant one thing earlier this century to middle-class women who favored an Equal Rights Amendment, and another to working-class women who opposed it on the ground that such an amendment would strip them of protective legislation. Today, sexual equality's meaning is also bound up with the historical epoch: class-divided society. Scarcity's practical limit upon the class-divided society is part and parcel of equality's theoretical limit upon the advancement of working class women.

I
THE LAW'S CURRENT MODEL OF SEXUAL EQUALITY

A. Professionals, Access, and Private Privilege

In *Hishon v. King & Spalding*,[22] the Supreme Court held that a law firm partnership is an "employer" to which the mandates of Title VII[23] apply.[24] The law firm's promise to consider associates for partnership was therefore a term, condition, or privilege of employment subject to Title VII's antidiscrimination mandate. The Court thus increased the ability of female lawyers—and, by not very strained comparison, of female professional employees of any partnership that promises to consider its employees for partnership—to achieve access to the ranks of partner. In *Roberts v. United States Jaycees*,[25] the Court held that the Jaycees in Minnesota may not exclude women. The Court thus granted women equal access to training in "the art of solicitation and management"[26] and to acquiring " '[l]eadership skills . . ., business contacts and employment promotions.' "[27]

The "equality" enunciated by the Court in *Hishon* and *Jaycees* benefits

18. Westen, *supra* note 7.

19. *See* Marx, *Marx on the History of His Opinions*, in THE MARX-ENGELS READER, *supra* note 5, at 4-5 (discussing the limits by which historical epoch and form of society constrain consciousness).

20. 163 U.S. 537 (1896).

21. 347 U.S. 483 (1954).

22. 104 S. Ct. 2229 (1984).

23. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e(17)(1982).

24. 104 S. Ct. at 2233.

25. 104 S. Ct. 3244 (1984).

26. *Id.* at 3261 (O'Connor, J., concurring).

27. *Id.* at 3254 (quoting United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981)).

directly women who hold or seek professional and entrepreneurial advancement.[28] These decisions, and the allocation of resources to litigation of issues involving such potentially lucrative opportunities, permit a view of women's equality under which access to such traditionally male areas is growing.[29]

Women in traditional service, clerical, sales, or cleaning jobs, however, gain little from the nondiscriminatory allocation of the right to be considered for partnership or from the nondiscriminatory dispensation of managerial and networking skills. More importantly, the decisions also set up a model that limits the measure of equality. First, the decisions set that limit by measuring equality in terms of access to benefits that already exist in only a limited portion of the private sector.[30] Second, decisions based on this equality of access model set that limit by embracing a sex neutral philosophy of sexual equality: "[m]en and women alike suffer from the stereotypes perpetrated by sex-based differential treatment."[31]

An historically accurate and materially based analysis of working women's inequality would show that women are entitled to rights and benefits such as pregnancy disability leave or pay, or exclusive forms of organization.[32] But this access model's sex neutral philosophy and its limitation to existing private sector rights foreshadows relinquishment of such rights and benefits. This access model thus not only may limit women's rights to those that men already have; it may even play a role in undermining women's existing rights.

B. Clerical, Service, and Factory Workers, and Invalidation of Minimum Rights

In contrast to this highly visible trend of access to traditional male enclaves[33] stands a web of federal employment and antidiscrimination laws that

28. For a discussion of the impact of the *Jaycees* decision upon women's right of access to men's clubs, see Kelley, Roberts v. United States Jaycees: *How Much Help for Women?*, 8 HARV. WOMEN'S L.J. 215 (1985).

29. *See, e.g.*, Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985) (Santa Cruz Boys' Club's exclusion of girls held unlawful under California's Civil Rights Act). I argue here that Title VII has been used to expand access to professional jobs while the majority of working class women are losing employment-related benefits and rights. For a contrasting view of Title VII, which argues that it has achieved greater integration for lower-level jobs than it has for jobs in high places, see Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

30. While my primary concern is the effect of the dual development of the law on working class women, others have noted that simple access to traditional male jobs is of questionable value for even the minority to whom it has become available. Karst, *supra* note 1, at 485; Note (Littleton), *supra* note 16.

31. Koire v. Metro Car Wash, 40 Cal. 3d 24, 31, 707 P.2d 195, 210, 219 Cal. Rptr. 133, 139 (1985).

32. *See* Feldblum, Krent & Watkin, *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986) (proposing that compensatory purpose doctrine be used to shield female organizations from challenges under state public accomodation statutes, federal constitutions, and state Equal Rights Amendments) (forthcoming).

33. *See, e.g.*, Morain, *Next Target: Sex Bias in Men's Clubs*, L. A. Times, Nov. 15, 1985, at 1, col. 1 (assault on private men's clubs is means for women's professional advancement).

are undermining the working conditions of the majority of women.[34] Some of these laws, like the Employee Retirement Income Security Act ("ERISA")[35] and the National Labor Relations Act ("NLRA")[36], were enacted to protect all employees: Congress sought to alter the balance of bargaining power between employer and employee.[37] Other laws, like Title VII of the Civil Rights Act of 1964,[38] prohibit employment discrimination against discrete groups of employees. The statutes intersect at the point of consideration of the employment rights of working women.[39] Despite their original protective purposes, these laws are now characterized by a virtual absence of substantive minimum standards and a simultaneous preemption and invalidation of state laws that provided minimum protections to workers, particularly to working women.[40]

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34. *See generally* Low, *State's Labor Laws Are Being Limited by Federal Courts*, L.A. Daily J., Feb. 14, 1985, at 1, col. 6.

35. 29 U.S.C. §§ 1001-1461 (1982).

36. 29 U.S.C. §§ 151-169 (1982).

37. *See, e.g.*, 29 U.S.C. § 151 (1982) (criticizing the inequality of bargaining power between employees and employers, and declaring a national policy of "encouraging the practice and procedure of collective bargaining and protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"). The breadth and power of this alteration of the employment relationship is recognized by proponents and critics alike. *See, e.g.*, Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) (advocating scrapping federal labor legislation and returning to tort and common law principles as well as pre-New Deal allocations of property rights) [hereinafter cited as Epstein I]; Getman & Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415 (1983) (criticizing Epstein's description of labor law's development and his implicit choice of norms veiled as natural allocations of power); Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983) (same as Epstein I, but more vitriolic) [hereinafter cited as Epstein II]; *cf.* Verkuil, *Whose Common Law for Labor Relations?*, 92 YALE L.J. 1409 (1983) (New Deal labor legislation is an incremental response to, rather than a radical departure from, previously existing conditions and laws; it represents an evenhanded application of common law principles to labor and capital).

ERISA's disclosure requirements were enacted, in part, to allow employees to police their plans more effectively. H.R. REP. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4649; *accord* Blau v. Del Monte Corp., 748 F.2d 1348, 1356 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 183 (1985).

38. 42 U.S.C. § 2000e-2000e(17)(1982).

39. *Cf.* Andrade, *supra* note 12, at 72; Howard, *supra* note 4; Williams, *supra* note 4.

40. Prior to the enactment of Title VII, hundreds of state laws—not necessarily beneficial in their effect—governed women's employment. *See* E.L. FISCH & M.D. SCHWARTZ, STATE LAWS ON THE EMPLOYMENT OF WOMEN (1953) (surveying all the states' laws). By virtue of the Supremacy Clause, Title VII invalidated and preempted many of these "protective" laws. *E.g.*, Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974), *aff'g* 356 F. Supp. 1111 (N.D. Cal. 1973), *cert. denied*, 423 U.S. 1063 (1976) (state law termed "beneficial" to women, because it mandated overtime pay for women only, preempted and invalidated by Title VII); Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd*, 444 F.2d 1219 (9th Cir. 1971) (burdensome employer policy excluding women from certain strenuous jobs that offered opportunities for overtime pay invalidated). Other state statutory protections for employees, including women, still exist, and provide protections far more comprehensive than any federal law. California's Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12996 (1982), for example, bars employment discrimination against more groups than the federal law does, and provides disability leave for pregnancy where fed-

1. ERISA

ERISA preemption of state law is one area in which the invalidation of substantive rights for working people is occurring. ERISA is a complex federal statute which was designed to protect pensions and benefits promised to working people by their employers. Rather than protecting these employment rights, however, ERISA has preempted and invalidated many strong state enforcement mechanisms and replaced them with a weak and often impractical federal one.

ERISA covers any "employee benefit plan,"[41] broadly defined, formal or informal, written or unwritten.[42] With few[43] exceptions, ERISA preempts all state laws that "relate to"[44] such a benefit plan. ERISA replaces these state laws with substantive requirements for pension plans only, and purely procedural[45] requirements for all other employee benefit plans.

ERISA's broad reach has several unfortunate consequences for employees. ERISA preempts the minimum substantive protections that various state statutes and common law causes of action previously provided and replaces them with a statute that regulates only the procedural aspects of welfare benefit plans. ERISA has thereby invalidated laws as diverse as parts of New York's antidiscrimination statute[46] and common law tort[47] and contract[48]

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eral law is silent. *See* Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983) (examining the broad scope of the state remedy).

41. 29 U.S.C. § 1003(a) (1982) (subject to the limitation that the employer or employee organization be engaged in commerce or in an industry affecting commerce).

42. Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (en banc); 29 U.S.C. § 1002 (1982).

43. In Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380 (1985), the Supreme Court held that ERISA does not preempt Massachusetts' statutory requirement "that specified minimum mental health care benefits be provided a Massachusetts resident who is insured under a general insurance policy, an accident or sickness insurance policy, or an employee health-care plan that covers hospital and surgical expenses." *Id.* at 2383. This decision signals no reversal in the trend of ERISA preemption. The decision was based on ERISA's own "insurance saving clause" exception to preemption, 29 U.S.C. § 1144(b)(2)(A) (1982). There is even an exception to the insurance saving clause exception, see 29 U.S.C. § 1144(b)(2)(B) (1982), but it was inapplicable to Massachusetts' law. *Metropolitan Life* continues to recognize the broad preemptive scope of ERISA's "relate to" language. *Id.* at 2385.

44. Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); 29 U.S.C. § 1144(a) (1982); *cf.* Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984) (ERISA's preemptive reach is broad, but "not all-encompassing"). *See generally* Note, *ERISA and Preemption of State Fair Employment Laws*, 59 S. CAL. L. REV. —— (1985) (forthcoming).

45. All employee benefit plans—pension as well as welfare-benefit—must comply with ERISA's procedures for reporting and disclosure, 29 U.S.C. § 1021-1031 (1982), and of fiduciary responsibility, 29 U.S.C. § 1101-1114 (1982). ERISA's substantive vesting and participation standards and funding requirements apply only to pension plans, 29 U.S.C. §§ 1051(1), 1081(a)(1) (1982). *See Blau*, 748 F.2d at 1352. ERISA "does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life*, 105 S. Ct. at 2395.

46. Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

47. Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1215-16 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (tortious interference with employee benefit plans preempted). Preemption has been carried to its logical and absurd conclusion: in one California case, a federal district

causes of action against plans.[49] In addition to this loss of substantive benefits by ERISA preemption, employees who have suffered from an ERISA plan administrator's procedural abuses are often entitled to no substantive remedy.[50] Finally, ERISA limits judicial intervention in plan administrators' decisions to the arbitrary and capricious, bad faith, or legally erroneous standard of review.[51]

ERISA is silent about equality between working men and women, and it leaves the standards upon which that equality will be based and the enforcement of those standards primarily in the hands of the private sector.[52] ERISA preemption combined with ERISA's weak procedural and substantive protections and remedies has thus worked a perhaps unexpected deprivation on employees.

2. *NLRA/Collective Bargaining*

NLRA preemption of state law is another area in which federal law is now undermining employees' previously existing rights. Originally, the NLRA's enactment replaced armed government intervention in pitched battles against laborers who sought to organize with National Labor Relations Board, and federal judicial supervision of union elections and labor-management relations.[53] This federal law sought to strengthen employees' bargaining power and thereby to render labor negotiation more equal and more peaceful. Today, however, federal substantive rights under the NLRA and other labor

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court remanded a lawsuit against a trust fund to a state court, holding that the bad faith and emotional distress claims survived ERISA preemption. The state court then declared these causes of action preempted and invalidated by ERISA and dismissed them. Provience v. Valley Clerks Trust Fund, 163 Cal. App. 3d 249, 209 Cal. Rptr. 276 (Cal. Ct. App. 1984); L.A. Daily J., Jan. 7, 1985, at 1, col. 4.

48. Lafferty v. Solar Turbines Int'l, 666 F.2d 408 (9th Cir. 1982) (breach of contract claim preempted).

49. A recent Supreme Court decision about the preemptive scope of the NLRA implicitly foreshadows continued ERISA preemption. After holding that the NLRA preempted a state tort action for bad faith handling of insurance claims, the Court added in a footnote: "The parties have not briefed the question whether this tort suit would be pre-empted by the Employee Retirement Income Security Act of 1974 . . . . Because we hold that this claim is preempted under § 301, there is no occasion to address the separate question of pre-emption by ERISA." Allis-Chalmers v. Lueck, 105 S. Ct. 1904, 1912 n.6 (1985).

50. *Compare* Wolfe v. J.C. Penney Co., 710 F.2d 388, 393 (7th Cir. 1983) (no substantive remedy for procedural abuse) *with Blau*, 748 F.2d at 1354 (reversing grant of summary judgment which held that plan administrator's decision to deny benefits was, as a matter of law, not arbitrary and capricious, and the court stated: "When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quantity of defendants' procedural violations may then work a substantive harm.").

51. Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133, 1135 (9th Cir. 1984); Sly v. P.R. Mallory & Co., 712 F.2d 1209, 1211 (7th Cir. 1983). *See generally Employee Retirement Income Security Act*, in *Labor Law in the Ninth Circuit: Recent Developments*, 17 LOY. L.A.L. REV. 353, 496 (1984).

52. *See* H.R. REP. NO. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4639 (recognizing the voluntary nature of all private employee benefit plans).

53. Getman & Kohler, *supra* note 37.

laws are diminishing in two ways: stronger state laws are being preempted, and the Supreme Court is weakening the protections that Congress wrote into the federal laws themselves.

The first aspect of the diminution of employees' rights is federal preemption. In many states employees receive protection from employers' wrongful discharge in violation of public policy,[54] of the implied covenant of good faith and fair dealing,[55] or of a state statute.[56] These state remedies now face a seige of NLRA preemption.[57]

The Supreme Court has recently indicated, in *Allis-Chalmers Corp. v. Lueck*,[58] that a case-by-case analysis is necessary to determine the extent of NLRA preemption of state laws. The NLRA, unlike ERISA, offers no clear statutory guide to the extent of this preemption. Some discord is apparent in the case-by-case decisions: the Court upheld state regulation of minimum substantive benefits in collectively bargained insurance policies in *Metropolitan Life Insurance Co. v. Massachusetts*,[59] but found state protections against breach of the duty of good faith in the handling of an employee's insurance claim preempted in *Allis-Chalmers*. The legal principle that the Supreme Court offers to reconcile these two decisions is, "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the NLRA."[60] Enforcement of an employer's duty of good faith conflicts, at least in the handling of an insurance claim, but mental health protection does not. The seige upon workers' rights presented by NLRA preemption will thus not be one of clear derogation of substantive benefits, but of litigation to discern what substantive minima the Court means to leave intact.

The second aspect of federal undermining of employee rights is the Supreme Court's weakening of substantive protections that federal law formerly provided to employees under collective bargaining agreements. In a recent unfair labor practices decision, for example, the Supreme Court drastically limited the freedom of a union to conduct its internal affairs when the

54. *E.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

55. *E.g.*, Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

56. *E.g.*, Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

57. Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985); *see* Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635 (1983); Note, *Intimations of Federal Removal Jurisdiction in Labor Cases: The Pleadings Nexus*, 1981 DUKE L.J. 743; *see also* Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985) (distinguishing between wrongful termination claims on basis of whether state public policy is implicated). For cases that seem to distinguish between preempted and surviving wrongful termination claims on the basis of whether the collective bargaining agreement provides just cause protection that meets state standards, see *Garibaldi*, 726 F.2d at 1374-75 n.11; Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984); Schroeder v. Trans World Airlines, 702 F.2d 189, 191 (9th Cir. 1983).

58. 105 S. Ct. 1904 (1981).

59. 105 S. Ct. 2380 (1985).

60. *Id.* at 2382.

conduct of those affairs increased the union's power in a strike vis-a-vis the employer. As Justice Blackmun described this decision in *Pattern Makers' League of North America, AFL-CIO v. NLRB*:[61]

> Today the Court supinely defers to a divided-vote determination by the [NLRB] that a union commits an unfair labor practice when it enforces a worker's promise to his fellow workers not to resign from his union and return to work during a strike, even though the worker freely made the decision to join the union and freely made the promise not to resign at such a time, and even though union members democratically made the decision to strike in full awareness of that promise.[62]

In another recent decision involving collective bargaining practices that affect federal workers, the Court limited the freedom of an arbitrator to discipline the employer for a violation of the contract. The Court in *Cornelius v. Nutt*[63] addressed "whether the arbitrator may overturn agency disciplinary action on the basis of a significant violation of the collective-bargaining agreement that is harmful only to the *union*."[64] The Court held that the arbitrator may not, because "only" the union was harmed. In *NLRB v. Bildisco and Bildisco*,[65] the Court subordinated the policies underlying the NLRA to the policies of bankruptcy law by holding that an employer may unilaterally cancel a collective bargaining agreement when it files for reorganization.

Bildisco explicitly places greater value on the particular rights of employers over the collective rights of employees in their union. Both the *Cornelius* and *Pattern Makers* decisions derogate employee rights by valuing the purported rights of the individual worker at the expense of the collective rights of the workers in their organization, the union. *Pattern Makers* does so by upholding an individual worker's choice, not only to undermine his union but to break its strike; *Cornelius* does so by finding that the only employer breaches of a collective bargaining agreement that matter are those that harm the individual, not those that harm the workers' organization.

This emphasis on individual employees' rights over workers' collective rights marks a shift in the law. The former rule had been that "The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."[66] *Pattern Makers* changes this policy under the NLRA; *Cornelius* changes it for federal employees.

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61. 105 S. Ct. 3064 (1985).

62. *Id.* at 3077 (Blackmun, J., dissenting).

63. 105 S. Ct. 2882 (1985).

64. *Id.* at 2884 (emphasis in original) (decided under a provision of the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(A) (1982)).

65. 465 U.S. 513 (1984). The effect of this decision was undone by Congress' enactment of § 1133 of the Bankruptcy Code.

66. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

3. *OSHA/Occupational Safety*

The field of occupational safety and health legislation presents problems similar to those created by ERISA and the NLRA. OSHA[67] seeks to set minimum standards to ensure safe and healthful working conditions.[68] Few standards, however, have been adopted.[69] The occupational health field suffers from a lack of attention to the problems faced by women workers in particular.[70] Occupational safety is a problem in fields ranging from industrial work to computer and technological employment.[71] Despite OSHA's minimal protections, this federal statute nevertheless was recently held to preempt a state law that required chemical manufacturers to communicate hazardous substances information to employees via disclosure, education, and labelling.[72]

4. *Federal Wage Discrimination Law*

Federal wage discrimination law provides inadequate protection for the many women doing traditional women's work. The judiciary has limited much of the federal prohibition against sex discrimination in wages to cases of intentional discrimination; the executive has strongly endorsed such restrictive interpretations.[73] Both branches of the federal government currently interpret federal statutes in a manner that freezes the status quo with respect to the majority of working women, and, thus, preserves the dual effect of sex discrimination law upon the majority and the minority.

The Equal Pay Act[74] and Title VII[75] both prohibit wage discrimination on the basis of sex. Title VII also prohibits segregation or classification of employees "in any way which would deprive or tend to deprive any individual of employment opportunities" on the basis of sex.[76]

The Equal Pay Act's prohibition applies to "*equal* work on jobs the performance of which requires *equal* skill, effort, and responsibility."[77] In addi-

67. 29 U.S.C. §§ 651-78 (1982).

68. 29 U.S.C. § 651(b) (1982).

69. *See* Williams, *supra* note 4, at 664 n.152 (regarding establishment of standards for worker exposure to hazardous substances).

70. Hunt, *Reproduction and Work*, 1 FEMINIST STUDIES 543 (1975); *cf.* Letter from Carin Perkins, Staff Research Associate in Epidemiology, University of California, Davis, School of Medicine, to the author (Aug. 6, 1984) (describing first study to be conducted on the effects of video display terminal exposure upon pregnancy loss prior to 20th week of gestation).

71. Chavkin & Welch, *Occupational Hazards to Reproduction: An Annotated Bibliography* (joint publication of Program in Occupational Health Department of Social Medicine and the Residency Program in Social Medicine, Montefiore Hospital and Medical Center 1980).

72. United Steelworkers of Am. v. Auchter, 763 F.2d 728 (3d Cir. 1985); *cf.* Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985) (federal law preempts state environmental law's permit scheme). *See generally A Matter of Chemistry*, 5 CALIF. LAW. 19 (Aug. 1985) (discussing federal preemption of state right-to-know laws).

73. *See infra* text accompanying notes 94-96.

74. 29 U.S.C. § 206(d)(1) (1982).

75. Section 703(a) of Title VII prohibits discrimination on the basis of sex with respect to compensation. 42 U.S.C. § 2000e-2a(1) (1982).

76. 42 U.S.C. § 2000e-2a(2) (1982).

77. 29 U.S.C. § 206(d)(1) (1982) (emphasis added); *see* E.E.O.C. v. First Citizens Bank,

tion, the legislative history of the Equal Pay Act indicates that "comparable worth" language was explicitly rejected in favor of the equal work standard.[78] The Equal Pay Act therefore has been inapplicable to women who suffer depressed wages but who work in a segregated field; the fact that no male performs the exact same job for greater pay precludes their claim.[79]

Title VII's prohibition, however, may be broader. It prohibits intentional sex-based wage discrimination even if no man works an exactly equal job for greater pay.[80] Thus, "comparable worth" law suits based on intentional wage discrimination—disparate treatment—remain cognizable under Title VII, despite the absence of an identical job performed by a man.[81]

The standard of proof of intentional discrimination may, however, be prohibitively high.[82] Further, claims of disparate impact may be completely unavailable to women suffering this type of wage discrimination,[83] despite the general availability of this theory to all other claims of employment discrimination in violation of Title VII.[84] Opponents of this use of disparate impact analysis maintain that it is applicable only to specific employer practices such as height and weight limits, but not to complex processes, such as wage setting.[85] Additionally, opponents assert, the Bennett Amendment to Title VII[86] incorporates the Equal Pay Act's four affirmative defenses to a claim of pay inequality; one of those defenses is a "differential based on any other factor other than sex;"[87] and the market may be considered such an "other" factor.[88]

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758 F.2d 397, 400 (9th Cir. 1985) (E.E.O.C. must show substantial equality of jobs to shift burden of disputing wage discrimination to employer).

78. AFSCME v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985).

79. In the mid-19th century, the Working Women's Association adopted one of the earliest forms (of which I am aware) of the claim for higher wages for women in a segregated work force to equalize the conditions of working women and men. Their platform declared that the "lack of a 'just estimate' of women's work, [and the fact that] no definite wages had ever been fixed in the departments of women's special industries . . . had given rise to various abuses"; and the platform called for organization to "establish our position on an equitable basis." P. FONER, *supra* note 6, at 143 (quoting Working Women's Association's Platform).

80. County of Washington v. Gunther, 452 U.S. 161, 168 (1981) (recognizing disparate treatment claim of wage discrimination under Title VII). *See* Newman, Newall & Kirkman, *The Lessons of AFSCME v. State of Washington*, 13 N.Y.U. REV. L. & SOC. CHANGE 475, 476-77 (1985).

81. Newman, Newall & Kirkman, *supra* note 80, at 486-87.

82. AFSCME v. Washington, 770 F.2d 1401, 1406.

83. *Id.*

84. *E.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The dissenting statement to the U.S. Commission on Civil Rights' comparable worth analysis and recommendations points out that all "theories of liability developed under Title VII are directly applicable to pay equity claims." U.S. COMM'N ON CIVIL RIGHTS, ANALYSIS AND RECOMMENDATIONS, *supra* note 1, at 80 (statement of Mary Frances Berry and Blandina Cardenas Ramirez).

85. *E.g.*, U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS, *supra* note 1, at 71 (recommendation No. 15).

86. 42 U.S.C. § 2000e-2(h) (1982).

87. 29 U.S.C. § 206(d)(1)(iv) (1982); *see* 42 U.S.C. § 2000e-2(h) (1982) (incorporating the Equal Pay Act's affirmative defenses); *accord Gunther*, 452 U.S. at 167-68.

88. Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1983); *see also* Spaulding v. Univer-

Both the complex processes argument and the market factor defense render Title VII unavailable to women who suffer depressed wages but who do not perform jobs that are the same as those a man performs. Since the majority of working women are concentrated in jobs performed predominately by women, the lack of an equally situated male may preclude most of their legal challenges to their depressed wages.

The Ninth Circuit's recent decision in *AFSCME v. State of Washington* gives this reasoning the force of law. It holds that both theories of Title VII liability are essentially unavailable to women suffering depressed wages solely because of their traditionally female occupation: "disparate impact analysis is confined to cases which challenge a specific, clearly delineated employment practice applied at a single point in the job selection process,"[89] and disparate treatment analysis "does not obligate [Washington] to eliminate an economic inequality which it did not create."[90]

The first reason, although it finds some support in the case law,[91] is illogical: it assumes that the more pervasive the discriminatory practice, the less objectionable it is. Exactly the converse is true, and exactly the converse has been adopted as law in other areas—for example, the totality of conditions theory used in prison condition challenges brought under the eighth amendment.[92] The second reason simply adds wage discrimination of this sort to the types of rights of which the judiciary will recognize a violation but for which they will provide no remedy.[93]

Implicit throughout the decisions denying relief to women suffering wage discrimination has been the reluctance of the judiciary to develop pay scales for private industry. The initial inquiry of Title VII, however, is whether a violation of existing discrimination laws has occurred—not what remedy is appropriate. If this inquiry were raised first, then courts would examine the same type of statistical and inferential evidence under these discrimination claims that they examine under other employment discrimination claims. If

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sity of Washington, 740 F.2d 686, 706 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984) (employers need not ignore market factors in determining wage rates); American Nurses Ass'n v. Illinois, 606 F. Supp. 1313, 1318 (N.D. Ill. 1985) (rejecting comparable worth claim under Title VII); Cox, *Equal Work, Comparable Worth and Disparate Treatement: An Argument for Narrowly Construing* County of Washington v. Gunther, 22 DUQ. L. REV. 65, 73 (1983) (emphasizing importance of "the controversial value of noninterference by government with employer discretion" in defining the scope of permissible wage determinative factors other than sex).

89. AFSCME v. Washington, 770 F.2d at 1405.

90. *Id.* at 1407.

91. *E.g.*, Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800-01 (5th Cir. 1982).

92. *See generally* Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977).

93. *E.g.*, United States v. Leon, 104 S. Ct. 3405 (1984) (recognizing fourth amendment claim but denying exclusionary remedy for officer's good faith violation); Sure-Tan Inc. v. NLRB, 467 U.S. 883 (1984) (recognizing employer violation of federal wage laws but denying illegal immigrant workers any effective remedy); City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (denying standing in federal court to challenge violation of constitutional rights in use of chokehold).

this evidence showed that Title VII was violated, the remedy could be addressed next. The judicial fear of establishing wage rates, however, puts the cart before the horse.

Placing primary emphasis on the issue of developing pay scales, rather than on whether discrimination has caused pay disparity, has rendered Title VII ineffective for the vast majority of women concentrated in women's work. The executive branch fully endorses this restrictive view of wage discrimination law.[94] The Department of Justice has filed a brief in a comparable worth case in the Seventh Circuit arguing against recognition of the theory of comparable worth.[95] The current United States Commission on Civil Rights has also taken a stand opposing comparable worth.[96]

Not all states, however, adhere to this view. In California, a task force on comparable worth has recommended that the state adopt legislation to combat the evil that jobs " 'performed mainly by women tend to pay less than jobs requiring similar skill, effort, responsibility and working conditions performed mainly by men.' "[97] In *AFSCME*, the Ninth Circuit indicated that comparable worth is an appropriate sphere for state legislation.[98]

It is unclear, however, how much further than the federal government the states may go in enacting more stringent antidiscrimination laws. If wage discrimination is similar to the areas of law discussed above, the question of federal preemption may also arise in this context.[99]

C. *The Dual Model*

These limits upon wage discrimination law, occupational health and

94. Newman, Newall & Kirkman, *supra* note 80, at 493-96.

95. *U.S. Assailed for Role in Pay-Equity Lawsuit*, L.A. Daily J., Aug. 20, 1985, at 3, col. 3.

96. *See* United States Comm'n on Civil Rights, Comparable Worth: An Analysis and Recommendations, *supra* note 1, at 70-72; Remarks of Vice Chairman Abram of the U.S. Commission on Civil Rights, 2 U.S. Commission on Civil Rights, *supra* note 1, at 124-25 (comparing predominately female garment workers' lower wages with predominately male furriers' higher wages and urging access to the traditionally male trade, rather than improved wages for the predominately female trade, as appropriate remedy); Statement of June O'Neill, Urban Institute, Washington, D.C., *reprinted in* 2 COMPARABLE WORTH: ISSUE FOR THE 80'S, A CONSULTATION OF THE U.S. COMMISSION ON CIVIL RIGHTS (1984) at 111 (criticizing the concept of comparable worth as contrary to market economy, access, and even feminism).

97. Gilligiam, *Task Force Report on Comparable Worth Pay Assailed*, L.A. Times, Sept. 4, 1985, Part I, at 18, col. 3 (quoting legislative report); *see Study Group Urges Comparable Worth Law for California*, L.A. Herald Examiner, Aug. 7, 1985, at 1, col. 4.

98. AFSCME v. Washington, 770 F.2d at 1407.

99. Similar issues arise in the context of unemployment insurance. Although federal law prohibits discrimination on the basis of pregnancy in state administration of unemployment benefits, *see* Federal Unemployment Tax Act of 1976, 26 U.S.C. § 3304(a)(12), courts are now split on whether leaving work because of pregnancy is a nondiscriminatory reason for denying benefits. The Fourth Circuit has held that South Carolina may not deny benefits for that reason. Brown v. Porcher, 660 F.2d 1001 (4th Cir. 1981). The Missouri Supreme Court, however, recently held that Missouri may do so. Wimberly v. Labor & Indus. Relations Comm'n, 688 S.W.2d 344 (Mo. 1985). In so deciding, Missouri has interpreted a ban on pregnancy discrimination in a manner that effectively denies material benefits—to which women at least in the Fourth Circuit had been entitled—to working class women.

safety, employment and unemployment benefits, collective bargaining and other employee rights, reveal a consistent theme. Potentially far-reaching federal remedies[100] have devolved into a substantive dead end for the majority of working women.[101] At the same time real incomes are dropping and poverty is growing.[102]

This end has been accomplished by many decisions and theories, including two simultaneous and theoretically contradictory legal means: the weakening of federal statutes and federal preemption of state protections. Title VII protections, for example, have been weakened by recent decisions. Title VII's prohibition against discrimination in employment is weaker without judicial acknowledgement of the disparate impact of pervasively discriminatory wage rates upon women. Title VII is also weaker now that the Supreme Court has limited the availability of federal judicial review of state administrative employment discrimination decisions in the name of comity.[103] On the other hand, Title VII and other federal statutes—ERISA, OSHA, the NLRA—are so pervasive that they have preempted stronger state laws. ERISA, for example, has preempted state antidiscrimination laws; the NLRA has preempted state law protecting employees from certain employer breaches of the duty of good faith.[104]

The views of federalism expressed in these decisions concerning the strength and scope of federal laws conflict with one another. Decisions that undermine the federal protections have minimized the otherwise broad protective reach of federal laws. Decisions expansively preempting state laws have greatly increased the scope of federal law.

Because the trend towards undermining workers' economic stability implicates these contrasting views of federalism, it is important to note that the Supreme Court's recent opinions on federalism also embody conflicting visions. In *Atascadero State Hospital v. Scanlon*,[105] the Court expansively interpreted the principle of state sovereign immunity implicit in the eleventh amendment. The Court based its view on "the Eleventh Amendment['s] implicat[ion of] the fundamental constitutional balance between the Federal Government and the States."[106] That balance, *Scanlon* concludes, weighs so

100. *See* Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078 (1984) (cognizant of the potentially revolutionary nature of the Equal Pay Act's incorporation of comparable worth principles, but uncomfortable with the interference with the market that this has brought); Becker, *Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby*, 51 U. CHI. L. REV. 1112 (1984) (agreeing that the Equal Pay Act already incorporates comparable worth values, but disagreeing with what it characterizes as Freed and Polsby's underlying, indirect attack on antidiscrimination legislation).

101. *See* Blumrosen, *supra* note 1 (arguing that Title VII and the Equal Pay Act should apply to claims of wage discrimination based upon job segregation).

102. *See* Jeffries & McGahey, *supra* note 1.

103. *See* Mann, *Federalism Issues and Title VII:* Kremer v. Chemical Construction Corp., 13 N.Y.U. REV. L. & SOC. CHANGE 411 (1985); Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984).

104. *See supra* text accompanying notes 41-66.

105. 105 S. Ct. 3142 (1985).

106. *Id.* at 3145-46.

heavily in favor of state sovereignty that only a specific, unequivocal waiver, stated in the words of the congressional act itself, may waive that sovereignty. In *Garcia v. San Antonio Metropolitan Transit Authority*,[107] however, the Court's narrow interpretation of the tenth amendment powers reserved to the states preserved Congress' regulation of the minimum wages of state workers.

The jurisprudence concerning these conflicting visions[103] of states' rights raises the practical question of where federal preemption of state substantive rights for working women will fall in the federalism debate. I address the practical question of expanding working women's rights in the context of the federalism debate below, in Part IV. Furthermore, neither judicial decisions nor feminist jurisprudence recognize the material consequences of the current class-differentiated dual impact. This error—ignoring the material conditions under which women labor—has long plagued the interpretation of women's role in various disciplines.[109] I address the question of the importance of acknowledging these actual, material consequences of federalism on today's conditions in Section II and III.

II

THE DUAL MODEL OBSCURED BY FEMINIST JURISPRUDENCE

A. Feminism's Dichotomy: Equal Treatment vs. Positive Action

Much of the debate[110] over sexual equality in feminist jurisprudence involves a dichotomy:[111] "equal treatment" vs. "positive action."[112] Ideal concepts of equality conflict with each other, and obscure the effect of either pole upon working women. The dichotomy obscures the actual distribution of women in primarily sex-segregated, low-paying, low-status jobs, and the effect of current antidiscrimination and employment law in stripping the majority of

107. 105 S. Ct. 1005 (1985).

108. *See Atascadero*, 105 S. Ct. 3142, 3179 (Blackmun, J., dissenting).

109. *See* Leacock, *Introduction*, in F. ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE 34 (E.B. Leacock ed. 1973) ("the debate over women's status in primitive society has largely ignored the actual role of women in primitive society in favor of an almost exclusive focus on descent system").

110. Some of the debate already transcends this dichotomy. MacKinnon focuses on the distribution of power when she addresses the question of sexual equality. *See, e.g.*, MacKinnon, *Agenda for Theory*, *supra* note 6, at 542. MacKinnon characterizes the "differences" approach to gender discrimination as moral and liberal, and she contrasts it with the radical and political approach of analyzing and attacking hierarchy. *See generally Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 20-24 (1985).

111. I credit Fran Olsen's article, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983), discussing the family/market dichotomy, with helping me to think about the diverse feminist meanings given to sexual equality as caught in a limited dichotomy.

112. The debate has been described in these terms by most commentators. *E.g.*, Krieger & Cooney, *supra* note 9, at 515-16; Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1985); Williams, *supra* note 6, at 196; Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); *see also* Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 88-109; Scales, *supra* note 150, at 426-37.

their substantive protections while conferring upon the minority the rights of access and privilege. Without noting this class-differentiated effect, the debate fails to describe adequately the meaning and effect of sexual equality.

The equal treatment pole has been forcefully expressed by Professor Wendy Webster Williams: "[t]he equality approach to pregnancy (such as that embodied in the PDA[113]) necessarily creates not only the desired floor under the pregnant woman's rights but also the ceiling which the *Miller-Wohl* case threw into relief. If we can't have it both ways, we need to think carefully about which way we want to have it."[114]

The positive action, or substantive sexual equality pole, in contrast, argues that defining discrimination against women by reference to men's needs is irrelevant when applied to biological characteristics that men and women do not share, such as pregnancy and lactation:[115] "An equality doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men."[116] To some feminists, women's differences from men include cultural characteristics associated with women's role in the family.[117]

Much of feminist jurisprudence adopts the dichotomy of equal treatment vs. positive action. For example, one pair of authors, Linda Krieger and Patricia Cooney,[118] distinguish between equal treatment and reasonable accommodation. Professor Kathryn Powers'[119] distinction between individual equality and equality of participation of women tracks the same ground. Even Professor Ann Freedman's[120] incisive critique of the Supreme Court's approaches to sexual equality—"irrationality" and "real differences" analysis—

113. In Williams' opinion, not mine.

114. Williams, *supra* note 6, at 196. This argument is made, explicitly and implicitly, by many advocates of women's rights. *E.g.*, Andrade, *supra* note 12, at 79 (both restrictions on, and protections for, women should be treated the same way).

115. Krieger & Cooney, *supra* note 9, at 435-37 (describing incorporationist approach).

116. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007 (1984).

117. E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 16 *passim* (1980) (proposing a bivalent approach that accounts for women's concerns for family and maternity, women's general economic dependency, and women's general lack of provisions for later years); Krieger & Cooney, *supra* note 9, at 557-63 (describing bivalent approach); Scales, *Towards A Feminist Jurisprudence*, 56 IND. L.J. 375, 430-34 (same); *see infra* text accompanying notes 121-22.

118. Krieger & Cooney, *supra* note 9, at 557-63. Wolgast denies that the bivalent view is just another species of equality theory. She asserts that notions of equality and inequality are as inapplicable to the differences between men and women as they are, to, say, the differences between dogs and cats. Both comparisons involve differences rather than equality or inequality. E. WOLGAST, *supra* note 117, at 37-55. Nevertheless, her choice of which rights are equal and which are special, her resort to the reasonable accomodation analogy, *id.* at 51-52, and her failure to consider the material conditions of working women in finding an alternative to equality theory, *id.* at 156-58 (describing women's decisions about whether to work as free choices and assuming that the choice to work entails a career that provides for old age, i.e., a professional, well-paid career), keep her within the idealist dichotomy.

119. Powers, *supra* note 112.

120. Freedman, *supra* note 1, at 918, 927 (Supreme Court focuses on either the "irrationality of particular rules as means to the government's asserted goals" or at "differences in fact" between men and women).

fits this model because she contrasts both with her own call for substantive equality analysis.

Krieger and Cooney's reasonable accommodation norm and Powers' participatory rights norm are based on substantive equality ideology. Williams, on the other hand, chooses formal sexual equality. Other commentators choose a position that falls in the middle of the dichotomy. For example, the "bivalent"[121] and the "incorporationist" views[122] advocate the same treatment for most attributes that men and women share, and differentiated treatment for a limited set of differences between men and women. Commentators who describe the debate in assimilationist and anti-assmilationist terms[123] also divide the world of equality theory into ideals of sameness and difference.

The liberal debate over formal and substantive equality[124] revolves around a similar dichotomy. It has been cast as a struggle between the antidiscrimination principle and the principle of preferential treatment for disadvantaged groups,[125] and as a choice between individual equality and equality of participation.[126] Liberal equality theory, by casting the debate in these terms and thereby providing the theoretical foundation for the equal protection/positive action dichotomy, thus forms both feminism's basis and its nemesis. It limits the debate to ideal definitions of equality.

Professor Peter Westen, in his article *The Empty Idea of Equality*,[127] shows how the value of equality as an ideal depends upon the substantive rights being claimed. When substantive rights or benefits are more abundant, legal and popular notions of equality favor distributing those resources to deprived groups.[128] Due to existing federal labor, employment and discrimination law, however, these rights and resources are becoming scarcer for the working class. If working class women demand only formal equality to men—men who lack job safety, security and disability protections—they will always relinquish any claim to pregnancy leave or benefits. If working class women

121. For a description, see E. WOLGAST, *supra* note 117, at 14 (where there are differences between men and women, "justice requires men and women to be treated differently").

122. For a description, see Scales, *supra* note 117, at 435-37. ("The law should account for sex differences in a strictly limited way.")

123. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977) (adopting assimilationist viewpoint, which eradicates differences between sex roles); *see* E. WOLGAST, *supra* note 117, at 32 (criticizing assimilationist viewpoint); Scales, *supra* note 117, at 428-30 (same); Note (Littleton), *supra* note 16 (same).

124. Described, for example, by Law, *supra* note 116, at 1009-10; Powers, *supra* note 112, at 68-69. *See* R. DWORKIN, *supra* note 15, at 227 (distinguishing between equal treatment and treatment as an equal); Scales, *supra* note 117, at 426-28.

125. Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT (M. Cohen, T. Nagel & T. Scanlon eds. 1977) (essay contrasting "the structure and limitations of the antidiscrimination principle, the principle that controls the interpretation of the Equal Protection clause" with the group-disadvantaging principle). For a discussion of the language and moral values associated with the rights of individuals, groups and society, see Garet, *Communality and Existence: the Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

126. Powers, *supra* note 112, at 102.

127. Westen, *supra* note 7.

128. *See* Jeffries & McGahey, *supra* note 1.

demand only substantive equality to men—men who lack job safety, security and disability benefits of any kind—they will today relinquish any claim to pregnancy protections, leave or benefits. The results of substantive equality have collapsed into the results of formal equality due to today's scarcity. Equality under conditions of scarcity reduces feminists discussing access to hazardous employment to characterizing the "right" that they seek for women as a "right to subject one's body to possible harm"[129] in procuring employment.

I propose that the sexual equality dichotomy's particular failure is its philosophical idealism: it begins with an idea of what sexual equality should mean, rather than from an understanding of current law and its effect upon the working conditions of the majority of women.[130] The conditions are those described in Section I. Working class women face scarcity—of employment, of choice, and of resources such as time and money. Others enforce the scarcity—by employment, labor, and discrimination law. The idealist view of equality attempts to pose a universal and eternal answer to this temporal set of conditions. The choice in each case that arises under labor, employment, or discrimination law, however, is between greater scarcity or greater abundance for the majority of working women. This is the question that idealist equality theory has failed to answer.

B. The Material Base from Which the Dichotomy Arises

The equality dichotomy has appeared to ask the correct question because each pole of the dichotomy embodies an aspect of truth that makes it plausible and forceful.

Professor Williams, for example, defends the equal treatment side of the model by arguing that historically, single-sex legislation has harmed women;[131] historically, state concern for "women's special procreational capac-

129. Comment, *Employment Rights of Women in the Toxic Workplace*, 65 CALIF. L. REV. 1113, 1138 (1977); *see also* Note, *Title VII—Employment Discrimination and Fetal Safety in Hazardous Work Environments*— Wright, et al. v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), 1984 ARIZ. ST. L.J. 211, 233 (characterizing the "equality required by the Pregnancy Discrimination Amendment" as the right to procure, and maintain, toxic employment).

130. *See supra* notes 8 & 9 for an explanation of my use of the words materialism and idealism. I disagree with MacKinnon's use of the word idealism to describe a Marxist critique of the centrality of consciousness raising, feelings and attitudes to the feminist movement. *See Agenda For Theory*, *supra* note 6, at 517-18. Simply because they raise "ideas" does not render that process and those feelings idealist; indeed, the powerful discovery and sharing of reality that occurs when those previously isolated, individuated, and denigrated feelings are shared reveals much of women's material condition of commonality and powerlessness. I also disagree with the use of idealism to simply mean too much theory, *see, e.g.*, Cole, *Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59, 90 (1985). I use idealism to criticize a substantive error of theory. I do not deny that much of feminism is based on a material appreciation of women's condition. *Id.* at 80-90. I criticize only an idealist error, not all of feminism.

131. Wright, *Reproductive Hazards and "Protective" Discrimination*, 5 FEMINIST STUDIES 302 (1979), argues in a similar fashion that protective policies have excluded women only from the hazards of traditionally male jobs; protective policies have never provided affirmative pro-

ity" has harmed women; sexual categorization allows for unfavorable treatment; and special protective legislation for female employees shifts attention away from employer policies that work to the disadvantage of all workers.[132] Thus, she concludes, equal treatment rests on justified fears about the effects of sex specific legislation on working women.

The fears are only partly justified, and the analysis of history is only partly true. As for her first argument, protective legislation served a positive function for the majority of working women who fought for it and even fought against a proposed Equal Rights Amendment that threatened to strip them of their gains.[133] Equal treatment's stand against protective legislation thus ignores the differences between the majority of working women, who historically benefitted from these statutes, and the privileged minority of women, who saw them as superfluous.

With regard to the second argument, it is true that state concern for women has often worked to women's detriment;[134] but state and federal silence in the face of women's need has also been harmful. Today, for example, federal preemption of state benefits to pregnant workers—one form of federal silence with respect to sex—works to most women's detriment.

As for the third argument, enactment of pregnancy specific statutes may allow good and bad ones to crop up, but prohibiting pregnancy specific statutes also allows good and bad sex neutral statutes. Neither neutrality nor specificity guarantees substantive rights: that problem must be attacked directly, without the equality dichotomy gloss.

Professor Williams's final argument—that gains for a portion of workers harm the entire working class—is baffling. Historically, the struggle for protective legislation was waged on behalf of all workers, and women's gains were a part of that struggle. There is some support for the theory that divisiveness and shifting of attention was caused by the middle class feminists who placed the supposed interests of all women as a class above the interests of working women, by choosing tactics such as strikebreaking in order to gain skilled jobs

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tection for women in equally hazardous, but predominately female, jobs. *See also* Andrade, *supra* note 12, at 75-79. But women have worked in factories for a long time. *See generally* E. FLEXNER, CENTURY OF STRUGGLE, THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES 134-44, 248-55 (revised ed. 1975) (describing the role of working class women in trade union organization and strikes). These women held jobs that were subject to limitations on weight lifting and hours of work, mandatory break time, and other benefits for which they and their unions fought.

132. Williams, *supra* note 6, at 196.

133. A. NESTOR, WOMAN'S LABOR LEADER, AN AUTOBIOGRAPHY OF AGNES NESTOR 236-38 (1954). *But see* Bell, *Implementing Safety and Health Regulations for Women in the Workplace*, 5 FEMINIST STUDIES 286 (1979) (criticizing protective legislation and concluding that society must assume a certain level of risk for everyone); Hill, *Protection of Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUDIES 247, 271 (1979) (concluding that women's protective legislation is detrimental because it is both under- and over-inclusive).

134. *See* Note, *Pink Collar Blues: Potential Hazards of Video Display Terminal Radiation*, 57 S. CAL. L. REV. 139, 152-55 (1983).

from which they would otherwise have remained excluded.[135] There is some support for the theory that men's negative attitudes towards women working or unionizing caused divisiveness.[136] But where is the historical support for the thesis that actual gains for women harmed the entire working class?

Equal treatment theory is thus satisfactory to the extent that it reflects a concern for the rights of working women and a skepticism about the legislature's "help" for women. It is plausible in certain contexts, as when professional women[137] seek access to traditionally male professions.[138] Equal treatment theory is implausible to the extent that it posits sex categorization as the primary evil that has plagued working women and posits sex neutrality as an overarching goal rather than a potential tactic.

Positive action theories also contain some truth. Proponents of this ideology demand that a normative theory of woman's equality be explicitly developed[139] and judicially adopted. The norm upon which these feminists would base sexual equality theory is that differences between men and women—physical, social, or historical—should be recognized and treated differently. This norm leads to appealing results today. Substantive equality proposals,[140] statutes,[141] and decisions[142] do often expand job opportunities for pregnant women in "traditionally" women's jobs: receptionists,[143] department store salespersons,[144] clerical workers.[145]

This norm, however, has not always produced such results. As Professor Williams points out, historically, recognition of the differences between women and men has led to decisions that kept women out of schools and professions, stripped pregnant women of employment, and resulted in the violation of scores of other women's rights.[146] The substantive equality norm may also harm working women today: equal access to hazardous employment, for ex-

135. *E.g.* P. FONER, *supra* note 6, at 150-52.

136. *E.g.* 1 P. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 382-83 (1947).

137. Powers, *supra* note 112, at 91-92.

138. See discussion of the *Hishon* and *Jaycees* decisions, *supra* text accompanying notes 22-32.

139. Krieger & Cooney, *supra* note 9, at 562-63; *see also* Freedman, *supra* note 1, at 948-50.

140. *See* Powers, *supra* note 112, at 106-10; *cf.* Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940-46 (1985) (claims to adequate pregnancy disability leave and flexible job definitions to accommodate pregnant women have been accepted by at least one court each).

141. *E.g.*, CAL. GOV'T CODE § 12945(b)(2) (West 1980) (guaranteeing reasonable pregnancy disability leave of up to four months).

142. *E.g.*, Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819 (D.C. Cir. 1981) (invalidating gender neutral ten-day cap on disability leave as discriminatory in effect against women, because it fails to account adequately for pregnancy disability).

143. California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986).

144. *Miller-Wohl v. Commissioner*, 515 F. Supp. 1264 (D. Mont. 1981), *vacated on juris. grounds*, 615 F.2d 1088 (10th Cir. 1982).

145. Abraham v. Graphic Arts Int'l Union, 660 F.2d 811.

146. *See* Williams, *supra* note 112; Note, *supra* note 134, at 154-55.

ample, is a distorted conception of a material right, yet substantive equality proponents[147] advocate this result.[148]

Both theories of equality may produce benefits or harms in particular cases. That sexual equality theory *works* as a tactic in certain cases is not disputed here. It is, however, an inadequate principle.

III

THE DUAL MODEL OBSCURED BY JUDICIAL EQUALITY THEORY

Courts have provided us with no truer principle to guide sexual equality theory than have feminists. The Supreme Court's definitions of equality under Title VII and the equal protection clause reveal both a formal view of the meaning of sexual equality—i.e., sexual equality means sameness of treatment with men—and an idealist view of the nature of equality.[149] The formalism is evident in cases that uphold women's rights, such as *Hishon* and *Jaycees*, as well as in the cases that take those rights away, such as the *Gelduldig-Gilbert-Satty* trilogy of pregnancy decisions that I discuss below.[150] This view of sexual equality as sameness of treatment based on the assimilationist ideal has been well explored.[151]

The failure to base equality theory on materialism, however, has not been well explored. It is evident on all levels of the judiciary, in various issues involving sexual equality, and in cases that protect working women as well as those that do not. Interestingly, however, despite the fact that the courts do not enunciate a theory to explain the economic consequences of their decisions, some have shown a sensitivity to these consequences.[152]

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147. *E.g.*, Law, *supra* note 116, at 1009-10 ("Equality is a substantive goal, not simply a neat classification or a rational relationship between means and ends.").

148. *Id.* at 1029-30.

149. See *supra* note 144 and accompanying text regarding the illusions promoted by judicial decisions that fail to account for underlying economic forces.

150. For background on the cases and related articles, see generally H. KAY, TEXT, CASES AND MATERIALS, SEX-BASED DISCRIMINATION 493-95 (2d ed. 1981); Scales, *supra* note 117, at 377-88.

151. *See* Note (Littleton), *supra* note 16; *cf.* Note, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 176 (1985) (The Court's implicit valuation of the principle of gender neutrality in its equal protection decisions "may incorporate an incorrect assumption about the likelihood of illicit legislative motive in gender classificiation cases . . . [and] may embody a theory of equality that, according to prevailing doctrine, is not reflected in the equal protection clause.").

152. The California Supreme Court provides an example of this failure to acknowledge economic consequences, but an implicit and inexplicable sensitivity to those consequences, in a different area of the law. That court recently upheld the constitutionality of presuming the paternity of potent, cohabitating husbands for children born during marriage. Michelle W. v. Ronald W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748, (Cal. 1985). An economic result of such a presumption is that it aids a woman who seeks to obtain a husband's usually greater income earning potential in the support of the child. Historically, the economic roots of such a law lie in in society's determination to make inheritance along patrilineal lines determinable and certain. F. ENGELS, *supra* note 109, at 130-31. The court, however, mentions neither economic factor. Instead, it relies on an unsupportable argument about family stability and child welfare that is irrelevant to the facts of the case. The failure to root theory in materialism, like

I focus on three of the Supreme Court's basic pregnancy discrimination in employment cases. These foundational decisions on the constitutional and statutory meanings of sexual equality in employment reveal both the formal and idealist errors, yet they also reveal some implicit appreciation of economic consequences. After *Gilbert* and *Satty*, Congress enacted the Pregnancy Discrimination Act ("PDA") to overturn the Court's approach to Title VII pregnancy discrimination. However, the post-PDA lower court decisions are inconsistent and confused. Like the early Supreme Court decisions, they reveal a distaste for the harsh economic results produced by a rigid application of equality laws, and a failure to explain that distaste with a normative theory.

A. Sexual Equality in Employment in the Supreme Court

In *Gelduldig v. Aiello*,[153] the Court addressed "the constitutionality of a provision of the California [disability insurance system] that, in defining 'disability,' excludes from coverage certain disabilities resulting from pregnancy."[154] The Court held that California's exclusion of pregnancy disability coverage did not violate the equal protection clause.[155] The Court reasoned: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[156] "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[157] The Court thus adopted a paradigm which was blind to sexual differences, in particular, to female sexual attributes.[158] This analysis allowed California to exclude disability insurance for pregnancy without violating the equal protection clause. This reasoning renders equality analysis irrelevant to characteristics in which men and women differ.

The Court applied the same analysis in *General Electric v. Gilbert*.[159] *Gilbert* also dealt with a claim of equality in the face of a pregnancy disability benefit exclusion. It was decided under Title VII prior to the enactment of the Pregnancy Discrimination Act ("PDA"),[160] so the decision could still follow equal protection principles. *Gilbert* held that "the exclusion of . . . pregnancy-related disability benefits from General Electric's employee disability plan"[161] does not violate Title VII. The Court used the same gender blind definition of

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the failure to go beyond formalism, is thus evident in many issues of sexual equality at many levels of the judiciary.

153. 417 U.S. 484 (1974).

154. *Id.* at 486.

155. *Id.* at 494-97.

156. *Id.* at 496-97.

157. *Id.* at 496-97 n.20.

158. *See* E. WOLGAST, *supra* note 117, at 87-90 (claims to equal rights obscure rational ways of discussing maternity expenses in *Geduldig*).

159. 429 U.S. 125 (1976).

160. 42 U.S.C. § 2000e(k) (1982).

161. 429 U.S. at 128.

equality: "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks."[162] Equality thus remains irrelevant when the characteristic is pregnancy.

Proponents of equal treatment as a means of achieving women's equality cite *Gelduldig* and *Gilbert* as an example of classifying on the basis of a sex characteristic—pregnancy—to the disadvantage of women: only pregnancy benefits were excluded from the employer's coverage. Yet these policies could have been written in terms that made it gender neutral, but with a similar effect. They could have listed various disabilities shared by men and women and covered only those listed. Pregnancy then would remain uncovered, but silently. Would the Court's equality be satisfied by the rewrite? I suspect that the Court under *Geduldig* would be as satisfied with a gender neutral rewrite that had the effect of excluding pregnancy as with a gender specific plan that excludes pregnancy. So the mention of pregnancy is not the crux of the matter.

In *Nashville Gas Co. v. Satty*,[163] the Court tempered its conclusion but employed the same ideology. The Court held that Title VII prohibits employers from "depriving employees returning from pregnancy leave of their accumulated seniority."[164] Title VII did not, however, prohibit an employer from depriving pregnant employees of sick leave pay.[165]

The Court reconciled its two holdings in *Satty* by distinguishing between benefits and burdens.[166] Sick leave pay is an affirmative benefit that the employer need not extend when the triggering disability is the female characteristic of pregnancy. Losing seniority, however, is a burden to which employers may not subject only women returning from pregnancy.

The Court could have labelled the deprivation of accumulated sick leave pay a burden, or the affirmative decision to grant seniority in some cases a benefit. Neither description holds any claim to absoluteness. Both descriptions depend on some other theory to choose what is a benefit or burden.[167]

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162. *Id.* at 139 (emphasis in original).

163. 434 U.S. 136 (1977).

164. *Id.* at 141.

165. *Id.* at 143-46.

166. *Id.* at 142.

167. In Burns v. Rohr Corp., 346 F. Supp. 994, 997 (S.D. Cal. 1972), the court discussed the problems inherent to benefits and burdens distinctions regarding women's employment:

> One difficulty with such an argument in this case is the characterization of rest-break regulation as "beneficial." Since the net effect of the regulation is to reduce the number of work hours for women by one hundred minutes per forty-hour week, it would appear that it could equally well be characterized as restrictive .... [C]ourts have ruled invalid as being in conflict with Title VII state statutes and regulations issued thereunder which have tended to make women less desirable for hiring because of the special accomodations that the prospective employer must make for them.

Cf. Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974) (overtime benefit to women preempted by Title VII); Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th

But the Court's concern with benefits and burdens allowed it to make a decision with somewhat less harsh economic consequences to working women who become pregnant than a decision based solely on the theory that equality is irrelevant to pregnancy would have permitted. The strict view, adopted in *Geduldig* and *Gilbert*, that equality is irrelevant to characteristics in which men and women differ, would have allowed the employer to both increase burdens upon, and decrease benefits to, pregnant women. The *Satty* line of reasoning is different. It discusses economic burdens and benefits in a decision purportedly based on antidiscrimination law and equality theory. The Court in *Satty* thus acknowledges economic consequences, but enunciates no theory of equality that explains the concern.

The judicial definition of equality as sameness has been criticized[168] because it defines the norm as male and measures women's equality by conformity to that norm. This critique correctly challenges one aspect of the Court's equality analysis: where the Court offers an explanation of what counts for measuring sexual equality, the norm is male and nonpregnant. The economic categories, however, cannot be explained by that norm. Why burdens? Why benefits? The Court offers no substantive notion of equality, of sameness in relevant features, that justifies economic categorization when the explicit issue is sexual equality.

The lower courts' decisions on sexual equality in employment also reflect a failure of theory. Different theories of equality, with different economic consequences, are available to the courts. But no theory explicitly recognizes that its fundamental effect is upon the economic rights of women.

B. Sexual Equality in Employment in the Lower Courts

The employment discrimination cases in the lower courts that I discuss below concern the same areas identified earlier: women's access to potentially hazardous jobs, and treatment of sex specific characteristics, in this case the availability of pregnancy disability benefits.[169] The theories of sexual equality raised in these cases are based on equal protection, Title VII's antidiscrimination mandate, and Title VII's PDA. Thus, I first briefly review Title VII and

Cir. 1972) (overtime benefit to women extended to men, rather than preempted and invalidated by Title VII); RCA del Caribe, Inc. v. Silva Recio, 429 F. Supp. 651 (D.P.R. 1976) (Puerto Rico statute mandating, for women only, pay differential for overtime or night work, transportation to and from factory for night work, and no more than one continuous week of night work deemed restrictive to women).

168. *See, e.g.*, Note (Littleton), *supra* note 16.

169. Representative articles covering one recent case, California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (1985), *cert. granted*, 106 S. Ct. 783 (1986), include: Curtis, *For Equality of the Sexes*, CALIF. LAW. 15 (June 1985); L.A. Daily J., Apr. 25, 1985, at 1, col. 1; *Court Upholds Maternity Leave, Job Guaranty*, L.A. Times, Apr. 17, 1985, at 3, col. 2; *U.S. Court Backs California Law on Pregnancy Leave*, L.A. Daily J., Apr. 17, 1985, at 1, col. 2; *California Pregnancy Law Restored*, L.A. Herald Examiner, Apr. 17, 1985, at 1, col. 1; *U.S. Court Upholds Maternity Leave Law*, The Register, Apr. 17, 1985, at 3, col. 1.

the PDA; I then discuss how the courts have applied antidiscrimination law to specific situations.

Title VII prohibits sex discrimination in employment.[170] Claims of overt, facial sex discrimination "may only be overcome by establishment of the narrow, b.f.o.q. defense specifically provided by §703(a) of Title VII, 42 U.S.C. §2000e-2(a)."[171] Claims of disparate treatment, impermissible motive discrimination, are evaluated according to the framework developed in *Texas Department of Community Affairs v. Burdine*[172] and *McDonnell Douglas Corp. v. Green*,[173] and their progeny:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[174]

Disparate impact claims are analyzed according to the principles of *Griggs v. Duke Power Co.*:[175]

> The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude cannot be shown to be related to job performance, the practice is prohibited.[176]

By enacting the PDA,[177] Congress included pregnancy discrimination

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170. Title VII's prohibition of employment discrimination, 42 U.S.C. § 2000e-2(a) (1982), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

171. Wright v. Olin Corp., 697 F.2d 1172, 1183 (4th Cir. 1982). "B.f.o.q." means bona fide occupational qualification.

172. 450 U.S. 248 (1981).

173. 411 U.S. 792 (1973).

174. *Burdine*, 450 U.S. 248, 252-53 (1981) (quoting *McDonnell Douglas*, 411 U.S. 792, 802 (1973)).

175. 401 U.S. 424 (1971).

176. *Id.* at 431.

177. The PDA, 42 U.S.C. § 2000e(k) (1982), amends Title VII's definitions:

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited

within its prohibition against sex discrimination. Congress thereby "not only overturned the specific holding in *General Electric v. Gilbert*, but also rejected the test of discrimination employed by the Court in that case."[178]

The PDA's peculiar phrasing, however, leaves doubt about which ideology of equality it endorses.[179] Its second clause seems to demand that employers must be strictly blind to pregnancy: "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." Its first clause, however, seems to demand that employers not adopt neutral policies that disproportionately affect pregnant employees, just as under traditional Title VII analysis they may not adopt neutral policies that disproportionately affect women employees: "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 . . ."

Decisions under Title VII, the PDA, and the equal protection clause have been contradictory. They differ over the proper interpretation of the PDA's two clauses: Does sameness of treatment mean ignoring pregnancy or acknowledging pregnancy? Does the prohibition of pregnancy discrimination mean ignoring pregnancy or acknowledging pregnancy? They differ over the proper reconciliation of Title VII and the equal protection clause: Can the equal protection clause jurisprudence[180] that sexual equality is irrelevant to pregnancy produce the same result as the Title VII jurisprudence that discrimination is relevant to pregnancy? The practical effect of the courts' different answers to these questions is that some pregnant women retain their pregnancy disability leave, their pregnancy benefits, their jobs, or their hazardous jobs; other pregnant women do not. Some of those decisions are reviewed below. While I attempt to expose the contradictions in the legal reasoning, my purpose is not to discover a theory of equality to unify the diverse results. My goal is to show that the idea of sexual equality, alone, necessarily leads to these indeterminate material results; and that only a theory of sexual equality that

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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, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

178. Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 676 (1983). The majority and dissent agreed on this farreaching effect. *Id.* at 678 (crediting Congress with adopting the view of the *Gilbert* dissenters); *Id.* at 686 (Rehnquist, J. and Powell, J., dissenting) (crediting the Supreme Court's majority in *Newport News* with adopting the view of the *Gilbert* dissenters).

179. *See, e.g., Cal Fed*, 758 F.2d 390 (noting tension between the PDA's two clauses); Scales, *supra* note 117, at 406 (PDA's wording is ambiguous); Note, *Sexual Equality Under the Pregnancy Discrimination Amendment*, 83 COLUM. L. REV. 690, 694-97 (1983) (noting tension between the PDA's two clauses).

180. As set forth in *Geduldig*, 417 U.S. 484.

explicitly incorporates materialist norms can produce more determinate and satisfactory results.

1. Theoretical Inconsistencies

A federal district court's post-PDA decision in the *Miller-Wohl*[181] case provides an internally contradictory answer to whether Title VII's PDA jurisprudence—that pregnancy is relevant to discrimination—can be reconciled with the equal protection jurisprudence that pregnancy is irrelevant to equality. The *Miller-Wohl* decision attempted to collapse the two ideas of equality—i.e., pregnancy discrimination as sex discrimination and pregnancy as irrelevant to sex discrimination—into one. The question was whether a state statute mandating pregnancy disability leave for employees survived federal preemption. The court held that under the equal protection clause logic that pregnancy is irrelevant to equality, "men and women are not treated unequally when pregnancy is the one physical condition given preferential treatment."[182] The court also held, however, that even under Title VII's logic that pregnancy is relevant to discrimination, the statute (that the court had just characterized as one giving "preferential treatment") survived.

When the Montana Supreme Court decided this same controversy three years later, its decision gave a contradictory answer to yet another question: whether the PDA's definition of discrimination mandates ignoring pregnancy or mandates acknowledging pregnancy. First, the court held that the employer's facially neutral no leave policy exerted the disparate impact of job termination upon the plaintiff.[183] By implication, therefore, the statute was a valid remedial response to disparate impact.[184] The court then held, however, that to comport with both the state statute and Title VII, the Montana legislature could adopt the simple expedient of requiring an employer to extend the same leave rights to all employees temporarily disabled as are extended to pregnant women under the Montana Maternity Leave Act (MMLA).[185] Thus, the statute is valid under the PDA's definition of discrimination, but legislative extension to men would be even more valid. "[E]xtension of such MMLA benefits to all workers would end any argument that the MMLA is indeed sex based discrimination in violation of Title VII."[186] After the PDA, then, the court finds that it is unclear what a state may do in response to the employment disability associated with pregnancy. The court essentially tries to reconcile PDA "first clause" and "second clause" analysis to preserve as many substantive economic benefits as it can.

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181. Miller-Wohl Co. v. Commissioner, 515 F. Supp. 1264 (D. Mont. 1981), *vacated on juris. grounds*, 615 F.2d 1088 (10th Cir. 1982).

182. *Id.* at 1266.

183. Miller-Wohl Co. v. Commissioner, 692 P.2d 1243, 1254 (Mont. 1984).

184. *Cf. id.* (holding that the MMLA is not preempted by Title VII).

185. *Id.* at 1254-55.

186. *Id.* at 1255.

2. Practical Inconsistencies

Courts have used different analyses to answer the question of the relevance of discrimination to job loss due to pregnancy and have come to different results. For example, *Levin v. Delta Air Lines, Inc.*[187] held that transferring flight attendants when they become pregnant is not impermissible sex discrimination. *Hayes v. Shelby Memorial Hospital*,[188] however, held that firing an x-ray technician when she became pregnant was impermissible sex discrimination. The *Levin* court downplayed the difference between the narrow b.f.o.q. defense and the broader business necessity defense, and found that any "sufficiently significant" impact on business safety provides a defense against sex discrimination.[189] The *Hayes* court downplayed the potential risk of radiation to a fetus,[190] despite the lack of scientific consensus on the subject[191] to reach its decision—a fact that is important to note in the courts' treatment of equality in the context of hazardous employment discussed below. Thus, in practice, *Hayes* finds sex discrimination where *Levin* would not. *Hayes* preserves the woman's job but downplays the hazard; *Levin* fails to preserve the job.

Two courts addressing the same case used different analyses, which resulted in different economic consequences. In *California Federal Savings and Loan Association v. Guerra* (*Cal Fed*), the District Court held that a state statute that guaranteed reasonable pregnancy disability leaves of up to four months, discriminated against men on the basis of sex under the PDA.[192] This holding interprets the PDA's ban on discrimination to mean that states must be totally blind to pregnancy.

The appellate court in *Cal Fed*[193] held that "Title VII does not preempt a state law[194] that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII."[195] Just as equality in health insurance plans is determined by the comprehensiveness of the coverage—not by spending equal amounts of

187. 730 F.2d 994 (5th Cir. 1984).
188. 726 F.2d 1543 (11th Cir. 1984).
189. 730 F.2d at 997.
190. 726 F.2d at 1550-51.
191. Note, *Pink Collar Blues*, *supra* note 134, at 142-44, 148.
192. *Cal Fed*, 34 FAIR EMPL. PRAC. CAS. 562 (BNA) (C.D. Cal. 1984).
193. 758 F.2d 390 (9th Cir. 1985).
194. CAL. GOV'T CODE § 12945(b)(2). The statute provides:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:. . .

(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . .

(2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

195. *Cal Fed*, 758 F.2d at 396 (footnote omitted).

money on each sex—equality in employment is determined by available opportunities, not by allocating the same number of disability leave days to each sex. Title VII's equality guarantee is thus not inconsistent with California's recognition of, and provision for, pregnancy, with its disability leave and job preservation guarantee. According to this holding, the PDA's ban on discrimination allows states to take pregnancy into consideration. Under the District Court's decision, the plaintiff lost her old job; under the Court of Appeals' decision, she was entitled to return to the same, or a similar, job.

Even courts that use the same analysis in similar situations come to inconsistent results. Several cases hold that the ban on discrimination and the mandate of equality under Title VII and the PDA allow employers to acknowledge, and provide for, pregnancy. In *Abraham v. Graphic Arts International Union*,[196] the court found that an employer's disability leave, though gender neutral on its face, was inadequate to cover pregnancy. It violated Title VII because Title VII protects against the discriminatory impact of neutral as well as facially discriminatory policies.[197] The court expressed its concern with the economic consequences upon working women of any different interpretation of equality:

> While a ten-day leave undoubtedly would accomodate a wide range of temporary disabilities, it falls considerably short of the period generally recognized in human experience as the respite needed to bear a child .... In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter.[198]

The *Abraham* court used disparate impact analysis, and found that a neutral policy was still "unequal," and therefore impermissible, under the PDA's first clause. Pregnancy was thus relevant to equality analysis, and equality meant that the plaintiff on remand had the opportunity to regain her job. In *Marafino v. St. Louis County Circuit Court*,[199] the court declined to accept the assertion that a policy against hiring individuals who would shortly require a leave of absence amounted to disparate impact on pregnant women: "In the total absence of any evidence that women do in fact request lengthy leaves of absence more frequently than men, the Court cannot conclude that disparate impact has been shown."[200]

Marafino and *Abraham* dispute only the level of proof necessary to show the disparate impact upon pregnant women of a gender neutral disability leave policy, so they apparently agree that the legality of gender neutral disability leave may be evaluated under Title VII's disparate impact analysis.[201] This

196. 660 F.2d 811 (D.C. Cir. 1981).
197. *But see Gilbert*, 425 U.S. at 139-40.
198. *Abraham*, 660 F.2d at 819 (footnotes omitted).
199. 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).
200. *Id.* at 213.
201. The difference between the two decisions is the amount of proof necessary to find that

means that both courts agree that equality, under Title VII, does not demand ignoring pregnancy. Nevertheless, the economic consequences of the cases were different: Abraham had a chance to regain her job with adequate disability leave, but Marafino never got a job.

The problem of inconsistent analysis becomes explicit in the cases involving hazardous employment. As discussed above, the *Hayes* court found that a hospital engaged in impermissible sex discrimination when it fired a pregnant x-ray technician for the stated reason of protecting the fetus from exposure to ionizing radiation. The court applied disparate impact and disparate treatment analyses and declined to specify why either, or both, of the analyses was really appropriate.

The court in *Wright v. Olin Corp.*[202] also reached the conclusion that denial of the job constitutes impermissible sex discrmination unless justified. In *Wright*, employees challenged Olin's " 'fetal vulnerability' policy which restricts female access to jobs requiring contact with toxic chemicals."[203] The court held that Olin's policy established a prima facie violation of Title VII under disparate impact theory.[204] The court concluded, however, that fetal vulnerablity policies which "impose otherwise impermissible restrictions on [women's] employment opportunity" may be justified by business necessity.[205]

Wright exposes the heart of the contradiction in the cases. By applying disparate impact analysis, despite its explicit admission that the PDA makes disparate treatment analysis more logically appropriate, the *Wright* court admitted to choosing a particular theory of equality because of the material result that it produces.[206]

Equality theory alone provides no logical basis for the choices that these courts have made. *Wright* admitted this: the court chose the theory of equal-

a facially neutral disability leave policy adversely affects women. In this sense, judicial analysis of facially neutral disability leave policies parallels judicial decisions regarding the amount of proof of discrimination that must exist prior to the adoption of an affirmative action program. The circuits are in conflict over whether an employer must first commit a prima facie case of discrimination, or need not prove prior discrimination at all, prior to instituting an affirmative action program. *See* Bushey v. New York State Civil Service Comm'n, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1384 (1985) (state, as employer, need not prove that prima facie case of racial discrimination was not rebuttable prior to adopting affirmative action program); Janowiak v. City of South Bend, 750 F.2d 557 (7th Cir. 1984) (finding of discrimination is necessary before employer may adopt race-conscious affirmative action program); Johnson v. Transportation Agency, 748 F.2d 1308 (9th Cir. 1984) (no past determination of discrimination necessary to justify affirmative action policy of hiring women). By arguing over the amount of prior discriminatory impact that is necessary before a facially neutral disability leave policy will be illegal (and hence replaced with adequate pregnancy disability leave), the courts are treating pregnancy leave like affirmative action. Because affirmative action programs have narrowly circumscribed time limitations, the analysis so far is not directly applicable to an institution as permanent as pregnancy. It may well be applicable by analogy.

202. 697 F.2d 1172 (4th Cir. 1982).

203. *Id.* at 1176.

204. *Id.* at 1187.

205. *Id.* at 1189. The Fourth Circuit remanded the case for further proceedings confined to the issue of business necessity of Olin's fetal vulnerability program. *Id.* at 1187.

206. *Id.* at 1185 n.21.

ity upon which it relied because of general policy considerations. A Ninth Circuit judge, during oral argument questioning in the *Cal Fed* case, indicated that he realized that he was being asked to make similar policy choices.[207] The conflicting decisions indicate several reasons for choosing from among competing theories such as disparate impact and disparate treatment, and pregnancy as relevant or irrelevant to discrimination. The equality theory chosen explains each decision, but what explains the choice of equality theory?

C. Judicial Ideology of Equality Divorced from the Material Base

The Supreme Court's disdain for categorizing by sex is revealed in its decisions on pregnancy in the workplace, but the Court shows some sensitivity for economic consequences. The *Satty* Court's failure to advance a theory that justifies its concern for economic effects leaves no substantive norm for a sexual equality theory that explicitly acknowledges material consequences. Lower courts, having chosen from a grab bag of potential theories of equality, have also produced a variety of inconsistent decisions. Some decisions, like *Wright*[208] and *Abraham*,[209] have acknowledged their concern for the substantive economic rights of working class women. But no opinion has advanced a theory of equality which explicitly includes economic consequences.

The inconsistency in decisions that results from the vagueness and ambiguity inherent in "equality," from the linguistic opacity of the first and second clauses of the PDA, and from the potentially distasteful results that a logical application of disparate treatment analysis might dictate, is no stranger to the law.[210] The many pregnancy discrimination analyses highlight Professor Simon's thesis that "[t]here is no noncontroversial process of 'interpretation' that leads naturally or automatically to the right answer."[211] In fact, the divergence of analysis lends support to Professor Westen's assertion that equality is an empty idea, dependent upon other concepts of right for its substance.[212]

Some courts explicitly admit the doctrinal incoherence.[213] Some commentators believe that this sort of doctrinal "multiplicity on the intellectual level resulted from a lack of unity on the social level," namely class divi-

207. Tape of the oral argument listened to by the author (argued Feb. 14, 1985).

208. 697 F.2d 1172.

209. 660 F.2d 811.

210. *See* Schauer, *supra* note 15, at 415.

211. Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 630 (1985). *See generally* Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 136, 173 (1985) (recognizing the claim of both critical legal studies theorists, represented by Roberto Unger, and liberals, represented by Ronald Dworkin, that "legal interpretation always involves, and ought to involve, politics").

212. Westen, *supra* note 7.

213. *Wright*, 697 F.2d at 1183 (discussing the complexity of adapting traditional Title VII analysis to fetal vulnerability policies), and at 1184-85 (admitting that the fit is not perfect, and applying disparate impact analysis in order to take advantage of its business necessity defense which is broader that the statutory b.f.o.q. defense).

sion.[214] In other words, a different theory of equality arises from and serves the interests of each class. This doctrinal incoherence or multiplicity does reflect the "social" level; the "social" level in turn relfects the economic base. But the reflection is not direct, as a mirror image would be. It is distorted like the images in a carnival house of mirrors. The economic base is class-divided; the incoherence in judicial rhetoric, like the incoherence in feminist jurisprudence discussed above, obscures that class division. The diversity makes the definitions of sexual equality chosen appear to be based purely on chance.[215]

The judiciary's hint at economic considerations, however, is more than chance—though less than theory. When the question is whether equality in each case has increased the woman's resources, or economic freedom, or power, the answers can be categorized logically. *Abraham* and *Cal Fed* increased the women's resources: most working women need pregnancy disability leave to keep their jobs, and state and federal pregnancy disability legislation increases that economic freedom. *Levin* limited that freedom by sanctioning job loss at pregnancy. By making the meaning of equality depend upon the level of proof of economic consequences, *Marafino* allows for preservation of economic rights in the context of certain cases. *Hayes* is more complicated than the court let on. An x-ray technician loses economic freedom if she is deprived of her livelihood because she is pregnant; however, downplaying the potential hazards of radiation is equally a failure to appreciate the employment needs of women. Finally, *Wright* raises the problem that equality has been degraded and diverted to a fight for hazardous employment.

These lower court decisions will have great consequences for working class women. All the plaintiffs in these cases, except Marafino, did traditional women's work: hospital, sales, factory, and clerical work, and airline attending. The courts' theories of equality fail to incorporate their occasional appreciation of the economic consequences of pregnancy discrimination issues. Only a theory of equality that incorporates the notion of access to scarce resources of employment, money, and time will allow the decisions to be neatly categorized and evaluated.

IV
FEMINISM'S IDEALIST ERROR

A. The Idealist Error

In Section I, I showed that the majority of working women are con-

214. Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1307-08 (1979).

215. Engels wrote the following regarding chance:

> But chance is only one pole of a relation whose other pole is named 'necessity' . . . . The more a social activity, a series of social processes, becomes too powerful for men's conscious control and grows above their heads, and the more it appears a matter of pure chance, then all the more surely within this chance the laws peculiar to it and inherent in it assert themselves as if by natural necessity.

F. ENGELS, *supra* note 109, at 233-34.

fronted by diminishing substantive legal protections: a condition of relative scarcity of economic benefits. In Section II, I attempted to criticize the tendency in some of feminist jurisprudence to develop ideals of sexual equality without accounting for the realities of scarcity in a class-divided society. In Section III, I showed that judicial equality theory lacks consistency and does not explicitly recognize economic consequences.

These philosophies, although they often work, also obscure the connections between jurisprudence and material effects by their reliance upon ideas of equality rather than upon realities of scarcity. Equality is defined in relation to ideal constructs of women[216] or ideal images of male-female equality,[217] and is perceived as an ideal as classless and timeless as mathematical equality between numbers.[218] Equality today, as it has been historically, is defined by reference to a universal ideal.[219]

Equality, however, is not a concept that can transcend time, space, and class. Equality is a product of historical development.[220] As soon as sexual equality is described as an eternal truth it loses whatever temporal value it had. To be meaningful today, the concept of sexual equality must be tempered with an appreciation of the historical condition of working class women in a class-divided society and with the relative scarcity of resources.

Frederick Engels called the acknowledgment of the limits that history and society place on our production and our philosophy "the appreciation of necessity."[221] Necessity constrains current philosophies of equality, just as it

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216. *See* Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985) (discussing the law's dependence on non-neutral constructs); *see also* Karst, *supra* note 1, at 460-63 (an example of an article that looks at constitutional law through predetermined constructs of male and female).

217. Wasserstrom, *supra* note 123, at 605-07.

218. Westen, *supra* note 7, at 583.

219. Engels criticized his contemporary's philosophy of equality:

> In order to establish the fundamental axiom that two people and their wills are absolutely equal to each other and that neither lords it over the other, we cannot use any couple of people at random. They must be two persons who are so thoroughly detached from all reality, from all national, economic, political and religious relations which are found in the world, from all sex and personal differences, that nothing is left of either person beyond the mere idea: person — and then of course they are "entirely equal."

ANTI-DUHRING, *supra* note 8, at 108-09.

220. *Id.* at 118.

221. "[N]ecessity is *blind* only *in so far as it is not understood.*" Freedom does not consist in the dream of independence of natural laws, but in the knowledge of these laws, and in the possibility this gives of systematically making them work towards definite ends. . . . Therefore the *freer* a man's judgment is in relation to a definite question, with so much the greater *necessity* is the content of this judgment determined; while the uncertainty, founded on ignorance, which seems to make an arbitrary choice among many different and conflicting possible decisions, shows by this precisely that it is not free, that it is controlled by the very object it should itself control. Freedom therefore consists in the control over ourselves and over external nature which is founded on knowledge of natural necessity; it is therefore necessarily a product of historical development.

Id. at 125 (emphasis in original) (quoting Hegel and crediting him with discovering the relation-

limits today's production and distribution of resources, or today's visions of the future.[222] Thus, while sexual equality theorists speak in absolute terms, the actual choices to be made concern the allocation of scarce resources such as time (e.g. for pregnancy disability leave) and money (e.g. for pregnancy disability benefits or for employment opportunities). For example, judges may choose in general terms whether pregnancy, theoretically, is equal to some disability of a man; but the effect will be the distribution of the resources of disability insurance, disability leave, seniority, or occupational safety research, development and implementation.

When judges write their decisions on the basis of equality theories, they tend to obscure this mundane effect.[223] But this mundane effect, I believe, is exactly the benchmark by which to measure the desirability of laws affecting women and employment. It is the benchmark that sexual equality theory, without an appreciation for necessity, lacks.

The wide divergence of judicial decisions on sexual equality in employment shows the lack of such a benchmark in the law. The broad spectrum of feminist sexual equality theories reveals a similar lack of agreement on the objective basis by which to evaluate women's equality. This divergence in decisions and theories lends support to the nihilist contention[224] that the interrelationships among cases are too inconsistent to support coherent explanation.[225]

Such an explanation, however, is incomplete. The multiplicity of sexual equality theories does not represent inexplicable diversity. Rather, it shows how far ideology has become divorced from the material base, from the appre-

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ship between freedom and necessity). Lenin builds on this ideology of freedom and necessity. He equates freedom with mastery of nature: "[U]ntil we know a law of nature, it, existing and acting independently and outside our mind, makes us slaves of 'blind necessity.' But once we come to know this law, which acts . . . *independently* of our will and our mind, we become the masters of nature." V. LENIN, MATERIALISM AND EMPIRIO-CRITICISM, *supra* note 9, at 192-93. John Stuart Mill characterizes necessity as "the doctrine that our volitions and actions are invariable consequents of our antecedent states of mind." J.S. MILL, *Of Liberty and Necessity*, in ETHICAL WRITINGS 214, 216 (1965). I am not referring to this equation of necessity with antecedent states of mind; I use necessity to denote already existing laws of nature and laws arising from the relations and forces of production.

222. *See* Littleton, *supra* note 10.

223. [J]uridical illusion . . . reduces law to the mere will . . . . This illusion of the jurists also explains the fact that for them, as for every code, it is altogether fortuitous that individuals enter into relationships among themselves (e.g. contracts); it explains why they consider that these relationships [can] be entered into or not at will, and that their content rests purely on the individual [free] will of the contracting parties.

Marx, *The German Ideology*, in THE MARX-ENGELS READER, *supra* note 5, at 152 (insertions by original editor).

224. Tushnet, *supra* note 214, at 1340-42 (identifying this contention).

225. *Id.* at 1341. This divergence also reinforces Tushnet's purportedly Marxist acceptance of the nihilist description of the law as "radically fragmented." *Id.* at 1345.

ciation of necessity; that is, it shows its idealism.[226] The ideal of equality becomes a primary, though confused, touchstone, and the reality of class-differentiated effects becomes secondary and unimportant. The appreciation of necessity reverses this order. It makes the appreciation of materially class-differentiated effects primary, and it would search for a definition of equality secondarily and upon the basis of the primary findings.

The theory of necessity as a benchmark for measuring advances for women also has a contextual aspect:[227] it evaluates whether particular policies or laws will contribute to the material and economic advancement of women's employment rights on the basis of the facts of each case. One appellate case exemplifies this approach. *Cal Fed* leaves open the possibility that in cases decided on their facts, instead of on summary judgment, policies or laws affecting pregnancy might be found discriminatory as applied, rather than on their face.[228] Other court decisions, however, which limit the scope of judicial review of the facts concerning employment discrimination cases, suggest that the dominant trend is in the other direction.[229]

B. Materialism Applied

I break no new ground by asserting that a normative[230] theory is neces-

226. Philosophy and ideology both reflect and influence the economic base. F. ENGELS, FEUERBACH, *supra* note 9, at 23-24.

Engels describes law as an exercise of philosophy, that is, a part of the ideological superstructure that has lost connection with the economic base:

> The consciousness of the interconnection between this political struggle and its economic roots becomes dulled and can be lost altogether. . . . It is indeed only among professional politicians, theorists of constitutional law and jurists of private law, that the connection with economic facts gets completely lost. Since in each particular case the economic facts must assume the form of juristic motives in order to receive legal sanction; and since, in so doing, consideration of course has to be paid to the whole legal system already in operation, the consequence is that the juristic form is made everything and the economic content nothing.

Id. at 54-55.

227. See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) for a discussion of many women's tendency to favor contextual decision making and many men's tendency to favor abstract decision making.

228. *See Cal Fed*, 758 F.2d at 395-96.; *see also* Law, *supra* note 116, at 1031.

229. Resnik, *supra* note 103, at 964-1005 (exploring the single judge, limited review model that dominates Title VII adjudication, as well as the rest of the federal docket); *e.g.*, Hirst v. California, No. 84-2060 (9th Cir. Apr. 16, 1985) (applying California law); Anderson v. Bessemer, 105 S. Ct. 1504 (1985) (clearly erroneous standard of review applicable to factual finding of discrimination under Title VII); Pullman-Standard v. Swint, 456 U.S. 273 (1982) (question of discriminatory intent under 42 U.S.C. § 2000e-2(h) is a question of fact subject to clearly erroneous standard of Rule 52(a)); Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) (applying state rules of issue preclusion to Title VII claim formerly adjudicated in administrative forum with limited state court review).

230. I am not the first to suggest that a theory of neutral principles is untenable and substantive norms must be adopted. *Compare* Simon, *supra* note 211, at 605 *passim* (exploring "concepts of goodness and justice" in constitutional authority and interpretation) *with* Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 694 n.39 (1985) (criticizing the populist underpinnings of Simon's notions of goodness and justice).

sary to analyze the equality of women. I contribute to the debate the touchstone of necessity, rather than only the language of equality, for evaluating what rights working women need and which theories of equality will help meet these needs.

I do not discard the relevance of equality theory to women's rights, but *Gelduldig* has significantly limited the theory by stripping the constitutional guarantee of equal protection of its meaning when applied to characteristics which distinguish the sexes. Moreover, under current employment and discrimination law, the rights available to the working class have diminished. By undermining the working class male, who has thus far formed the standard by which rights and benefits were measured, recent developments in the law have rendered equality even more irrelevant. Equality thus may be closer to our grasp, but it is becoming an increasingly limited goal. Perhaps the closer it comes to realization, the greater the limits of equality in the context of current society will appear. As one Marxist scholar has noted, "Just as the legal equality of capitalist and proletarian makes visible 'the specific character of the economic oppression burdening the proletariat,' so also will legal equality reveal the fundamental change that is necessary for the liberation of women."[231]

To the extent that idealist equality remains relevant to that "fundamental change," the acknowledgment of necessity must place sexual equality analysis in context. I outline below the way the acknowledgment of necessity in employment affects my view of the hard cases. This view of women's equality may be applicable to areas other than sexual equality in employment as well.[232]

1. Materialist Answers to the Hard Questions Concerning Sexual Equality in Employment

One hard question is the appropriate treatment, under equality jurisprudence, of hazardous employment from which women have previously been excluded. As noted above,[233] the general demand from both formal and substantive equality theorists is for greater access for women to hazardous employment—although sometimes this equality demand is tempered with appeals for occupational safety. The right of access to employment hazards on an equal basis with men is perhaps the most glaring illustration of the limitations of current equality jurisprudence. To choose to exercise this right, a woman must be so constrained by necessity that she is willing to bear the health risk in order to make a living. Her choice may be based on knowledge

231. Leacock, *Introduction*, in F. ENGELS, *supra* note 109, at 43 (quoting F. Engels).

232. One area in which this view might be applied is criminal defense. For a general discussion of the meaning of equality in the context of women's self-defense claims, see Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985).

233. *See supra* text accompanying notes 147-148.

of the alternatives, but it is not free.[234] The material issue here is whether society will allocate its resources to achieving safe employment for the working class. Casting the issue as equality of access—formal equality to do the jobs that men do—obscures the issue of allocating resources and economic rights.

Another hard question is the proper treatment, under equality theory, of *potentially* hazardous employment in which women have traditionally been segregated. The demands emerging from women faced with this situation are diverse. As the cases discussed above show,[235] x-ray technicians have sought to retain their jobs when they become pregnant. But many women fear that other jobs, such as video display terminal (VDT) operation, pose hazards; thus, a demand is emerging from unions that VDT operators have a right to transfer to alternative employment during pregnancy; this demand is also reflected in proposed legislation.[236]

A comparison of the right to transfer with the right of access to hazardous jobs shows similarities and differences in the underlying equality theories. One obvious difference is that the right of access downplays potential differences between men and women, while the right to transfer highlights those differences. Another difference is that the right of access downplays potential hazards while the right to transfer takes greater account of that problem.

Although differences between the two rights exist, the similarities are more significant. One similarity is that both rights seem rooted in the notion of the importance of the individual employee's right to choose.[237] Each right would put the decision about which job to take in the employee's hands—rather than in the hands of the employer or the state. That both demands are

234. *See* Andrade, *supra* note 12, at 100 ("no waiver, no work" policy of employers, which conditions women's potentially hazardous employment upon waiver of their rights to sue, is no choice).

235. *See supra* text accompanying notes 188-91.

236. *E.g., Genetic Screening and the Handling of High Risk Groups in the Workplace: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 97th Cong., 1st Sess. 177 (1981) (American Civil Liberties Union promotes individuals' choice to work in hazardous employment). For discussions of the allocation of choice between employer and employee, see McGarity & Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999 (1981) (exploring pre-employment screening tests, including those with disproportionate racial or sexual impact, such as fetal vulnerability screens, and various justifications for government intervention in the private sector); Note, *Occupationally Induced Cancer Susceptibility: Regulating the Risk*, 96 HARV. L. REV. 697 (1983) (proposing that workers who are exposed to carcinogens should be subjected to cytogenetic testing to determine their individual sensitivities).

237. Several unions have secured the right of pregnant video display terminal (VDT) operators to transfer away from VDT work during the term of their pregnancy. *E.g.*, Agreement Between the Village Voice, Inc. and District 65, U.A.W., paragraph 28(H) (July 1, 1984-June 30, 1987) ("No pregnant workers will be required to use video display terminals. At her request, a pregnant worker will be offered any vacant job available if she is qualified to perform the work without loss of seniority."); VDT Contract Language, Memorandum of Understanding, United Public Employees, Local 390/400, Service Employees International Union and the City and County of San Francisco ("The Board of Supervisors shall encourage each department to adopt the following policy: Upon request, a pregnant employee shall have the right to be

reducible to this single right shows that some underlying substantive right must be driving a demand that has been discussed as a problem of equality. The problem, however, with reducing such concerns about equality in employment to this particular right—the individual right to choose—is that it obscures the fact that there is not true choice based on freedom in any of these situations; the "choice" is based on necessity. With the access to hazardous employment demand, it is the need to make a living that must compel the choice. With the transfer demand, in addition to the necessity imposed by the compulsion to make a living, necessity is imposed by lack of knowledge of whether a hazard exists and how to guard against it.

Another similarity between the rights of access and transfer is that both are responses to types of occupational segregation. Lobbyists for the right of pregnant women to transfer away from VDT work argue that access to hazardous, but traditionally male jobs, is appropriate to remedy women's prior exclusion from those jobs. But the right to transfer from hazardous, traditionally female jobs, is an appropriate goal because no prior exclusion from those jobs needs to be remedied; thus, women's safety may be considered paramount. Male occupational segregation has thus been linked with a goal of equal employment opportunity for women, an access demand. Female occupational segregation has been linked with a transfer demand. Acknowledging the importance of historical patterns of job segregation is certainly one aspect of a materialist analysis of what counts as sexual equality today, because it provides a standard by which to decide whether changes are *advances* from the past. Another aspect of such analysis, however, must be whether the work that women will now be able to do under either the access or transfer options represents an advance over the jobs that women held in the past. The working conditions of the jobs—including safety and pay—are just as relevant to the materialist analysis as their sexual composition. Those conditions will be part of the judgment about whether the "choice" that these demands seek is based on freedom rather than on necessity.

Thus, if the hard question concerns a workplace hazard to women alone, or to both men and women, access to toxic employment offers women not more than, but only an option different from, lack of access. There is still no true choice based on freedom in this situation. The important concern, and the

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assigned duties away from video display equipment or to be temporarily appointed to another position for the duration of pregnancy.")

Proposed state legislation also seeks this right. *E.g.*, CALIFORNIA LEGISLATURE ASSEMBLY BILL 3175 (1983-84 Regular Session) (Feb. 15, 1984) paragraph 8108.

This right has been recognized in other countries as well. In Sweden, for example, the Svenska Bankmannaforbundent (the Swedish Bank Employees' Union) and the bank employers' organization have made a joint recommendation that: "the banks . . . give pregnant women with VDU [VDT] -work as extensively as possible at other jobs when they ask for it." Letter from Magnus Neuberg, Svenska Bankmannaforbundent, to the author, Feb. 6, 1985. In Canada, for example, the Treasury Board Personnel Management Manual, Vol. 7, Chap. 14, pp. 1-4 (1983), allows the transfer of "pregnant employees who wish to be transferred" away from VDT work.

proper framework for analysis, should be the allocation of resources for safe, healthful, and well-paid employment.

Similarly, if the hard question concerns a potential workplace hazard, limited to women or fetuses, transfer offers women not more than, but an option different from, exposure. There is no choice based on freedom here either, because freedom from necessity must be informed by knowledge. Lack of knowledge about whether a hazard exists or is confined to one sex limits working womens' choices as well. The important concern here should be the allocation of resources to discovering the existing extent of potential hazards and means of alleviating them.

Another hard question arising in the case law involves state legislation or employer policies that ensure women's right to maintain employment after pregnancy. The statutes or policies that ensure this right distribute a scarce resource (jobs) directly, and thus provide pregnant working women with a greater array of true choices than women previously had. This right acknowledges the constraints of economic necessity that working class women face, and takes a step away from that necessity towards freedom. Any threat to this right resulting from the disinclination of employers to hire women in the first place should be addressed through the use and strengthening of antidiscrimination laws.

2. *Materialist Strategies for Achieving These Answers*

The next question concerns overall strategies for achieving material advances for working class women. One strategy might include an emphasis on legal rights that entitle or empower[238] women, rather than on legal equality and its contradictory results. For example, Littleton[239] posits equality of procreative choice as a means of gaining for women the freedom to make decisions about having children with the same ease as men. By using procreative choice as the relevant feature by which to measure, for example, pregnancy disability leave laws, Littleton has made freedom of procreative choice the substantive right upon which her reconstructed sexual equality theory is based. This is one example of emphasizing rights that advance women towards greater freedom.

Similarly, Westen notes that an amendment to the Constitution that guarantees the rights of women, rather than the equal rights of women,[240] might address sexual discrimination more directly. Legal rights analysis can look more directly at material content than equality does. By adopting a definition of rights that includes employment safety and employment opportunity, such an amendment could protect working women more adequately than the muddled attempt to equalize women's access to hazardous, debilitating, carcinogenic, and mutagenic employment with men. It could protect working wo-

238. *See* MacKinnon, *supra* note 6 (both articles).
239. *See* Littleton, *supra* note 10.
240. Westen, *supra* note 7, at 594.

men more fully than transfer from or to unknown hazards. It could account for pregnancy disability leave and benefits more adequately than the equality debate has. It would do all this by protecting the right of working women to advance from the constraints of necessity,[241] rather than fall into its jaws on the principled ground of ideal equality. Westen's rights approach to the Equal Rights Amendment thus provides another potential means of adopting rights that entitle, free, and empower women rather than expanding contradictory equality theories.

The *Scanlon*[242] vision of federalism points to the states as a means of procuring these rights even within the framework of the growing federal preemption that now plagues working class women's rights. At least one federal court has upheld a state law that guarantees pregnancy disability leave to women employees, in part because of the state's ability, unaltered by Congress, to address this area.[243] Another federal court, dismissing a federal comparable worth claim, allowed in dicta for states to address this area.[244] The Supreme Court will consider in *Cal Fed*, early next term, whether state legislation that allocates time and money to pregnancy disability will survive court challenges. If they survive, then perhaps state legislation allocating other resources—including the state's funds, rather than the employer's—would also survive.

Congress may have inadvertently provided another means of retaining rights in the face of the weakening of federal substantive remedies: the use of federal statutes to litigate, maintain, and strengthen existing federal rights. The Racketeer Influenced and Corrupt Organizations Act ("RICO")[245] has broad potential applicability to civil rights litigation, because the range of available defendants includes governmental authorities, the range of redressable offenses may include the deprivation of various employment-related rights, and the array of available civil remedies, such as treble damages and attorneys' fees, are far more expansive than those offered under other civil rights statutes. In its recent decisions in *Sedima v. Imrex Co.*[246] and *American National Bank and Trust Co. v. Haroco, Inc.*[247] the Supreme Court underscored the breadth and availability of RICO's civil enforcement provisions. These decisions foreshadow increased civil RICO effectiveness against some of the substantive deprivations discussed above.[248] For instance, violations of

241. *See generally* Engels, *Socialism: Utopian and Scientific*, in THE MARX-ENGELS READER, *supra* note 5, at 605, 637-38 (describing advancement from necessity to freedom).

242. Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985).

243. *Cal Fed*, 758 F.2d 390.

244. AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).

245. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68.

246. 105 S. Ct. 3275 (1985) (no prior conviction necessary to sustain allegation of predicate offense).

247. 105 S. Ct. 3291, 3292 (1985) ("The submission that the injury [alleged] must flow not from the predicate acts themselves but from the fact that they were performed as part of the conduct of an enterprise suffers from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in [*Sedima*].").

248. *See* Strafer, Massumi & Skolnick, *Civil RICO In The Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655 (1982); *see also Health Clinic's Antitrust, Racketeering*

ERISA procedural requirements may form a basis for RICO's predicate mail or wire fraud counts on either a breach of fiduciary duty or a breach of federal statutory obligation theory.[249] The RICO count may then afford a substantive remedy—including treble damages and attorney fees—where ERISA affords only a procedural one.[250] Violations of other federal statutes may be redressed the same way.[251]

Each of these suggestions posits a legal means of achieving an economic gain. They offer a more direct means of benefitting working class women than do the complicated and contradictory demands that emerge from the equality debate.

CONCLUSION

Some feminist theorists and most judicial decisions obscure the duality between the law's treatment of the employment rights of the majority and the minority of women. Judicial theory lacks coherence and results are unpredictable; but some unexplained concerns with economic consequences do appear. Feminist jurisprudence offers coherent substantive theories of equality, but these theories often obscure equality's dual impact on women's employment rights. Feminist theories have provided effective tactics but lack the appreciation of neccessity that would make them effective overall principles.

Feminist and judicial theories are misguided because they ask the wrong question. The correct question to ask is what are the limits of sexual equality in a class-divided society characterized by scarcity for the majority. This question recognizes the dual effect of employment law upon the minority and majority of working women. The answer must, too.

Suit Is Brought Against Anti-Abortion Protestors, L.A. Daily J., Aug. 21, 1985, at 5, col. 3 (women's health clinic sues anti-abortion protestors for RICO violations); Lobsenz, *Experts Say Lawyers are Misusing RICO Statute*, L.A. Daily J., July 25, 1985, at 3, col. 1 ("Legal experts told Congress Wednesday anti-racketeering laws intended to fight organized crime are instead being misused by attorneys to gain leverage in management-labor disputes and landlord-tenant disputes or even feuds between church members.").

249. *E.g.*, McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1507-08 (D.N.J. 1985) (violation of ERISA, because it "contravene[s] important public policies", constitutes fraud predicate); *id.* at 1509 (breach of fiduciary duty stemming from collective bargaining agreement may suffice to meet fraud predicate).

250. *See supra* text accompanying note 45.

251. *But see* McLendon v. Continental Group, 602 F. Supp. at 1509 n.9 (NLRA "does not give rise to intangible rights the violation of which necessarily creates criminal liability under the mail fraud statute").